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WAGE AND HOUR CLASS ACTIONS IN THE HEALTHCARE INDUSTRY:

Diagnosis and Prevention in 2010

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I. THE SCOPE OF THE PROBLEM

With the wave of antitrust class actions against hospitals abating, plaintiffs' attorneys are brandishing a new and potent weapon: wage and hour class and collective actions.[1] Littler's own internal study of wage and hour class action filings in state and federal courts from January 1, 2008, through December 31, 2009, found that the number of wage and hour class actions filed against healthcare providers, including hospitals, nursing homes, pharmaceutical companies and other healthcare-related entities, increased by more than 30 percent in 2009 as compared to 2008.[2]

What started in 2008 as a localized outbreak by a single law firm filing class and collective actions against hospital systems in Rochester, New York challenging automatic 30-minute pay deductions for meal periods has now become an epidemic. The disease spread quickly as the same firm filed nearly identical cases against large healthcare systems in Syracuse, Utica, and Buffalo, New York; Pittsburgh and Philadelphia, Pennsylvania; and Boston, Massachusetts. Most recently the same firm filed 22 class and collective actions in federal and state courts against major New York City area hospital systems. The range of employers named in these cases is extensive and includes some of New York's most notable healthcare institutions. In addition to the hospital systems named in the caption of the complaints, the lawsuits also name hundreds of other healthcare facilities that the plaintiffs allege are subsidiary, joint or affiliated organizations throughout the entire New York metropolitan area, including community hospitals, rehabilitation centers, clinics, laboratories, research institutions, veterans' hospitals, psychiatric hospitals, drug and alcohol rehabilitation facilities, adult day care facilities, fertility centers, and other specialized institutions for diagnosis, care and treatment of conditions such as AIDS, Alzheimer's Disease, epilepsy, cardiac and vascular disease, pediatric diseases, cancer and blood disorders, and many other types of illness or disease. Some of the cases also name the president and/or CEO of the healthcare institution as individual defendants. The sizes of the potential classes are similarly broad, potentially reaching 100,000 employees.

The firm that filed these new class actions has targeted more than 100 healthcare systems in 48 states, the Virgin Islands and Guam. No healthcare employer is immune. In fact, many more law firms are getting into the act and filing wage and hour class and collective actions against healthcare employers in state and federal courts across the country, including Florida, Texas, Illinois, California, Tennessee, Michigan, Indiana, the District of Columbia, and elsewhere, in addition to New York, Pennsylvania, and Massachusetts. In the last six months more than 300 such suits have been filed, and the number of cases being filed continues to grow.

The aggressive tactics of plaintiffs' lawyers has played a significant role in this trend. Plaintiffs' class action counsel no longer wait for potential wage and hour plaintiffs to walk through the door or call. Instead, they are turning to sophisticated means to identify and gather "opt-in" plaintiffs. For example, a prominent New York plaintiffs' class action firm has been sending letters to hospital employees across the country. The letters state:

> Our investigation has revealed that many hourly employees in the health care industry are not paid for all the hours that they work, especially during meal periods. You may be owed unpaid wages for situations including when you worked during your meal break. We are currently investigating.

Enclosed with the letter is a "fact sheet" that poses the question: "Is there any urgency to complete the consent form?" The response: "Yes … any delay in returning the Consent Form can cost you back wages."

The internet has also helped plaintiffs' attorneys to more efficiently and expeditiously amass information regarding an employer's practices, and reach employees across the country, in some cases using names and addresses gathered from unions and other publicly available sources such as state nurses registries. Plaintiffs' attorneys also have set up websites to provide information to employees about current "investigations" of healthcare employers. One such website is www.hospitalovertime.com and another is www.overtimecases.com. Both websites direct the viewer to identified plaintiffs' law firms and further identify that firm's pending "investigations."

The dramatic increase in wage and hour class actions against healthcare employers has also been fueled by a number of recent multi-million dollar judgments and settlements — some involving well known and highly respected healthcare employers, and each involving significant fees to plaintiffs' counsel. Examples of some recently publicized settlements include:

- A class action against a large healthcare plan by support specialists, product specialists, and business application coordinators who worked in an IT capacity and claimed they were misclassified as exempt. The plaintiffs alleged they were denied overtime under the California Labor Code and the Federal Fair Labor Standards Act (FLSA) for hours worked in excess of 40 and that they were not paid for travel time and meal breaks. In October 2008, the employer agreed to pay $5.4 million to settle the case.

- A class action against a large hospital by current and former nurses, social workers and aides who claimed they were denied overtime and rest and meal periods in violation of the California Labor Code. The court approved a settlement of $15 million.

- A class action by 3,000 home healthcare workers who claimed they were not paid for time spent (or expenses) when traveling between patient visits and — as a result — were denied overtime. The employer agreed to pay $2 million dollars and to prospectively pay for travel time and to include those hours on the road to calculate overtime pay.

- A settlement of over $9 million by a large hospital and healthcare system to a class of nurses and other employees who claimed they worked during uncompensated rest breaks that were automatically deducted from their time cards and paychecks.

- Following an investigation by the California Division of Labor Standards Enforcement, a California hospital paid $2.7 million to settle claims by employees that they had not been paid for second meal breaks during shifts as required by California state wage law.

- A U.S. Department of Labor settlement for more than $1.7 million to 4,000 health care workers involving a Missouri medical corporation comprised of seven healthcare centers and hospitals and allegations that employees were subject to an automatic deduction for meal periods whether the employees were fully relieved of their duties or not.

The internet also provides nearly instantaneous information about significant settlements (or, more rarely, judgments) in wage and hour class actions regardless of location. Moreover, the pleadings filed by successful plaintiffs' counsel, also typically available online, provide a template for lawyers nationwide. As a result, because of the sheer size of these cases, the disruption they cause, the large potential damages, the potential for adverse publicity, and the cost of litigation, many companies and institutions feel compelled to pay significant amounts to settle these lawsuits.

The explosion of wage and hour class actions, while visited upon employers in all sectors of the economy, is now focused on healthcare industry employers, in part because it remains one segment of the economy that continues to grow. The recent class action lawsuits (and settlements) have predominately involved three distinct areas of wage and hour law: (1) "off-the-clock claims"; (2) employee misclassification; and (3) the "regular rate of pay" and shift differentials. This Littler Report examines the legal theories and practical implications of lawsuits brought in these three areas and suggests practical solutions to defend against and perhaps avoid such claims.

If you would like to receive the entire Littler Report entitled "Wage and Hour Class Actions in the Healthcare Industry: Diagnosis and Prevention in 2010" please contact:

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1 Collective actions provide a powerful tool for unions seeking to organize healthcare employers as well. The ability to directly contact a large class of nonexempt employees which it likely would not have otherwise, and to publicly assert claims of unlawful compensation practices, provides positive press for an organizing effort. The Service Employees International Union (SEIU) has provided legal counsel and heralded its victories in FLSA collective actions against non healthcare employers. *See, e.g.,* http://www.seiulorg/2009/09/janitors-win-more-than-1-million-in-lost-pay-from-ups-and-cleaning-contractors.php. As SEIU and other unions intensify their organizing efforts in the healthcare industry, employers can reasonably expect that union trial lawyers will be setting their sights on healthcare systems nationwide.

2 This is not all that surprising considering the recent dramatic increase in employment class actions in general, and FLSA collective actions in particular. From 2004 to 2008 there was a 99% increase in employment class action filings in federal courts, of those, the largest and most dramatic percentage increase was in class actions filed under the FLSA, which increased 98% between 2004 and 2007. *EL360*, Jan. 15, 2009, *at* http://www.law360.com/articles/76803.

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