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HEALTH CARE INDUSTRY STILL BEING TARGETED IN CLASS/COLLECTIVE ACTION WAGE AND HOUR LITIGATION

A multi-facility health care employer, with subsidiary facilities in Pennsylvania and New Jersey, has been named in a class/collective action lawsuit filed in Pennsylvania federal court for allegedly failing to pay its employees adequate overtime under both federal and state wage and hour laws.

PLAINTIFF'S ALLEGATIONS

The plaintiff, a non-exempt (i.e., hourly) medical lab technician employed by the health system's Pennsylvania and New Jersey subsidiaries, alleges that employees weren't paid adequate overtime during weeks in which they worked at two or more facilities owned by the health system and their ***combined*** work hours exceeded 40 hours in a work week.

Similarly, for those employees—including the plaintiff—who worked on a 14-day pay period under what is known as an 8-and-80 system, plaintiff claims that they were not paid adequate overtime during the 14-day period in which they worked for two or more facilities owned by the health system and their ***combined*** work hours exceeded the 80-hour overtime threshold. (Without going into too much detail about 8-and-80 pay systems, the main takeaway is that employees are entitled to overtime for hours worked in excess of either: i) 8 hours per day; or ii) 80 hours per 14-day workweek.)

As an example of the alleged underpayment, plaintiff claims that during one pay period, he worked 80.25 hours for the Pennsylvania subsidiary of the health system and another 16.75 hours for the New Jersey subsidiary for a combined total of 97 hours. During the pay period in question, plaintiff claims that he received overtime pay for 0.25 hours from the Pennsylvania subsidiary because the defendants, when calculating hours worked, only considered plaintiff's hours worked at the Pennsylvania subsidiary. This calculation, according to the plaintiff, was improper. Plaintiff asserts that when determining whether his hours worked exceeded the overtime threshold, he should have received 17 hours of overtime because he is ***jointly employed*** by the Pennsylvania and New Jersey subsidiaries.

JOINT EMPLOYMENT EXPLAINED

The federal Department of Labor ("DOL") has issued guidance on joint employment relationships. According to the DOL, the underlying facts and circumstances dictate whether or not a single individual is jointly employed by two or more employers at the same time. For example, on the one hand, employers are ***not*** considered joint employers and can disregard the work performed by the employee at the other employer in the same workweek where the two employers are acting entirely independently of each other and are completely disassociated with the employment of the employee.

But where, on the other hand, the facts show:

> [...] that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), ***all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act***. In this event, all joint employers are responsible, both individually and jointly, for [complying with the FLSA], including the overtime provisions, with respect to the entire employment for the particular workweek. . .
>
> 29 C.F.R. §791.2(a) (emphasis added) (footnotes omitted).

JOINT EMPLOYMENT ALLEGATIONS ASSERTED BY PLAINTIFF

Plaintiff's theory in his lawsuit is essentially as follows: the parent health system includes hospital facilities and other health care systems operating in multiple states; the parent system characterizes its business as an integrated network of health services; and the parent system centralizes various processes, including policies and procedures, employee benefits, human resources functions, insurance coverage and payroll. In addition, according to plaintiff, all of the various subsidiaries in the system combine revenues, profits and expenses in one consolidated financial statement. Therefore, plaintiff argues that the parent health system and its subsidiaries are joint employers, and, as a result, he and other employees should have paid overtime based on the ***combined hours*** that employees spent working at ***any*** of the

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subsidiary locations.

Plaintiff's lawsuit was filed under both federal and state wage and hour laws. Moreover, the lawsuit was filed by plaintiff as a class and collective action on his own behalf as well as on behalf of all employees in the United States, who, within the last three years, were allegedly "shorted" overtime pay based on the total combined hours worked at any of the health care facilities owned or operated by the parent health system.

ANALYSIS AND PRACTICAL TAKEAWAYS

The question of when separate employers become "joint employers" for purposes of the FLSA has been in flux over the past several years. As we previously reported, in January 2016, the DOL issued an Administrator's Interpretation (during President Obama's administration) concerning joint employment under the FLSA, stating that "[t]he concept of joint employment, like employment generally, 'should be defined expansively'" and outlining both horizontal and vertical joint employment analyses under the FLSA and other federal laws.

Fortunately for employers, however, in June 2017 the U.S. Secretary of Labor Alexander Acosta (during President Trump's administration) withdrew the 2016 Administrator's Interpretation, noting at the time that the removal of the Administrator's Interpretation "does not change the legal responsibilities of employers under the [FLSA]…as reflected in the department's long-standing regulations and case law."

Moreover, various jurisdictions have established different joint employment tests. Although many jurisdictions follow what is referred to as the "economic realities" test for joint employment, other jurisdictions have established their own analyses. In 2017, the employers in a recent joint employment case pending in the (federal) Fourth Circuit Court of Appeals formally requested that the U.S. Supreme Court hear the case and issue a ruling—a move that led many to hope for a standard, nation-wide joint employment test under the FLSA. But, in January 2018, the Supreme Court denied the request to hear that case, so the legal landscape is still murky at best.

Practically speaking, the health care industry is still being targeted in class/collective action wage and hour litigation. And, based on the consolidation and integration that's taking place within the industry, coupled with the lack of clear guidance on joint employment issues, employers—especially health care employers—should be both strategic and careful in structuring their relationships with other entities. Consider consulting with an attorney to ensure compliance with the FLSA and state law requirements. Additionally, Hall Render offers a web-based wage/hour compliance protocol that helps identify and mitigate certain wage/hour issues in the workplace.

If you have any questions or would like additional information about this topic or Hall Render's wage/hour compliance protocol, please contact:

- Dana Stutzman at (317) 977-1425 or dstutzman@hallrender.com;
- Mary Kate Liffrig at (720) 282-2033 or mliffrig@hallrender.com; or
- Your regular Hall Render attorney.

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