Don't Fall Into The Gap: Wage/Hour Lawsuit Highlights Risks For Employers

Insights
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In August, the U.S. Circuit Court of Appeals for the 3rd Circuit affirmed dismissal of five purported class or collective actions brought against a number of healthcare systems and their affiliates. Although favorable for the employers, this decision illustrates that plaintiffs' lawyers remain eager to challenge various aspects of timekeeping practices that arise frequently in hospitals and other healthcare settings.

The hospitals in this lawsuit included Abington Memorial Hospital, Aria Health System, Jefferson Health System, Albert Einstein Healthcare Network, and Temple University Health. The case initially included several more claims, but by the time it reached the 3rd Circuit, only three allegedly unlawful pay policies remained in controversy.

Specifically, the employees alleged that each of the healthcare systems had failed to correctly compensate nurses and other patient-care professionals by:

- automatically deducting 30 minutes each day from the time employees were on-the-clock for meal breaks "without ensuring that employees actually received a break;"
- applying an "Unpaid Pre- and Post-Schedule Work Policy" which "prohibited employees from recording time worked outside their scheduled shifts;" and,
- applying an "Unpaid Training Policy" claimed to have denied payment for time spent in "compensable training activities."

The principal issue on appeal was procedural, however. The specific question was whether the employees had properly plead claims under the Fair Labor Standards Act (FLSA). Quoting the U.S. Supreme Court the 3rd Circuit panel observed that "to survive a motion to dismiss, a complaint must contain sufficient factual matter. . . to state a claim to relief that is plausible on its face," and while detailed factual allegations are not necessary, more than "labels or conclusions" or "a formulaic recitation of the elements of a cause of action," is required. In these cases the employees in their complaints alleged, merely:

> ***[H]e or she "typically" worked shifts totaling between thirty-two and forty hours per week and further allege[d] that he or she "frequently" worked extra time.***

The appellate court found these allegations insufficient to state a plausible claim of unpaid overtime sufficient to defeat the hospitals' motion to dismiss. The panel observed that no employee claimed to have worked at least 40 hours in any one workweek, and also worked uncompensated time in excess of 40 hours. In a footnote, the panel adopted the reasoning of the 2nd Circuit, which has required that:

> ***[A] plaintiff must connect the dots between bare allegations of a "typical" forty-hour workweek and bare allegations of work completed outside of regularly-scheduled shifts, so that the allegations concerning a typical forty-hour week include an assertion that the employee worked additional hours during such a week . . . . (Emphasis added).***

Accordingly, class or collective action complaints that do not adequately "connect dots" may not state a plausible FLSA unpaid overtime claim that would survive a motion to dismiss.

Filling The Gap

Another important but more subtle principle reaffirmed by the 3rd Circuit is that nothing in the FLSA entitles one to recover for uncompensated time that is not overtime. In other words, so-called "gap time" which is not compensated, but which occurs in a workweek in which there is no overtime, is not within the remedial framework of the FLSA. This principle was applicable because the case involved:

> ***time that is not covered by the minimum wage provisions because, even though it is uncompensated, the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked.***

But employees paid at or just slightly above minimum wage would present a different outcome if the unpaid time would, in the aggregate, result in a minimum wage violation. Various state laws could also change the result.

For employers, the good news is that plaintiffs' lawyers will have to work a little harder to keep putative class or collective FLSA actions alive. The bad news, however, is that they will learn from this decision and keep trying to attack employer practices such as those described above. Thus, healthcare employers should review these situations in their organizations, to ensure that their practices and documentation will pass muster if challenged.

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