

The Rise in Collective Actions Against Patient Care Providers

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An Emerging Trend

Suits filed in NY, MA, PA

Will likely spread nationwide

Focus on major metropolitan areas

Generally brought as collective action (as opposed to class) meaning that significant fees will be spent defending

-Employment Law360, November 9, 2009

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Lawsuits Charge Philadelphia-Area Hospitals for Not Paying for Work in Breaks

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If you worked as an hourly employee for a Health Care Facility or Hospital our investigations suggest that **You may not have been paid for all the time you were permitted to work**

Attorneys at Thomas & Solomon LLP are investigating and filing lawsuits to recover these unpaid wages.

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Because of several employment laws, every day you delay may eliminate your ability to recover money. **If you delay in joining, your rights may not be protected.**

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Local hospital workers sue for lunch money

Wednesday, July 22, 2009 at 3:05 p.m.

SYRACUSE (AP) -- Thousands of employees at three upstate New York hospitals could be owed millions in overtime pay for working through their lunch breaks, according to federal class action lawsuits.

The hourly health care workers will soon get court-authorized notices in the mail and have until Sept. 15 to join the suits, said Patrick Solomon, a Rochester lawyer whose firm is handling the class actions.

The lawsuits filed in November in U.S. District Court in Syracuse contend that [St. Joseph's Hospital Health Center](#) and [Crouse Hospital](#) in Syracuse and [Faxton-St. Luke's Healthcare](#) in Utica have practices and policies that automatically deduct health care workers' lunch breaks from their pay, even when they work during those breaks taking care of patients.

Officials at the three hospitals said the lawsuits have no merit and that their facilities were in full compliance with state and federal labor laws.

The federal Fair Labor Standards Act requires workers to be paid if they must work through a lunch break.

"Nurses are dedicated and they don't just drop patients to take lunch," Solomon said Wednesday.

The three hospitals employ a total of about 3,200 nurses, but the class action covers any worker involved in direct patient care. Total employment is about 2,560 at Crouse, 3,140 at St. Joseph's and 2,600 at Faxton-St. Luke's.

So far, the plaintiffs include 118 current and former workers at St. Joseph's, 110 at Faxton-St. Luke's and 103 at Crouse.

Federal law allows workers to recover lost wages for up to three years. For an employee making between \$15 and \$25 an hour, those lost wages could range from \$7,000 to more than \$29,000 over that time, Solomon said.

Solomon's firm filed a similar state class action in February 2006 against the University of Rochester, which agreed to pay a \$9 million settlement. The settlement potentially covers up to 40,000 full and part-time hourly employees who worked at the university over the last seven years, according to the law firm. The university and its health affiliates currently employ 20,000 people.

Over the past year, Solomon's firm also filed class actions against five hospitals in Buffalo and Pittsburgh involving a total of 2,081 plaintiffs. Those suits are pending. They name Catholic Health System and Kaleida Health in Buffalo and Pittsburgh Mercy Health System, West Penn Allegheny Health System and University of Pittsburgh Medical Center.

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November 25, 2009	May 27, 2009
Lawsuits Charge Philadelphia Area Hospitals for Not Paying for Work in Breaks	District Judge Vacates Restrictions Imposed by Magistrate, Authorizes New Notice Form for Faxton-St. Luke's Healthcare
Philadelphia Hospitals Sued for Back Lunch Pay for Workers	District Judge Vacates Restrictions Imposed by Magistrate, Authorizes New Notice Form for St. Joseph's Hospital
Philadelphia Hospitals Named in Suit	May 26, 2009
Seven Philadelphia Area Health Systems Sued Over Lunch Breaks	UPMC Class Action Lawsuit Certified
Philadelphia Health Care Employees Want Pay for Work During Mealtime	May 15, 2009
October 26, 2009	Judge Certifies Class Action Lawsuit Filed by Employees Against UPMC
Kaleida, CHS Facing Class Action Lawsuits	April 14, 2009
October 23, 2009	Hospital Workers in Pittsburgh Sue for Lunch Money
Catholic and Kaleida Health Care Workers Praise Court Ruling	Nurses File Lawsuit Against Mercy Health System
September 5, 2009	Workers Sue UPMC, West Penn, Mercy Hospitals
Biggest Hospitals in Mass. Face Labor Suits	Hospitals Lawsuits in Pittsburgh Could Impact Thousands
Lawsuit Charges UMass Memorial with Pay Abuses	Lawsuit Claims Pittsburgh Hospitals Owe Hundreds money
September 4, 2009	Pennsylvania Hospital Workers File Class Action Wage Lawsuit
Mass. Hospitals Sued for Pay Practices	Lawsuit Claims Pittsburgh Nurses Weren't Paid for Lunch Breaks
Health Care Workers Sue Hospitals Over Wage Deduction	Two Nurses Sue Pittsburgh Hospital Over pay Concerns
September 3, 2009	April 1, 2009
Class Action Suit Expected Against Mass. Hospitals	Nurses Alleged UPMC and West Penn Allegheny are Stealing Time from Employees
July 22, 2009	UPMC and West Penn Allegheny Alleged to be Stealing Time from Employees
Syracuse Healthcare Employees Have Choice on Whether to Join Lawsuit	Medical Employees File Class Action Lawsuit Against UPMC and West Penn Allegheny
Hospital Workers in Syracuse Sue for Lunch Money	UPMC and West Penn Allegheny Accused for Not Paying Employees for All Time Worked
Employees at St. Joe's, Crouse Want Law Followed	UPMC and West Penn Allegheny Accused of Cheating Workers Out of Pay
Law Firm Says Syracuse Hospital Employees in Lawsuit Need to Make Claim Decision	Nurses in Pittsburgh Contend Not Paid for Training or Work Done When Supposed to be on Meal Break
Central New York Hospital Workers Sue for Lunch Money	March 16, 2009
Syracuse Hospital Workers Sue for Lunch Money	Magistrate Authorized Notice Restricts Communication with Potential Plaintiffs for Faxton-St. Luke's Hospital
Syracuse Hospitals Pay Roll Lawsuit	Magistrate Authorized Notice Restricts Communication with Potential Plaintiffs for St. Joseph's Hospital
July 10, 2009	Magistrate Authorized Notice Restricts Communication with Potential Plaintiffs for Crouse Hospital
Pay Suit Against Pittsburgh Hospitals Seeks Plaintiffs	January 28, 2009
Pay Suit Against UPMC, West Penn and Mercy Seeks Plaintiffs	Judge Conditionally Certifies Class of St. Joseph's Hospital Employees
Lawsuit Against UPMC, Mercy, West Penn Alleges Workers Weren't Fully Paid	Judge Conditionally Certifies Class of Faxton-St. Luke's Hospital
100,000 asked to join hospital lawsuit in Pittsburgh	Judge Conditionally Certifies Class of Crouse Hospital
July 9, 2009	December 29, 2008
Pittsburgh Health Care Workers being Asked to Join Lawsuit	Catholic and Kaleida Health System Workers' Federal Suits Over Unpaid Breaks Go Forward
Class Action Suit Claims Pittsburgh Hospitals Failed to Properly Pay Employees	December 11, 2009
July 8, 2009	Buffalo Hospitals Must Face Overtime Claims
Judge Certifies Class Action Lawsuit Filed by Employees Against Pittsburgh Mercy	November 26, 2008
July 2, 2009	Hospital Employees in Syracuse, NY Sue Over Unpaid Lunch Time
Judge Orders Employees of UPMC to be Notified of Class Action Lawsuit	November 24, 2008
July 1, 2009	Firm Sues St. Joseph's and Crouse Hospitals in Syracuse
Judge Orders Employees of Faxton St. Luke's Healthcare to be Notified of Class Action Lawsuit	November 19, 2008
Magistrate Denies Defendant's Request Seeking Additional On Communications with Potential Faxton-St. Luke's Plaintiffs	89 Former and Current Employees from Faxton-St. Luke's Join Lawsuit
Judge Orders Employees of St. Joseph's Hospital to be Notified of Class Action Lawsuit	Employees File Lawsuit Against 3 Major Hospitals in Syracuse, NY
Magistrate Denies Defendant's Request Seeking Additional Restrictions on Communications with Potential Plaintiffs for St. Joe's	89 Current and Former Employees File Lawsuit Against Faxton-St. Luke's Healthcare
Judge Orders Employees of Crouse Hospital to be Notified of Class Action Lawsuit	Workers at 2 Major Syracuse Hospitals File Class Action Lawsuit
Magistrate Denies Defendant's Request Seeking Additional Restrictions on Communications with Potential Plaintiffs from Crouse	Employees at St. Joseph's, Crouse and Faxton-St. Luke's Hospitals in Lawsuit Say They Weren't Paid for Work
June 1, 2009	July 16, 2008
Judge certifies Class action Lawsuit Filed by Employees Against West Penn Alleghany	Investigations Into Pay Practices at Syracuse Hospitals
May 29, 2009	May 23, 2008
District Judge Vacates Restrictions Imposed by Magistrate, Authorizes New Notice Form for Crouse Hospital	Major Class Action Lawsuit Filed by Employees Against Kaleida and Catholic Health Systems

General Compliance Strategies

- **Conduct an audit of existing wage and hour policies, procedures and practices**
- **Update and revise policies to ensure a uniform, company-wide standard for applying wage and hour compliance issues**
- **Implement an effective training program for management**
- **Implement an effective wage and hour compliance and reporting system**
- **Utilize technological innovations to minimize wage and hour liability exposure**
- **Conduct periodic reviews of policies, procedures and practices**

1. Conduct an audit of existing wage and hour policies, procedures and practices

- A. Assess the formal written policies, procedures and practices
- B. Conduct audit of actual practices that are being implemented with respect to those policies and procedures

A. Assess the formal written policies, procedures and practices

- i. Are regular pay days established?
- ii. Are employees paid with the frequency required by applicable state law?
- iii. Is an authorized instrument of wage payment used?
- iv. Are employees provided with a pay stub or earnings statement with each wage payment, which complies with state law?
- v. Are nonexempt employees properly compensated for all overtime worked?
- vi. Is off-the-clock work prohibited and prevented?
- vii. Are meal and rest period requirements complied with and documented?
- viii. Is all compensable “work time” tracked and compensated?
- ix. Is vacation accrual, use and payout tracked and compensated?
- x. Has authorization been obtained for deductions from employee paychecks, and are the deductions appropriate?
- xi. When are commissions earned and paid, how are they calculated, and are they included in the regular rate for overtime purposes?
- xii. When are bonuses earned and paid, how are they calculated, and are they included in the regular rate for overtime purposes?
- xiii. Are terminated employees paid their final wages in accordance with applicable state law?

B. Audit actual practices that are being implemented with respect to formal policies and procedures

- i. Plan and design the audit
- ii. Develop an audit process
- iii. Conduct the audit

2. Update and revise policies to ensure a uniform, company-wide standard

- This will help to some degree in defending against class actions based on allegations that the company has engaged in a systemic pattern and practice of wage and hour violations
- Key considerations in drafting wage and hour policies:
 - Policies must be compliant with state and federal wage and hour law
 - Employer should only enact policies that the company and its managers will be able to follow
 - Provide training to management, human resources, payroll

Essential Policies

- A. Time and Manner of Wage Payment
- B. Classification of Employees as Exempt
- C. Payment for all Overtime Worked
- D. Timekeeping Policy
- E. Meal and Rest Periods
- F. Vacation
- G. Commissions
- H. Payment of Final Wages
- I. Open Door Policy
- J. Whistleblower/Nonretaliation Policy

Essential Policies: Timekeeping Policy

- i. Strictly prohibit off-the-clock work
- ii. Specify that managers cannot request or require off-the-clock work or suggest that it is acceptable
- iii. Require managers to report all suspected off-the-clock work to human resources or senior management so that it can be investigated and corrected
- iv. Require employees to accurately record all hours and submit their completed, signed time records in a timely manner
- v. Require managers to review their employees' time records for accuracy and to immediately correct any record that is wrong or missing information
- vi. Prohibit employees from recording information on time records of other employees
- vii. Prohibit managers from improperly editing time records to reduce actual working time, offer comp time or defer reporting working time to another non-overtime week
- viii. Include a mechanism for employees to report payroll errors or concerns

Essential Policies: Meal and Rest Periods

- i. State whether, when and for how long the meal and/or rest breaks will be provided
- ii. Describe the procedure to be followed in the event that a meal and/or rest period is interrupted by work
- iii. Ensure that employees are provided with any compensation that might be required for time spent in a noncompliant meal and/or rest period
- iv. Require employees to record the beginning and ending times of their meal breaks
- v. Instruct employees to contact their supervisor if they have questions regarding meal or rest periods

Essential Policies: Open Door Policy

- *Encourages employees to resolve their complaints internally*
- *Reduces likelihood that employer will become defendant in a class action*
 - i. Policy should specify method for lodging complaints
 - ii. Policy should provide for multiple avenues of redress
 - iii. Policy should expressly state that payroll-related concerns are covered

Essential Policies: Whistleblower/Nonretaliation Policy

- i. Specify that lodging a complaint will not subject employee to retaliation
- ii. State that anyone engaging in retaliation will be subject to discipline up to and including termination

Excerpts From

Fact Sheet #53 – The Health Care Industry and Hours Worked

Meal Breaks

Bona-fide meal periods (typically 30 minutes or more) are not work time, and an employer does not have to pay for them. However, the employees must be completely relieved from duty. When choosing to automatically deduct 30-minutes per shift, the employer must ensure that the employees are receiving the full meal break. [See Regulations 29 CFR 785.19.](#)

Example #9:

A skilled nursing facility automatically deducts one-half hour for meal breaks each shift. Upon hiring, the employer notifies employees of the policy and of their responsibility to take a meal break. Does this practice comply with the FLSA? Yes, but the employer is still responsible for ensuring that the employees take the 30-minute meal break without interruption.

Example #10:

An hourly paid registered nurse works at a nursing home which allows a 30-minute meal break. Residents frequently interrupt her meal break with requests for assistance. Must she be paid for these frequently interrupted meal breaks? Yes, if employees' meals are interrupted to the extent that meal period is predominately for the benefit of the employer, the employees should be paid for the full 30-minutes.

Other Breaks

Rest periods of short duration, generally running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as work time. It is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the rest room, etc. [See Regulations 29 CFR 785.18.](#)

Example #11: Many third shift nursing home employees who smoke prefer to take three ten-minute unpaid smoke breaks instead of their 30-minute unpaid meal break. Is it okay for them to substitute the smoke breaks for their meal break? No, the employee must be compensated for the smoke breaks.

Training and Seminars

Attendance at lectures, meetings, training programs and similar activities are viewed as working time *unless all of the following criteria are met:*

- Attendance is outside of the employee's regular working hours;
- Attendance is in fact voluntary;
- The course, lecture, or meeting is not directly related to the employee's job; and
- The employee does not perform any productive work during such attendance.

See Regulations 29 CFR 785.27.

Example #5:

A residential care facility offers specialized training on caring for Alzheimer residents. There are two workshops: one in the evening for the day shift and one during the day for the evening shift. All employees are required to attend. Is this compensable time? Yes, because the training is not voluntary and is related to the employees' jobs.

Example #6:

The administrator of a nursing home says specialized patient care training is voluntary, but the nursing supervisors expect all employees on their units to attend and schedule times for each employee to go. Is the time considered hours worked? Yes, the time would be considered hours worked. When the nursing supervisors expect all unit employees to attend and schedule their times, it is not truly voluntary.

Example #7:

The dishwasher decides to go to the Alzheimer's training session after his shift. Must the administrator pay for the dishwasher's time spent at the training session? No, because all four criteria above are met. It is not considered hours worked.

Example #8:

The administrator provides a Tai Chi course to residents and allows employees to attend during their off-duty hours. Do employees have to be paid for the time they attend this course? No, the employees do not have to be paid because attendance is voluntary and the other three criteria are met.

Complete Fact Sheet Follows

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



Fact Sheet #53 – The Health Care Industry and Hours Worked

The Fair Labor Standards Act (FLSA) requires covered employers to pay non exempt employees at least the federal minimum wage of \$5.85 per hour effective July 24, 2007; \$6.55 per hour effective July 24, 2008; and \$7.25 per hour effective July 24, 2009, for all hours worked and overtime pay for hours worked over 40 in a workweek. The FLSA is administered by the Wage and Hour Division of the U.S. Department of Labor.

Hospitals and other institutions “primarily engaged in the care of the sick, the aged, or the mentally ill” are covered employers under Section 3(s)(1)(B) of the FLSA. Thus, hospitals, residential care establishments, skilled nursing facilities, nursing facilities, assisted living facilities, residential care facilities and intermediate care facilities for mental retardation and developmentally disabled must comply with the minimum wage, overtime and youth employment requirements of the FLSA.

Summary

This fact sheet provides guidance regarding common FLSA violations found by the Wage and Hour Division during investigations in the health care industry relating to the failure to pay employees for all hours worked.

Nonexempt employees must be paid for all hours worked in a workweek. In general, “[hours worked](#)” includes all time an employee must be on duty, on the employer premises, or at any other prescribed place of work. Also included is any additional time the employee is “suffered or permitted” to work. The FLSA requires employers to pay for hours actually worked, but there is no requirement for payment of holidays, vacation, sick or personal time.

The failure to properly count and pay for all hours that an employee works may result in a minimum wage violation if the employee’s hourly rate falls below the required federal minimum wage when his or her total compensation is divided by all hours worked. More likely, the failure to count all hours worked will result in an [overtime](#) violation because employers have not fully accounted for hours worked in excess of 40 during the workweek.

Rounding Hours Worked

Some employers track employee hours worked in 15 minute increments, and the FLSA allows an employer to round employee time to the nearest quarter hour. However, an employer may violate the FLSA minimum wage and overtime pay requirements if the employer always rounds down. Employee time from 1 to 7 minutes may be rounded down, and thus not counted as hours worked, but employee time from 8 to 14 minutes must be rounded up and counted as a quarter hour of work time. [See Regulations 29 CFR 785.48\(b\)](#).

Example #1:

An intermediate care facility docks employees by a full quarter hour (15 minutes) when they start work more than seven minutes after the start of their scheduled shift. Does this practice comply with the FLSA requirements? Yes, as long as the employees’ time is rounded up a full quarter hour when the employee starts working from 8 to 14 minutes before their shift or if the employee works from 8 to 14 minutes beyond the scheduled end of their shift.

Example #2:

An employee’s schedule is 7 a.m. to 3:30 p.m. with a thirty minute unpaid lunch break. The employee receives overtime compensation after 40 hours in a workweek. The employee clocks in 10 minutes early every day and clocks out 7 minutes late each day. The employer follows the standard rounding rules. Is the employee entitled to overtime compensation? Yes. If the employer rounds back a quarter hour each morning to 6:45 a.m. and rounds back each evening to 3:30 p.m., the employee will show a total of 41.25 hours worked during that workweek. The employee will be entitled to additional overtime compensation for the 1.25 hours over 40.

Example #3:

An employer only records and pays for time if employees work in full 15 minute increments. An employee paid \$10 per hour is scheduled to work 8 hours a day Monday through Friday, for a total of 40 hours a week. The employee always clocks out 12 minutes after the end of her shift. The employee is paid \$400 per week. Does this comply with the FLSA? No, the employer has violated the overtime requirements. The employee worked an hour each week (12 minutes times 5) that was not compensated. The employer has not violated the minimum wage requirement because the employee was paid \$9.75 per hour (\$400 divided by 41 hours). However, the employer owes the employee for one hour of overtime each week.

Travel Time

Time spent by an employee in travel as part of his principal activity, such as travel from jobsite to jobsite during the workday, must be considered as hours worked. An employee who travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel. This is not considered hours worked. [See Regulations 29 CFR 785.33](#).

Example #4:

A licensed practical nurse (LPN) works at an assisted living facility which has a “sister facility” 20 miles away. There have been times that the LPN has been asked to fill in for someone at the other facility after she completes her shift at her normal work site. It takes her 30 minutes to drive to the other facility. The travel time is not recorded on her time sheet. Is this a violation of the FLSA? Yes. The travel time must be considered part of the hours worked.

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Attendance at lectures, meetings, training programs and similar activities are viewed as working time *unless all of the following criteria are met:*

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Example #11: Many third shift nursing home employees who smoke prefer to take three ten-minute unpaid smoke breaks instead of their 30-minute unpaid meal break. Is it okay for them to substitute the smoke breaks for their meal break? No, the employee must be compensated for the smoke breaks.

On-Call Time An employee who is required to remain on call on the employer's premises or so close to the premises that the employee cannot use the time effectively for his or her own purpose is considered working while on-call. An employee who is required to carry a cell phone, or a beeper, or who is allowed to leave a message where he or she can be reached is not working (in most cases) while on-call. Additional constraints on the employee's freedom could require this time to be compensated. [See Regulations 29 CFR 785.17.](#)

Example #12: An assisted living facility has four LPN wellness coordinators who are paid hourly. They rotate being on-call each week. They are required to carry a cell phone and be within 45 minutes of the facility when they are on-call. They are not paid for all time spent carrying the cell phone but are paid for time spent responding to calls and time when they have returned to work at the assisted living facility. Does this comply with the FLSA? Yes.

Unauthorized Hours Worked

Employees must be paid for work "suffered or permitted" by the employer even if the employer does not specifically authorize the work. If the employer knows or has reason to believe that the employee is continuing to work, the time is considered hours worked. [See Regulation 29 CFR 785.11.](#)

Example #13:

A residential care facility pays its nurses an hourly rate. Sometimes the residential care facility is short staffed and the nurses stay beyond their scheduled shift to work on patients' charts. This results in the nurses working overtime. The director of nursing knows additional time is being worked, but believes no overtime is due because the nurses did not obtain prior authorization to work the additional hours as required by company policy. Is this correct? No. The nurses must be paid time-and-one-half for all FLSA overtime hours worked.

Example #14:

An hourly paid office clerk is working on a skilled nursing home's quarterly budget reports. Rather than stay late in the office, she takes work home and finishes the work in the evening. She does not record the hours she works at home. The office manager knows the clerk is working at home, but since she does not ask for pay,

assumes she is doing it “on her own.” Should the clerk’s time working at home be counted? Yes. The clerk was “suffered and permitted” to work, so her time must be considered hours worked even though she worked at home and the time was unscheduled. [See Regulations 29 CFR 785.12.](#)

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

The FLSA statute appears at [29 U.S.C. § 201](#) et seq. The federal regulations regarding hours worked appear in [29 C.F.R. Part 785](#).

When the state laws differ from the federal FLSA an employer must comply with the higher standard. Links to your state labor department can be found at www.dol.gov/esa/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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