

ORANGE COUNTY BUSINESS JOURNAL

Hospitals are a Target for Wage and Hour Class Action Lawsuits *What health care employers need to know*

by Marta M. Fernandez and Amy Messigian

In recent years, Southern California hospitals have become a prime target in the onslaught of wage and hour class action litigation. Between January 2008 and December 2009, hospital wage and hour class actions in California rose by more than 30%. The range of employers named in these cases varies from community hospitals and clinics to national hospital systems. No health-care employer is immune. The plaintiff classes often include nurses and other patient care facilitators, as well as non-patient care employees such as administrative staff, IT employees, schedulers, and maintenance staff. The size of the plaintiff class can range from under 100 to over 100,000 and the settlements reached in the last three years have ranged from \$2 million to \$85 million.

While class action complaints against hospitals throw in "everything but the kitchen sink," including unfair competition claims, pay stub violations and waiting time penalties for failing to properly pay wages at the time of an employee's termination, the crux of the class action lawsuits predominately involve three distinct areas of wage and hour law: (1) missed meal and rest breaks; (2) the calculation of the "regular rate of pay;" and (3) alternative workweek schedules. Missed meal and break claims predominantly arise from allegations that the hospital failed to pay overtime and penalties for missed or interrupted meal and rest breaks. The regular rate calculation claim typically alleges that premium pay, such as weekend or short shift differentials are not included in the regular rate of pay, which is used to calculate overtime and meal/rest period penalties. Finally, while a variety of alternative

workweek schedules ("AWS") are allowed under California law, such as the 3-day/12-hour AWS utilized for continuity of care in acute care units, claims based on AWS typically suggest that the schedules have been improperly administered or implemented.

At least one of these issues, missed meal and rest breaks, is waiting for a resolution by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*. Under California and Federal law, an employee is entitled to a bona fide meal period during which the employee must be relieved from all duty. If the employee

works through their meal period, the employer is required to provide the employee with an extra hour of pay. Where an employee works more than ten hours in a shift, the employer is required to provide a second, unpaid, off-duty meal period, unless the employee chooses to waive the second meal period. Many hospitals have secured written meal period waivers from nursing employees, many of whom are scheduled on 12-hour shifts. However, recent lawsuits have challenged the waivers on the basis that they were not truly signed voluntarily by the employee or are otherwise invalid due to some technicality in the wording.

Even as to the first meal period, claims abound. For hospitals and other healthcare employers, patient care and staffing needs often complicate break scheduling. For years, many hospitals relied on 30-minute automatic pay deductions for meal periods and employed a variety of methods to correct auto-deductions in cases of missed meal periods. Some required employees to notify their supervisor

JMBM
**Jeffer Mangels
 Butler & Mitchell LLP**

Jeffer Mangels Butler & Mitchell LLP

The labor and employment lawyers at Jeffer Mangels Butler & Mitchell counsel businesses and management on workplace issues including wage and hour disputes, reductions in force, discrimination, harassment, and labor-management matters including collective bargaining negotiations and arbitrations. We work with employers to avoid workplace problems, but when controversy is unavoidable, we are aggressive and effective advocates. Our lawyers have handled hundreds of jury trials, administrative trials and appeals before courts and administrative agencies nationwide. For more information call 949.623.7200 or go to www.JMBM.com.

Marta M. Fernandez

Marta M. Fernandez is a labor and employment partner at Jeffer Mangels Butler & Mitchell LLP. Marta and her team represent numerous hospitals and health care facilities in Orange County. She represents clients in wage and hour class actions and audits; union prevention strategies; collective bargaining; neutrality agreements; representation and decertification elections; arbitrations; NLRB trials; State, Federal and administrative trials; management training and provides day-to-day labor and employment counseling. Contact Marta at mfernandez@jmbm.com or 949.623.7260.



Amy Messigian

Amy Messigian is a labor and employment lawyer at Jeffer Mangels Butler & Mitchell LLP. She represents management in litigation, including the defense of wage and hour class actions, discrimination, harassment, wrongful termination, and accommodation claims, and in matters before the Division of Labor Standards Enforcement, the Workers' Compensation Appeals Board, and other administrative agencies. Contact Amy at amessigian@jmbm.com or 949.623.7200.



ORANGE COUNTY BUSINESS JOURNAL

while others required the employees to fill out a meal log. However, the auto-deduct practice has come under fire as not properly recording breaks within the work day. Plaintiffs claim, for example, that because an employee must affirmatively report the missed meal break, he or she will not be properly compensated if they forget to notify their supervisor. As a result, many hospitals have turned to electronic timekeeping systems that flag any missed clock-in or clock-out.

Nevertheless, other challenges remain – such as providing a “duty free” meal period. It is now common practice to require that nurses surrender employee pagers and cell phones while on break; however, this does not necessarily mean that the meal period is free from interruption. Nurses may take their meal break in a nurses’ lounge where it is possible that they will be met with a question from a doctor or other colleague. A key issue in these wage and hour cases is whether such interruption constitutes an “on-duty” meal period.

Brinker, currently pending before the California Supreme Court, will help answer this question. In *Brinker*, the Court will decide whether an employer must **ensure** that a duty-free meal period is taken or simply provide employees with the **opportunity** to take a duty-free meal break. Liability for many employers, including many hospitals, will turn on this key distinction.

All healthcare employers must be on alert. If they have yet to be sued, it is all but certain that they will become the target of a class action lawsuit. To help limit exposure, employers should audit their pay practices and policies for compliance with federal and state wage hour laws. Perform regular payroll audits – at least once per year – and train managers and supervisors on the meal and rest break policies in place. Spot potential vulnerability and implement corrective measures. An early audit of pay practices may significantly reduce a hospital’s liability in the event a class action lawsuit is filed.