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Time is money

Lawsuits hit hospitals for improper pay calculation

By Gregg Blesch

As lawyer J. Nelson Thomas tells it, a lot of bologna sandwiches are eaten at hospitals. Scratch that. His point is that a lot of them are not eaten, or only partially eaten.

Thomas' firm, Rochester, N.Y.-based Thomas & Solomon, has filed class-action lawsuits against 26 healthcare systems in Massachusetts, New York and Pennsylvania. The suits make a variety of allegations that hospital workers are not getting the wages they're owed. The core charge is this: Computerized timekeeping systems automatically deduct half-hour meal breaks whether or not the employee ends up working.

"In a hospital, you're not ensuring that people stop working—quite the contrary," Thomas says. "A patient is coding right now. Oh, excuse me, I have to finish my bologna sandwich," Thomas says, suggesting something a nurse would never say. It's true for janitors too, he suggests. "I can't say, 'I'll clean up that blood later, I'm eating my bologna sandwich,'" he says. "Virtually ever position in the hospital is under the same demands."

Partners HealthCare System in Boston recently agreed to pay \$17.3 million to settle one of the lawsuits brought by Thomas & Solomon on behalf of hospital workers. "We greatly value our employees, and remain fully committed to ensuring that they are properly paid for all the hours they work," Partners said in a memo distributed to employees Nov. 5, the day the agreement was filed in U.S. District Court in Boston. It remains subject to court approval.

The U.S. Labor Department's Wage and Hour Division may be taking a more aggressive look into compliance laws. A report issued in June 2009 by the Government Accountability Office found that the division had a shoddy record of investigating complaints, and then newly sworn-in Labor Secretary Hilda Solis responded in a statement that the department was hiring 150 new field investigators.

Partners paid \$2.7 million in July 2009 to resolve allegations that overtime pay wasn't calculated appropriately when workers put in hours at multiple Partners facilities during a pay period.

Partners was the second organization to settle a suit brought by Thomas & Solomon on behalf of hospital employees alleging wage and hour violations, with automatically deducted meal



J. Nelson Thomas: Hospitals have been reluctant to change their policies even after they've been sued.

breaks at the core. This past June, Beth Israel Deaconess Medical Center, Boston, and two other Massachusetts hospitals affiliated with it through a bond-holding group, CareGroup, agreed to pay \$8.5 million to settle one of the lawsuits. The rest, most of them filed in 2008 and 2009, are slogging along in the courts.

Thomas & Solomon has its sights on the rest of the country as well, soliciting complaints from hospital workers via letters and the Web, where it secured the domain name hospitalovertime.com. The automatic deduction of meal breaks saves hospitals millions of dollars a year, and it's difficult for a hospital to pay employees for that time if its competitors

don't, Thomas says. "Even hospitals that have been sued have not changed their policies," he says. "That's how lucrative the practice is."

From a hospital's perspective, fending off such lawsuits is grueling, says Nancy Sheehan, vice president and general counsel at Catholic Health System, which has two hospitals in Buffalo, N.Y., and two more in the suburbs of Kenmore and Cheektowaga. The system was targeted in lawsuits filed in 2008. "It's a very time-intensive, labor-intensive process," Sheehan says. "The overall premise really lacks merit, but certainly the impact is significant."



Nancy Sheehan:
Defending a wage-dispute lawsuit is a time- and labor-intensive process.

In practice, someone manually overrides the system's automatic deduction when an employee reports not getting a full break. As Catholic Health slogs through the lawsuit's discovery process—court-mandated mediation failed—the staff is pulling five years of data from the timekeeping system to show the overrides, as well as tracking down paper records of override requests, which aren't kept by all departments but could prove that requested overrides are executed. The system also is compiling training logs showing employees have been instructed to report to managers when they're owed pay for working through breaks.

"There may be instances where a nurse may get paged from lunch and then either forgets to tell a manager or somehow it does get missed," Sheehan says. "I was a nurse before I became a lawyer and worked a lot of midnights, and you do what you need to do and you don't really think about it." But, she adds, "We have policies in place to try to prevent it from happening."

Other hospitals contacted about being hit with the firm's lawsuits declined to be interviewed or provide comment because they generally don't talk about pending litigation.

Kevin Troutman, a former healthcare executive in human resources and now a labor lawyer, says he is advising clients to carefully review their timekeeping systems for vulnerabilities to lawsuits or enforcement actions.

"If an employee is not getting a full meal break and there's an automatic system assuming they did, that's going to be a problem," Troutman says. "If you go all the way to trial, they're going to find a violation," he says, adding that the damages will be double the amount of the wage

discrepancy, plus attorneys' fees. "Suddenly that becomes a pretty big number," he says.

Plaintiffs' lawyers and the government also are interested in instances when employees get work done off the clock before and after scheduled shifts, Troutman says. Another risk area is rounding. Under federal law, when employers round to the top of the hour when workers clock in and clock out, the rounding can't always favor the employer. That is, if the system rounds to 9 a.m. when someone clocks in at 8:55 a.m., the system can't then round down to 5 p.m. when the worker clocks out at 5:10 p.m.

"Nobody's trying to do anything wrong, but you could end up with a violation because of a technicality, and it could be a costly technicality," Troutman says.

Nationally, the federal government has not identified healthcare as an area of particular interest, but an ongoing initiative by the Labor Department's New York office indicates significant vulnerability in the industry. Beginning in with nursing homes in 2005 and adding hospitals in recent years, investigators in New York have selected a few healthcare facilities for site visits and audits. Just over a third have been deemed in full compliance with the Fair Labor Standards Act.

In this year's inquiries, investigators scrutinized two hospitals and 11 nursing homes, which officials declined to identify. The effort secured back wages of \$165,000 for 98 employees.

The numbers and types of facilities haven't been consistent, so the tallies aren't directly comparable from year to year, but the yield has been as high as \$737,000 for 1,644 employees, perhaps indicating healthcare employers are "getting the message," says Sonia Rybak, assistant director for the Wage and Hour Division in White Plains, N.Y.

Among organizations that require follow-up investigation, the compliance rate is generally very high, Rybak adds. "Unless there's new management—and then it's as if we've never been there."

***Prior results do not guarantee similar outcomes.**