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Employment Law Daily Wrap Up

News: Story

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**WAGE-HOUR—CLASS ACTIONS—S.D.N.Y.: NATIONWIDE COLLECTIVE
ACTION CHALLENGES PAY PRACTICES OF QUEST DIAGNOSTICS**

Mobile medical examiners for Quest Diagnostics were granted conditional certification of a nationwide collective action challenging the pay practices of the medical testing company. Finding that the affidavits of the medical examiners detailed similar experiences of being paid only per-appointment, but that they were required to perform considerable work to prepare for and close-out those appointments, a federal district court in New York concluded that the putative collective members sufficiently alleged they were victims of a common policy (*Vecchio v. Quest Diagnostics Inc.*, April 30, 2018, Ramos, E.).

Off-the-clock work. As a mobile medical examiner, the named plaintiff was primarily responsible for visiting insurance customers in their homes or places of business to conduct physical examinations and basic lab work for purposes of insurance eligibility or underwriting. During the course of her relationship with Quest, the plaintiff worked as both an independent contractor and an employee. According to the employee she was primarily compensated on a per-procedure basis. However, she alleged that she completed significant amounts of work for which she was not compensated, including pre-appointment work, travel time, or lab-work or paperwork completed at home after her appointments.

As a result, although the employee routinely worked more than 10 hours per day and more than 40 hours per week, her per-hour compensation rate was often below the federal minimum wage, and she regularly did not receive overtime compensation.

Additionally, the employee alleged that although she was classified as an independent contractor before being classified as an employee, her work under both categorizations constituted an employment relationship for purposes of the FLSA. Finally, she asserted that the employer had a common practice, policy, or plan of failing to keep accurate time records and failing to pay minimum wage and overtime in violation of the FLSA.

Nationwide collective. On June 29, 2016, the employee commenced a collective action. Over the next nine months, seven other mobile medical examiners opted into the action. However, those examiners worked only in New York and Florida. Thereafter, the employee sought contact information of other medical examiners so that she could demonstrate that a sufficient number of similarly situated plaintiffs exist from geographically diverse locations to justify conditional certification of a nationwide collective.

Ultimately, plaintiff's counsel received over 1,000 responses to an email to a subset of examiners asking whether they would be willing to discuss their experience working for Quest. A second email outlined a series of questions attempting to determine if examiners were similarly situated to the named plaintiff. It also informed examiners that they were welcome to join the action and asked for a declaration from those who opted in. Since then, over 430 examiners from at least 43 states have opted into this action. The examiners were comprised of three categories: individuals classified as independent contractors; examiners who were independent contractors and were later classified as employees; and examiners who were always classified as employees.

On October 20, 2017, the employee filed a motion for conditional certification of an FLSA collective action. Like the named plaintiff, each examiner who submitted affidavits averred that they were principally paid by appointment, that they spent a significant amount of time preparing for appointments, travelling between appointments, and doing post-appointment work, and that they were not compensated for such work, resulting in they not being paid minimum or overtime wages.

Similarly situated. In seeking conditional certification, the employee contended that the putative collective members were similarly situated because they have substantially similar job requirements and pay provisions that require them to work off-the-clock hours without receiving adequate compensation. For its part, the employer challenged whether the employee could establish that she is similarly situated, contending that has not demonstrated that she and the opt-in plaintiffs are victims of an identifiable policy or plan.

The court rejected the employer's assertion that it should not consider the 55 declarations proffered by the employee and other mobile medical examiners because they are virtually identical and conclusory. Here, the employees specifically attested to their own experiences of not being paid minimum and overtime wages for work performed pre- and post-appointment. Because the employee identified particular employees and made specific allegations, the court determined that it was entitled to rely on the statements. Moreover, taken together, the declarations provided sufficient indicia that Quest maintained a common practice across geographic locations.

Similar declarations. The court also rejected the employer's claim that the declarations should not be considered because they were virtually identical. The mere fact that there are similarities between the affidavits submitted by plaintiff and the opt-in plaintiffs further indicated that they were 'similarly situated.' Finally, the court rejected the employer's claim that the employee had not demonstrated that she and the opt-in plaintiffs were victims of an identifiable policy or plan. Here, the employer pointed to the fact that there was no written policy requiring the employee to work without compensation. The court found this argument both legally and factually incorrect. The FLSA does not require that a plaintiff identify a *formal*, facially unlawful policy before obtaining conditional certification of a collective action.

While the employee's declaration did not cite to any specific written policies, the declarations submitted by the putative collective members sufficiently alleged that they were victims of a common policy (even if not a formal, written one) pursuant to which examiners were paid only per-appointment, but were required to perform considerable work to prepare for and close-out those appointments.

Paul B. Maslo, counsel for the plaintiff, observed that: This ruling is significant because it allows medical examiners across the country—including both independent contractors and employees—to band together to challenge Quest's employment practices.

The case is No. 16 Civ. 05165 (ER).

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Companies: Quest Diagnostics Inc.; ExamOne World Wide, Inc.; ExamOne LLC

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