

QUEST DIAGNOSTICS INC. TO PAY \$688,000 IN OVERTIME BACK WAGES SETTLEMENT AFTER MISCLASSIFYING SYSTEMS EMPLOYEES AS EXEMPT

April 29, 2008

Medical diagnostic testing company Quest Diagnostics Inc. ("Quest") has agreed to pay 238 employees across the country a total of \$688,772 in overtime back wages due under the federal Fair Labor Standards Act (FLSA) after having misclassified certain computer systems workers, the U.S. Department of Labor Wage & Hour Division announced April 29, 2008. The settlement stems from a misclassification of systems workers as "exempt" which commonly occurs not only among health industry employers, but also among other employers as well.

According to the Labor Department, the Quest overtime back wages payment resulted after a Wage & Hour Division investigation at Quest's Cambridge, Massachusetts location revealed that employees working in the positions of client systems analyst and senior client systems analyst were misclassified as being exempt from the FLSA's overtime requirements. The investigation also revealed that this same misclassification existed at all of the company's facilities nationwide. After being informed of the investigation's findings, company management agreed to pay the affected employees back wages and to fully comply in the future with the requirements of the FLSA.

Misclassification of workers and inappropriate compensation time practices are common compliance concerns among employers generally and for health industry employers particularly. As in other industries, health care and other employers often overestimate the scope and applicability of the exempt classification, misclassify workers as independent contractors who are actually common law employees, overestimate their ability to provide "comp time" in lieu of overtime, misapply "on-call" policies, or misunderstand other FLSA requirements. Wage & Hour Division Fact Sheets suggest that many health industry employers incur overtime and minimum wage violations because they failure to properly count and pay for all hours that an employee works in accordance with the FLSA due to improper rounding of hours worked, failure to properly credit time spent traveling, failure to credit time spent for required attendance at lectures, meetings, training programs and similar activities are viewed as working time, improperly deducting times for breaks, failing to properly credit on call time, and failing to pay for unauthorized hours worked. Enforcement of these requirements against health care employers also is rising since the Wage & Hour Division has included health industry employers among the industry groups targeted for special compliance monitoring under the FLSA and the highly-publicized implementation of updated FLSA regulations regarding the classification of workers a few years ago has peaked the interest of plaintiffs' attorneys .

These mistakes can be very costly. Health industry and other employers that fail to properly pay employees under Federal and state wage and hour regulations face substantial risk. Violation of wage and hour mandates carries substantial civil – and in the case of willful violations, even criminal- liability exposure. Civil awards commonly include back pay, punitive damages and attorneys' fees. As a consequence, health care and other employers should review and document the defensibility of their existing practices for classifying and compensating workers under existing Federal and state wage and hour laws and take appropriate steps to minimize their potential liability under applicable wages and hour laws.

Under the FLSA, a health industry or other employer generally must pay an employee in accordance with the minimum wage and overtime requirements of the FLSA unless the employer can prove that the employee qualifies as "exempt" as a white collar employee under the DOL's FLSA regulations. The FLSA mandates that the base hourly rate of pay of each "non-exempt" employee of not less than the current Federally-established minimum wage of \$5.15 an hour for each of the up to initial 40 hours of work performed by the employee in any workweek. Subject to certain limited exceptions, the FLSA's overtime rules generally also mandate that "non-exempt" employees be paid overtime pay at a rate of not less than one and one-half times the regular rate of pay for hours in excess of 40 hours of work performed in a given work week. The regulations also provide guidance for determining when leased, contract or other non-traditionally employed workers will be treated as employees, for determining when an employer must treat "on-call" time, travel time, meal and break times, and certain other time periods as compensable hours worked by a non-exempt employee, when "comp time" in lieu of the payment of wages is permitted, various alternative methods for calculating overtime under certain special circumstances, and various other rules applicable to various special circumstances.

Health care providers and other health industry employers, like other employers, generally are required to comply with the applicable requirements of these Federal regulations. In addition a health industry or other employer also generally must comply with various state-imposed minimum wage, overtime, compensable time, paid break, and other rules governing the calculation and payment of wages to employees employed within the particular state in which the employee renders the services.

Under the FLSA and applicable state wage and hour laws, employers generally bear the burden of proving that they have properly paid their employees in accordance with the FLSA. Additionally, the FLSA and most applicable state wage and hour laws mandate that employers maintain records of the hours worked by employees by non-exempt employees, documentation of the employer's proper payment of its non-exempt employees in accordance with the minimum wage and overtime mandates of the FLSA, and certain other records. Since the burden of proof of compliance generally rests upon the employer, health industry employers should take steps to ensure their ability to demonstrate that they have properly paid non-exempt employees in accordance with applicable FLSA and state wage and hour mandates and that

employees not paid in accordance with these mandates qualify as exempt from coverage under the FLSA.

To minimize exposure under the FLSA, health care employers should review and document the defensibility of their existing practices for classifying and compensating workers under existing Federal and state wage and hour laws and take appropriate steps to minimize their potential liability under applicable wages and hour laws. Steps advisable as part of this process include, but are not necessarily limited to:

- Conducting an audit of each position currently classified as exempt to assess its continued sustainability and to develop documentation justifying that characterization;
- Review of existing practices for tracking compensable hours and paying non-exempt employees for compliance with applicable regulations and to identify opportunities to minimize costs and liabilities arising out of the regulatory mandates;
- If the audit raises questions about the appropriateness of the classification of an employee as exempt, self-initiation of appropriate corrective action after consultation with qualified legal counsel;
- Review of existing documentation and recordkeeping practices for hourly employees;
- Exploration of available options and alternatives for calculating required wage payments to non-exempt employees; and
- Reengineering of work rules and other practices to minimize costs and liabilities as appropriate in light of the regulations.

Because of the potentially significant liability exposure, health industry employers generally will want to consult with qualified legal counsel prior to the commencement of their assessment and to conduct the assessment within the scope of attorney-client privilege to minimize risks that might arise out of communications made in the course of conducting this sensitive investigation.

For assistance with assessing or defending your current worker classification, wage and hour or other health care and human resources policies and controls, please contact Cynthia Marcotte Stamer at cstamer@solutionslawyer.net, 972-419-7188.

About Cynthia Marcotte Stamer & Heidi Kocher

Cynthia Marcotte Stamer, P.C., a member of the law firm of Glast, Phillips & Murray, P.C, has more than 20 years experience advising and representing health care providers, health plans, health information technology providers, and other health industry clients about health care operations, reimbursement, regulatory and public policy, risk management, human resources, credentialing, technology, privacy, and other concerns. Her clients include hospitals, physicians, clinics, IPAs, PHOs, skilled nursing facilities, assisted living and home health, rehabilitation, imaging and other diagnostic services providers, DME, physician practice management companies and other management services organizations, health care technology, and other health industry clients. Recognized in the International Who's Who of Professionals and bearing the Martindale Hubbell AV-Rating, Ms. Stamer is a highly regarded legal advisor and consultant, author and speaker, who regularly conducts management and other training on health industry credentialing and human resources, privacy, quality, reimbursement and other operational, regulatory, and public policy matters.

Chair of the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group, Board Certified in Labor & Employment Law and known for her practical, direct problem-solving approach, Ms. Stamer also applies her extensive industry experience in numerous professional and industry leadership roles. In addition to her ABA Health Law Section involvement, Ms. Stamer serves on the editorial advisory boards of and is a contributing author for the Bureau of National Affairs and other publications, served as the Compliance Committee Chair and a member of the Board of the National Kidney Foundation of North Texas Board of Directors, serves on the continuing education and conference planning committees of the ABA Joint Committee On Employee Benefits (JCEB), the HFMA Lone Star Chapter, TAHFA, the IRS TEGE Advisory Council, and numerous other health industry groups. She also is the past-president of the Alliance for Health Care Excellence, and founder of its Health Care Heroes and Patient Empowerment Programs. She also is active in numerous other industry organizations including the American Health Lawyers Association, the Medical Group Management Association, the Alliance for Healthcare Excellence, the Dallas Bar Association Health Law Section,

Ms. Stamer is a widely published author and highly sought-after speaker nationally and internationally sought out for her strategic knowledge and insights on operational and technical health care risk management and operational concerns. A columnist for MD News and recurring author for various other health industry publications, Ms. Stamer's insights have been quoted by the Wall Street Journal, the Bureau of National Affairs (BNA), HIPAA Comply, Private Payer News, Modern Health Care, Managed Healthcare Executive, Health Leaders, Caring for The Elderly Magazine, For The Record, the Dallas Morning News, Spencer Publications, the Dallas Business Journal, the Houston Business Journal, and a various other national and local publications. Ms Stamer is the author of 100s of publications on health industry matters including numerous highly regarded works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, the Medical Group Management Association, Government Institutes, Inc., Decision Health and others.

Heidi Kocher has over 10 years experience in health care law, having represented many kinds of health care providers, from small DME companies to large national health care organizations. Prior to returning to private practice, Ms. Kocher was in-house at one of the largest national hospital companies. Her wide-ranging experience includes advising corporate and individual clients on the myriad federal and state fraud and abuse laws, such as Stark, the Anti-kickback statute, and False Claims Act, structuring mergers, acquisitions, joint ventures, employment agreements, and other deals, developing compliance programs and plans, interfacing with fiscal intermediaries, carriers, and other payers, resolving reimbursement issues, conducting investigations, assisting with preparing for and responding to JCAHO surveys, obtaining advisory opinions from the OIG, and representing providers in relation to federal and state agencies. She has worked with hospitals, physicians, mid-level practitioners, pharmacies, DME companies, LTACs, SNFs, home health and hospice agencies, inpatient rehab facilities, clinical laboratories, as well as allied health practitioners. She is active in the Health Care Compliance Association, and has written numerous articles and provided training on various health care law topics.

For more information about Ms. Stamer and Ms. Kocher, a listing of selected publications and other health industry links, information about

workshops and other training and other health industry information and resources or other details about Cynthia Marcotte Stamer, P.C. and Glast, Phillips & Murray, P.C., see CynthiaStamer.com or contact Ms. Stamer or Ms. Kocher.

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