

**Wage and Hour Claims in the Health Care Industry:
Trends and Analytical Responses**

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I. Introduction to Trends in Wage & Hour Claims

Wage and hour claims have experienced well-publicized growth in recent years, driven by the plaintiffs' bar's increased interest as well as the Department of Labor's (DOL) greater enforcement of wage and hour issues. The DOL's Wage and Hour Division intends to hire an additional 250 investigators to increase the enforcement of violations such as unpaid overtime, missed meal and rest breaks, and instances of alleged off-the-clock work.¹

The health care industry is experiencing the same general growth in wage and hour cases. One law firm alone (Thomas and Solomon, LLP in Rochester, NY) has been responsible for at least 20 lawsuits against health care providers, particularly hospitals, alleging employees were not paid for the time they worked during meal breaks. Some notable examples of activity in recent wage and hour cases from the health care industry² include:

- Kaiser Foundation Health Plan agreed to pay \$5.4 million in October 2008 to resolve a suit accusing it of misclassifying 770 Assistant Department Administrators as exempt workers and failing to pay them overtime (*Verma v Kaiser Foundation Hospitals, et. al.*, case number 3:09-cv-2019.)³
- Partners Healthcare Inc. agreed to pay \$2.7 million in overtime back wages in July 2009 to 700 employees to settle a suit brought by the U.S. Department of Labor (*Solis v. Partners Healthcare System, Inc. et. al.*, case number 09-cv-10666).⁴
- SSM Health Care paid \$1.7 million in December 2009 to nurses under an agreement with the U.S. Department of Labor to pay back pay for missed meal breaks.⁵
- Conditional certification was granted in May of 2009 in a collective action potentially involving 85,000 University of Pittsburgh Medical Center employees, who alleged that defendant automatically deducted meal breaks from their pay (*Camesi et al. v. The University of Pittsburgh Medical Center et al.*, case number 09-cv-85).⁶
- Conditional certification was granted in July 2009 in a collective action against Pittsburgh Mercy Hospital involving 8,000 to 10,000 potential plaintiffs alleging that they worked through 30 minute meal breaks without being paid (*Taylor v. Pittsburgh Mercy Health System Inc. et al.*, case number 09-cv-0037).⁷

¹ http://www.abajournal.com/news/article/feds_to_ramp_up_enforcement_of_rampant_wage-and-hour_violations/

² The firms in the Health Care industry are defined by the Standard Industrial Classification (SIC) code provided by the Bureau of Labor Statistics.

³ Law 360, October 7, 2008 <http://www.law360/articles/71755>

⁴ Law 360, July 24, 2009 <http://www.law360/articles/113086>

⁵ Associated Press, December 9, 2009. <http://www.dol.gov/opa/media/press/whd/whd20091461.htm>

⁶ Law 360, May 15, 2009-<http://www.law360/articles/101835>

⁷ Law 360, July 8, 2009-<http://www.law360/articles/110514>

- Conditional certification was granted in *Gordon et al. v. Kaleida Health et al.*, case number 08-cv-00378, and *Hinderberger et al., v. Catholic Health System, Inc.* in November 2009 involving potential classes of 6,000 and 3,000 employees, respectively.⁸

Continued Strength in Health Care Employment

According to the Bureau of Labor Statistics, the health care industry is the United States' largest employer with over 13.7 million workers in November 2009.⁹ These workers represent 10.5% of the total private employment in the United States.¹⁰ Notably, the health care industry has experienced robust growth even during the recession; employment in health care has actually increased by 613,000 jobs since the recession began in December 2007 – a time during which millions of jobs were lost in the economy as a whole.¹¹ Chart 1 below shows the percentage changes in employment for the health care industry as a whole and its components compared to total non-farm employment. While health care employment growth has slowed in recent years, it is still experiencing positive job growth, unlike the economy as a whole where job growth turned strongly negative in 2008. The Bureau of Labor Statistics predicts continued strong growth in health care employment throughout the next decade.¹²

⁸ Law 360, November 20, 2009 - <http://www.law360/articles/135410>

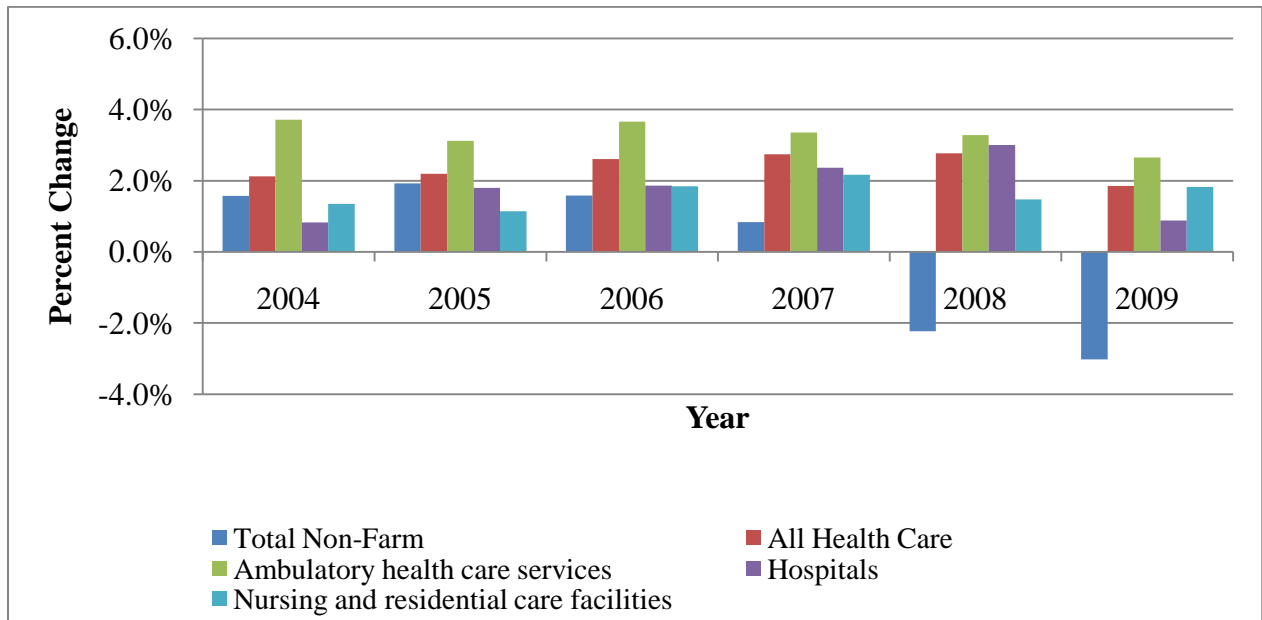
⁹ In this paper the health care industry includes ambulatory health care services, hospitals, and nursing and residential care facilities, except where otherwise indicated.

¹⁰ Bureau of Labor Statistics, "Employment Situation New Release", Friday, December 4, 2009. http://www.bls.gov/news.release/archives/empsit_12042009.htm

¹¹ Bureau of Labor Statistics, "Employment Situation News Release", Friday, December 4, 2009. http://www.bls.gov/news.release/archives/empsit_12042009.htm

¹² Bureau of Labor Statistics: Employment Projections: 2008-2018 Summary. <http://www.bls.gov/news.release/ecopro.nr0.htm>

**Chart 1 – Percent Change in Employment 2004 – 2009
Health Care Employment Compared to Total Non-Farm Employment¹³**



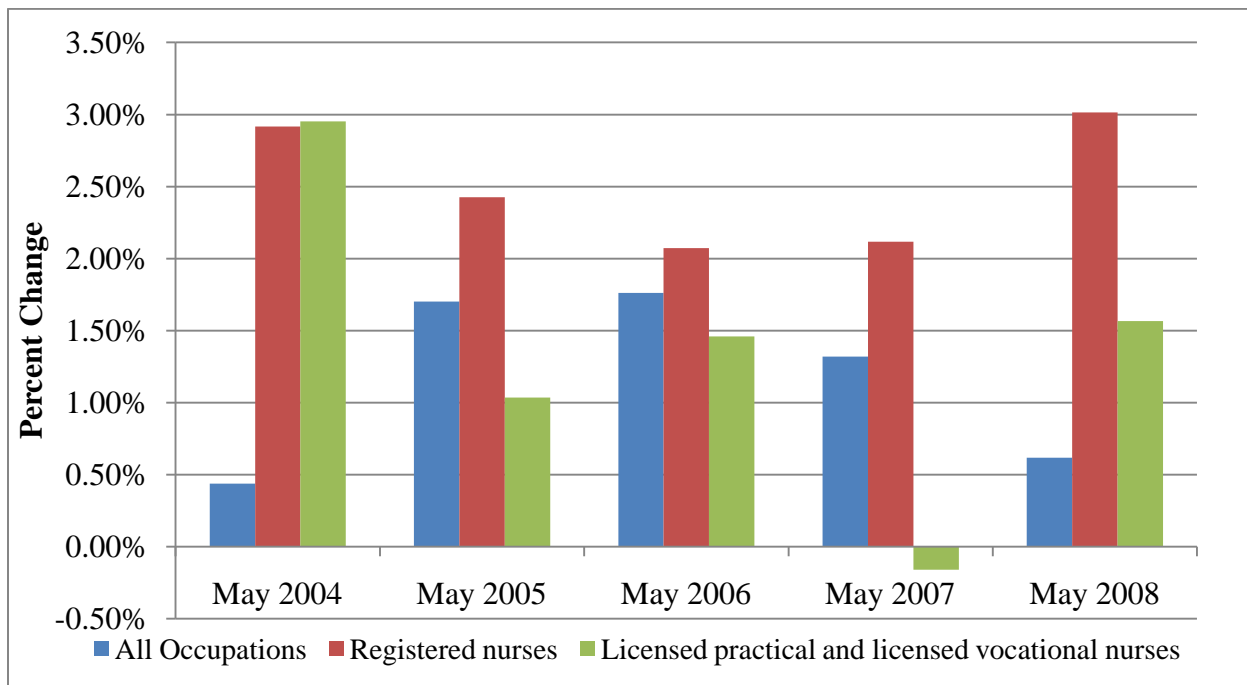
Source: Bureau of Labor Statistics

Nurses who are in nonexempt positions have been a particular focus of the plaintiffs’ bar in wage and hour cases. In part this may be because nursing employment continues to experience robust growth in comparison to the labor market as a whole. Chart 2 compares the employment growth in all professions from May 2004 through May 2008 with that of registered nurses (RNs), licensed practical nurses (LPNs), and licensed vocational nurses (LVNs). In many hospitals RNs are exempt employees but few, if any, LPNs or LVNs are classified as exempt. All non-exempt employees are subject to the provisions of the Fair Labor Standards Act (FLSA) and the exempt status of some of the RN jobs may also be challenged.¹⁴

¹³ 2009 values are through Nov. 2009.

¹⁴ See, for example, *Verma v Kaiser Foundation Hospitals, et. al.*, case number 3:09-cv-2019.

**Chart 2: Percent Change in Employment 2004 – 2008
Nurses' Employment Compared to All Occupations**



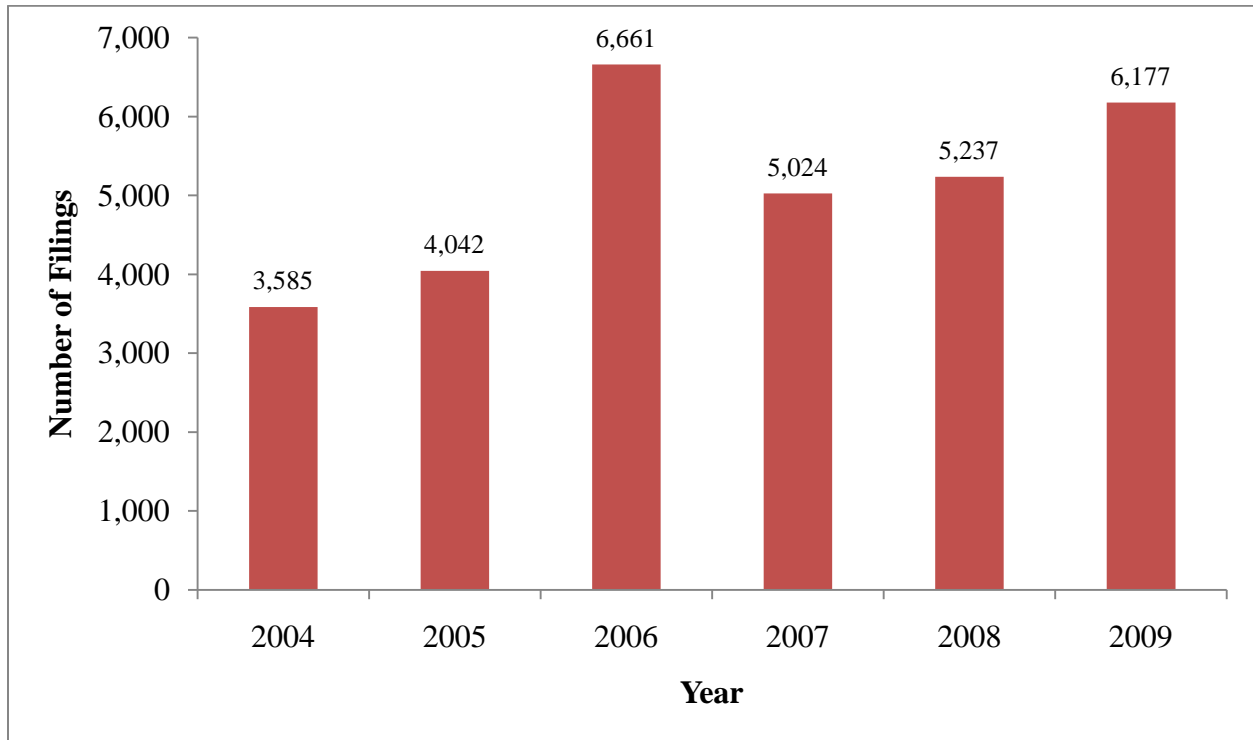
Source: Bureau of Labor Statistics

Given the strong growth in health care employment and the increasing focus on wage and hour issues, it is likely that the number of wage and hour actions in the health care industry will continue to grow. This paper focuses on trends in wage and hour litigation overall and in the health care industry.

Growth in Wage & Hour Filings

Wage and hour cases brought under FLSA rose by approximately 72% over the past six years (2004 to 2009) as shown in Chart 3.¹⁵ During 2009 alone, there were 6,177 FLSA cases filed in U.S. District Courts.

**Chart 3: FLSA Filings in U.S. District Courts
For All Industries by Year**



Source: PACER

Geographic Distribution of FLSA filings

The geographic distribution of FLSA filings is not uniform across the U.S. Over two thirds of all FLSA filings have been filed in five states. Florida has the most FLSA filings, with 39 percent of all FLSA filings between January 1, 2004 and December 31, 2009. (See Table 1).

¹⁵ These data come from federal court records in PACER (Public Access to Electronic Data). The large number of filings in 2006, compared to other years, reflects over 2,000 individual filings against a single defendant.

Table 1 - FLSA Filings by Most Popular States*

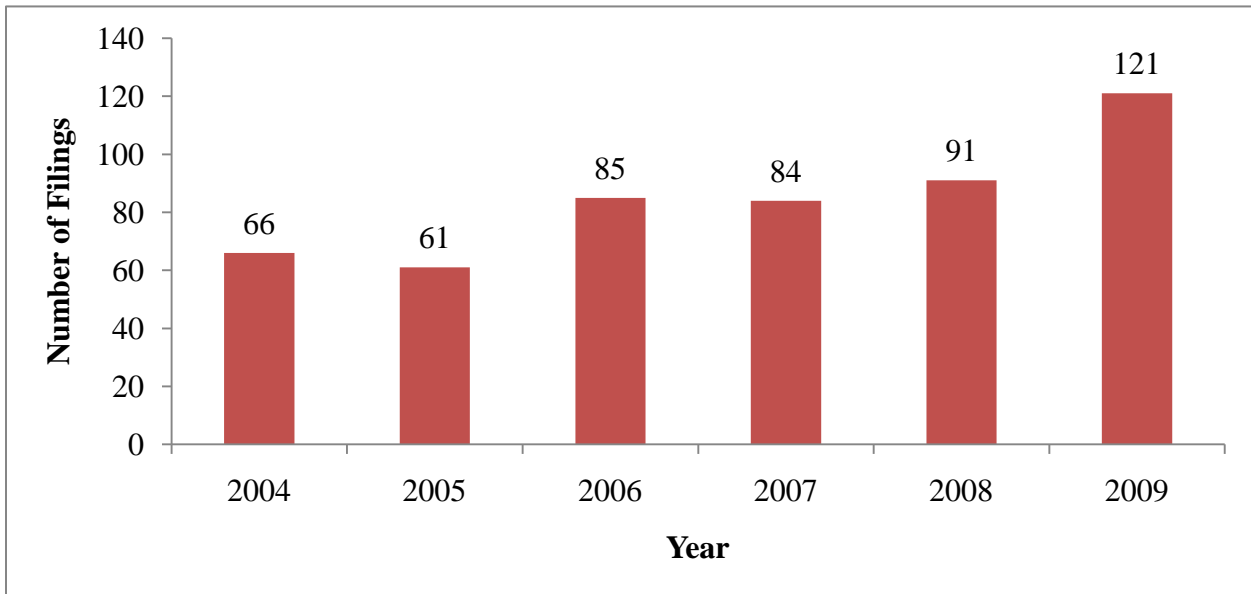
Top 5 States All FLSA Filings	Percent of All FLSA Filings
Florida	39%
Alabama	10%
New York	8%
Texas	7%
California	5%
Total	68% **
** Sums not exactly equal to totals in columns are due to number rounding.	

*Source: PACER

The Impact of Wage & Hour Filings on the Health Care Industry

Litigation has increased in the health care industry focusing on the issues of unpaid overtime, unpaid work time, missed meal and rest breaks, etc. From 2004 to 2009 the number of FLSA filings against health care providers increased by over 80%. See Chart 4. There were 121 FLSA cases filed in U.S. district courts in 2009 alone. The health care industry’s share of wage and hour filings is likely to be even larger in the future as the plaintiffs’ bar continues to focus on this industry. The geographic distribution of health care industry FLSA filings is similar to that of all filings.

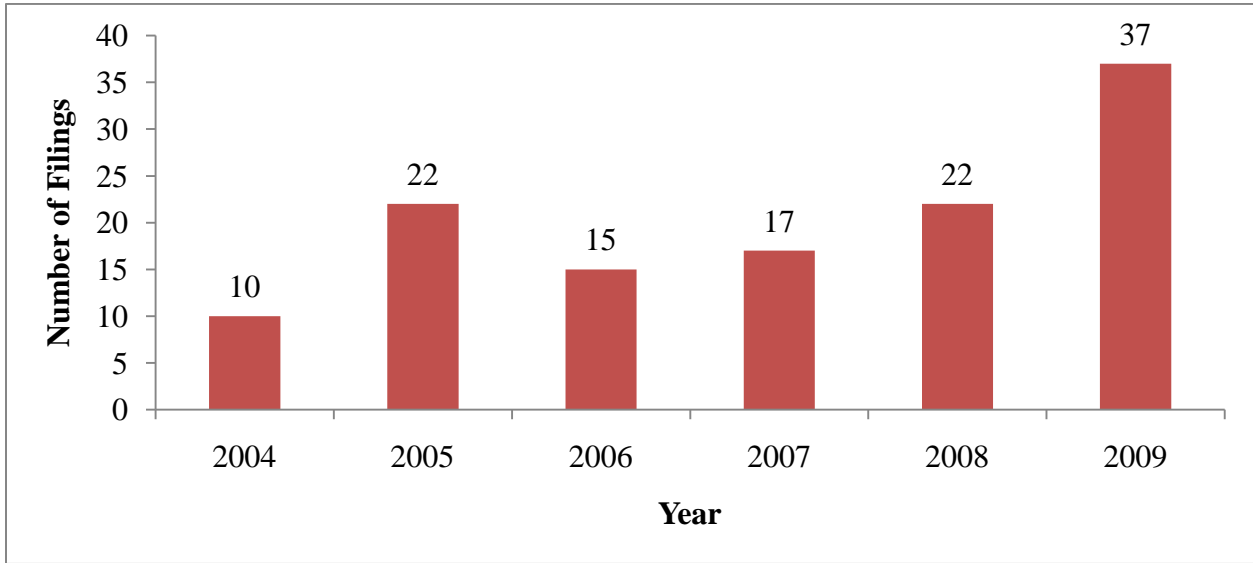
Chart 4: FLSA Filings against All Health Care Employers by Year



Source: LexisNexis, atVantage

The number of FLSA filings against hospitals each year more than tripled over the time period. (See Chart 5.)

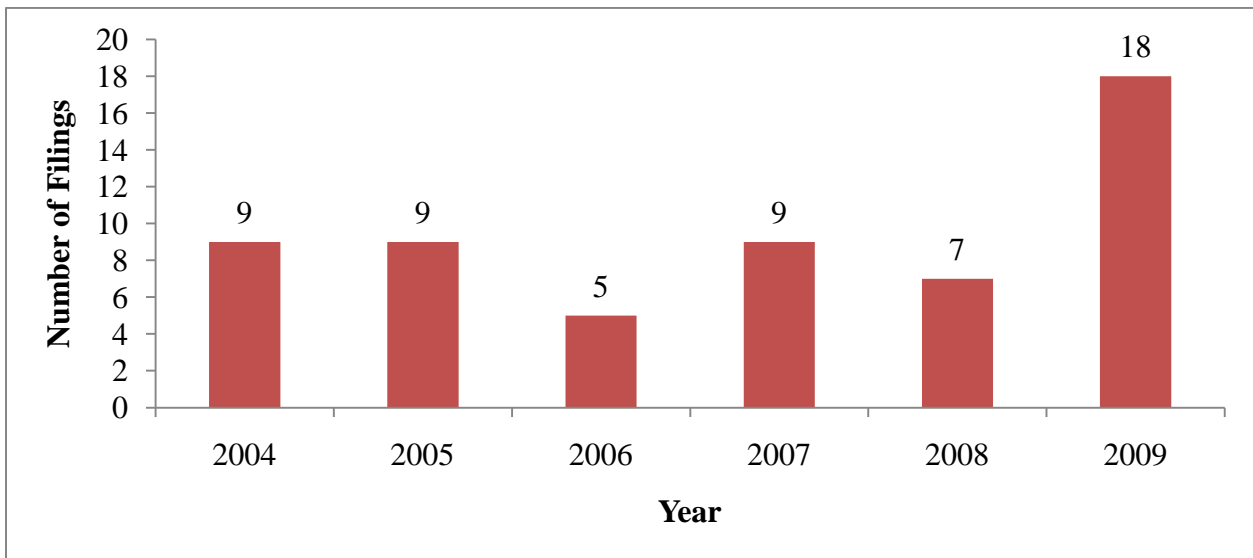
Chart 5: FLSA Filings against Hospitals by Year



Source: LexisNexis, atVantage

Among the other health care industries, skilled nursing care facilities also saw substantial increases in the number of FLSA filings, from 9 in 2004 to 18 in 2009. (See Chart 6.)

Chart 6: Skilled Nursing Facilities FLSA Filings by Year



Source: LexisNexis, atVantage

Why are Wage and Hour Issues so Important in the Health Care Industry?

The health care industry is characterized by a wide variety of job titles, work responsibilities, compensation arrangements, and schedules. The possibilities for unintended wage and hour violations may increase when the schedules are varied, the number of hours worked varies, and the needs of the industry are not routine.

The BLS reports that an above average percentage of workers in the health care industry are part-time compared to all industries (20% vs. 15.9% for all industries in 2008).¹⁶ The BLS also reports that, “many health care establishments operate around the clock and need staff at all hours. Shift work is common in some occupations, such as registered nurses. It is not uncommon for healthcare workers to hold more than one part-time job.”¹⁷ In addition, the need for staff varies by patient, and staffing needs are not always routine or easily anticipated. When analyzing wage and hour claims the variation in staffing assignments must be considered since the incidence of off-the-clock work, missed breaks, and uncompensated overtime may vary by job title, shift, or location. Analyzing hours worked may also be difficult as many hospitals and other health care facilities hire nurses from temporary staffing services.

II. The Use of Statistics in Considering Class Certification or Collective Actions

A substantial proportion of the FLSA cases filed against health care providers are class or collective actions rather than individual lawsuits. The damage awards from this type of action are generally higher because such cases apply to a larger fraction of the workforce who either choose to “opt-in” to a class or elect not to “opt out” of the class.¹⁸

Statistical analyses are valuable when examining large amounts of data for a sizeable number of employees. Statistical analysis can be especially useful when considering whether the claims and claimants in the case meet the Rule 23(a) requirements for a class.¹⁹ These analyses can be used to test whether potential wage and hour violations are incidental (or consistent with random actions) or sufficiently numerous that they are unlikely to be the result of chance. Suppose an

¹⁶ BLS Career Guide to Industries, 2010-2011 edition, Overview and Outlook, Table 2.

<http://www.bls.gov/oco/cg/indchar.htm> and BLS Career Guide to Industries, 2010-2011 edition, Healthcare.

<http://www.bls.gov/oco/cg/cgs035.htm>

¹⁷ <http://www.bls.gov/oco/cg/cgs035.htm>

¹⁸ Those filing a collective action do not have to satisfy Rules 23(a) and (b) in order to be certified as a collective action. Instead, the standard of establishing that the claimants are similarly situated must be satisfied. For conditional certification under a collective action only a “modest factual showing” is necessary *Pritchard*, 210 F.R.D. at 596 (JA 346), as well as the *Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 497 (D. N.J. 2000).

¹⁹ These requirements are often described as (i) sufficient number of plaintiffs to make trying it individually unwieldy (numerosity), (ii) common issues of fact or law (commonality), and (iii) claims that are typical of the potential class (typicality). Federal Rules of Civil Procedure, Section IV, Rule 23(a).

employee alleges that he/she was not paid overtime and that this is a common practice of his/her employer. The likelihood of overtime may be measured, as well as whether all employees had the same likelihood of overtime or if overtime varied by job, part-time/full-time status, location, supervisor, etc. If the possibility of overtime is frequent for some jobs and not for others, then statistical tests can determine whether the difference in the likelihood of overtime is inconsistent with random differences.

Likewise, if available data show that employees in one facility were paid for statistically significantly more overtime than employees in another facility with similar work patterns, the variation among facilities could be an issue. If the variation is not consistent with chance, then an argument can be made that some jobs (or facilities) are not properly in the class because they have little or no chance of having overtime (or were apparently paid for their overtime). The statistical analysis of this variation supports the argument that the plaintiffs' claims are not typical of all employees and the employees do not have facts of law in common. Alternatively, if employees all have a good chance of working overtime then the statistical tests may support this. If so, then it may be possible that all employees may belong in the same class and plaintiffs' claims may be typical.

III. The Usefulness and Limitations of Data in Health Care Wage and Hour Cases

When evaluating wage and hour claims, analysts typically begin by looking at a company's payroll and timekeeping data; however, other databases that track employee activity may also be useful. Below is a list of types of data that often prove useful in wage and hour cases.

- Timekeeping Data – Basic timekeeping data typically include the original swipes (punches) made by employees when they clock in or out for the day and/or for meal breaks, as well as management edits or other changes made to the data before it is processed for payroll. Management edits may be a point of contention in wage and hour cases, so it may be particularly useful when a timekeeping system retains information about these edits. Information such as the identification of the specific manager making the edit, the date/time the edit was made, the reason for the edit, and, whether the edit was requested by the employee or the manager are useful pieces of data. When this information is available, it can potentially be used to analyze the prevalence and diversity of management edits in cases where time-shaving is claimed. For example, analysts might look at edits by manager and by edit type or at the effect of edits on total employee compensable time. In addition, schedule data retained within the timekeeping system may be utilized when there is a need to compare scheduled hours with paid hours from payroll.

- Payroll Data – Payroll data typically contain pay rates, measures of hours paid (regular, overtime), and amounts paid for each pay check and/or work week. Ideally, the payroll data could be directly linked on a day-by-day or week-by-week basis to the timekeeping data, so that one could easily track how the punch data are reflected in actual employee pay. Payroll data are critical to ascertain the pay rates of employees and gather hours paid for nonexempt employees. These data may also be used in analyses looking at the variation in pay, overtime, vacation time, and leave time of class members across locations, shifts, and job titles.
- Job History Data – Job history data are generally useful for determining the identity of potential or actual class members at each point during the class period. For example, in cases where the filing dates of individual opt-ins are used to determine time periods for which opt-ins are eligible to receive damages, job history data may be useful to determine individual class member timeframes. In addition, other information provided in job history databases that may assist in identifying potential class members and the scope of the class include: job title, location, full-time/part-time status, exempt status, state, etc of the employees.

In addition to the three types of data described above, employers may retain data that track employee activity throughout the day even though that may not be the primary purpose of the data source. Examples of potential proxy sources of time-tracking data include:

- Security systems – Many employers have security systems that require employees to swipe a badge to gain access to the work facility. However, the timestamps from these systems may be of limited use when employees piggy-back on their way into the work facility (one follows another in the front door without swiping his/her own badge). Also, most security systems do not require a badge swipe to exit the facility, so the data are typically not informative to establish leave times at the end of shift. However, work facilities may require the last employee leaving work for the day to arm the security system. This information may be useful in determining the longest interval of time an employee could have worked during a day.
- Phone systems and PDAs (personal digital assistant) – The use of company phones and PDAs is drawing increased attention in wage and hour cases as plaintiffs assert that the use of these devices outside of standard working hours, when not compensated, may constitute off-the-clock work. To the extent that the employer can assess the usage of these devices, these data may be a relevant source of the time worked by the employees. However, because of the voluminous amount of data in these instruments, the time of the activity or the activities themselves may not be retained.

- Point-of-Sale (POS) data – Point-of-sale data is typically generated by cash register activity by the employee and may contain timestamps of the sales or other cash-related activity. Again these timestamps may provide a source of the time worked by employees. To the extent that these data are not accurately linked to an individual employee, they are less useful in wage and hour analyses.
- Other electronic data systems – Training systems, email, hand-held device scanners, and other software used in the course of the day, such as pharmacy systems, patient medical history data systems, billing and insurance systems may also provide a source of data to identify when employees worked.

These proxy sources of time-tracking data do create complications when attempting to compare their timestamps to timestamps in the timekeeping system for wage and hour violation analysis. Potential issues that may arise include:

- The system may have an employee identifier that is not the same as the identifier in the timekeeping data.
- The amount of data in the proxy timekeeping source pertaining to an employee may be hundreds of times greater than the data corresponding to check in and checkout times in a timekeeping system. These datasets can become more difficult to manage when a large group of employees is involved for a multi-year period.
- The usefulness of the data for a wage and hour case depends upon the structure of the data, as well as its security and protocols for recoding time stamps and employee ids. Therefore, these databases need to be understood well by the analyst in order to avoid improper or inaccurate wage estimates.
- Complex computer programs may be required to link the various data sets together.
- Finally, in the health care industry, data extraction must be undertaken with special care so as to protect electronic patient data and thereby remain in compliance with HIPAA regulations. These regulations were expanded in February 2009 by the Health Information Technology for Economic and Clinical Health Act or HITECH, which is part of the American Recovery and Reinvestment Act (ARRA).

Working with experienced experts assists in maintaining cost control and helps to focus the analysis on the issues raised in the wage and hour claims. Further, experienced experts may relieve overburdened IT staff from the complex data and programming work that is often required in order to conduct robust statistical analyses. The next section discusses how statistical sampling can assist in achieving these objectives.

IV. Use of Statistical Sampling as a Means to Control Costs

As discussed in the previous section, data analysis in a wage and hour class action often involves voluminous datasets as well as complex programming to analyze the data in a meaningful way. Generally an employer's IT unit does not have the appropriate resources to produce the analyses that can be used as legal evidence unless it routinely assists legal counsel in litigation. An alternative to the expensive and sometimes inefficient downloading and analyzing of the relevant data in their entirety is to limit the initial analyses to a sample of data. The chief advantage of a data sample (or group of data samples from the various data sources) is that it substantially reduces the volume of material to analyze. The sample, of course, must effectively represent the entire data population – which requires that the sample be both representative and random. Even with a sample of data, rather than entire databases, however, the other difficulties of working with these data – including complex programming, linking the files together, managing the different structures of the databases, etc. – may still exist.

Analysts can design a scientific sample of employees which would be defensible in court as well as cost-effective. Statisticians and labor economists can design data samples from each relevant data set that are appropriate to an analysis of the issues and characteristics of the potential employee group. If a case focuses special attention on particular job titles, locations, shifts, etc., but also needs results for the entire workforce, the sample can be designed to meet these needs.

V. Analysis of Wage and Hour Claims

In this section we discuss some of the issues that are raised in wage and hour claims and how statistical analyses can assist in determining whether there is support for each of the claims and how strong that support might be.

Off-the-Clock Work

In spite of the potential pitfalls associated with the use of proxy data to demonstrate potential off-the-clock work, employers may find them useful for setting limits to potential damages or for showing variation in the amount of possible off-the-clock work. For example, in a case in which plaintiffs assert that an average of 1 hour of pre-shift off-the-clock work occurred per employee each day, available security data may show that, on average, employees arrived at work 5 minutes before they clocked into the timekeeping system. This type of analysis could significantly affect the value of potential damages.

Measures of off-the-clock work derived from relating proxy data systems to timekeeping records may be used to inform class certification or decertification arguments. For example, if the amount of potential off-the-clock work is found to vary among the hospitals by statistically

significant amounts, then some of the hospitals – those with a lower likelihood of off-the-clock work – may be excluded from a class that sought to include multiple hospitals.

Time Shaving

Time shaving claims have also been lodged against hospitals whose electronic payroll systems automatically deduct 30-minute meal breaks from employees' pay. In these cases, some experts may turn to proxy timestamp data; however, as discussed above, care is required to ensure that the proxy timestamp data do not produce misleading results.

Time shaving may also be consequence of rounding work time within the payroll system. If non-rounded timestamp data exist, then these timestamps may be compared to the compensated hours to determine whether rounding is, on average, to the advantage or disadvantage of the employee.

Electronic data are also useful when exploring time shaving claims that are based on accusations that managers edit employees' timekeeping data in order to reduce the amount of compensable work time. When the timekeeping system reliably tracks management edits, an analyst can compare compensable work time before and after these edits to see whether the edits generally increased, decreased, or had no impact on compensable time, on average. This exercise may be complicated by the fact that management edits could replace the entries that employees failed to make, so the analysis will need to take this into account as well.

Classification

Misclassification of employees as exempt when they do not qualify for this exemption can be very costly for employers since this may result in liability for multiple years of previously unpaid overtime. The health care industry, with its wide variety of job titles, professions, and job duties presents special challenges when it comes to classification. For example, in *Belt et. al. v. EmCare, Inc.*, the court ruled in favor of plaintiffs based on advice from the Department of Labor that physicians assistants and nurse practitioners were not “bona fide professionals” and should be compensated for overtime. When it comes to classification issues, survey experts, or experts in job analysis or time-and-motion studies, may conduct an observational study or a survey to determine the time workers spend on exempt vs. non-exempt tasks. The breakdown of each job into various tasks, with estimates of time spent on each task, is often useful in determining how the jobs should be classified. Statistical experts may then summarize and evaluate the statistical significance of the data that show how employee time is spent.

Minimum Wage Violations

In the late nineties and in the early part of the last decade, the DOL's Wage and Hour Division investigated FLSA violations in the nursing homes and residential care facilities. In 1998, it found minimum wage violations in 35% of the residential care facilities with violations and, in

2000, it found minimum wage violations in 11% of the nursing homes that had violations.²⁰ The DOL attributed these violations to several factors, including (i) a low level of fixed pay such that hours worked were not all compensated at the minimum wage rate, (ii) failure to pay for all hours worked, (iii) illegal deductions for uniforms; and (iv) worker misclassification. This resulted in a wage and hour compliance initiative in nursing homes during the last ten years. The need for vigilance regarding minimum wage violations continues.

Meal and Rest Break Violations

Possible non-payment of overtime and non-payment of missed or partial meal and rest breaks has given rise to a large number of FLSA claims. In *Camesi et al. v. The University of Pittsburgh Medical Center et al.* and *Taylor v. Pittsburgh Mercy Health System Inc. et al.* (noted above), plaintiffs submitted affidavits indicating that the hospital computer system automatically deducted 30 minutes from employees' time each day to reflect a lunch break. Failure to pay overtime for work performed during lunch breaks was also an issue in *Gordon et al. v. Kaleida Health et al.* (case number 08-cv-00378), and *Hinderberger et al., v. Catholic Health System, Inc.*

When employees are required to clock in and out for their meal and rest breaks, timekeeping data may be used to quantify the number of possible missed breaks (if it is accurate to assume that a missed punch signals a missed break) as well as the extent to which breaks were either shorter or longer than expected. At the class certification or decertification stage, it may be useful to look at the statistical significance of differences in the number of missed or short breaks by location, job title, shift, etc. in order to determine whether all employees were similar with respect to the likelihood of missing breaks or meals. If there are proxy timestamp data available, meal and rest break clock in and out timestamps may be used to determine whether there is evidence that employees performed compensable activities during an unpaid break. When undertaking this type of analysis, being mindful of the caveats discussed above regarding the interpretation of proxy timestamp data helps to produce a meaningful analysis.

VI. Conclusions

There are strong indications that many, if not most, health care providers will be the target of wage and hour lawsuits within the next few years. There are also indications that the current administration intends to enforce FLSA requirements more stringently than the prior administration. Given the relative ease with which FLSA collective action lawsuits may be conditionally certified, health care providers need to take a close look at their compensation systems to avoid costly litigation. Large hospital systems are particularly vulnerable to these

²⁰ <http://www.dol.gov/whd/healthcare/surveys/residential.htm> and <http://www.dol.gov/whd/healthcare/surveys/nursing2000.htm>

lawsuits because of the number and great variety of individuals they employ. Given the complexities of their payroll systems, which may differ across organizational units and over time, many health care industry employers will want to work with counsel to determine whether an analysis prior to litigation would be useful.