Attorney Scores Win in Quest Diagnostics Class Action Certification

*By **Jay W. Belle Isle** - May 11, 2018*

Lady Justice; image by WilliamCho, via Pixabay, CC0.

On April 30, attorney **Paul B. Maslo** of **Napoli Shkolnik PLLC** scored a win in a class action certification motion in Vecchio, et. al. v. Quest Diagnostics, et. al., a case involving the **Fair Labor Standards Act** (FLSA) and the employer's failure to pay minimum wage and overtime in violation of that Act.

Certification

Under the FLSA (**29 U.S.C. § 216**), "one or more employees for and in behalf of himself or themselves and other employees similarly situated" may file suit in federal court. The "others similarly situated" must *opt into* (choose to be a part of) the class action and notify the court of this decision in writing. Employees who do not opt in are not bound by the rulings made in the class action and may, if they choose, bring a separate suit on the same grounds as those in the class action.

The first step in achieving certification is "notice" or "conditional certification," a process by which the court decides:

1. Whether sending notice (an opportunity to opt in) to potential Plaintiffs is proper; and
2. Whether the suit should proceed as a class action.

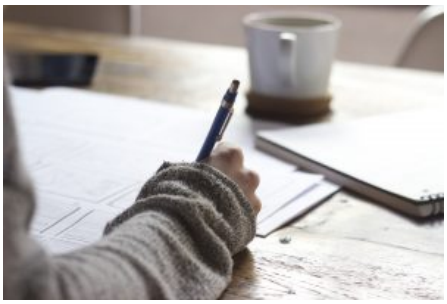
Mr. Maslo filed a motion in the Southern District of New York to have conditional certification of this class action granted on behalf of lead Plaintiff Maria Vecchio.

Ms. Vecchio's main claim is that Quest Diagnostics compensation practices violate the FLSA in that medical examiners (of which the Plaintiff is one) are paid by the appointment, despite requiring them to do a significant amount of work off-the-clock and, therefore, uncompensated. When one looks at the amount paid compared to the hours worked, the medical examiners often do not make minimum wage and are not compensated on an hourly basis for overtime.

The Claim

Plaintiff Vecchio worked for Quest from November 2013 to October 2016 as a medical examiner. According to the suit, her primary duties were to visit "insurance customers at their homes or places of business [to] conduct physical examinations and basic lab work for the purposes of insurance eligibility and underwriting."

During the course of her employment, Vecchio alleges that she was paid on a "per-procedure basis," meaning a set amount for each examination. However, neither travel time, lab-work, nor the pre- and post-appointment paperwork she was required to do was compensated.



Person doing paperwork at home; image by Free-Photos, via Pixabay, CC0.

The total hours she worked often amounted to more ten hours per day and more than 40 hours per week. When taken in total, her compensation did not meet the federally-required minimum wage, nor overtime. Failure to meet minimum wage occurred over at least three two-week pay periods, while failure to pay overtime happened for at least 34 weeks. Exceptions, such as being assigned to work at clients' corporate offices or at health fairs, were paid at an hourly rate and Vecchio asserts there were no FLSA violations involving those instances.

The claim was filed on June 29, 2016 and, over the subsequent nine-month period, seven others opted into the suit. In an effort to locate other similarly situated potential Plaintiffs, and to show sufficiency of numbers for nationwide class action status, Mr. Maslo requested contact information for other medical examiners working for Quest. His request was granted by Magistrate Judge Kevin Fox on

May 3, 2017, despite Quest's objections. Since receiving that information, over 430 others from at least 43 states and the District of Columbia have opted into the suit.

The Motion

The current motion for class certification was filed on October 20, 2017, along with affidavits from Ms. Vecchio and 54 of the opt-in Plaintiffs located in 24 states. Quest responded on October 24 by requesting the Court to allow the deposition of Ms. Vecchio and five of the opt-in Plaintiffs. The Court denied this request as being an unnecessary burden on the Plaintiffs at this point in the action.

The Plaintiffs contend they are similarly situated due to similar job requirements and pay. Quest attempted to rebut that assertion on three points:

- It had offered evidence contrary to Plaintiffs' claim;
- Plaintiffs' affidavits were "vague" and "identical;"
- Plaintiff failed to provide proof of an identifiable policy or plan.

The Court was not persuaded by the Defendants' rebuttal as follows:

- Defendants' affidavits contradicting Plaintiffs' were the only evidence offered and Defendant could not cite any case law in support of its position;
- Given the specificity of the Plaintiffs' affidavits and the fact that each separately presented individual situations, taken along with a lack of supporting case law regarding nearly identical declarations, all that was necessary was to show an "identifiable factual nexus" binding the Plaintiffs together, which Plaintiffs did;
- The FLSA doesn't require identification of a formal, illegal policy for class certification. Indeed, the Plaintiffs did not make an assertion that such a *formal* policy exists. Even Defendants' own evidence – a policy "requiring examiners to clock in upon leaving home and to clock out when returning," points to examiners not being allowed to be on the clock for pre- and post-appointment tasks.

Accordingly, the Court rejected the Defendants' rebuttal completely.

Quest challenged the scope of the action (nationwide), but the Court found that, due to sheer numbers of Plaintiffs and their disparate locations, the nationwide scope was appropriate. The Defendant also challenged the form and method of notice offered by the Plaintiffs, arguing that the notice did not adequately describe Quest's defenses; the 90-day opt-in period was too long; Plaintiffs' request to remind potential opt-in Plaintiffs at the half-way point of the period was improper; calling Potential opt-ins with invalid home or e-mail addresses was improper; and that the class was not sufficiently defined, nor was the class period.

The Court did not find this challenge any more persuasive than the Defendant's other challenges. Given that the Plaintiffs' position as stated in the notice was also brief, Quest's defenses – "Quest denies that it has violated the FLSA" –were deemed sufficient in that regard. Due to the potential size of the class, the Court also found that the opt-in period and methods of contact to be proper.

As to Quest's argument that the class and class period were not well-defined, the Court disagreed. The Plaintiffs' brief defined these items as, "All persons who were employed directly by Defendants as Mobile Examiners (or similar job position), whether designated as independent contractors or employees, at any time in the three years prior to the filing of the Complaint." The Court found these definitions to be specific, and District Judge Edgardo Ramos granted conditional certification of the class on April 30.

Mr. Maslo said, "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 entire class is expected to be around 6,000 examiners.

The firm Baker & McKenzie is opposing counsel in this matter.

Join the Discussion

Jay W. Belle Isle

Before becoming LegalReader's Editor-in-Chief, Jay W. Belle Isle worked as a freelance copywriter with clients on four continents. Jay has a degree in Business Administration from Cleary University and a Juris Doctor from Thomas M. Cooley Law School. Jay has also worked as a contracts administrator for a DOD contractor specializing in vehicle armor.