

**ARE PER DIEM INCENTIVE PAYMENTS CONSIDERED WAGES FOR
HEALTHCARE STAFFING COMPANIES?**

Written by: Christopher M. Leddy, Esq.

Healthcare Staffing companies, in particular, routinely provide base pay as well as per diem expenses (i.e. food and lodging) as part of their total compensation package when recruiting and hiring travel nurses. In fact, for many travel nurses, the payment of the per diem expenses is part of the allure, as per diem payments are typically tax-free. Likewise, employers may benefit from such an arrangement (if done within the constraints of the law) as it permits payment to travel nurses that may otherwise be taxable and subject to various wage and hour restrictions, including, overtime.

However, in the recent 9th Circuit decision of *Clarke v. AMN Services LLC*, the Court, in reversing a lower court's decision in favor of the employer, stated not so fast, the per diem payments there should have been classified as compensation and not tax-free benefits because the payments were compensation for work rather than as reimbursement for expenses incurred by the travel clinicians.

The Court, in reaching its decision, relied on, amongst other guidance and case law, 29 C.F.R. § 778.224(a), which states that payments excludable from wages “do not depend on the hours worked, services rendered . . . or other criteria that depend on the quality or quantity of the employee's work.”

The employer in *Clarke v. AMN Services LLC*, had two different policies regarding its per diems: (1) pre-2014: “the per diem payments were prorated based on hours missed: for each hour a clinician failed to work, [the employer] would deduct \$18 from the weekly per diem benefits”; and (2) post-2014: generally, “if a clinician contracted to work three shifts per week misses a shift, “the per diem allowance . . . advanced to her the week before [is] adjusted by one-third.”

While the Court noted, that “[r]eimburse[ing] traveling clinicians for seven days of expenses even though most clinicians only work three days a week is justifiable because the clinicians are scheduled to work away from home for a prolonged period and are not expected to travel back and forth to their home base each week”, the Court found that the employer's policy of taking “pro rata deductions from its per diem payments [were] unconnected to whether the employee remains away from home incurring expenses for [the employer's] benefit. Instead, the deductions connect the amount paid to the hours worked while still away from home, thereby functioning as work compensation rather than expense reimbursement.” Thus, the Court reclassified the per diem payments as wages, subjecting such payments to taxes and increases to the applicable travel clinicians' overtime wages.

While, this case was based on a specific set of facts, the Court, undoubtedly, dealt a significant blow to per diem payments and the Healthcare Staffing Industry. All Healthcare Staffing companies should immediately review and update their contracts and policies in accordance with this case.



About Becker LLC: Becker LLC is a premiere mid-market firm recognized as a leader in the staffing industry. With offices in New York, California, Pennsylvania, and New Jersey, the firm provides forward thinking, mission-critical advice to staffing industry entrepreneurs and management on high stakes, complex legal matters as well as day-to-day matters and long-term plans. The firm are proud to be members of the following Staffing Associations: SIA, ASA, ASG, TempNet, CSP, MSA, NJSA, NYSA and serves as general counsel to the Mid Atlantic Staffing Association.

For more information, call (973) 422-1100, visit us on the web: <https://www.becker.legal/>