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What Employers Need to Know About Wage and Hour Collective and Class Actions

LISA C. JERN AND ABIGAIL J. POLITZER

Employers in a wide variety of industries are continuing to see a dramatic increase in wage and hour claims, including actions under the Fair Labor Standards Act (FLSA),¹ and actions under state and local laws. Large and small employers alike face potential liability of hundreds of thousands, or even millions of dollars, for wage and hour violations. This article is intended to provide employers with general information regarding wage and hour claims, particularly collective and class actions.

Several recent settlements serve as a reminder of the potential costs of defending against wage and hour claims:

- Albertson's Inc. agreed to pay \$53 million to 7,000 current and former hourly employees to resolve allegations that the employees were denied overtime and forced to work off the clock.² The settlement resolves 10 consolidated federal and state lawsuits that have been pending for over 10 years.
- Wal-Mart Stores, Inc. agreed to pay \$33.5 million to 87,000 current and former employees after discovering errors during an internal review of payroll processes.³ The errors included failure to take into account bonuses and other income when calculating overtime pay rates. Wal-Mart agreed to pay back wages after voluntarily reporting the errors to the U.S. Department of Labor (DOL). The company will not be subject to further fines or penalties for the violations.
- IBM Corporation agreed to pay \$65 million to resolve allegations that the company failed to pay overtime to 32,000 information technology employees who install and maintain computer software and hardware.⁴ The employees argued that they were improperly classified under the administrative exemption because IBM's

detailed instructions and procedures replaced independent judgment.

- Staples, Inc., agreed to pay \$38 million to settle a wage and hour class action lawsuit alleging that 1,500 current and former assistant store managers based in California had been misclassified as exempt under state law.⁵ The assistant managers argued that because they were discouraged from authorizing overtime for non-exempt employees, they routinely worked more than eight hours per day or 40 hours per week while devoting half of their time to the non-exempt tasks that they were unable to delegate.

In light of the ongoing increase in wage and hour claims, and the potential cost of defending against such claims, it is all the more important for employers to examine policies and practices to ensure compliance with federal, state, and local wage and hour laws.

HOW DO FLSA COLLECTIVE ACTIONS DIFFER FROM OTHER CLASS CLAIMS BROUGHT AGAINST EMPLOYERS?

In both a "class action" brought under Rule 23 of the Federal Rules of Civil Procedure and a "collective action" brought under the FLSA, a named plaintiff (or plaintiffs) sues on behalf of himself and other current or former employees who are similarly situated.

The primary difference between a class action and a collective action is the manner in which a class is formed. A Rule 23 class action does not require consent of class members. Instead, all members of the class are included as parties to the action unless they "opt out." To opt out, a class member must expressly request exclusion and formally withdraw from the lawsuit. In contrast, 29 U.S.C. § 216(b)

requires individual employees to “opt in” affirmatively in order to become a party to a collective action under the FLSA. To opt in, the individual must file a consent to join the lawsuit as a party plaintiff.

Another significant difference between a Rule 23 class action and a collective action under the FLSA is the binding effect of a judgment on a class member. All class members are bound by the judgment in a Rule 23 class action *unless* they opt out of the action. Under the FLSA, however, a class member who does not consent to join the collective action can neither benefit from, nor be bound by, the judgment in the lawsuit. Those employees who are not bound by the judgment can file a separate lawsuit if they choose to do so.

Class and collective actions also differ in their notice requirement. Rule 23 requires that all members identified in a class be given notice so that they may opt out from the lawsuit. The FLSA does not have a similar requirement concerning notification of potential class members. As described further herein, a plaintiff hoping to proceed with a collective action under the FLSA will typically seek the court’s permission to send notice to potential class members, thereby allowing potential class members to opt in to the action.

A practical implication of these different notice procedures is that under the FLSA, claims of potential class members may be barred by the statute of limitations before they are made aware of the lawsuit. Under Rule 23, the statute of limitations may be tolled pending the court’s determination as to whether the plaintiffs can maintain a proper class. In contrast, filing suit under the FLSA does *not* toll the statute of limitations. Instead, an FLSA action is considered commenced as to each class member when the class member files his or her written consent to opt in to the action. Class members who fail to file a timely consent may be subject to a dismissal of their claims.

CAN A WAGE AND HOUR CLAIM PROCEED AS A CLASS ACTION UNDER RULE 23?

The answer is both yes and no. A class action claim under *state* wage and hour laws can proceed in federal court provided that the requirements of Rule 23 are satisfied or in state court under the state counterpart to Rule 23. A class action claim under the FLSA, however, can *only* proceed in federal or state court as a collective action using the opt in procedure described above.

The jurisdictional provisions of the Class Action Fairness Act of 2005 (CAFA)⁶ allow most large wage and hour class actions to be brought in or removed to federal court.

WHY ARE EMPLOYERS DEFENDING AN INCREASING NUMBER OF WAGE AND HOUR COLLECTIVE AND CLASS ACTIONS?

Although the increase in wage and hour actions is part of a larger trend of workplace class actions, which have also focused on discrimination and post-employment benefits, there are several issues that are specific to wage and hour collective and class actions.

First, wage and hour litigation has become financially attractive. Successful plaintiffs typically receive unpaid wages, liquidated damages equal to the amount of unpaid wages, attorneys’ fees, and costs. Because a wage and hour collective or class action may be brought on behalf of a large group of employees, and because successful plaintiffs can receive attorneys’ fees, even minor wage and hour violations can result in large judgments and settlements if litigated as a class or collective action.

Second, many employers appear to have difficulty interpreting and applying wage and hour laws and regulations. Collective actions typically concern one of four main types of FLSA violations:

1. misclassifying non-exempt employees as exempt;

2. improperly docking exempt employees’ wages;
3. failing to pay non-exempt employees for all hours worked; and
4. miscalculating overtime for non-exempt employees.

Third, state and local wage and hour laws often differ from the FLSA. In fact, many state and local laws provide *greater* protections to employees. Compliance with the FLSA does not ensure compliance with applicable state and local laws. Plaintiffs often target employers operating in multiple states because such employers may not be compliant with all applicable wage and hour laws, which vary from state to state. State laws may also provide more relief than the FLSA, including punitive damages.

Finally, in November 2005, the U.S. Supreme Court upheld a verdict against a meat processing plant for failing to compensate employees for waiting time related to clothes-changing activities.⁷ This decision raised the general interest of the plaintiffs’ bar in FLSA collective actions and wage and hour claims.

WHAT INDUSTRIES ARE DEFENDING WAGE AND HOUR COLLECTIVE AND CLASS ACTIONS?

The recent increase in wage and hour litigation has targeted a wide range of industries, including low-wage industries, such as hospitality, retailing, construction, and manufacturing. For example, several collective and class actions have recently been brought against poultry producers alleging that assembly line employees are not paid for all performed duties, including pre- and post-production line work.

Wage and hour litigation has also targeted high-wage industries, such as financial services, technology, and communications. The financial services industry continues to defend numerous suits alleging that brokers and financial advisers

should be compensated for overtime work based on the contention that they are not covered by the FLSA's outside sales exemption. The insurance industry has defended similar suits alleging that insurance adjusters should be compensated for overtime.

WHO CAN BRING WAGE AND HOUR CLAIMS AGAINST EMPLOYERS?

The FLSA provides a private right of action for employees, either as individual plaintiffs or as part of a collective action, to recover unpaid minimum wages, to recover overtime compensation, or to redress retaliatory discharge. An individual or a group of employees can bring a collective action under the FLSA on behalf of other employees who are similarly situated.

The DOL, which enforces the FLSA, may also bring actions on behalf of employees to recover unpaid wages and overtime compensation. In recent years, the DOL has focused its enforcement on nine low-wage industries: agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial services, and temporary help.⁸

As previously discussed, many states also have wage and hour statutes that typically provide a private right of action for employees or enforcement by state agencies.

WHAT IS THE "SIMILARLY SITUATED" REQUIREMENT?

Under the FLSA, an individual or a group of employees can bring a collective action on behalf of other employees who are "similarly situated." Courts typically require a plaintiff to show that potential claimants: (1) have the same or similar job requirements and pay provisions; and (2) challenge a single policy or practice as violating the FLSA.

An employer can defeat an FLSA collective action by showing that

there is significant variation from department to department, and from position to position, in what people do and in how they are compensated. For example, in *De Ascensio, et al. v. Tyson Foods, Inc.*,⁹ current and former employees working at poultry processing plants sought compensation for the time they claimed they spent changing into work clothes and washing their hands. A jury rejected the employees' claim that they were similarly situated, however, because the employer established that there were significant variations in what the employees actually wore.

HOW IS A COLLECTIVE ACTION CERTIFIED UNDER THE FLSA?

A court will typically allow limited initial discovery prior to determining if an FLSA claim will proceed with a single plaintiff or as a collective action. Discovery may include the names and addresses of potential class members. Employers have successfully secured court intervention at this stage to prevent huge, unlimited discovery of potential claimants.

This process creates a "conditional" class of potential plaintiffs who may opt in to the collective action. Notably, the initial burden of obtaining conditional certification is lower than the burden of ultimately proving a claim on a class-wide basis. A plaintiff can seek permission to send notice to current and former employees who are part of the conditional class of similarly situated individuals. The court may limit notice to a particular work site (or sites) or prohibit notice altogether.

After all discovery is complete, a plaintiff must show again that the class of employees is similarly situated. If the court does not find that the class of employees is similarly situated, the class can be decertified or redefined. If the employees are similarly situated, the collective action is permitted to proceed.

ARE THERE SPECIAL CONSIDERATIONS REGARDING SETTLEMENT OF A COLLECTIVE ACTION UNDER THE FLSA?

There are special considerations under the FLSA for collective action settlements. Because an FLSA collective action requires individuals to "opt in" to become a party to the action, a settlement with the opt in group of employees does not preclude employees who have *not* opted in from filing their own actions. An employer should, therefore, be hesitant to settle an FLSA collective action too quickly, as an early settlement may result in further suits.

In addition, the FLSA prohibits private settlements of disputes. To obtain a valid waiver of FLSA rights, an employer must have the DOL supervise and approve the settlement, or for claims made in court, obtain a judicially approved consent judgment.

WHAT DAMAGES ARE AVAILABLE UNDER THE FLSA AND STATE WAGE AND HOUR LAWS?

The FLSA allows successful plaintiffs to recover unpaid wages, liquidated damages equal to the amount of unpaid wages, attorneys' fees, and costs. Punitive damages are also available for violations of the FLSA's anti-retaliation provisions.

Unlike other federal employment laws, the FLSA authorizes fines and criminal penalties for willful violations of the statute, including imprisonment for second and subsequent convictions.

The FLSA's broad definition of employer, which includes "any person acting directly or indirectly in the interest of an employer in relation to an employee," allows individual liability.¹⁰ A company's owners, officers, managers, and supervisors can, therefore, face personal liability if they exercise control over the aspect of employment alleged to have been violated.

Damages under state wage and hour laws vary. In addition to unpaid wages, successful plaintiffs may be able to recover interest, liquidated damages, and punitive damages under state wage and hour laws.

WHAT AFFIRMATIVE DEFENSES ARE AVAILABLE TO EMPLOYERS UNDER THE FLSA?

Two good faith statutory defenses are available to an employer defending an FLSA claim. First, an employer is protected from all liability for back pay if the employer relied in good faith on any written administrative regulation, order, ruling, approval, or interpretation issued by the DOL's Wage and Hour Division.¹¹ Second, an employer is protected from liability for liquidated damages if the employer had a reasonable, good faith belief that it was not violating the FLSA.¹²

The statute of limitations for an FLSA claim is two years after the cause of action accrued, except in the case of willful violations, which may be brought within three years.¹³ Additional common law defenses, such as estoppel and exhaustion of remedies, may also be available.

WHAT STEPS CAN EMPLOYERS TAKE TO REDUCE THEIR RISK OF EXPOSURE TO WAGE AND HOUR CLAIMS?

As interest in wage and hour collective and class actions continues to grow, employers should become thoroughly familiar with wage and hour law requirements and attempt to ensure compliance in order to reduce exposure to costly wage and

hour claims brought as collective or class actions. Some steps an employer may consider include:

- Auditing job classifications to ensure that employees are properly classified as exempt or non-exempt under federal, state, and local law;
- Auditing payroll practices to ensure that improper deductions are not being made;
- Ensuring that all remuneration (including commissions, bonuses, and other incentives) is being taken into account when calculating overtime rates for non-exempt employees;
- Auditing record-keeping policies to ensure retention of appropriate documents to substantiate classification and payroll practices;
- Reviewing the status of any individuals who might be considered employees or joint employees under wage and hour law, including independent contractors, volunteers, and trainees;
- Adopting a written wage and hour policy that communicates the employer's intention to avoid improper deductions and provides a specified procedure for reporting alleged improper deductions;
- Training managers regarding proper timekeeping practices, proper deductions for disciplinary violations, and enforcement of overtime policies;
- Training employees regarding proper timekeeping practices;
- Requiring employees and managers to review and certify timekeeping records;

- Promptly investigating any complaint and correcting any improper practice;
- Posting all required bulletins and posters;
- Documenting audits and other compliance activities to substantiate a good faith defense; and
- Consulting with an experienced employment lawyer before making wide-scale changes to any overtime classification, payroll practice, or wage and hour policy. ☼

NOTES

1. Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*
2. In re: Albertson's Inc. Employment Practices Litigation, Case No. 98-md-01215 (D. Idaho).
3. Chao v. Wal-Mart Stores, Inc., Case No. 07-cv-02007 (W.D. Ark.).
4. Rosenburg, et al. v. IBM, Case No. C-06-0430 (N.D. Cal.).
5. Williams v. Staples, Inc., Case No. 816121 (Cal. Super. Ct.).
6. Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d).
7. IBP, Inc. v. Alvarez, et al., 546 U.S. 21, 126 S. Ct. 514 (2005).
8. See U.S. Dep't of Labor, "2006 Statistics Fact Sheet: Wage and Hour Collects \$172 Million in Back Wages for over 246,000 Employees in Fiscal Year 2006," available at <http://www.dol.gov/esa/whd/statistics/200631.htm>.
9. De Ascensio, et al. v. Tyson Foods, Inc., Case No. 00-CV-4294 (E.D. Pa.).
10. See 29 U.S.C. § 203(d).
11. 29 U.S.C. § 259.
12. 29 U.S.C. § 260.
13. 29 U.S.C. § 255.

Lisa C. Jern is a partner, and chair of the Labor and Employment Group, in the Atlanta office of Sutherland Asbill & Brennan LLP. Abigail J. Politzer is an associate at the firm practicing primarily in the area of employment litigation.

The authors may be contacted at lisa.jern@sablau.com and abigail.politzer@sablau.com, respectively.