WAGE AND HOUR CLASS ACTIONS – AT WHAT COST?

By: Kathleen H. Klaus, Esq.

I. FLSA REQUIREMENTS AND HOW TO MAINTAIN A COMPLIANT WORKPLACE

A. Fair Labor Standards Act ("FLSA") and its corresponding regulations set forth provisions and standards concerning minimum wages, equal pay, overtime pay, record keeping, and child labor.

1. The FLSA also contains an anti-retaliation provision, which has been held to cover employees that orally complain of federal wage-and-hour violations.[1]

B. Common Issue is "Transportation" Workers

1. Courts have split on whether "gig economy" workers like Uber drivers and food deliverers are "transportation" workers.

C. Update on FLSA Issues That Have Arisen Because of the COVID-19

1. Working from Home

a. Work performed away from the primary worksite, including at the employee's home, is treated the same as work performed at the primary worksite for purposes of compensability.[2]

b. Employers do not have obligation to investigate hours worked by employees while working from home.

c. However, employers have to pay for all hours they know or have reason to believe work was performed, even if unauthorized.

d. Best practice is to implement "reasonable" reporting methods and compensating employee for all reported hours.

2. Flexible Hours

a. Employers do not have to pay for "in between time" when an employee is engaged in non-work-related activities.

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[1] *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011).

[2] https://www.dol.gov/agencies/whd/flsa/pandemic - Question 14.

i. For example, assume you and your employee agree to a telework schedule of 7–9 a.m., 11:30–3 p.m., and 7–9 p.m. on weekdays. Of course, you must compensate your employee for all hours actually worked—7.5 hours—that day, but not all 14 hours between your employee's first principal activity at 7 a.m. and last at 9 p.m.

b. Have to pay salaried employees for the entire week's work, even if they only worked one day.

3. Flexible Duties

a. Exempt employees may perform work of non-exempt employees on a limited, "emergency" basis without losing exempt status.

b. These exempt employees must still be paid at least $684 per week.

4. Employers May Reduce Salary for Lack of Work, but Only Prospectively

a. Generally, an employer may prospectively reduce the amount regularly paid to a salaried exempt employee like you for economic reasons related to COVID-19 or a related economic slowdown. However, any such reduction must be predetermined rather than an after-the-fact deduction from your salary based on your employer's day-to-day or week-to-week needs.[3]

b. Moreover, any such salary change must also be bona fide, meaning the change is not an attempt to evade the salary basis requirements and is actually because of COVID-19 or an economic slowdown as opposed to the quantity or quality of work you performed.

5. Donning and Doffing

a. *Probably* have to pay for time spent engaging in COVID-19 precautions before work, including handwashing, checking for fevers, etc.

II. STRATEGIES FOR AVOIDING A CLASS ACTION LAWSUIT

A. What Is a Class Action?

1. Employers that fail to comply with federal and state wage and hour laws could face class-action lawsuits.

2. If certain criteria are met, one person can file suit on behalf of a group of people who are "similarly situated."

[3] https://www.dol.gov/agencies/whd/flsa/pandemic - Question 19.

3. Class actions are driven and controlled by attorneys, usually class action counsel, who care more about their "payday" than they care about remedying any illegal conduct.

4. Class actions are expensive to defend, settle, and to lose.

5. There is virtually no chance of recovering any costs, even if you are successful in winning the case.

6. Depending on the nature of the claim, your insurance may or may not cover the class action.

B. Class Actions Seem to Be on the Rise

1. There were more favorable class certification rulings for plaintiffs in 2019 than in any other year in the past decade. Of the 271 wage and hour certification decisions in 2019, plaintiffs won 199 of 245 conditional certification rulings—approximately 81 percent.[4]

2. The value of the top 10 private-plaintiff wage and hour class actions in 2019 totaled $449.05 million, nearly double the 2018 total of $253.5 million.[5]

C. FLSA – Not Really a "Class Action"

1. The FLSA provide s for "collective actions," but the gist is the same.

2. One key difference is that employees have to "opt in." In most class actions, prospective plaintiffs are automatically in the class, and given an opportunity to "opt out."

D. Common FLSA Class Actions

1. Misclassification of workers (exempt vs. non-exempt) – Misclassifying non-exempt workers as exempt may lead to liability for employers as the workers are owed overtime and minimum wage.

2. Independent contractor misclassifications – Employers may misclassify employees as independent contractors, thereby avoiding wage and hour law requirements.

3. Off-the-clock work – Disputes often arise over employer's alleged failure to pay for pre-shift and post-shift activities.

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[4] https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/top-class-actions-2019.aspx

[5] *Id.*

4. Unpaid on-duty meal and rest breaks – Under the FLSA, breaks lasting under 20 minutes are compensable, while meal periods lasting one-half hour or more are generally non-compensable.

5. Improper calculation of the regular rate – Employers frequently miscalculate overtime, which should be based on a worker's "regular rate of pay," but this rate changes frequently because of additional earned compensation (such as bonuses) which must be included in the pay rate calculation.

6. Illegal tipping practices – Employers may not keep tips earned by tipped employees—unless it is as a "tip credit" towards the applicable minimum wage. And gratuities shared among tipped workers in a "tip pool" aren't required to be shared with non-tipped workers.

7. Inadequate recordkeeping – The FLSA mandates that employers keep employee time and pay records.

E. Class Action Waivers are Enforceable

1. Class action waivers are often contained in employment agreements.

a. These class actions waivers require employees to bring any claims against the company in an individual capacity, preventing them from filing a class or collective action.

b. Employers tend to include them in an arbitration agreement, but there are potential negative unintended consequences.

i. Door Dash had to pay $12 million in arbitration filing fees, when a law firm filed 6,250 individual arbitrations. Door Dash asked for relief from the arbitration agreement and its request was denied.[6]

2. The United States Supreme Court has upheld the enforceability of these class-action waivers, so long as the waiver does not preclude employees from vindicating their statutory rights.[7]

a. Possible exception for transportation workers.

i. Section 1 of the Federal Arbitration Act provides that "nothing herein" may be used to compel arbitration in disputes involving the

[6] https://www.reuters.com/article/us-otc-doordash/this-hypocrisy-will-not-be-blessed-judge-orders-doordash-to-arbitrate-5000-couriers-claims-idUSKBN2052S1

[7] See *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (U.S. 2011) and *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018).

"contracts of employment" of certain transportation workers engaged in interstate commerce.[8] This has led to litigation over whether the employee is "exempt" under the Federal Arbitration Act.

ii. Courts have split on whether "gig economy" workers like Uber drivers and food deliverers are "transportation" workers.

(A) A district court in California decided that Lyft drivers are not included in the exemption[9]; however, a district court is Massachusetts did find that Lyft drivers were included.[10]

F. Have Well Documented Policies And Procedures

1. Accurately account for all hours worked.

2. Ensure all employees are properly classified (employee vs. independent contractor; if an employee is exempt vs. non-exempt).

3. Ensure any compliance with any regulatory changes, including COVID-19 changes.

G. Consult with counsel if you have any concerns or questions regarding these issues.

III. CONSIDERATIONS WHEN DETERMINING WHEN TO LITIGATE AND WHEN TO SETTLE

A. Insurance

1. Does not cover these claims, although you can procure defense costs insurance.

2. You may be able to incorporate wage and hour insurance with your management liability insurance.

3. There are dedicated Wage and Hour policies that cover a broad range of coverage you can purchase, however these carry the highest premiums.

B. Damages and Remedies

1. Cases can be catastrophic.

[8] 9 U.S.C. § 1.

[9] *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904 (N.D. Cal. 2020).

[10] *Cunningham v. Lyft, Inc.*, 450 F. Supp. 3d 37 (D. Mass. 2020).

2. The average settlement value for a wage and hour case in 2019 was $8.2 million.[11]

3. The most common outcomes of a successful wage and hour suit is the award of back pay for unpaid wages and overtime.

4. Employees may also be able to recover liquidated damages and attorneys' fees and costs.

C. Trending Issues

1. Jurisdiction for multi-state employers:

a. Defense trend of limiting the scope of nationwide collective actions that are NOT filed in the district court where the company is incorporated or has its principal place of business.[12]

2. Challenges to certification:

a. Employers may be able to challenge the certification of the class or collective action and may even ask that a class be "decertified" by proving that the class is not "similarly situated."

D. Settlements

1. Most jurisdictions require court approval of an FLSA settlement.[13]

2. In deciding whether to approve a settlement, courts assess whether the settlement is "fair and reasonable" and the "product of a bona fide dispute over the application of the FLSA's provisions, rather than a waiver of statutory rights."[14]

3. Once the court approves the settlement, all opt-in plaintiffs are bound by it.[15]

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[11] Wage and Hour Litigation and Compliance Handbook 2021, Litigation and Administrative Practice Series, Number H-1201.

12 Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773 (2017).

13 See Cheeks v. Freeport Pancake House, Inc., 796 F. 3d 199, 206–07 (2d Cir. 2015) (holding that releases of FLSA claims in private settlements are only enforceable with DOL or court approval); but see Bodle v. TXL Mortg. Corp., 788 F.3d 159, 162–65 (5th Cir. 2015) (finding that private settlements of FLSA claims without court approval are enforceable when the settlement resolves a bona fide dispute about compensation owed or hours worked).

14 Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982).

15 29 U.S.C. § 216(b).