

Louisiana Employment Law Letter

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OVERTIME

Louisiana federal court to host nationwide wage and hour collective action

Enacted in 1938, the Fair Labor Standards Act (FLSA) is one of the federal government's longest-standing employment laws. Thus, most of you are aware that the FLSA requires you to pay overtime when an employee works more than 40 hours in a workweek — unless she fits within one of the law's "white-collar" or other exceptions. What most of you don't think about, however, is how the law's penalty and procedure rules can turn minor compliance errors into major litigation nightmares.

First, a successful employee is usually entitled to recover double the amount of lost wages under the FLSA's liquidated damages provision. Second, a successful employee is entitled to attorneys' fees, and awards of fees are sometimes greater than the amount of wages recovered for the employee. That provision offers an economic incentive for attorneys to pursue cases even when the amount of underpayment is relatively small. Finally, the Act has a special "collective action" procedure that allows employees and their attorneys to accumulate claimants and damages claims in a single case, similar to traditional class actions — but without passing the more rigorous procedural tests applied to class actions.

Attorneys for employees have recently discovered that those rules can provide a huge advantage compared to other types of mass tort (personal injury) and class-action cases, resulting in a wave of FLSA collective actions. Recently, that wave hit shore in federal court in Louisiana with the conditional certification of a massive nationwide collective action. Read on to learn more about the collective action procedure and how to protect your company from that litigation nightmare.

Insurance adjuster makes claim for pay adjustment

Kelly Marie Camp, a claims representative for a national insurance company, claimed the company violated the FLSA by failing to pay her overtime compensation (one and a half times her regular hourly rate) for working more than 40 hours per week. She argued that she was improperly classified as an "administrative" employee under the Act's exemption from overtime

pay. She filed a collective action lawsuit under the FLSA, seeking to represent all of the company's current and former salaried claims representatives.

Collective action conditionally certified

Camp asked the trial court to conditionally certify her case as a collective action and allow her to send a notice to all of the insurance company's other claims representatives advising them of their right to join the lawsuit. "Conditional" certification means that the court allows the case to proceed as a collective action but can later reevaluate whether the employees are "similarly situated" so that their claims can be tried collectively.

Unfortunately, the FLSA provides almost no guidance for courts deciding which cases should be allowed to proceed as collective actions and which procedural rules should apply to a case once it's determined to be a proper collective action. The law simply states without elaboration that FLSA cases may be filed "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Over the years, the phrase "similarly situated" has spawned a two-step procedure and has taken on two different meanings, neither of which has been clearly defined by the courts. At the first stage, usually right after the suit is filed, the employee requests conditional certification and seeks the court's permission to send an official notice to other potential parties to the lawsuit advising them that they can join the suit by signing a piece of paper and returning it to the employee's attorney. Typically, 20 to 30 percent of the potential claimants will opt into the lawsuit.

At the second stage, after discovery (pretrial fact-finding) is largely complete, the employer can ask the court to decertify the collective action. At that stage, "similarly situated" means something different because the court takes a more detailed look at the claims to determine if the employees are "similarly situated" enough for the case to proceed through trial as a collective action.

Most courts decide to decertify the actions because the employees' claims typically involve individual questions of fact and law that can't be fairly and efficiently decided at a representative trial (i.e., where the "representative" employee puts on her case and the court simply applies the results to the opt-in employees without considering evidence specific to their claims). If the court decertifies the collective action, the opt-in employees are dismissed, and the original employee proceeds to trial on her individual claim.

In this case, the insurance company argued against conditional certification by noting that the proposed class applies to claims representatives in 50 states with different job titles, job duties, and pay grades. But considering the "lenient standard" for conditional certification and the "minimal evidence" necessary at the first stage, the court ruled that Camp was similarly situated to the other claims representatives in all 50 states. The court granted conditional certification and allowed her to send an approved notice to all of the potential opt-in parties. *Camp v. Progressive Corp.*, 2002 U.S. Dist. LEXIS 21903 (E.D. La. 2002).

Court expresses 'trepidation' about decision

Although the court's decision was consistent with those of other courts, it expressed concerns about the two-step approach by stating that it may prove "wasteful and inefficient." While the court didn't explain further, we think it may have been referring to the same concerns expressed by other commentators.

Without even looking at whether the representative employee's and proposed opt-in employees' claims are similar enough to be decided on a collective basis, the first step of the process allows the disclosure of the names and addresses of all of the potential parties in the proposed collective action and the dissemination of an official court notice advising them of the suit and their right to "opt in." Then, at the second stage, after employees have opted in, courts usually decide to decertify the case and dismiss the claims by the opt-in parties. By then, however, the court, attorneys, and parties have already invested significant time and money in the process.

To employers, this process is harmful in a number of ways — each of which makes the process more attractive to attorneys for employees. First, the official court-approved notice gives an impression of legitimacy to the lead employee's effort to recruit opt-ins. The procedure also forces the employer to turn over the names and addresses of all potential parties without requiring the lead employee to make any showing that their cases can be decided as part of the proposed collective action. Then, even if the court decertifies the case and dismisses the opt-in employees' claims, they may still file their own lawsuits because they already have a lawyer and have decided to pursue their claims.

Because attorneys' fees are available to successful employees, their attorneys have plenty of motivation to use the notice procedure as a springboard for numerous individual lawsuits by the former opt-in parties. The result for the employer can be very expensive — numerous cases to defend in different courts with potential liability for attorneys' fees in each one. That forces the employer to make a real Hobson's choice — allow the case to proceed as a collective action even though the procedure may be an unfair way to decide the claims, or move to decertify and face the possibility of multiple lawsuits in multiple jurisdictions.

Those factors have probably played a role in many employers agreeing to expensive settlements of large collective actions. A telephone company paid \$62.8 million to settle two wage and hour collective actions. A coffee purveyor settled one for \$18 million, and a poultry producer is paying \$20 million to settle a U.S. Department of Labor (DOL) case and related cases filed by individual employees. Those are just a few of the results that have put wage and hour claims — previously left mostly to the DOL's Wage and Hour Division to pursue — on the legal "what's hot" list.

Compliance is key

The best way to avoid a collective action lawsuit is to focus your energy on wage and hour compliance. Many large employers increase their risk of facing those claims by doing nothing. But regularly reviewing your employees' classifications and duties — and your pay practices — is the best way to prevent lawsuits and liability.

To help you start focusing on FLSA issues, here's a list of five common compliance errors:

1. misclassifying employees as exempt from overtime pay when they don't qualify for any of the "white-collar" exceptions;
2. making salary deductions from employees' pay that jeopardize their exempt status;
3. treating employees as independent contractors;
4. failing to include nondiscretionary bonuses in calculating an employee's regular rate of pay; and

5. improperly substituting compensatory time off (which is available only to certain public employees) for overtime pay.

Those are just a few of the most common FLSA violations. If you're really serious about getting proactive with FLSA compliance, the best way to find and eliminate potential problems is to have your attorney audit your company's practices. That's one New Year's resolution you can't afford to leave off your list.

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