Is the Tidal Wave of Wage and Hour Class and Collective Actions Ready to Hit Massachusetts?

Over the better part of the last decade, the United States judicial system has seen a dramatic increase in wage and hour class and collective action lawsuits. Employment law attorneys generally attribute this surge to a change in the securities class action laws, relaxation of federal court filing requirements, and employee-friendly laws in states like California and New York. The Fair Labor Standards Act of 1938 ("FLSA") and its state law counterparts allow large groups of aggrieved employees to recover against employers in connection with alleged wage violations. Unlike the traditional class action in which all affected individuals are members of the class unless they "opt-out" of the class, class claims under the FLSA must be brought as "collective actions" and only those class members who affirmative "opt-in" to the case are considered class members. While individual cases do not typically yield large verdicts, class and collective action lawsuits can be lucrative for plaintiffs' attorneys. These cases initially gained momentum in California, and have been gradually moving to the East Coast. Indeed, with its new mandate of treble damages for violations of state wage and hour laws, Massachusetts could soon witness a massive increase in this area of litigation.

How Have Wage and Hour Class and Collective Actions Increased?

Plaintiffs' attorneys attribute the surge in wage and hour class and collective actions to employer ignorance of the FLSA and state law, while management-side attorneys point to, among other things, large payouts for plaintiffs as the reason for the increase. Whatever the reason, attorneys on both sides of the aisle agree that wage and hour class and collective actions have come to the forefront of employment litigation. The FLSA is a particularly nuanced piece of legislation, which prohibits a multitude of payroll and timekeeping practices about which employers are sometimes unaware. State laws often contain additional prohibitions and provide greater remedies to employees for violations. The newfound focus on wage and hour issues and the success attorneys in California have achieved in pressing such claims, coupled with the downturn in once-reliable securities class action filings, have prompted many plaintiffs' law firms to include in their focus wage and hour class and collective action litigation.

The increase in wage and hour class and collective action litigation has been remarkable. According to an April 2008 report published by the Federal Judiciary Committee, the number of labor class actions filed prior to June 2007, most of which consist of FLSA collective actions, have increased by 228 percent since 2001. *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center, April 2008, p. 3. They also represent a much larger proportion of all class action filings in the federal courts than they did in 2001. During the period from January-June 2007, labor law class actions represented almost half of all class actions filed in federal courts. *Id.* at pp. 3-4. Whereas, during the period from July-December 2001, they constituted only 24.6% of all federal court class action filings. *Id.*

In addition to the spike in federal wage and hour class and collective action litigation, many states have seen a dramatic increase in wage and hour class action filings in state court as well, most notably on the West Coast. These states, like Massachusetts, provide employees with greater protections than the FLSA. In California, for example, workers are entitled to overtime pay if they

work more than eight hours in a single day – a requirement not contained in the FLSA. Washington state law mandates that employers pay for employees' tools and uniforms. In Massachusetts and New Hampshire, state law provides substantial protection for tipped employees. These additional protections have led to increased employer violations and greater opportunity for plaintiffs' attorneys to recover damages for violations of state law.

There has also been an increased enforcement emphasis on FLSA violations in recent years. According to the United States Department of Labor's website, the Wage and Hour Division recovered record amounts of back wages on behalf of employees in fiscal year 2007. *See* http://www.dol.gov./dol/about/results/notable.htm. In fiscal year 2007, the Wage and Hour Division reportedly collected $220,613,703.00 in back wages on behalf of employees, a 67% increase over the amount of back wages collected by the Division in 2001. *Id.*

What Kinds of Claims are Being Brought?

The wage and hour class and collective actions that have been filed have typically consisted of several chief categories: misclassifying non-exempt employees as exempt; improperly "docking" an exempt employee's wages; not paying non-exempt employees for all hours worked; and, miscalculating the proper amount of overtime due to non-exempt employees.
Certain employees, including executives, outside salespersons, administrators, and professionals, are not entitled to mandatory overtime pay and are exempt from overtime requirements. Trouble arises when employers (either intentionally or inadvertently) misclassify large groups of employees as exempt from overtime requirements. Courts have found violations when, for example, companies classify lower-level employees with supervisory responsibilities as managers. These employees do not fit within any of the statutory exemptions and are thus entitled to compensation for lost overtime pay. When the number of affected employees is substantial, a class can obtain a significant judgment against an employer.
An illustrative class action challenging employee misclassifications is *Belazi, et al. v. Tandy Corporation*. That case involved a traditional class action in which 1300 managers of RadioShack outlets claimed they were entitled to overtime pay, having worked numerous 12 and 13 hour shifts. The plaintiffs claimed that they were not exempt from California's wage and hour protections because they spent more than 50% of their time selling to customers. Thus, they were not "managers" within the meaning of the statutes. RadioShack settled the case for $29.9 million dollars – reportedly one of the largest such settlements ever reached in the state. Large settlements in other misclassification cases have been reported as well by Merrill Lynch ($37 million dollars), Staples ($38 million dollars) and Starbuck's ($18 million dollars).

Even employers who have properly classified their employees as exempt have gotten into class action trouble when they have treated them as non-exempt employees. Eckerd Corp., for example, entered into an $8 million dollar settlement to resolve a class action lawsuit on behalf of its pharmacists alleging that Eckerd had improperly "docked" their salaries when they worked less than 40 hours in a workweek. The FLSA prohibits employers from "docking" the salaries of exempt employees except in certain circumstances. When employers improperly dock the salaries of otherwise exempt employees, the result can be that the exemption will be lost.

Whether certain time worked is compensable has also been a subject of recent class and collective action lawsuits. It is generally understood that employers must compensate their employees for actual time worked. However, disputes arise when employers fail to compensate employees for additional activity such as pre/post shift preparation and travel, as well as missed rest breaks. If a court determines that this time constitutes compensable work, a class of aggrieved employees can potentially recover large sums of money from an unsuspecting employer.

One of the most notable verdicts in this area came in 2006 in the case of *Braun v. Wal-Mart Stores Inc*. when a Pennsylvania jury ordered Wal-Mart to pay more than $78 million dollars to aggrieved employees. The plaintiff class claimed that the chain failed to compensate them for missed breaks and off-the-clock-work in violation of state wage laws. The judge in the case later increased the verdict to over $187 million dollars. Notable settlements in this area are United Parcel Service's $87 million dollar settlement of a missed meal and rest period class action, and Perdue's $20 million dollar settlement of a class action lawsuit and United States Department of Labor enforcement action challenging Perdue's failure to pay its employees for time spent "donning and doffing" protective and sanitary equipment before and after their shifts.

In another wage and hour enforcement action by the United States Department of Labor, Wal-Mart agreed to pay $34 million dollars in connection with Wal-Mart's calculation of the "regular rate" of pay for overtime purposes. Under the FLSA, an employee's rate of pay for overtime purposes must be augmented by most types of additional, non-discretionary compensation earned by the employee, *e.g.* prizes, bonuses, premiums and incentive awards. When employers base an employee's overtime rate only on their regular weekly earnings without taking into account all the other types of extra compensation the employee has earned, they run the risk of violating the FLSA.

What Does This Mean for Massachusetts?

The Massachusetts legislature recently enacted Senate Bill No. 1059 over Governor Patrick's objection. Aimed at "protecting employee compensation," the bill mandates treble damage awards against employers who violate the state's wage and hour laws, regardless of whether the violation was the result of a good faith mistake. Massachusetts law also requires that employers pay employees' attorneys fees and litigation costs if found liable.

In practical terms, the new law will make Massachusetts a very attractive forum for plaintiffs' class action attorneys. If the movement in California is any indication, wage and hour claims could increase exponentially once the bill becomes effective on July 13, 2008. One local plaintiffs' law firm has already made a practice of crafting existing law to bring class action lawsuits against the restaurant and travel industry on behalf of service employees. *See, e.g., Difiore v. American Airlines*, 2008 WL 1515467; *Calcango v. High Country Investors, Inc. D/B/A Hilltop Steak House and Marketplace*, 2006 WL 4399549. With the new mandate of treble damages in successful state wage and hour cases, the potential rewards for bringing wage and hour claims in Massachusetts have grown much greater. The new law, coupled with the continued spread of wage and hour class and collective actions to the East Coast and the increased attention on wage and hour issues, could bring many additional plaintiffs and plaintiffs' law firms into the fray.

What Can Employers Do to Protect Themselves?

In light of the new legislation and the likely increase in wage and hour lawsuits that will be associated therewith, employers must be vigilant in implementing pay and timekeeping policies. Additionally, employers should take the time to evaluate their existing pay and timekeeping policies and practices. Now is a good time to conduct audits of pay and timekeeping policies and practices, and to review employee classifications and job descriptions to ensure compliance with state and federal law. Likewise, employers should educate managers on the potential consequences of any violation and stress that, in light of the abolition of the good faith defense in Massachusetts, they can be held liable whether harm is inadvertent or intentional. These and other steps can help to correct problems before they arise, and more importantly before they mushroom into a class and/or collective action.

Morgan, Brown and Joy, LLP has assisted many of its clients with such preventative measures and has helped to protect them from wage and hour claims. Morgan, Brown and Joy, LLP also has expertise in defending individual and class/collective action wage and hour lawsuits.

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