An Overview of the FLSA "Collective Action"

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Employers are continuing to see an increase in the number of wage and hour lawsuits filed by current or former employees under the federal Fair Labor Standards Act ("FLSA"). In 2010, 6,081 FLSA lawsuits were filed in U.S. federal courts. See Statistics Div., Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics. In 2011, that number jumped to 7,008. One source of such lawsuits is the FLSA "collective action," which is appealing to plaintiffs' attorneys, as it provides a means of overcoming the economic inefficiency of seeking to recover relatively small amounts on behalf of numerous allegedly similarly situated employees.

What is the FLSA?

By way of background, the FLSA requires covered employers to pay their non-exempt employees a certain minimum wage for all hours worked and overtime for hours worked over 40 in a work week. A typical FLSA collective action involves one or more of the following alleged FLSA violations: (1) misclassifying non-exempt employees as exempt; (2) making improper deductions from exempt employees' salaries; (3) failing to pay non-exempt employees for all hours worked (e.g. allowing employees to work "off the clock"); and/or (4) failure to pay or miscalculating overtime for non-exempt employees.

How Do FLSA "Collective Actions" and "Class Actions" Differ?

As with a "class action" brought under Rule 23 of the Federal Rules of Civil Procedure, a named plaintiff (or plaintiffs) in an FLSA collective action files suit on behalf of himself and other similarly situated current or former employees. There are some notable procedural differences, however, between a Rule 23 "class action" and an FLSA "collective action."

First, a Rule 23 class action does not require consent of the putative class members. Instead, once the district court certifies a class under Rule 23, all members are parties to the action (and bound by the judgment) unless they opt out by requesting exclusion and formally withdrawing from the lawsuit. In contrast, the FLSA requires individual employees to affirmatively consent in writing to becoming a party to a collective action under the FLSA. An individual, who does not consent to join the collective action, neither benefits from nor is bound by the judgment in the lawsuit.

Second, unlike Rule 23 class actions, courts use a two-phase inquiry to determine whether to certify a collective action under the FLSA. During the first stage (often referred to as the conditional certification stage), the standard for certification requires only "a modest factual showing" that the plaintiff(s) is/are similarly situated to the other employees they seek to notify of the action. This standard is relatively lenient and frequently results in conditional certification of the collective action (and, hence, notice to potential plaintiffs of the opportunity to "opt-in"). Following more detailed discovery, the court employs a stricter standard to determine whether the filing plaintiff(s) and the other collective action members are sufficiently similar to certify the collective action.

Third, under Rule 23, the statute of limitations may be tolled pending the court's determination of whether the plaintiffs can maintain a proper class. In contrast, under the FLSA, the statute of limitations as to an individual claimant continues to run until that claimant has filed a consent to opt-in. As a result, the statute of limitations may have already run as to many putative members of the collective action before they receive notice that a lawsuit has been filed.

What Can Employers Do to Minimize Their Risk of an FLSA Collective Action?

Despite their differences, collective actions and class actions are similar in one important respect: they are time-consuming, burdensome and expensive for businesses forced to defend the action. There are various proactive steps, however, that employers can take to substantially reduce their risks and potential liabilities under the FLSA. Among other things, employers, in consultation with knowledgeable employment law counsel, should:

- Conduct regular audits of job classifications to ensure that individuals have been properly classified as exempt, as independent contractors or as volunteers;
- Conduct regular payroll audits to ensure that improper deductions are not being made from exempt employees' salaries and that all remuneration required to be considered for overtime calculation purposes (e.g., bonuses, shift differentials, etc.) is being taken into account;
- Conduct regular audits of timekeeping processes to ensure that non-exempt employees are properly recording and verifying all time worked;
- Maintain required postings and appropriate written policies that take advantage of the FLSA's "safe harbor" provision;
- Train supervisors and employees on proper timekeeping practices; and
- Respond promptly to internal wage and hour complaints and correct any identified unlawful practice(s).

Authors