FLSA Class Actions

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Six strategies for limiting your exposure to class action lawsuits

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Largely because of its class action feature, the Fair Labor Standards Act (FLSA) has become increasingly popular with plaintiffs' attorneys. Indeed, more than 150 class actions seeking damages under the FLSA have been filed over the last three years, and, between 2000 and 2003, the number of class actions swelled by 70 percent. Not surprisingly, the dramatic increase in the filing of such class actions, as well as enhanced agency enforcement, have pushed the FLSA to the foreground of the legal landscape.

In addition to the increased activity, employers have another reason to take notice of FLSA class actions: potentially devastating legal liability. Between FY 2001 and FY 2003, the Department of Labor (DOL) collected approximately $435 million in back wages for more than 700,000 employees. Add in the availability of potential fines and attorneys' fees in private legal actions, and it becomes readily apparent why several large employers have agreed to huge settlements to avoid litigation. Moreover, the DOL estimates that its new regulations, which took effect on Aug. 23, 2004, extend the FLSA's overtime provisions to 6.7 million employees previously considered exempt. Thus, it is imperative that employers understand how this increasingly visible statutory and regulatory scheme works.

The U.S. Supreme Court now has before it an FSLA case concerning the issue of what constitutes compensable "working time" under the FLSA. The issue is whether meat- and chicken-processing employees should be paid for time spent waiting to receive required safety equipment and walking to and from work stations after getting the equipment. A ruling adverse to employers could greatly increase their class action exposure, especially in the meat- and chicken-processing industry, which employ some 200,000 workers. (See Chapter 6.)

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The strategies for reducing class action exposure entail a variety of approaches, each of which is discussed below. In general, these include:

- reducing the class size;
- challenging notice to potential class members;
- reducing opt-in opportunities for additional members;
- using arbitration agreements to avoid suits altogether;
- complying with the DOL's latest "white-collar" exemption regulations; and
- developing internal processes and policies.

Limit Class Size

One probable explanation for the rapid rise in class actions under the FLSA is the relative ease of establishing a class. Essentially the only hurdle for employees attempting to assert their status as a class is the requirement that proposed class members be "similarly situated" and deprived of overtime or other wages as the result of a single unlawful decision, policy or plan. Generally, this is a two-stage process.

Early after filing the action, the class representative will attempt to make a preliminary showing that other employees – colleagues and former colleagues – are similarly situated to him or her. This burden typically can be met through detailed allegations of class-wide discrimination supported by sworn statements. If the court agrees that other employees appear to be similarly situated, it conditionally certifies the class. The standard for conditional certification at this early "notice stage" is lenient and often granted because it effectively requires little more than allegations. If the court determines there is sufficient reason to conditionally certify the class, it may even direct the employer to disclose the names and addresses of similarly situated employees in order to facilitate notification of their status as potential class members.

Given the relatively low standard applicable to the notice stage, courts generally find at least some employees to be similarly situated to the class representative, since all employees holding the same position at the same facility are likely subject to the same overtime pay practices. Thus, at this stage, employers are more likely to be successful in their efforts to limit the class, rather than opposing certification outright. For example, a sales clerk might argue that all hourly employees nationwide are similarly situated to her, to which the employer can respond that only those employees who worked as sales clerks at the same facility are similarly situated. If the court agrees with the employer and draws the class narrowly, the employer's exposure is greatly reduced.

In *England v. New Century Financial Corp.*, a United States District Court recently held that employees overseen by a multitude of managers, at different locations, and subject to working conditions that varied by location, were not similarly situated for purposes of the FLSA. The court further indicated that an employer

may also be successful at narrowing the potential class if it can demonstrate the absence of a nationwide policy or practice governing compensation.

Challenge Notice to Potential Class Members

Following the notice stage determination, the class representative will be permitted to send a court-approved notice to other potential class members. If the employer does not object to the form or content of the notice proposed by the class representative, courts will generally authorize its use. Strategically speaking something may be gained by challenging the notice, as long as there is a good-faith basis for doing so. Not only might employers potentially receive some say over how notice of the suit is presented to potential class members, but also such a challenge may effectively delay the serving of notice. Because the FLSA ordinarily only holds employers liable for wages improperly withheld over the two years preceding an employee's joining of the suit, and that two-year period runs backward from the date each employee joins, delaying the date by which they may join will reduce the aggregate liability in instances where employers have corrected past practices, or where some individual class members are no longer employees of the employer.

Reduce Opt-in Opportunities

Once potential class members receive notice of the pending class action, they are required by the FLSA to "opt in" if they wish to join the suit by filing written consent with the court. Thus, another strategy that may serve to limit an employer's liability in these actions is to settle or otherwise moot the class representative's claim before potential class members can opt-in. In *Vogel v. American Kiosk Management*, a recent case decided by a federal district court in Connecticut, the employer filed an offer of judgment covering all the damages claimed by the class representative, plus costs and attorneys' fees. The court held that the simple act of the offer, whether accepted or not, mooted the class representative's claim by removing the dispute over damages. Because the class representative had no legally cognizable cause of action, the court dismissed her claims, thereby preventing the launch of a class action.

It is during the second stage, usually initiated by an employer's motion to decertify and occurring after the completion of discovery, that the court reviews class certification using a stricter standard. At this time, employers should focus on the characteristics that differentiate persons in the class, such as the fact that they were:

- employed at different locations under different management;
- not subject to an overarching policy or plan common to each member, or
- otherwise subject to differing circumstances.

If an employer is successful in demonstrating that litigation will entail inquiries into the characteristics of individual members or groups of members, the class may be decertified or narrowed.

Make Use of Arbitration Agreements

Another effective way to limit potential exposure to FLSA class actions is through the use of valid alternative dispute resolution agreements requiring employees to arbitrate any claims they may have against their employer. In *Pennington v. Frisch's Restaurants, Inc.*, the Sixth Circuit U.S. Court of Appeals recently indicated that assuming the arbitration agreements entered into between possible class members and the employer were valid, each employee could be required to arbitrate his or her FLSA claim in accordance with the agreement. Thus, if an employer can successfully move to compel arbitration against an employee during the notice stage, before the employee can conditionally certify a class, the employer may be able to head off a potentially costly, time-consuming and dangerous class action.

Comply With New Regulations

Of course, the most effective way to prevent FLSA liability is through compliance. On Aug. 23, 2004, the DOL implemented a major overhaul of the "white collar" exemptions to the FLSA. In addition to raising the minimum salary level for exempt employees from $155 per week to $455 per week, regardless of the actual pay period, the new regulations also slightly modified the requirements for the three main "white collar" exemptions, covering executive, administrative and professional employees. By understanding and complying with these new regulations on an entity-wide basis, employers can naturally reduce their exposure under the law.

The most notable change to the "white collar" exemptions concerns the administrative exemption, which covers those employees whose primary duty is the performance of office or other non-manual work "directly related to the management or general business operations" of the employer. This is defined by the new regulations to include only such work as involves assisting in the running or servicing of the business as opposed to work performed in a retail or service sales environment or on a production line. Such changes may stand to impact numerous employers across various fields.

In addition to making slight changes to the duty requirements for the three "white collar" exemptions, the new regulations also dramatically modify the exemption for outside sales employees. These employees are only exempt from the provisions of the FLSA if their primary duty is making sales and they are regularly engaged away from the employer's place of business. Indeed, such sales must be made at the customer's home or place of business, and sales made over the Internet, by phone, or by mail do not qualify. In addition, drivers who also engage in making sales are exempted from the FLSA if their primary duty is engaging in outside sales.

Although the impact of these changes is not yet clear, the impetus for these new regulations is to reduce the applicability of the so-called "white collar" exemptions, and to bring more workers under the FLSA's rubric. Employers seeking to limit their exposure to potential FLSA class actions would be wise to re-evaluate their compensation plans to ensure company-wide compliance with these new regulations.

Develop Internal Processes and Policies

To further reduce their exposure, employers may wish to develop and implement an internal process for answering FLSA questions and handling potential wage complaints. Moreover, if they have not already done so, employers should consider publishing and implementing policies ensuring that non-exempt employees are in fact compensated for all time worked, and stiffening policies requiring employees to report their time accurately. Furthermore, a published policy providing that all overtime must be pre-approved would serve the dual purpose of enabling an employer to limit its overtime expenditures, while shielding it from potential class actions, or at least narrowing exposure, by making overtime determinations a local matter. These steps, in addition to dissuading employees from litigating by providing an in-house mechanism for redress, also potentially serve as evidence against class certification.

Conclusion

While there are numerous tactics that employers can use in the event they are faced with an FLSA class action, obviously the best way to limit exposure is to avoid litigation in the first place through compliance. As noted above, every employer's first step should be familiarizing itself with the new regulations and conducting an audit of all positions ensuring that those employees previously classified as exempt have remained so and to the extent necessary re-classifying employees who no longer come within the DOL's definition of a "white collar" worker. Only through compliance can an employer truly insulate itself from claims.

Resources

For a comprehensive explanation of the Fair Labor Standards Act, see the *Fair Labor Standards Handbook* (for public sector employers), the *Employer's Guide to the Fair Labor Standards Act* (for private sector employers) and the *FLSA Employee Exemption Handbook*, published by Thompson Publishing Group. Go to www.thompson.com.

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