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The New Hot Potato: Wage and Hour Collective Actions

Employers that fail to comply with their overtime obligations are playing with fire

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The new hot potato for employers is exposure to collective actions under state and federal wage and hour laws. While many employers are generally aware of their obligations under antidiscrimination laws, many are simply in the dark when it comes to which employees are entitled to overtime pay. On Aug. 23, 2004, the U.S. Department of Labor revised its regulations interpreting the “white collar” overtime exemptions under the Fair Labor Standards Act, 29 U.S.C. §201, et seq., for executive, administrative, professional, outside sales and computer employees. Although these rule changes received quite a bit of publicity, it appears that many employers are still at risk with regard to the failure to pay overtime. While some employers are just ill informed, others know of their obligations but are reluctant to change overtime practices for fear that it will put their employees on notice of their

claims.

In recent years, the failure of many employers to educate themselves about their overtime pay obligations has led to an increase in “collective” actions being filed by employees under the FLSA. In 2004 alone, there were an estimated 1,500 collective actions filed under the FLSA.

‘Collective’ v. ‘Class’ Actions

Assuming an employee is aggrieved and entitled to receive overtime under the FLSA, the employee’s right to bring a civil action (and the employer’s potential exposure) is governed by 29 U.S.C. §216(b). Section 216(b) is significant in several respects. First, the statute expressly confers concurrent jurisdiction in the state and federal courts. However, such concurrent jurisdiction was recently impacted by the Class Action Fairness Act of 2005, signed into law by President Bush on Feb. 18, 2005, which grants original jurisdiction to the federal courts over

certain large state “class actions.” Second, the statute authorizes awards of compensatory damages and liquidated (double) damages in an amount equal to the employee’s unpaid overtime. Third, and most important for purposes of this discussion, section 216(b) allows one or more employees to pursue an action on behalf of themselves and other “similarly situated” employees. Representative lawsuits filed under the FLSA are commonly referred to as “collective actions” as distinguished from federal or state “class actions,” which contain different certification requirements.

The standard for certifying a collective action under Section 216(b) is far less stringent than the standard to certify a class under Federal Rule of Civil Procedure 23 or New Jersey Court Rule 4:32-1, which tracks Rule 23. For example, plaintiffs attempting to certify a collective action under the FLSA need only show that the named plaintiffs and the proposed class are “‘similarly situated,’ such that the named plaintiffs are adequate representatives of the proposed class.” *Morisky v. Public Service Electric and Gas Co.*, 111 F.Supp.2d 493, 495 (D.N.J. 2000). By contrast,

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plaintiffs attempting to certify a class action under Rule 23 or Rule 4:32-1, must first satisfy the following four prerequisites: numerosity, commonality, typicality and adequacy of representation. In addition to these four requirements, Rule 23(b) and Rule 4:32-1 further require that: (a) the prosecution of multiple actions would create a risk of inconsistent adjudications or prejudice nonparties; or (b) injunctive or declaratory relief would be appropriate to correct an unacceptable policy or practice that affects the class as a whole; or (c) common questions of law or fact predominate over individual issues and that a class action is the most "fair and efficient" method for adjudicating the controversy. Only when these factors are satisfied may the court certify a class under Rule 23 or Rule 4:32-1.

Significantly, neither the FLSA nor the applicable regulations define the meaning of "similarly situated." However, the federal courts have generally applied a two-tiered approach. See *Morisky*, 111 F.Supp.2d at 497 (citing *Thiessen v. General Elec. Capital Corp.*, 996 F.Supp. 1071, 1080 (D. Kan. 1998)). At the early (notice to potential "class" members) stage of the litigation, the court applies a "fairly lenient standard" that often results in a "conditional certification." *Id.* at 497. "At this stage, some courts have required 'nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination.'" *Id.* (citing *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J. 1988), *aff'd* in part, appeal dismissed in part 862 F.2d 439 (3d Cir. 1998), *aff'd* 493 U.S. 165 (1989)); see also *Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249, 261 (S.D.N.Y. 1997). Because this determination is made early in the litigation, courts often simply rely on the allegations in the pleadings and affidavits by the parties. After discovery, the courts employ a stricter standard based on the available facts to ascertain whether the class members are indeed similarly situated.

Although the standard for obtaining certification as a collective action under Section 216(b) is less stringent than Rule 23, this does not mean all provi-

sions of Section 216(b) are more beneficial for plaintiffs. For example, Section 216(b) contains an "opt-in" requirement for class membership. Under the FLSA, no employee may become a party plaintiff unless he or she consents in writing to become a member of the class and files his or her consent with the court where the action is pending. On the other hand, Rule 23(c)(2)(B) contains an "opt-out" procedure requiring class-members to affirmatively request exclusion from the class after receiving court-directed notice of the action.

Despite the less stringent standard for certification under Section 216(b), representative plaintiffs may still face difficulties in demonstrating that the group as a whole is "similarly situated." For example, certification under Section 216(b) may be inappropriate where class members have different job responsibilities and the issue involves whether the employer has misclassified large groups of employees as exempt. See *Morisky*, 111 F.Supp.2d 493, 498 (D.N.J. 2000), where the District Court denied class certification under Section 216(b) because an individual, fact-sensitive analysis of each class member's job duties was necessary to determine whether he or she qualified for an overtime exemption.

On the other hand, in *Hoffman v. Sbarro, Inc.*, several former employees of Sbarro's restaurants filed a collective action on behalf of all "current and former Sbarro restaurant managers" for unpaid overtime compensation. There, the plaintiffs alleged that Sbarro misclassified all restaurant managers as exempt "executive" employees because the company's policies and practices violated the terms of the exemption. 982 F.Supp. at 251. Specifically, the plaintiffs alleged that Sbarro's policy of requiring its restaurant managers to reimburse the company for cash shortages violated 29 C.F.R. §541.118(a), which provides that "executive" employees' compensation may not be "subject to reduction because of variations in the quality or quantity of the work performed." *Id.* at 253-54. According to the plaintiffs, because Sbarro required all restaurant managers to reimburse (or potentially reimburse)

the company for cash shortages, all restaurant managers subject to the policy could not, as a matter of law, qualify for the "executive" employee exemption.

The *Hoffman* court found, based upon the pleadings and affidavits, that the plaintiffs had satisfied their burden of demonstrating that all members were "similarly situated." *Id.* at 261. In particular, the court noted that Sbarro's restaurant managers were all subjected to actual or potential reductions in their compensation for cash shortages and other losses. Based on these allegations, which were admitted by Sbarro's, the court held as follows: "[t]here is no question, therefore, that plaintiffs have shown a factual nexus between their situation and the situation of other current and former Sbarro's restaurant managers sufficient to determine that they are 'similarly situated.'" *Id.* at 261-62.

The *Morisky* and *Hoffman* cases are good examples of when putative class members are "similarly situated" for purposes of FLSA overtime violations. Whether attempting to certify a collective action or opposing certification, practitioners should consider whether the potential class members have similar job responsibilities and whether the challenged employment policy affects the class members similarly. If both of these requirements are not satisfied, or if the employer has specific defenses based on each class member's job duties, it is unlikely a court will find the class to be "similarly situated."

New Jersey Wage and Hour Law

Importantly, the FLSA does not pre-empt state overtime laws that are more favorable to employees. 29 U.S.C. §218(a); *State v. Comfort Cab, Inc.*, 118 N.J. Super. 162, 169-75 (Cty. Ct. 1972). Thus, New Jersey practitioners must also consult the New Jersey Wage and Hour Law and its regulations, particularly with respect to "trucking industry" employees and those seeking to come within the "outside salesperson" exemption. See N.J.S.A. 34:11-56a4.

The NJWHL does not provide guidance or define the limits of the "outside salesperson" exemption. Instead, the elements of that exemption

are contained in N.J.A.C. 12:56-7.4. Paraphrasing, the regulation defines "outside sales person" to be any employee who is customarily and regularly engaged away from his or her employer's place of business in a) making sales or b) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Additionally, the employee's hours of nonexempt work must not exceed 20 percent of hours worked in the workweek; provided, that work performed incidental to and in conjunction with the outside sales person's own personal sales or solicitations, including incidental deliveries and collection, is regarded as exempt work. Employees who basically drive vehicles and who only incidentally or occasionally make sales do not qualify for this exemption.

The outside sales person exemption is discussed in detail in *Dept. of Labor v. Pepsi-Cola Co.*, 2002 WL 187400 (N.J. Super. A.D., 2002), an unreported Appellate Division decision. There the New Jersey Commissioner of Labor ruled that Pepsi's "route salesmen" did not qualify as "outside" salespeople

under the regulation. On appeal, Pepsi argued that its route salesmen qualified for the exemption because they had "sales responsibilities, objectives, and training, and were paid in part on commission." *Id.* at *5. The Appellate Division, however, affirmed the Commissioner's final decision and focused on the "primary function" of the route salesmen, which the court stated was to deliver products to Pepsi's customers in prearranged amounts specified by the customer "and not significantly affected by solicitations of the customer by the driver." *Id.* at *76.

By applying the rationale of *Pepsi*, New Jersey delivery persons who occasionally receive orders or make incidental sales will not qualify for the "outside salesperson" exemption.

With respect to employees whose primary duties involve transporting goods, such employees may qualify for a reduced overtime rate as "trucking industry" employees under N.J.S.A. 34:11-56a4. Unlike other employees under the NJWHL, "trucking industry" employees receive an overtime rate of not less than 1.5 times the minimum wage as opposed to 1.5 times their reg-

ular hourly wage. See N.J.S.A. 34:11-56a4. However, this compromised overtime rate effectively provides a complete exemption for those trucking industry employees who receive regular wages that exceed 1.5 times the current minimum wage of \$5.15/hour (\$7.73/per hour). See *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 263 (3d Cir. 1999) (interpreting the effect of a former New Jersey regulation that became the "trucking industry" provision now codified in N.J.S.A. 34:11-56a4).

In conclusion, collective and class actions for unpaid overtime are becoming the new "hot potato" in employment law, presenting substantial risks for employers not in compliance with their overtime obligations. As discussed above, the enforcement mechanisms under Section 216(b) of the FLSA in some respects are extremely favorable for plaintiffs seeking to bring collective actions that challenge company-wide overtime policies. Careful practitioners should not only review their clients' overtime policies for compliance with the FLSA, but also review the new regulations promulgated by the DOL together with applicable state laws. ■