VENABLE LLP

labor and employment alert

www.Venable.com
DECEMBER 2010

Please contact the author or any of the attorneys in our Labor and Employment Group if you have any questions regarding this alert.

Rebecca M. Aragon
rmaragon@Venable.com
310.229.9976

Will Insurance Cover California Wage and Hour Class Actions?

There is a strong possibility that wage and hour class actions may be covered under many Employment Practice Liability (EPL) or Directors and Officers Liability (D&O) policies. In a pending coverage action in the Central District of California, *Professional Security Consultants, Inc. v. United States Fire Insurance Co.*, No. CV 10-04588 SJO (SSx), 2010 WL 4123786 (C.D.Cal. Sept. 22, 2010), the court recently denied an EPL insurer's motion to dismiss a complaint where an employer sought reimbursement for costs to defend and settle a California wage and hour class action. Although this ruling is not contained in a published decision, it provides employers with potentially compelling arguments in pressing for insurance coverage in wage and hour class actions.

Case Background

Employees of Professional Security Consultants (PSC) filed a wage and hour class action alleging PSC violated various California Labor Code provisions by, among other things, disseminating false information concerning wage and hour policies and failing to pay overtime. PSC tendered the class action to its EPL insurer, United States Fire (US Fire). When US Fire denied coverage, PSC brought suit to enforce its rights under the policy. US Fire moved to dismiss the coverage action on the basis that its policy's Fair Labor Standards Act (FLSA) exclusion barred coverage "for violations of the responsibilities, obligations or duties imposed by…the FLSA…or similar provisions of any federal, state or local or foreign statutory or common law." The court denied the motion to dismiss on the grounds that the FLSA exclusion was not broad enough to cover the misrepresentation and other allegations related to the wage and hour violations.

More Support for an Insurer's Duty to Defend Wage/Hour Actions

Another California court reached a similar conclusion in rejecting a D&O insurer's attempts to deny coverage in a wage and hour class action. In *California Dairies, Inc. v. RSUI Indemnity Co.*, 617 F.Supp.2d 1023, 1048-1050 (E.D. Cal. 2009), the court held that the exclusionary FLSA language in the D&O policy at issue did not bar all types of wage and hour claims. The Court noted that the FLSA exclusion in the policy (which also excluded claims based on other provisions similar to the FLSA) did not encompass many California Labor Code provisions which are not found in the FLSA, such as the requirement to provide itemized wage statements, reimburse employees for costs, and timely pay wages at termination to avoid the imposition of waiting time penalties. The D&O insurer, therefore, had a duty to defend despite the policy's "wage and hour" exclusion.

Best Practice Tip for Employers

Employers should always tender employment-related claims to their insurance carriers, even if they involve allegations which directly or tangentially concern wage and hour matters. If a carrier denies coverage, employers are well-advised to seek the assistance of experienced counsel to help press for coverage.
For any questions regarding how these court rulings may affect the status of any current wage and hour class actions your company may be defending, or for questions regarding settled claims where insurance coverage was denied, please contact Rebecca Aragon, chair of the Labor and Employment Practice in Los Angeles.
