Wage and Hour Collective Actions Against Employers Continue to Grow

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As has been underscored at recent Williams Kastner Labor and Employment Practice Group seminars and in articles, the economic downturn has led to an explosion of wage and hour actions by plaintiffs' attorneys. Here are some recent developments in the wage and hour area.

Independent Contractor Status. The primary focus of litigation has been alleged misclassification of independent contractors. Federal agencies and even state legislatures have taken action to correct alleged abuses in this area. All are watching the effort by the International Brotherhood of Teamsters to organize Federal Express ground drivers by attacking their independent contractor status. In early 2009, the Northern District of Indiana granted a class action status to current and former drivers in eight states, while class certification was denied in four other states. In March 2009, a Washington Superior Court jury determined that a class of Federal Express ground delivery drivers were independent contractors and therefore were not due overtime. These decisions have led to interest in both federal and state legislation in this area since the independent contractor status is seen as a major hindrance to union organizing, and also a significant loss to state coffers relying on workers compensation and unemployment compensation premiums from employers.

Meal and Break Periods. The federal Department of Labor continues to focus on unpaid breaks and mealtimes during which employers are required to work. On December 8, 2009 the Department of Labor announced that 4,000 nurses at Missouri health care facilities were to receive a total of $1.7 million in back pay. The Department of Labor deemed the employers liable for the unpaid meal breaks since nursing employees were carrying hospital phones while on meal breaks and accepting calls in contravention of employer policies that phones were not to be carried during meal breaks.

In January of 2010, the Ninth Circuit Court of Appeals, with jurisdiction over Washington, ruled that the United Steelworkers' were wrongfully denied class certification of a putative class of refinery workers in their meal break theory case of *United Steel v. ConocoPhillips*. The union alleged that that refinery operators were required to stay with their work units during meal periods, were required to respond to work calls during breaks and that the breaks therefore constituted compensable "work time." The lower court had denied class action certification based on the absence of assurances that the union could prove that the putative class members were "on duty" and therefore that the meal break theory "predominated" over individual issues. In reversing, the Ninth Circuit ruled that this determination related to the merits of the union's claim and was inappropriate for the class certification inquiry.

Donning and Doffing. Donning and doffing cases continue to crop up, and in a recent federal Court of Appeals case out of Wisconsin, the Court held that time spent donning and doffing work clothes and personal safety items and in showering at the end of shifts was not

compensable. In *Musch v. Domtar Industries, Inc.*, the Seventh Circuit Court of Appeals similarly held that the employees' acts of changing clothes and showering at the conclusion of the day were not "integral and indispensible" to their employment since this conduct was totally voluntary on the part of the employees. One of the issues was whether alleged employee exposure to chemicals required the changing of work clothes and taking of showers. The Court determined that widespread chemical exposure was not established, and that the plant had a policy of compensating employees for time spent showering and changing clothes in the event of exposure to hazardous substances while working. The Court therefore upheld a summary judgment in the employer's favor.

Class action status was denied in a donning and doffing case in Michigan but granted in Arkansas. The denial of class certification by the Michigan court was based on plaintiffs' failure to demonstrate that the workers were subject to a single policy proscribing the treatment of time spent donning and doffing protective equipment as "work time." Indeed, the Court pointed out that a written policy expressly defined the start of the work day as the time when workers began to put on their personal protective equipment ("PPE"), and that they should not commence this activity until the beginning of their scheduled shifts. Plaintiffs had alleged that the written policy was not complied with, and that employees and supervisors were expected to show up at their work stations at the commencement of the shift, having already put on the PPE. However, the Court determined that the policy in conjunction with inconsistent deposition testimony undermined plaintiffs' ability demonstrate a consistent and common policy sufficient to support class certification.

However, a class was certified in an Arkansas donning and doffing case involving Butterball LLC since, according to the Court, the employees were subject to a common company policy involving nonpayment, despite the fact that the class members were subject to two different payment schemes involving different compensation policies for donning and doffing.

Exempt Status. Finally, a California decision entitled *Russell v. Wells Fargo*, underscores the danger of misclassification of exempt status. In that case, computer engineers and technicians were determined to be non-exempt employees due backpay for unpaid overtime. Wells Fargo argued that, under the so-called "fluctuating work week" overtime formula, the successful plaintiffs were merely due one-half their effective hourly rate for each hour over 40, having already been paid straight time for all hours worked under the fluctuating work week theory. Thus, if the computer technician worked 60 hours, his or her effective rate would drop dramatically from that calculated by awarding 40 hours per week, and the resulting overtime calculation would also drop. Wells Fargo's argument was based, in part, on favorable Department of Labor opinion letter issued in January of 2009. However, the Court rejected Wells Fargo's argument and determined that the "fluctuating work week" methodology only applied when the employer and the employee had a clear understanding that it would apply. In this case, the workers were misclassified as exempt and therefore no mutual understanding was present. As a result, Wells Fargo was required to pay the full time and one-half for all hours over 40.