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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Rethinking Common Wisdom Of 'Wage And Hour' Insurance

Law360, New York (May 16, 2012, 1:49 PM ET) -- Although a great deal of commentary exists regarding the impact of the Great Recession on many types of litigation, only recently has the surge in wage and hour class action litigation come into focus.

In fact, numerous recent articles have documented the proliferation of high-stakes wage and hour class action litigation: See, e.g., Paul Davidson, Overworked and Underpaid, USA Today, Apr. 16, 2012; Wage-And-Hour Litigation Outpacing All Other Workplace Class Actions, Business Insurance, Apr. 2, 2012; Shannon Green, Wage and Hour Litigation is Big — and Getting Bigger, Corporate Counsel, Mar. 19, 2012.

In addition to the recession, the increase in such lawsuits is primarily driven by:

1. Technological advancements allowing work from remote locations;
2. The continued potential for large recoveries and attorneys' fees;
3. A relatively easy class certification process as compared to discrimination cases; and
4. Divergent state and federal labor laws that permit plaintiffs to pursue claims on a variety of theories.

See, e.g., Paul Davidson, Overworked and Underpaid, USA Today, Apr. 16, 2012 (discussing impact of proliferation of mobile devices).

Although the best strategy to avoid a devastating wage and hour class action is to carefully review your employment practices with a qualified attorney, an often overlooked component of a company's protection from the financial consequences of such a claim is its insurance policies.

To ensure the best protection, any employer should consider carefully, with the help of a professional if necessary, the specifics of its insurance policies and how they are likely to respond in the event of such claims.

Coverage Analysis

Most employers routinely purchase employment practices liability (EPL) insurance policies or, particularly with private companies, directors and officers liability (D&O) insurance policies that include EPL coverage.

Although both of these types of policies typically contain broad definitions of "loss," and the companies that purchase them likely expect coverage for wage and hour claims, insurance carriers often assert that the policies do not provide coverage for these claims.

Insurers typically rely on two principal arguments. First, insurers assert that the underlying claims do not constitute "loss," or seek only uninsurable restitution. Second, insurers typically contend that coverage is barred by the Fair Labor Standards Act (FLSA) exclusion, which bars coverage for "alleged violations of the Fair Labor Standards Act ... or any similar federal, state or local statute."

Companies, however, should not accept these insurer contentions without a careful evaluation of the specifics.

First, as with all insurance coverage issues, the specific language of the policy matters. As stated above, insuring agreements of EPL policies are typically broad in scope and plaintiff lawyers usually assert multiple claims and broad allegations. If even a single such claim or theory is within the scope of coverage, the employer may be entitled to partial or complete coverage of the lawsuit.

Moreover, several judicial decisions in recent years have cast doubt on insurers' efforts to apply their principal arguments on a wholesale basis. For example, in SWH Corp. v. Select Insurance Co., the California Court of Appeals denied the insurers' request for summary judgment on the issue of whether the amounts sought in a wage and hour case were "restitution," or not "loss," under the policy.

The court determined that SWH had suffered a covered "loss" as defined by the policy and that whether SWH's "loss" constituted uninsurable restitution was an issue of fact.

In reaching this conclusion, the court acknowledged that "[t]he line between damages and restitution is often fine or invisible ... [The narrow type of uninsurable relief is only] restitution of property or money obtained by criminal, willful, or fraudulent conduct, and/or restitution that is punitive in nature."

The SWH court also found that the underlying allegations of wage and hour violations that were the basis of SWH's claim of "loss" did not come within the policy's FLSA exclusion because the FLSA exclusion was ambiguous and, therefore, should be construed in favor of the insured.

More recently, in California Dairies Inc. v. RSUI Indemnity Co., 617 F. Supp. 2d 1023 (E.D. Cal. 2009), the court found that the policy's FLSA exclusion applied to some, but not all, of the allegations against the company. Specifically, the court found that the FLSA exclusion did not apply to the following claims:

1. Failure to reimburse employees for costs related to uniforms;
2. Failure to comply with itemized wage statement requirements; and
3. Failure to pay wages due at termination.

Finally, it is important for employers to be aware that the insurer's duty to defend is broader than its duty to indemnify for judgments or settlements. As such, even if it is determined that an insurer is not ultimately obligated to indemnify its insured for an underlying wage and hour claim settlement or judgment, the insurer may still be obligated to cover defense costs.

Given the substantial defense costs associated with class action wage and hour litigation, coverage for defense costs is often a significant recovery and is certainly better than no coverage.

Proactive Measures

Regardless of whether a company has been named in a wage and hour lawsuit, there are several steps that all risk management and legal departments can take to put their companies in the best possible position to avoid such claims and potentially secure insurance coverage if and when the need arises.

First, evaluate corporate policies and operations that may impact wage and hour issues in an attempt to prevent claims in the first place. For example, some companies have instituted policies requiring certain employees to leave firm-issued wireless devices at the office so that these employees are unable to work from remote locations when they are not on the clock.

Second, collect, organize and safeguard all of the company's policies. This process should include an effort to identify, and obtain, if possible, policies issued to other pertinent companies, such as predecessors and current or former affiliates of your company.

Third, consider involving outside coverage counsel to audit the organization's current insurance portfolio to confirm that the company has the most complete and cost-effective coverage available

to it for these types of claims.

Fourth, if the company becomes aware of facts or circumstances that may give rise to a wage and hour claim, or is served with a wage and hour lawsuit, the company should give notice promptly to all of its liability insurers, absent any relatively rare, case-specific circumstances that may justify refraining from giving such notice.

Because certain actions that the company takes at the outset of litigation and throughout its defense may bear on the ultimate likelihood of recovering insurance proceeds, it may benefit the employer to involve coverage counsel from the outset.

Finally, in the event that an insurer does deny the company's claim, do not take those denials at face value, and seek an independent review of the carrier's position.

Conclusion

The coverage provided by insurance policies for wage and hour class action lawsuits can be an extremely valuable corporate asset, even if such policies provide coverage only for defense costs associated with such claims. Companies can maximize the benefits of this asset by acting proactively now, and by being willing to question, and challenge where appropriate, coverage denials from their insurers.

--By Barry Buchman, Kami Quinn and Jason Rubinstein, Gilbert LLP

Barry Buchman and Kami Quinn are partners and Jason Rubinstein is an associate in Gilbert's Washington, D.C., office.

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