AVOIDING (OR AT LEAST RIDING) THE TIDAL WAVE OF WAGE & HOUR COLLECTIVE ACTIONS

Denise K. Drake
Spencer Fane Britt & Browne LLP

It's no joke – the tidal wave of wage and hour collective actions is headed directly toward your company. Fair Labor Standards Act claims brought by groups of employees now outnumber all other types of employment class action claims. In fact, they outnumber all other types of employment class actions combined.

Plaintiffs' attorneys are not dumb. They've seen the statistics associated with the wage and hour collective action lawsuits and settlements. The media certainly has not helped employers in this area. There have been a number of articles about collective actions in the Wall Street Journal, New York Times, Kansas City Business Journal, and other business publications. The Internet, of course, also plays a part in the proliferation of these lawsuits as information dissemination and gathering now occurs at lightening speed world wide. Collective actions are the easiest to file, and most financially rewarding lawsuits, available for plaintiffs and their lawyers today.

It also doesn't hurt that the Fair Labor Standards Act is one of the most often misunderstood and misapplied laws in the employment area. Even though this law was originally passed in 1938, modified slightly over the years, and re-interpreted recently by the Department of Labor to make compliance "easier," accidental errors and easy target areas for employee abuse abound.

And, collective actions are by no means cheap to defend. The process is complex, easy for plaintiffs to navigate, set-up to encourage many employees to join the action, and an incredibly inefficient in a way only the government might have created. Estimates of attorneys' fees associated with the defense of these actions range from $350,000 to well over $1 million.

Employers must take action now to avoid, or at least be prepared to safely ride, the collective action tidal wave when it hits. There are many different proactive steps an employer might take to help minimize the potentially devastating effects this wave may have, limited only by the creativity of the company's executives, in-house counsel, and human resources professionals.

COLLECTIVE ACTIONS

A class action is a court mechanism that can be used to provide relief to many different employees for the same wrong. There are strict rules that must be met for a lawsuit to qualify for class action status. One very important rule is that the proposed class must have common interests, legally and factually. Given the naturally disparate nature of the employment relationship (employers certainly know "one size does not fit all" when it comes to employee situations), it is not easy for plaintiffs to get a class action employment lawsuit certified. The stringent rules governing class actions help protect employers (and society[1]) against spurious claims and plaintiffs' attorneys who simply want to push employers into settlement by asserting class action claims.

When a class action is certified, all employees who fit within the defined class are deemed to be part of the plaintiff class. All employees are notified that they are "in the class." Individual employees may affirmatively "opt-out" of the pool of plaintiffs when they receive this notice, and pursue their own claims separately. If an individual employee does not opt-out, he or she is deemed to be part of the class and all of the decisions made on behalf of the class are made on the individual's behalf.

Collective actions are in some ways a mirror image of class actions. The rules to get a collective action conditionally certified have been applied leniently by the courts. Plaintiffs are typically only required to demonstrate that they are "similarly situated" to the group they wish to represent. And, courts have interpreted the similarly situated standard in an almost ridiculously over-inclusive manner. Indeed, in some instances it appears simply having the same job title might be enough to be similarly situated, regardless of the differences existing between the employees actually holding the job. Realistically, there are very few protections for employers at this stage.

Once a court conditionally certifies a collective action, the plaintiffs get to send out a notice to all the employees the court deemed similarly situated. You might think of this notice like a money party invitation – "come join the fun, free money at the end." Each invited person can "opt-in" (join) the action by completing and sending in a basic form.

AUDIT

EXEMPT CLASSIFICATIONS

Each job classified as "exempt" from overtime requirements should be reviewed at least annually to make sure the job continues to meet all of the requirements for qualifying as an "exempt" position.

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[1] Many forget that the costs to employers are normally passed from the company to society through increased pricing, cuts in service, and other cost-saving / revenue-increasing acts.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

Section 13(a)(1) of the FLSA, however, provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

To qualify for the **executive employee exemption**, all of the following tests must be met:

1. The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

3. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

4. The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

To qualify for the **administrative employee exemption**, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

To qualify for the **learned professional employee exemption**, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

3. The advanced knowledge must be in a field of science or learning; and

4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional employee exemption**, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;\

2. The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

To qualify for the **computer employee exemption**, the following tests must be met:

1. The employee must be compensated **either** on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week **or**, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

3. The employee's primary duty must consist of:

    a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

    b) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

c) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

d) A combination of the aforementioned duties, the performance of which requires the same level of skills.

To qualify for the **outside sales employee exemption**, all of the following tests must be met:

1. The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

2. The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

NON-EXEMPT PAY PRACTICES

Keeping accurate records of all hours worked is critically important in this collective action atmosphere. Employers should review and audit their timekeeping systems at least once a year. Employers should run and review exception reports to look for anomalies in the time keeping system. Finally, employers should ask their employees how the system is working, if any changes are needed, etc.

SHOW "GOOD FAITH"

In the Portal-to-Portal Act, Congress created two employer defenses against allegations that an employer willfully violated the FLSA. These defenses are commonly referred to as the "good-faith defenses."

Section 10 of the Portal-to-Portal Act provides an absolute defense to FLSA minimum wage and overtime claims. This defense is available only when an employer proves it took or failed to take a particular action because, in good faith, it applied a written administrative regulation, ruling, approval or interpretation of the DOL's Wage and Hour Administrator or any administrative practice or enforcement policy of the administrator.

The purpose of Section 10 is to protect employers who rely in good faith on the Wage and Hour Administrator's mistaken or invalid interpretation of the FLSA.

Successful Section 10 defenses are exceedingly rare. When successful, however, it is a complete bar to liability.

The **Section 11** good-faith defense allows a judge to reduce or eliminate an award of liquidated damages if the employer shows that its actions were taken in good faith and that the employer had "reasonable grounds for believing" its actions did not violate the FLSA.

If a jury finds an employer guilty of a willful violation during the liability phase of a trial, the employer probably will not be able to establish its good faith during the remedies phase of the trial. If, however, willfulness was not established earlier for statute of limitations purposes, an employer still has an opportunity to avoid liquidated damages at the judge's discretion.

The Section 11 good-faith defense is not a complete bar to liability and is far more subjective.

Under Section 11, an employer must prove both that its actions were taken in good faith and that the employer had an objectively reasonable basis for believing that its actions did not violate the FLSA. Good faith alone will not prevent a court from imposing liquidated damages. In fact, a number of courts have warned that unless an employer can establish both elements of the defense, liquidated damages awards will be the norm, and single damages the exception.

Specifically, a number of courts have found that an employer's failure to investigate its FLSA obligations can establish a willful violation and prevent an employer from establishing that there was a good-faith basis for its actions. For example:

- There was no good-faith defense available when human resources failed to consult with the in-house legal department.
- A plaintiff was awarded liquidated damages when the employer failed to introduce evidence that it had taken steps to evaluate its FLSA compliance or that it had sought expert advice regarding its classification of the plaintiff as an independent contractor.
- An employer failed to establish a good-faith defense where the employer had not considered one of the required elements of an overtime exemption, suggesting that the employer's review of the position's description and the regulations was seriously lacking.

An employer that fails to take steps to determine its FLSA obligations or to ensure its continued compliance with the law may accidentally undermine the company's ability to defend itself against the extended three-year statute of limitations as well as an award of liquidated damages.

Ignorance, even when well-intended, is not a defense to liability. "[A] good heart but an empty head" does not satisfy an employer's burden to establish it has acted in

good faith for purposes of this defense." *Walton v. United Consumer's Club*, 786 F.2d 303, 312 (7th Cir. 1980).

Reported decisions suggest that employers can rely on a number of factors to establish a Section 11 good-faith defense. For example, several courts have found that an employer may consult with a DOL investigator or attorney, receive incorrect advice, and establish it acted in good faith.

An employer that stays current on FLSA developments by attending, studying the relevant statutes and regulations, contacting the DOL for compliance assistance, and periodically reviewing its payroll practices, generally may be found to have acted in good faith even when they were mistaken about the lawfulness of their practices.

HIRING

Before an employee is even hired to fill a position, companies can do many things to make sure their pay practices are appropriate.

As mentioned above, the job to be filled should be re-evaluated to make sure it is appropriately classified as exempt or nonexempt. Job descriptions should explain the company's expectations for the employee in relation to the classification.

For example, an exempt employee's job description might explain:

> Store managers are expected to focus most or all of their energies on managing the workplace and our employees. Store managers are expected to work the number of hours necessary to effectively manage the store. Time doing the jobs of other employees or engaging in menial tasks is prohibited; managers must manage.
>
> All managers must closely monitor the proper recording of hours worked by hourly employees. It is illegal for any employee to work and not be paid for all of the time he or she worked. Any person encouraging, permitting, or failing to accurately monitor the proper recording of all hours by hourly employees is subject to disciplinary action, including the termination of employment.

Alternatively, for hourly employee job descriptions:

> Stockers are expected to be honest in all aspects of their employment, including the recording and reporting of <u>all</u> hours (even minutes) worked. It is illegal for any employee to work and not be paid for all of the time he or she worked. The company cannot pay any employee properly

> unless the employee records you his or her hours properly. Absolutely no one is authorized to request, suggest, encourage or require any employee to work without pay.

The interview process is another way to weed out people who may not want to follow the company's wage and hour rules. Asking employees about their past behaviors is a terrific way to bring this issue to the forefront.

For example, for managers:

> Have you ever allowed any employee reporting to you to work off the clock?
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> Have you ever worked as a manager, but spent most of your time doing manual labor instead of managing? Why? What were you doing? How might you have fixed this issue so you could have spent more time managing as intended? Etc.
>
> What would you do if you suspected an employee did not record all of the hours he or she worked one day?

And, for hourly employees:

> Have you ever worked for an employer but not clocked in to record all of the time you spent working? Do you understand that we do not allow any one to work "off the clock"?
>
> What would you do if a manager suggested that you work, but not properly record, all of the hours you worked?

JOB OFFERS

Once an employee is hired, but before the employee reports for duty, an employer can focus the employee's attention on its policies. Consider stating in the employee's offer letter that the employee will be expected to accurately record all hours worked, to report violations of the time keeping policy, etc. Tell managers that they will be expected to ensure that all employees are accurately recording all of their hours worked. The emphasis on accurate reporting should be made is a more serious and heavy-handed manner than admonitions to not allow overtime.

ORIENTATION

During orientation, all pay practice policies should be reviewed. Employees should sign a statement acknowledging their commitment to following all of the companies' pay practice policies.

SAFE HARBOR POLICIES

Employers should make sure that all of the safe harbor policies available to them are set up properly. The DOL fair pay website is very helpful, providing step by step instructions for setting up and enforcing such policies.

INTERNAL REPORTING PROCEDURES

An internal reporting system should be in place for employees to report time keeping violations or problems. The internal reporting procedure should emphasize that retaliation will not be tolerated. An internal reporting procedure, requiring notice to a particular person or group of people, is critical.

HOURS RECORDS

Employers should have employees verify each workweek that all of the hours they recorded for the week are accurate. Employers might consider circulating a monthly time report to each employee, asking the employee to re-verify that all of the hours recorded are accurate.

Supervisors and managers should look at all time records to make sure they look accurate. Many clock-in and -outs might be cause for investigation. Too few, likewise, might demonstrate that a problem exists.

PERFORMANCE REVIEWS

Part of the performance review process should allow the employee to provide affirmative information about their experiences during the past year. Ask nonexempt employees if they worked any hours off-the-clock in the past year; Have the hourly employees affirmatively state they have not. Ask exempt employees certain questions geared toward making sure their positions continue to

TRAINING

As with all other important human resources and management issues, the exempt and nonexempt categories, expectations of the company, etc., should be the subject of "training." What constitutes training, of course, is a broad concept, limited only by the imagination and resources.

PERIODIC COMMUNICATIONS

From time to time, the company should remind employees about its time keeping policy. A letter to all employees from the CEO, sent to all employee homes, and perhaps requiring a return form be signed by the employee are alternatives to make sure everyone is reminded of the importance of accurate time keeping, appropriate handling of the jobs, etc.

POST-EMPLOYMENT

In an exit interview or otherwise, employees should be asked about any problems they may have experienced, including off-the-clock or otherwise problematic work activities.

CONCLUSION

Employers can avoid (or at least ride) the collective action tidal wave with a little organization, focused attention, and creativity. Putting a plan together today will pay off by the thousands in the future.