Hybrid FLSA Collective Actions and State Wage and Hour Class Actions: 
Navigating the Complexities of Opt-In Collective Actions and Rule 23 Opt-Out Class Actions

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Overview

- Recent class and collective action trends and case law developments.
- Overview of Procedural Requirements for Certification Under the FLSA, Rule 23 and state law analogs to Rule 23.
- Litigation strategies, including considerations for litigating hybrid cases.
Class and Collective Action Trends

- Class and/or collective action lawsuits present a significant liability risk for employers and continue to rise as the plaintiffs’ bar seeks to involve the largest possible number of claimants to increase the return on investment and total “value” of a case.

- Federal courts in most states have experienced increases in the number of FLSA lawsuits filed, with the largest increases concentrated in a few states, including Florida, New York and Texas.
Continued Trends

- The number of FLSA class actions decreased from 8,954 filings in 2015 to about 8,300 filings in 2016.
- In 2016, conditional certification was granted approximately 75% of the time (or in 147 of 195 rulings).
- In 2016, the plaintiff’s bar was less successful at beating decertification motions, with about a 55% success rate.
- The largest workplace class-action settlements brought in nearly 30% less money for workers in 2016 compared to 2015.
- However, wage-and-hour settlements were more successful in 2016 than in 2015 (10 largest settlements $700 million versus $460 million).

2011
- DHL Express
- Cin-Lan Inc.
- Dick's Sporting Goods
- Partners Health
- Tyson Foods
- CVS Caremark
- Oracle
- JP Morgan
- Spearmint Rhino
- Family Dollar
- ConocoPhillips
- HSBC
- Robert Half
- City of NY
- H&R Block
- Merrill Lynch
- Old Republic
- Merrill Lynch
- Roto-Rooter
- 24 Hour Fitness
- AT&T
- Rite Aid
- Merrill Lynch
- Ecolab Inc.
- Tata Consultancy
- Novartis
- Wells Fargo
- Verizon
- J.P. Morgan
- Kindred Health
- Schneider Logistics
- Walgreens
- City of LA
- Brinker
- Uber
- FedEx
- FedEx

2016
- Children's Place
- Ecolab
- Lyft
- 0
- 50
- 100
- 150
- 200
- 250
- 300
- In Ms of $
Continued Trends

- Decrease in federal court filings not necessarily reflective of decrease in claims:
  - State court filings are up due to pre-suit resolutions and, even in contested cases, ability to rely solely on state law (CA and now NY);
    - Importance of the FLSA claims and the availability of the collective mechanism varies from case to case
  - Arbitrations are up (as discussed below)
Case Law Developments


- **Issue**—whether it was proper to allow the jury to use representative evidence to establish liability for the class.

- **Holding**—affirms use of representative evidence in this case (based on Mt. Clemens Pottery).

- Declines to issue any broad categorical rules governing the use of representative evidence.
  
  - “Whether a representative sample may be used to establish class-wide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action.”
Case Law Developments

- **Spokeo, Inc. v. Robins**, 194 L. Ed. 2d 635 (U.S. 2016)

  **Issue**—whether a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke federal court jurisdiction, is conferred with Article III standing merely because he or she alleges a technical statutory violation.

  **Holding**—a plaintiff must show that they suffered from an actual injury, not just a “bare procedural violation” in order to sue in federal court.

  The Court reaffirmed that the first element of Article III standing, i.e., an “injury-in-fact” requires a plaintiff to allege that an injury is both “concrete and particularized.”
Case Law Developments

- **National Labor Relations Board v. Murphy Oil USA** (No. 16-307), **Epic Systems Corp. v. Lewis** (No. 16-285), and **Ernst & Young LLP v. Morris** (No. 16-300).

- **Issue**—whether an agreement to arbitrate disputes containing a class and collective action action waiver violates the National Labor Relations Act.

- Resolution of circuit split.

- The Court reaffirmed that the first element of Article III standing, i.e., an “injury-in-fact” requires a plaintiff to allege that an injury is both “concrete and particularized.”
Under 29 U.S.C. § 216(b), courts generally recognize that plaintiffs may not proceed collectively with other non-party employees, until they establish that they should be permitted to do so as a “collective action.”

Two competing standards within the Circuits for certification of the collective:

- First, non-traditional, approach: “Similarly-situated” determined based on Rule 23(a) (i.e., class action) factors and typically occurs after some discovery has taken place.
- Second, more common approach: Two-tiered approach involving a first stage of conditional certification and then a second stage of potential decertification.
Regardless of the collective action certification standard applicable in the Circuit, judges have broad discretion in presiding over collective actions, guided only by a handful of Supreme Court decisions. See generally *Hoffmann-La Roche v. Sperling*, 493 U.S. 165 (U.S. 1989). This discretion includes:

- Certification motion practice;
  - Both initial “conditional” certification and later motions for “decertification”
- Scope and nature of discovery;
- Scope and timing of summary judgment.
Rule 23 Class Actions

- While Courts have discretion to manage class actions as well, Rule 23 contains more specific requirements, with a plaintiff needing to satisfy the four requirements of Rule 23(a) and one of the three requirements of Rule 23(b).

- The four requirements of Rule 23(a):
  - Numerosity = individuals who would comprise the class must be so numerous that joinder of them all into the lawsuit would be impracticable.
  - Commonality = there must be questions of law and fact common to the proposed class.
    - Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011): A “common” issue is one that is “capable of class-wide resolution – which means that determinations of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.”
  - Typicality = the claims and defenses of the named plaintiffs must be typical of the claims and defenses of the putative class members.
  - Adequacy = the named plaintiffs and their counsel must be capable of fairly and adequately protecting the interests of the class.
Once a plaintiff satisfies the four requirements of Rule 23(a), she must satisfy one of the three requirements of Rule 23(b).

- Note: In employment cases, a plaintiff typically establishes class certification under Rule 23(b)(2) or 23(b)(3).

- Rule 23(b)(2) = A class should be certified if the party opposing certification “has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”
Rule 23 Class Actions cont’d

- Under Rule 23(b)(3), “(1) common questions must **predominate** over any questions affecting only individual members; and (2) class resolution must be **superior** to other available methods for the fair and efficient adjudication of the controversy.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

- *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (noting that unlike in Rule 23(b)(2) actions, each class member in a Rule 23(b)(3) class action for money damages is entitled as a matter of due process to personal notice and an opportunity to opt out of the certified class).
Certification procedures are different under Rule 23 and 29 U.S.C. § 216(b).

Rule 23:
- Rule 23(b)(2): The court’s order binds all members of the class.
- Rule 23(b)(3): Class member must opt-out of the class action (after receiving a class action notice). If she does not do so, she is bound by the judgment.

29 U.S.C. § 216(b): Class member must opt-in to the class before she is bound.
- Note: Opt-in rates tend to range from 10%-30%.
- Scope of opt-in can be uncertain.
Filing of Hybrid Matters- What’s the Appeal?

- Using conditional certification, which has a low threshold for certification, enables plaintiffs’ attorneys to get opt-ins who they can use to aid in their discovery process and to bolster their Rule 23 evidence.

- Increases potential damages:
  - Inclusion of Rule 23 class increases number of class members.
  - Recovery of penalties – statutes of limitations may be longer and there may be additional state penalties.

- Increases fees associated with litigation:
  - For example, parties may have to brief decertification at the same time they are briefing certification of the Rule 23 class.
Initial Case Intake Considerations

- Jurisdiction
- Judge
- Opposing Counsel
- Standing
- Prior waivers with any putative class members
- Arbitration agreement
Strategic Use of Motions to Dismiss or Strike Class Allegations

- Can be extremely beneficial to employers facing class or collective actions.
- Can significantly narrow plaintiffs’ claims.
- May force plaintiffs to plead their claims with more precision.
- May assist in obtaining valuable information to aid in defeating class claims.
Motions to Dismiss


- Under FRCP 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 667-678.
Motions to Dismiss

- Second Circuit – trio of cases clarifying the pleading standard for FLSA overtime claims

  
  
  - *DeJesus v. HF Mgmt. Servs.*, 726 F.3d 85, 90 (2d Cir. 2013).
Three additional Circuits have also adopted a variation of this more stringent pleading requirement:

- First Circuit, see, *e.g.*, *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir. 2012).


Motions to Strike the Class Allegations

- Federal Civil Procedure Rule 23 Requirements:
  - Numerosity
  - Commonality
  - Typicality
  - Adequacy

- A court can strike from a pleading “an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).
Motions to Strike the Class Allegations

- Permissible scope of class discovery will depend in large part on the class definition.

- Benefits to filing a motion to strike the class allegations:
  - Avoid or greatly decrease costly discovery;
  - Narrow the definition of the proposed class;
  - May uncover useful information to assist in defense; and
  - May stay or narrow discovery while motion is pending.

- Downside – courts can be hesitant to grant if the pleading is deemed *Iqbal*-sufficient
As noted above, Courts have a free hand under the FLSA and Rule 23 to set the discovery schedule, including:

- The deadline to move for any type of certification
- The role of dispositive motion practice as to the named Plaintiff(s)
- The timing and scope of discovery as to opt-in Plaintiffs (pre and post-conditional certification) and the absent class (both pre and, as applicable, post-class certification)

This makes the Rule 16 scheduling order (or absence thereof) of especial importance:

- Is the case stronger on the merits, or certification?
- Is bifurcation appropriate? Is it achievable? Certain district judges place the magistrates on very tight schedules in civil cases, without reference to nature of the case.
Certification Discovery

- Voluntary – Pre-Litigation:
  - To provide or not to provide?
  - Scope of data and in what form
  - Confidentiality/attorney’s eyes only
  - Waiver of privileged analyses
  - Use of outside experts
  - Tolling
Certification Discovery

After Litigation Commences:

- Class member releases
- Bifurcation
- Affirmative discovery
  - Plaintiffs’ depositions
  - Blitz declarations
- Off-the-clock cases
Certification Discovery

◆ Response to discovery:
  • Limit discovery regarding absent class members.
  • Limit company-wide fishing expeditions.

◆ Motion practice
  • Move for protective order vs. waiting for motion to compel
What data will you produce to aid settlement effort?

- Class identified data?
- De-identified time records?
- De-identified payroll records?
- Alternative data (swipes, operations data, etc.)?
- Sample data?
- Limit to the opt-ins or other sample?
Historically limited to defense costs – recent industry response has expanded indemnification offerings to include smaller retentions and limits (i.e., moving to middle-market)

Markets Expanding Primary Limits

- As carriers obtain reinsurance, they have become more flexible on size of limits offered
- Some carriers now have up to $25 million in available limits (usually $5 million retention)

Excess Markets Continue to Expand

- 9 of 11 Bermuda EPLI markets now willing to provide excess limits
- 2 Carriers providing capacity out of London
- Domestic markets continuing to trail but some are working on it
Risk Management -- Class Action Waivers

- Unclear whether state or federal law governs interpretation and enforceability, where the Federal Arbitration Act (FAA) is not implicated.
- Not much track record of courts enforcing these agreements.
- We do not recommend relying on enforcement in the courts.
Arbitration Agreements with Class Waivers

- The past 30 years have seen much greater acceptance of arbitration agreements, especially in employment matters.
- The past five years have seen a real focus by the Supreme Court on the interplay of class waivers, arbitration agreements, and state-law hostility to both (Discover Bank rule).
- As noted above, on January 13, 2017, the U.S. Supreme Court granted certiorari in National Labor Relations Board v. Murphy Oil USA (No. 16-307), Epic Systems Corp. v. Lewis (No. 16-285), and Ernst & Young LLP v. Morris (No. 16-300), consolidating them for oral argument.
- Acceptance largely based on FAA doctrine, so availability outside arbitration more uncertain.
Questions?

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