

Strafford

presents

Wage and Hour Collective and Class Claims: The Continuing Litigation Threat

Pursuing, Defending and Settling FLSA Actions as Costs Skyrocket

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

James F. Glunt, Shareholder, **Buchanan Ingersoll & Rooney**, Pittsburgh
Michele R. Fisher, Partner, **Nichols Kaster**, Minneapolis
A. Craig Cleland, Shareholder, **Ogletree Deakins Nash Smoak & Stewart**, Atlanta

Wednesday, March 24, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers.
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**Wage and Hour Collective and Class Claims:
The Continuing Litigation Threat**

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SPEAKERS:

A. Craig Cleland

Michele R. Fisher

Jay F. Glunt

Types of Wage/Hour Class Actions

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- **Misclassification – Exempt v. Nonexempt**
- **Misclassification – Contractor v. Employee**
- **Unpaid Off-the-Clock Work Time**
- **Docking and Other Wage Calculation Issues**

What makes the costs skyrocket?

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- **Class size.**
- **Multiple (“copy cat”) lawsuits.**
- **Consultants/experts often required.**
- **Operational changes may be prudent.**
- **Unusual procedures (FLSA opt-in structure).**

Avoiding the Wage & Hour Action

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- **Treat employees with fundamental fairness.**
- **Stay in compliance with applicable law.**
- **Stay aware and be proactive.**

Starting the Wage & Hour Action

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- Who are the Plaintiffs?
- Where to bring the case?
- FLSA action, state law class action, or hybrid?
- Removal of state court cases to federal court
Hertz Corporation v. Friend, 559 U.S. ___ (2010)
- Affirmative defenses/good faith defense
 - ✦ 29 U.S.C. § 259 Reliance on Administrative Rulings
 - ✦ 29 U.S.C. § 260 Liquidated Damages
- Motions to Dismiss

Is agreement to arbitrate enforceable?

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Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)

- Federal Arbitration Act does not foreclose class arbitration.
- Becomes a question of state law.
- Silence on class arbitration will generally be read to mean the agreement authorizes class arbitration.
- Arbitrator will generally determine whether to certify a class.
- Right to appeal from arbitrator's decision is limited.

To Arbitrate or Not to Arbitrate?

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- **Pros of Arbitration from Plaintiffs' Perspective**

- possibility of a class instead of collective action
- may increase likelihood of settlement due to costs
- moves quickly
- keeps both sides very busy if multiple arbitrations
 - arbitrator strike lists
 - scheduling conferences with arbitrators
 - Prearb submissions for each arbitration
 - briefing
- separate arbitrations mean key witnesses may have to show up for each one (can be a pro or a con)

To Arbitrate or Not to Arbitrate? - Continued

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- **Cons of Arbitration From Plaintiffs' Perspective**
- if class/collective action waiver stands, no conditional certification ruling to get list of employees
- not much discovery
- AAA lack of authority over parties prior to arbitrator being appointed in each case (pre arbitrator issues and issues with keeping cases moving).

To Arbitrate or Not to Arbitrate?

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Pros and Cons from Employer's Perspective

Pros

- Might be more confidential than state/federal court.
- Might move faster.

Cons

- Increased costs if agreement to arbitrate is challenged.
- Increased procedural uncertainty.
- No appellate review.

Issues to Think About When in Arbitration

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- Do you want different arbitrators on each case. Consolidation of any kind?
- Decide where arbitrators are going to be pulled from for all arbitrations. Just the state, or surrounding areas if not a certain number within state with wage & hour experience.
- Reach agreement on what happens if arbitrator selected declines.
- When choosing arbitrators contact attorneys in the area (NELA, defense organizations)
- What kind of discovery do you want? Skip depositions? Damages discovery?
- Whether to submit proposed findings of fact and conclusions of law (more time and costs).
- Whether you want a court reporter.
- Set timeline for arbitrator to render decision and fee award decision.

Issues to Think About When in Arbitration - Continued

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- Do you want to pay for detailed award? Company pays but it results in delay.
- Defendant – even a win can be a loss. Company has to pay arbitration costs, arbitrator time, filing fees, and cost of defense. Often more costly than value of claim. Partial win is usually a loss also.
- Discuss with AAA what happens to filing fees if settled. Pay as you go plan possibility.
- Whether arbitrator has authority to approve settlement
- Have court stay action pending arbitration and retain jurisdiction.
 - Allows court to approve settlement
 - Allows parties to seek help from court prior to arbitration being appointed if necessary.

Employer's Initial Response to Lawsuit

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- Preserve potentially relevant evidence (including ESI) and issue litigation hold order.
- Develop comprehensive defense strategy.
 - ✦ Assert uniformity of practice?
 - ✦ Communicate with putative class members?
 - ✦ Agree to tolling? “No employee shall be a party plaintiff to [an FLSA collective] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” 29 U.S.C. § 216(b).

Employer's Initial Response to Lawsuit (cont)

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- **Assess magnitude of potential class and damages.**
- **Consider operational changes.**
- **Gather evidence to support good faith defense.**

Obtaining or Defeating Certification

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- **Standard for FLSA: 29 U.S.C. § 216(b)**
“An action . . . may be maintained . . . by any one or more employees for and on behalf of himself or themselves and other employees similarly situated.”
- **Usually a two-stage process for FLSA collective action.**
- **District court has authority to conditionally certify an FLSA collective action and facilitate notice to the putative class members.**

Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165 (1989)

Obtaining or Defeating Certification

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- **FRCPP 23 provides standards for class certification under federal law (other than FLSA).**
 - ✦ Numerosity, commonality, typicality, adequacy.
- **Standard for class action under state law**
- **Plaintiffs' strategies for certification**
- **Defendants' strategies to defeat certification**
 - ✦ Show inconsistency across organization.
 - ✦ Use statistics.
 - ✦ Develop individualized defenses.

Obtaining or Defeating Certification

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- **What happens if certification is granted?**
 - Conditional
 - Final

- **What happens if certification is defeated?**
 - Conditional
 - Final

Discovery

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- **Preservation obligation**
- **Personnel files and other confidential information**
- **Use of sampling techniques**
- **Fed. R. Civ. P. 30(b)(6) deposition**
- **Plaintiff depositions**
- **Discovery sought by Plaintiffs**
- **Discovery sought by Defendants**

Settlement Strategies

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- **When to mediate**
- **Choosing a mediator**
- **Figuring out damages for mediation**
- **Which claims should be mediated/settled?**
 - Federal, state, or both?
 - FLSA opt-in plaintiffs only, or a larger class?
- **Rule 68 Offers of Judgment**

A Common Settlement Question

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Employers ask: Can we make them agree not to sue us again (and again and again)?

Rule 5.6 of ABA Model Rules of Professional Conduct

“A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.”

Settlement Checklist

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- Claims made settlement, reversion?
- Identify who is in settlement class.
- Formula for settlement allocations. Maximum gross amount/minimum amount?
- Responsibility for payroll taxes (e.g. FICA/FUTA).
- Service payments for named plaintiffs and those deposed.
- Contingency fund to effectuate the settlement (set aside a small amount in case of errors in allocations and then donate to charity if unused)

Settlement Checklist Continued

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- Who will draft the Notice of Settlement and what will it include generally?
- Content of claim form.
- What is the timeframe for Plaintiffs to accept the settlement or make a claim?
- What happens to those who reject/object to their offer? Dismissal without prejudice?
- What happens to those who are non-responsive? Dismissal with prejudice and donation of funds to charity?
- When are settlement checks void if not cashed?
- Will Defendants notify Plaintiffs counsel of outstanding checks so counsel can contact their clients re cashing them?

Settlement Checklist Continued

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- Include a cooperation clause for reissuing lost/damaged checks.
- When will settlement checks be disbursed. XX days after court approval of settlement?
- How will settlement be classified? Half W-2 as wages, Half 1099 as liquidated damages?
- 1099 to Plaintiffs firm for attorneys' fees.
- Scope of release – limited to overtime/minimum wage claims or broader?

Settlement Checklist Continued

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- **Right to void settlement if certain percentage do not accept.**
- **Who will draft settlement approval papers?**
- **What is the timeline for drafting?**
- **When will the settlement approval papers be filed with court?**
- **No admission of liability provision?**
- **Confidentiality provisions?**
- **Governing law provision?**
- **No solicitation provision?**

Settlement Checklist

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- **Notice pursuant to CAFA?**
- **Use a settlement administrator? Who pays?**
- **Who will pay for mediation?**

In conclusion . . .

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Will this trend come to an end?

New FLSA Actions Filed in Federal Court

1995	1996	1997	1998	1999
1,580	1,558	1,633	1,562	1,717
2000	2001	2002	2003	2004
1,935	1,960	3,904	2,751	3,617
2005	2006	2007	2008	2009
4,039	4,207	7,310	5,393	6,073

Thank you.

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