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IN PRACTICE

CIVIL PRACTICE

Class Actions and the FLSA

Be sure you know how to dance *Lusardi* two-step

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The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., governs multi-party plaintiff "collective" actions under the Age Discrimination in Employment Act, as well as federal claims involving a failure to pay minimum wages or overtime. These collective actions differ in several significant ways from class actions under Fed.R.Civ. P. 23. Not only must additional plaintiffs "opt-in" to participate, as opposed to "opt-out" if they do not wish to be bound, but there are different requirements concerning class certification, different case law concerning class discovery and other issues unique to collective actions.

The collective action is an important mechanism under the FLSA because it empowers a single employee, or just a few, to seek to recover sometimes relatively small amounts from the employer on behalf of themselves and other similarly situated employees. Typical claims include misclassification of employees as independent contractors, wrongfully treating nonexempt employees (those entitled to overtime) as exempt from the overtime laws and taking inappropriate deductions from wages. The number of collective actions filed under § 216(b) of the FLSA has increased significantly in recent years.

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The Certification Process for a Collective Action

The criteria for class certification of a collective action is set forth in § 216(b), which provides that employees may maintain an action for minimum wage violations or unpaid overtime on behalf of themselves and others who are "similarly situated" and who file a form with the court indicating their consent to opt-in to the lawsuit.

Most courts in collective actions brought pursuant to the FLSA follow a two-stage certification process, sometimes referred to as the "*Lusardi* Two-Step," after the case of *Lusardi v. Xerox*, 118 F.R.D. 351 (D.N.J. 1987).

• *Stage One*

In the first stage of the certification process, the court may grant "conditional" certification based on the pleadings and affidavits, if any, by applying a very lenient burden of proof. In the first stage, the court generally determines (1) the contour and size of the group of employees that may be represented and (2) whether the members of the collective action described in the pleading are "similarly situated." Accordingly, discovery at this stage should be tailored to those issues.

If the court grants conditional certification, notification is sent to all employees and former employees within the class period who at least preliminarily are believed to be "similarly situated." The notice advises them of their opportunity to opt-in to the case by filing consent forms. As a result, employees in the first stage are at a distinct advantage over employers, who are adverse to widespread notification to their workforce of alleged violations. However, as noted above, an employee who receives notification must affirmatively opt-in to the case by consenting in writing, as opposed to state wage-and-hour claims initiated pursuant to the state equivalent to Rule 23, where class members are in the case unless they affirmatively opt-out.

Another important distinction between a collective action and a case certified under Rule 23 is that the statute of limitations under the FLSA does not toll until a prospective class member opts in by filing a consent form. It is, therefore, important when bringing a collective action under the FLSA to promptly move for conditional certification so that notices can be mailed and potential litigants are given the opportunity to join the action. In contrast, the filing of a class action complaint under Rule 23 protects even absent class members. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550-51 (1974).

The need to file a consent form with the court under the FLSA before the statute of limitations is tolled often leads to an interesting dilemma. How can plaintiffs' counsel get the atten-

tion of the federal judge to rule on his or her motion for conditional certification when there is a backlog of motions from various cases all waiting for disposition? Similarly, can plaintiffs' counsel simply file additional consent forms from others interested in joining the action (who may have learned about the case from the named plaintiffs or publicity, rather than from any court-ordered notice) to toll the statute of limitations as to them before the court has certified the case?

Employers can defeat conditional class certification but it usually is because representative plaintiffs failed to file sufficient supporting affidavits. An employer can also argue that the named plaintiff(s) and the proposed class members are not similarly situated because they work in separate departments, have separate supervisors and that no unified or company-wide policies are at issue, but this defense to a collective action usually is flushed out in the second stage.

• *Stage Two*

The second stage is the more intensive discovery stage, when courts consider additional information and apply a higher standard to determine if the putative class members are similarly situated. However, the term "similarly situated" as used in the FLSA has not yet been defined. *See Hipp v. Liberty Nat'l Life Ins. Co*., 252 F.3d 1208 (11th Cir. 2001), *cert. denied*, 534 U.S. 1127.

At this stage, courts have significantly more data from greater discovery efforts on which to consider whether certification is appropriate. If the motion to decertify is denied, the case may proceed on a representative basis. If the decertification motion is granted, the claim is decertified and the opt-in plaintiffs are dismissed without prejudice. As a result, the employees' leverage from numerosity disappears.

Courts frequently consider a number of factors at the decertification stage to determine whether the plaintiffs are indeed similarly situated. The inquiry is factually intensive and no single factor is conclusive in the court's determination. Class members who work at the same location, with the same job titles and supervisors under a uniform policy are often deemed similarly situated. *Falcon v. Starbucks*, 580 F.Supp.2d 528 (S.D.Tex. 2008); see also *Zanes v. Flagship Resort Development*, No. 09-3736, 2012 WL 589556 (D.N.J. Feb. 22, 2012). In fact, plaintiffs need *not* demonstrate that they are similarly situated in every respect for class certification, provided they are similarly situated with respect to the FLSA violations they allege. *Winfield v. Citibank*, Nos. 10-CV-7304 and 10-CV-5950, 2012 WL 423346 (S.D.N.Y. Feb. 9, 2012).

Discovery Available

Courts are split as to the extent of discovery to allow in the second stage. Indeed, there are three distinct lines of cases regarding the issue. First, some cases hold that discovery in section 216(b) cases is governed by the discovery principles applicable in Rule 23 cases. *See Krueger v. N.Y. Tel. Co*., 163 F.R.D. 446 (S.D.N.Y. 1995). In Rule 23 cases, courts are permitted to consider the burdensomeness of discovery requests in determining their reasonableness. Thus, courts in this line of cases take into account the burdensomeness of the discovery requested and attempt to fairly tailor discovery requests depending on the size and contour of the putative collective action members. These cases do not permit any discovery from the opt-in plaintiffs, treating them as absent class members in Rule 23 actions. Generally, discovery of absent class members is not available in Rule 23 cases because absent class members are not named plaintiffs in the action.

In the second line of cases, courts recognize that a sampling/representative approach to opt-in class discovery, where the discovery is limited to a certain number or percentage of the opt-in class, is adequate for purposes of the "similarly situated" inquiry. In *Lusardi*, for example, a sample of 51 class members was selected as a microcosm of the entire conditional class of over 1,300 people. See also *Smith v. Lowe's Home Centers*, 236 F.R.D. 354 (S.D. Ohio, 2006); *Bradford v. Bed Bath & Beyond*, 184 F.Supp.2d 1342 (N.D.Ga. 2002).

In the last line of cases, the courts allow individualized discovery of the entire opt-in class for purposes of class certification. However, individual opt-in discovery is granted typically where a court determines that it is "*essential* for a defendant to take individualized discovery of the opt-in plaintiffs to determine if they are 'similarly situated' within the meaning of the FLSA." *See Khadera v. ABM Indus*., No. C08-417RSM, 2011 WL 3651031 (W.D.Wash. Aug. 18, 2011).

Recent Developments

Until recently, courts in the Third Circuit often would not allow both FLSA and similar state law claims to proceed in the same action, concluding that the opt-out procedures governing the state-law claims were inherently incompatible with Congress' intent to require FLSA claimants to opt-in to the litigation. However, as of March 2012, the issue appears to have been decided. In *Knepper v. Rite Aid*, Nos. 11-1684, 11-1685, 2012 U.S. App. LEXIS 6218 (3d Cir. Mar. 27, 2012), the Third Circuit "disagree[d] [with the district court's] conclusion that jurisdiction over an opt-out class action based on state law claims that parallel the FLSA is inherently incompatible with the FLSA's opt-in procedure." In doing so, the court joined "the Second, Seventh, Ninth and D.C. Circuits in ruling that this purported 'inherent incompatibility' does not defeat otherwise available federal jurisdiction." The court also affirmed the portion of the decision below which found that the FLSA did not pre-empt state law.

At first blush, collective actions might appear to be very similar to other class actions. However, a word to the wise: know your dance partner before doing the *Lusardi* two-step. ■