# Wage and Hour Litigation Continues to Snowball

**1/28/2011** By Allen Smith

Employers continue to be besieged by wage and hour collective and class actions, remarked Michael Kun, an attorney with Epstein, Becker & Green in Los Angeles, speaking at the firm's employment law conference in Washington, D.C., on Jan. 26, 2011.

The wave of class actions started with misclassification cases and has spread to meal and rest break cases, with the amounts at stake enormous. Now employers face greater enforcement by the U.S. Department of Labor (DOL), which has launched initiatives guaranteed to increase the number of wage and hour claims in the country, Kun said.

The department's We Can Help Campaign has included public service announcements encouraging workers to notify the department of violations. And its Bridge to Justice Program struck a deal with the American Bar Association to refer claimants to plaintiffs' lawyers when the department decides not to investigate claims itself. Employers typically prefer investigation by the DOL to plaintiffs' lawyers because they do not have to worry about attorneys' fees with the DOL, he remarked.

In the courts in 2010, there was a 10 percent increase from 2009 in the number of wage and hour federal collective actions and class actions, Betsy Johnson, an Epstein, Becker & Green attorney in Los Angeles, commented. Settlements are higher, which is creating the incentive for more litigation, she remarked.

The plaintiffs' bar is getting more creative, as most of the low-hanging fruit has been plucked. Exempt/nonexempt misclassification remains the source of much litigation, not just over store managers but also midlevel managers.

There are more novel off-the-clock claims as well. Nonexempts with BlackBerry devices are a particularly fertile area for litigation, she said. And there has been increased litigation over what should and should not be included in the regular rate.

In addition, Johnson said, she is seeing more hybrid class actions, where claims of action are brought under federal and state wage and hour laws. These cases can cause logistical nightmares for the courts, she noted in conference materials, because of the different class certification standards under federal and state law. Federal claims are opt-in while state claims are opt-out. Some courts have refused to permit both federal and state wage and hour claims to proceed on the same issues.

For example, in *Daprizio v. Harrah's Las Vegas Inc.*, No. 10-80179 (Nov. 3, 2010), the 9th U.S. Circuit Court of Appeals upheld a district court's dismissal of state wage and hour claims that were part of a hybrid complaint. The district court determined that the state law claims could not proceed because of the tension between the opt-in procedure of a Fair Labor Standards Act (FLSA) collective action and the opt-out procedure of a Rule 23 class action.

However, the 7th Circuit has held that plaintiffs could not be prohibited from bringing an FLSA collective action in the same lawsuit as a state law class action in *Ervin v. OS Restaurant Services Inc.*, No. 09-3029 (Jan. 18, 2011).

**Independent Contractor Misclassification**

One DOL regulation on the horizon is the right-to-know initiative, which will require employers to do an analysis of all independent contractors and explain to the workers why they are classified that way, David Barron, an attorney with the Houston office of Epstein, Becker and Green, noted. He said the proposed requirement is almost certain to be released during 2011.
And as states look for more tax revenue, employers can expect more challenges of independent contractor classifications, he predicted.

A joint Labor-Treasury initiative seeks to identify and deter misclassification of employees as independent contractors. The Wage and Hour Division has 90 new employees focusing on misclassification. And the Solicitor of Labor has 10 new employees to pursue misclassification litigation, including multistate litigation.

Barron recommended annual wage and hour audits as a key way to limit liability.

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