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Hospitality Labor and Employment Advisory: Ruling Against Restaurant Underscores Seriousness of Wage & Hour Class Action Epidemic

Two years ago, employees of a New York-based national restaurant brought a collective action against their employer for alleged – and potentially costly – minimum wage and overtime violations of federal wage and hour law. Last week, a federal trial court significantly upped the ante by certifying a class action under New York State labor law for similar claims, plus a claim for misappropriation of servers' tips. The ruling underscores the high-stakes risks restaurants face in New York and across the country as both plaintiffs' lawyers and government investigators devise increasingly aggressive and sophisticated strategies for targeting employers for wage and hour violations.

The controversial "hybrid" class action

The ruling in *Shahriar v. Smith & Wollensky Restaurant Group Inc*. is significant for several reasons. First, in certifying both a collective action under the federal Fair Labor Standards Act (FLSA) and a class action based on state law, the court authorized what is known as a "hybrid" lawsuit. The term "hybrid" refers to the fact that the rules that govern "collective" actions under the FLSA are different from, and largely inconsistent with, the rules that control "class" actions brought in federal courts pursuant to state wage and hour laws.

The most significant difference between the two types of lawsuits is that an FLSA collective action is an "opt-in" suit, meaning that an employee must affirmatively agree to be part of the action. In contrast, class actions brought in federal court to adjudicate claims based on state wage and hour law are governed by Rule 23 of the Federal Rules of Civil Procedure. A Rule 23 class action is an "opt-out" suit, that is, all affected employees are automatically included in the class unless they affirmatively refuse to join the action.

This opt-in/opt-out distinction is critical: research indicates that only about five to ten percent of potential plaintiffs opt into an FLSA collective action, whereas very few people opt out of a Rule 23 class action. Indeed, only 22 of the 172 potential employee-plaintiffs in *Shahriar* reportedly opted into the original FLSA collective action. Moreover, from a practical standpoint, a court presented with a hybrid case has only two options: (1) certify both the FLSA opt-in action and the opt-out class action concerning the state law claims, despite their conflicting procedures; or (2) refuse to exercise jurisdiction over the state claims.

Currently, there is no consensus among the federal courts in New York or elsewhere on which approach is the proper one. The court here decided to certify both types of actions.

Second, the case illustrates the stealth tactics some plaintiffs' lawyers are resorting to in pursuing wage and hour cases. The number of hybrid suits has increased dramatically in recent years, but, typically, the plaintiffs' state law claims are included in the complaint along with their FLSA claims. Here, however, the plaintiffs' lawyers apparently decided to pursue state law claims only after they received a poor response from potential class members to their action under federal law. Thus, after agreeing almost 18 months ago to let the named plaintiffs send out notices of the FLSA lawsuit to other potential plaintiffs – the overwhelming majority of whom declined to join the suit – the employer now risks additional liability to 275 current and former employees who have automatically become plaintiffs with regard to the state law claims

The fact that the court has now certified a class that is roughly ten times larger than that of the FLSA collective action is particularly disconcerting and illustrates just one of the difficulties employers face in defending wage and hour litigation.

There is "an epidemic of wage-and-hour class action lawsuits against Manhattan restaurants in the Southern District of New York"

So wrote the employer in its court filing opposing the class certification. The claim is not hyperbole. In just the last year, one plaintiffs' law firm alone has filed roughly 10 wage and hour collective and class actions against restaurants in the metropolitan New York/New Jersey area. Other firms have been similarly aggressive in the New York area, as well as across the country. As one prominent plaintiffs' counsel has admitted, "this is a good business to be in."

Wage and hour class and collective actions are indeed a lucrative business for plaintiffs' lawyers. Collective actions, in particular, are relatively easy to get certified, at which point the employer often must choose between settling the case, even at a substantial cost, and risking a more costly judgment and its potential for negative publicity. Just last month, for example, one restaurateur settled a wage and hour collective action involving a mere 11 employees for a reported $750,000.

Federal and state labor agencies also are targeting restaurants

In addition to the barrage of employee lawsuits, restaurants are confronting a significant increase in government enforcement efforts. Hilda Solis, Secretary of the U.S. Department of Labor, has warned employers that "there is a new sheriff in town" and has hired hundreds of investigators to pursue FLSA wage and hour violations. Similarly, over the past year, New York State's Labor Commissioner, M. Patricia Smith, has implemented a massive enforcement program which includes unannounced "proactive sweeps" of restaurants by neighborhood and collaboration with unions and community groups to encourage employees to report possible wage and hour violations to the New York Department of Labor. Smith recently warned employers that "this is the future."

Numerous other states as well, including California, Illinois, Massachusetts and Michigan, have stepped up their enforcement of local wage and hour laws and have specifically targeted the restaurant industry and other retailers.

Restaurateurs also should keep in mind that employees, themselves, have become savvier about their legal rights, especially since the advent of the Internet. Along with using the net to find lawyers and government agencies, restaurant workers have taken to airing their complaints on such "vent" websites as Shamelessrestaurants.com, Stainedapron.com and Bitterwaitress.com. In addition to providing a venue for blowing off steam, such sites allow employees to exchange information, get advice and find lawyers.

Restaurants can avoid becoming a target

Many restaurateurs unwittingly violate the law because they rely on age-old industry practices, get caught up in what their competitors are doing and assume that those practices are lawful, and/or do not fully understand their legal obligations. A little knowledge, however, can go a long way in minimizing the risk of becoming the target of a high-stakes lawsuit or government investigation.

In the current environment, restaurateurs need to be proactive in ensuring that their practices with respect to minimum wage, overtime, tip pooling, off the clock work and meal and rest periods meet both federal and state mandates. Restaurateurs also should be aware of their rights with respect to government investigations, as well as the most effective strategies for responding to an investigation or a wage and hour lawsuit.

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