

## Disclosure Of Identities In Employment Class Actions

*Monday, May 19, 2008* --- Identity theft and employment class actions.

Two phenomena of the past decade that would appear to be entirely unrelated – yet identity theft issues may provide employers with a much-needed litigation edge in employment class actions.

As the internet and other technologies have advanced, so too have identity theft concerns.

Many are the individuals who have opened up their credit card bills to find thousands of dollars of purchases charged to them by unknown persons who have somehow obtained their identifying information.

According to reports, as many as 8.4 million Americans were the victims of identity theft in 2007 alone, resulting in more than \$49 billion in fraud.

Concerns about rampant identity theft have led federal and state legislatures to enact a variety of laws, such as the Fair and Accurate Credit Transaction Act ("FACTA"), to protect citizens' information, including protecting credit card and Social Security information from disclosure.

The increase in incidents of identity theft would appear to have nothing whatsoever to do with another trend of the decade – the increase in employment class actions, particularly wage-and-hour class actions and collective actions.

Dozens of these cases are filed each week across the country, alleging that employees have been misclassified as exempt, or have not been paid for all time worked, or have not been provided everything required by federal or state laws, such as meal and rest breaks.

Wage-and-hour class actions are especially appealing to plaintiff's counsel for four reasons:

- 1) they generally do not require proof of intent by the employer to engage in unlawful conduct;
- 2) the burden is generally on the employer to prove it complied with the law, rather on the plaintiff to prove that the employer did not;
- 3) the potential exposure can be great depending upon the number of individuals who may be in the class; and

4) very few wage-and-hour class actions actually proceed to trial.

Most of these cases settle, with plaintiff's counsel receiving large portions of the settlement sum, often for doing relatively little work.

How are identity theft issues related to wage-and-hour class actions, or other employment class actions?

Simply, employee concerns about identity theft may provide employers with an argument against providing plaintiff's counsel with the names and contact information of putative class members prior to class certification.

And, without this information, plaintiff's counsel may have difficulty gathering information to support the plaintiff's motion for class certification.

Indeed, in a proposed wage-hour class action pending before the Superior Court for Orange County, California, the Court denied the plaintiff's motion to compel names and contact information for all putative class members prior to a ruling on class certification.

Unlike employees who work for most other employers, the company's employees had signed forms indicating that they did not want the company to share their contact information with third parties, or only permitting the employer to do so if they were asked on a case-by-case basis and affirmatively authorized the release of that information.

The forms were developed in response to recent California privacy rights decisions and ongoing concerns about identity theft, and are set forth below.

The instructions that the employees had given through these forms allowed the company to argue that, unlike other employers, its employees did not have just a limited expectation of privacy, but instead had a "heightened expectation of privacy" in their contact information.

Bucking a trend by California courts to require employers to provide this information pre-certification, the Court agreed that the unique privacy forms signed by the company's employees demonstrated that they in fact had a "heightened expectation of privacy" in their contact information.

The Court not only denied the plaintiff's motion to compel the names and contact information, but it also denied the plaintiff's counsel's request that employees' names and contact information be shared with them unless an individual affirmatively "opted out" by indicating that he or she did not want that information shared.

The Court reasoned that such a procedure would not adequately protect the employees' heightened privacy rights, concluding that the only employee contact information that the plaintiff would receive would be the information for employees who affirmatively "opted in" and indicated that they wanted their information shared with plaintiff.

Only time will tell whether this form or similar forms will be relied upon by courts to prevent the disclosure of employee contact information prior to class certification in employment class actions.

However, in cases where employers are often perceived to be at a great procedural disadvantage, having the ability to argue that the contact information need not be provided would itself appear to provide employers with some much-needed leverage in these matters.

--By Michael S. Kun, Epstein Becker & Green PC

*Michael Kun is a member of the firm in Epstein Becker & Green's labor and employment practice in the Los Angeles office.*

The following is the form that was relied upon by the Orange County, California Superior Court:

## RELEASE OF CONTACT INFORMATION

From time to time, (the "Company") may be asked to provide your contact information, including your home address and telephone number, to third parties. The Company may be asked to provide such information in the context of legal proceedings, including class action lawsuits.

We understand that many employees may consider this information to be private and may not want it released. Accordingly, please indicate whether you consent to the disclosure of your contact information by marking the appropriate box.

No, I do not consent to the Company's disclosure of my contact information to third parties.

Yes, I consent to the Company's disclosure of my contact information to third parties.

I would like to be asked on a case-by-case basis whether I consent to the disclosure of my contact information to a particular third party, and my contact information should only be provided if I affirmatively consent in writing.

Date

Signature

NOTE: Your response does not create a guarantee that the Company will not release your contact information as circumstances may require or warrant it. For instance, the Company may be required or compelled by law to disclose your contact information, regardless of whether you consent to such disclosure, or it may determine that it must do so should it determine that you

are a witness in a lawsuit or should it be requested by law enforcement officers. In such an event, the Company cannot be held responsible for disclosing this information even if you have not consented to disclosure or asked for a case-by-case determination of disclosure.