Labor/Employment

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Discovery in Overtime Class Actions Often Is Prevented Before Certification

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Since the majority of these actions are filed in - or removed to - federal court, the Federal Rules of Civil Procedure apply. Under Rule 26(f), no discovery may be conducted before the initial meeting of counsel. Most prudent class counsel, however, file a motion for class certification almost immediately after filing the compliant because of the rolling statute of limitations in a Fair Labor Standards Act action. See 29 U.S.C. Section 216(b). In this scenario, the defendant will not be able to propound written discovery or even notice depositions before the hearing date on the certification motion.

Defendants across the nation scream foul. But before employers move their respective legislators for change, it is important to consider the rationale of Section 216(b). The backdrop of classwide notice evolved from essentially two lines of cases implying disparate treatment for class certification in Fair Labor Standards Act collective class actions.

One group treats collective class actions as if they were Federal Rule of Civil Procedure 23 class certifications and applies the stringent "numerosity," "typicality," "commonality" and "adequacy of representation" requirements. *Shushan v. Univ. of Colo.*, 132 F.R.D. 263 (D. Colo. 1990). However, this ignores the more lenient "similarly situated" language of Section 216 of the Fair Labor Standards Act, which mandates a different procedural approach.

Overtime cases under the Fair Labor Standards Act are opt-in, not opt-out, cases. 29 U.S.C. Section 216(b). In these actions, the absent class members must file written consents with the court to opt in and be included in the action. Without the consent, any settlement or judgment does not bind them.

On the other hand, traditional class actions are governed by Rule 23, which provides that all absent class members are automatically part of the action if a class is certified and they do not explicitly opt out.

Different procedural standards are implicated. Indeed, some courts in the 9th Circuit have expressed concern that applying the same certification requirements to collective actions under the Fair Labor Standards Act is inconsistent with the congressional intent in specifically setting up the variant procedure in Section 216(b). See, for example, *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp.2d 1129 (D. Nev. 1999) (noting that the "Section 216(b) requirement that plaintiffs consent to the suit serves essentially the same due process concerns that certification serves in a Rule 23 action").

The second line of cases has a two-step approach to the "similarly situated" inquiry. See, for example, *Monney v. Aramco Servs. Inc.*, 54 F.3d 1207 (5th Cir. 1995) (describing two approaches but declining to endorse either); *Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D. N.J. 1988); *Schwed v. General Elec. Co.*, 159 F.R.D. 373 (N.D.N.Y. 1995) (even where later discovery proves putative class members to be dissimilarly situated, notice before discovery is appropriate as it furthers the remedial purpose of the Fair Labor Standards Act).

The first step occurs at the notice stage, such as a motion for conditional certification to facilitate notice to absent class members. At that time, the courts use the relatively lenient standard of whether the proposed class members are "similarly situated" and conditionally "certifies" the class. *Monney* (describing the process); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996) (observing that "similarly situated" standard is less stringent than that for joinder under Rule 20(a) or for separate trials under Rule 42(b)).

The key is this: The determination of "similarly situated" at the notice stage is made appropriately based on the pleadings and affidavits. *Grayson* (noting that plaintiffs' burden at this stage is not heavy, as they may rely on "detailed allegations supported by affidavits which 'successfully engage' defendants' affidavits to the contrary"); *Ballaris v. Wacher Silttronic Corp.*, 2001 WL 1335809 (D. Or. Aug. 24, 2001) (relying on affidavits and allegations of complaint to find that potential plaintiffs were "similarly situated").

The *Mooney* court describes a second step, if necessary, after the discovery is largely complete. The defendant may then bring a motion for "decertification." The court then has much more information regarding the situation of the plaintiffs who have opted in and whether they are "similarly situated," in fact.

In *Church v. Consolidated Freightways Inc.*, 137 F.R.D. 297 (N.D. Cal 1991), the plaintiffs filed a motion for class certification to facilitate notice in an Age Discrimination in Employment Act class action. Age-discrimination claims brought under the act are subject to the same opt-in mechanisms as Fair Labor Standards Act actions. *Sperling v. Hoffmann-LaRoche*, 493 U.S. 165 (1989).

While opposing the motion for certification, the *Church* defendants argued that the representative plaintiffs were not "similarly situated" because discovery would prove that the putative class members were employed at 112 locations in 74 jobs and left employment on 103 dates.

The defendants also contended that discovery would show that staffing decisions for the merged company were "highly decentralized." Thus, the defendants really argued that, "in determining the scope of the proposed class," the court could not rely simply on the definition of "similarly situated" under the Fair Labor Standards Act.

The court rejected that argument. It held that "the standards governing a conclusive finding of 'similar situation' appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination."

The *Church* court, citing *Sperling*, found that the plaintiffs' allegations alone were sufficient to show that the proposed class was similarly situated because the allegations in the pleadings were "detailed" and the plaintiff "had supported those allegations with affidavits which successfully engage defendant's affidavits to the contrary."

The court noted that "nothing would appear to prevent a court from modifying or reversing a decision on 'similar situations' at a later time in an action as new facts emerge."

Likewise, in *Harrison v. Enterprise Rent-A-Car*, 4 WH Cases 2d 1339 (July 1, 1998), the court authorized notice to current and former management assistants where the declarations of the original and opt-in plaintiffs - together with the allegations in the complaint - suggested that the class was similarly situated with respect to pay provisions and job requirements.

In *Harrison*, the defendants argued that notice was not appropriate because discovery would prove that the range of duties performed by the management assistants was too wide and too varied for the members of such a class to be "similarly situated." The defendants also argued that notice was overbroad and that the class members were exempt employees.

The *Harrison* court disagreed, citing *Mooney* with approval. It remarked that "defendants demand too much of the standard, at least at this stage."

The court wrote, "At the notice stage, the burden on plaintiffs to show that they and potential opt-ins are similarly situated is a 'lenient' one." See also *Hoffman* ("[T]he burden on the plaintiffs is not a stringent one, and the court need only reach a preliminary determination that potential plaintiffs are 'similarly situated.'").

The court pointed out, "Discovery may prove the [defendant's exemption argument] to be the case. Indeed, discovery may prove that plaintiffs and the potential opt-ins are not similarly situated after all, in which case defendants may move to 'decertify' the class."

The point is that subsequent discovery may well prove that the original plaintiffs and the opt-in class members are not, after all, "similarly situated" but that this should not work against the original decision to facilitate notice.

Most circuits view the latter line of cases as persuasive, because it is consistent with the more lenient "similarly situated" requirement and the opt-in process that ensures that only consenting plaintiffs are included in collective class actions. Further, it has been approved in the 9th and 11th circuits. See *Grayson*; *Ballaris*; *Bonilla*.

As such, class and defense counsel should be aware of the somewhat counter-intuitive discovery process in a collective class action, lest they be caught in a certification paradox.

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