The Wage & Hour Collective and Class Litigation Webinar Series for Wage & Hour Blog Subscribers

Drafting the Blueprint: Modeling An Effective & Efficient Defense to Collective and Class Actions
Introduction

• The Wage & Hour Collective and Class Litigation Webinar Series for Wage & Hour Blog Subscribers
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• Today’s initial webinar: Drafting the Blueprint: Modeling An Effective & Efficient Defense to Collective and Class Actions

• Second webinar (May 2): Fighting to Win: Deconstructing Conditional & Class Certification

• Third webinar (June 6): "Winning" the Case: The End Game
Wage & Hour Collective and Class Litigation (Law Journal Press, 2012)

- **Wage & Hour Collective and Class Litigation**
  - Dedicated to substantive and procedural issues critical to effective defense strategies
  - The definitive treatise on this important subject
- Our panelists today are the 3 co-authors, partners
  - Noah Finkel – Chicago Office
  - Brett Bartlett – Atlanta Office
  - Andrew Paley – LA/CC Office
- They were assisted by ~100 Seyfarth Shaw lawyers who were authors of/contributors to the book’s 27 chapters
Drafting the Blueprint: Modeling An Effective & Efficient Defense to Collective and Class Actions – What We Will Cover

• The Wage & Hour Litigation Landscape
• Initial Case Assessment
• Establishing the Business Objectives and Creating the Strategy Aimed at Achieving It
• Benefits & Risks of Early Resolution
• Pros and Cons of Arbitration
• Discovery Concerns -- The Importance of a Plan
Overview of the Wage & Hour Litigation Landscape

[Bar chart showing the number of FLSA cases filed from 1990 to 2011.

- 1990: 1257
- 1993: 1457
- 1996: 1545
- 1999: 1580
- 2002: 1558
- 2005: 1633
- 2008: 1717
- 2011: 1854

Total for 1990-2011: 7006]
Reasons For The Dramatic Increase In Wage & Hour Litigation

- Increased attention to wage & hour laws from regulatory amendments and court decisions helpful to plaintiffs
- Low standard for “conditional” certification for FLSA collective actions
- Ambiguities and inconsistencies in the law result in vulnerability to lawsuits challenging classifications, pay practices, payroll calculations
- Difficulties applying 1938 statute to 21st Century workplace
- Large settlements fuel plaintiffs’ lawyers’ interest (attorney’s fees)
- Liquidated and multiple damages
Predictive Analysis of Future Trends: Where Are We Headed?

• Bad news
  ► Likelihood that wage & hour lawsuits will continue to increase
  ► The number of sophisticated plaintiff lawyers filing wage and hour cases has increased and will continue to increase

• Good news
  ► With appropriate planning and effective implementation of an objective-oriented strategy, employers can optimize their chances of defending these cases at the lowest possible cost and burden.

• Impact of recent Supreme Court rulings
  ► *Wal-Mart v. Dukes* – Made it more difficult for plaintiffs to obtain class certification and should have same effect on collective certification
  ► *AT&T Mobility v. Concepcion* - Increased the chances that arbitration agreements will be enforced on an individual basis
  ► *Christopher v. SmithKline* -- (1) weight, if any, due to USDOL opinions in amicus briefs; (2) scope of outside sales exemption
Initial Case Assessment
Evaluating the Complaint

- **The Basics** – Jurisdiction, Judge, & Plaintiff’s Counsel
- **Plaintiff** – What do you know about him / her?
- **The Law** – FLSA Claim / State Law Claim / Hybrid
- **Factual Grounds** – Are the stated facts sufficient to support the merits claims?
- **Collective / Class Action Allegations** – Too vague to survive? Too broad? Can it be limited to a facility, a state, or a region? Or is it national in scope?
Preliminary Exposure Analysis

• Rough analysis. Not intended to be perfect and detailed

• Key Factors
  ▶ Statutes of limitations
  ▶ Misclassification or “off-the-clock” case
  ▶ Number of workweeks / people at issue
  ▶ Number of hours at issue
  ▶ Rate(s) of pay
Preliminary Exposure Analysis: Statute of Limitations

- **Rule 23** – Applicable statute of limitations tolls as of complaint date

- **FLSA** – Class members’ opt-in dates
  - Plaintiff’s request for tolling
Preliminary Exposure Analysis: Type of Case

• FLSA Misclassification
  ► Time and a half for hours over 40, using 40 as the divisor to determine regular rate
  ► Half-time, using fluctuating hours to determine regular rate (majority of courts use this method)

• Off-the-clock: Time and a half for hours over 40

• Other: Sometimes the time of time and a half has already been paid
Preliminary Exposure Analysis: Number of Workweeks / People at Issue

- Number of workweeks at issue provides the more accurate estimate of exposure.

- Number of people provides a less accurate estimate, but can be discounted based on tenure averages.

- Each will over-estimate unless discounted for weeks when no overtime would be worked.

- USDOL, Wage and Hour Division, Uses 40 weeks out of a 52-week year (or approximately 77%).

- In FLSA cases, opt-in participation rates vary.
Preliminary Exposure Analysis: Number of Overtime Hours at Issue and Employees Rates of Pay

• Number of Hours at Issue
  ▶ Early Stage: Use 2.5, 5, 10, 15 overtime hours, unless more exact estimate is available
  ▶ Later Stages: Determine more accurate estimates derived from data points and discovery

• Employees Rates of Pay
  ▶ Averages are okay
  ▶ Actual is better
Preliminary Exposure Analysis: Example

• Weekly Salary = $800  Average Weekly Hours = 45

• Misclassification Case Using Time and a Half:
  $800/40 = Regular Rate of $20
  $20 x 1.5 = Overtime Rate of $30
  5 x $30 = Weekly Overtime Pay of $150

• Misclassification Case Using Half-Time:
  $800/45 = Regular Rate of $17.78
  $17.78 x .5 = Overtime Rate of $8.90
  5 x $8.90 = Weekly Overtime Pay of $44.50

• Half-Time = Less than a third
Fact Investigation

• Who is the plaintiff?
• What was his / her position?
• What were his / her duties?
• How was he / she paid?
• Where did he / she work?
• Who were his / her supervisors?
• What other factors differentiate him from putative class members?
• How many putative class members are there?
• What are the meaningful factors that actually differentiate each class member from the other?
Document Preservation

• Determine the proper scope of the duty to preserve including what information, systems and persons may be relevant. Consider the following:
  ▶ Scope of preservation: Rule 23 versus FLSA
  ▶ HR/Admin/Class Managers – Personnel files, payroll records, time records, etc. Emails and documents regarding HR practice, procedure, and issues, training, etc.
  ▶ Security/IT – System Logs (i.e. log-in and logout records from various systems used), phone or call center records, security videos, etc.
  ▶ Class Members – Emails among class members or with managers/supervisors/HR, electronic documents on PC’s, network servers, and other media, logs on their PC’s (web browser history, log in/out, etc.), and daily work product
  ▶ Structured Data – Information from business applications used by class members (data exports, reports, etc.)
  ▶ Third Party Information – Documents held by others (ADP, claims admins, etc.)

• Identify best method to preserve each document source identified above
• Follow-up early with opposing parties regarding scope, objections, issues, costs and burdens, and sampling for preservation
Establishing the Business Objective and Creating the Strategy Aimed at Achieving It
The Business Objective: Ensuring that Counsel & Client Are On the Same Page

• What is the employer’s goal?
  ► Maintaining optimal business practice?
  ► Recruiting and retention of top employees?
  ► Minimizing risk?
  ► Minimizing publicity?
  ► Minimize total costs of litigation?
  ► Minimize disruption?
  ► Reducing likelihood of future suits?
  ► Minimizing costs of business practices?

• Client and counsel will need to prioritize -- and re-prioritize -- these goals
Case Strategy Tailored to Fulfill Business Objective

• What is the exit strategy?
  ► Litigate to the end,
  ► Or settle
    • Settlement is often a matter of when and how, not if
    • The litigation is a means to that end, and often determines the degree to which a settlement is favorable to the employer

• All litigation activities must be undertaken with that in mind

• This can affect several things
  ► Budget
  ► Extent to which oppose certification
  ► Whether certain motions are filed
  ► Whether to engage in a declaration campaign
Early Resolution
Is Early Resolution Viable or Overly Risky?

- Benefits
  - Minimizes disruption among:
    - management
    - employees
  - Reduces costs and attorneys fees
  - Plaintiffs’ counsel make lower investment
  - May prevent Plaintiffs’ counsel from discovery efforts that could lead to further claims
Is Early Resolution Viable or Overly Risky?

• Risks
  ► Become an easy target for future cases
  ► Could be forced into change in business practices
  ► May pay more than necessary due to:
    • lack of investigation and discovery
    • perception by Plaintiff’s counsel of not having confidence in its defense
    • inability to capitalize on low opt-in rate
  ► If too early and without enough discovery, court may not approve settlement
Strategies to Secure a Favorable Early Resolution

• Before mediation
  ► Early investigation
  ► Discovery to gain leverage
  ► Strategic timing on rollout of strongest defenses
  ► Look at the case backwards

• During and after mediation
  ► Think creatively on scope of and procedure for settlement
Pros and Cons of Arbitration
Class and Collective Action Waivers

• Arbitration agreements and class / collective action waivers may be an effective way to avoid class actions

• Enforcement of waivers is not guaranteed

• Potential pitfalls
  ▶ Class arbitration
  ▶ Converting an opt-in action to an opt-out action
  ▶ Multiplicity of individual suits
Recent Supreme Court Decisions

• **Stolt – Nielsen S.A. v. Animalfeeds (2010)**
  - Reaffirmed FAA’s primary purpose of enforcement of arbitration agreements according to their terms
  - Class arbitration cannot be compelled when agreement is silent on issue and parties agreed that there was no agreement on this question
  - Emphasized that intentions of the parties control
  - Class arbitration may not be compelled absent evidence that the party agreed

• **AT&T Mobility v. Concepcion (2011)**
  - FAA preempts CA law barring enforcement of class action waivers in consumer cases
  - State law or policy requiring availability of class arbitration interferes with the “fundamental attributes of arbitration” and is inconsistent with FAA
  - Can still challenge arbitration agreements on grounds of unconscionability

• **CompuCredit Corp. v. Greenwood (2012)**
  - Claims under Credit Repair Organization Act
  - Arbitration agreements must be enforced according to their terms “even when federal statutory claims are at issue”
  - FAA’s mandate can only be “overridden by a contrary Congressional command”
Lower Court Decisions

• Most federal decisions are faithful to *Concepcion* and *Stolt-Nielsen* but application of *Concepcion* to collective actions is a mixed bag

  ► *Raniere v. Citigroup, Inc.* (S.D.N.Y 2011)
  • Collective action waiver unenforceable because it would prevent plaintiffs from vindicating substantive statutory rights
  • “Waiver of the right to proceed collectively under the FLSA is per se unenforceable”
  • Collective actions are a “unique animal”
  • Because agreement had a “blow up” provision stating that if the collective action waiver was found unenforceable, the action shall proceed in court, rather than arbitration, the Court declined to order class arbitration

  ► *LaVoice v. UBS Financial Services, Inc.* (S.D.N.Y 2012)
  • No absolute right to a collective action
  • Statutory rights would not be precluded by enforcement of class action waiver
NLRB’s *D.R. Horton* Decision

- Section 7 of the NLRA invalidates a class action waiver in a workplace arbitration agreement.
- Arbitration agreement unlawfully barred employees from engaging in “concerted activity” protected by the NLRA.
- Ruling does not require class arbitration as long as the agreement leaves open a judicial forum for group claims.
- Being challenged on appeal.
- Good news – several district courts have refused to follow *D.R. Horton*.
  - Tentative decision
  - Class action waivers are enforceable where voluntary and not a condition of employment.
  - Employees allowed to opt out of arbitration provision; no threats of retaliation.
  - Suggests ruling might be different if arbitration agreement imposed through coercion or if employee did not understand agreement.
- *Grabowski v. C.H. Robinson Co.* (S.D. CA 2011)
  - Class action waiver does not violate Section 7 of the NLRA.
  - Reads Section 7 narrowly to focus on employee’s right to participate in union organizing activities.
Arbitrator Decisions

• Arbitrators clause construction and interpretation may permit class arbitration
  ▶ Disregarding Stolt-Nielsen and ordering class wide arbitration of Title VII claims despite silence on class arbitration

• Possible worst – case scenario of moving to compel putative opt-in collective action to arbitration, with result of opt-out class arbitration, deters some employers from moving to compel arbitration
California Decisions

- California state appellate courts have demonstrated reluctance to apply *Stolt-Nielsen* and *Concepcion*
  - Right to pursue representative actions under PAGA may not be waived in arbitration agreement
  - PAGA creates a public right – i.e. plaintiff “acts as a proxy or agent of state labor law enforcement agencies, representing the same legal right and interests of those agencies”
  - Remanded to the trial court to determine whether to sever the unenforceable PAGA waiver provision or whether to refuse to enforce the entire arbitration agreement
  - Disability and age discrimination suit
  - Arbitration provisions in employment handbook was unconscionable and unenforceable because plaintiff did not receive a copy of the AAA rules
California Decisions

• Federal courts are more likely to enforce arbitration agreements even as to non-class claims

• See e.g. Quevedo v. Macy’s, Inc. (C.D. CA 2011)
  – PAGA claims are subject to arbitration class / collective waiver

• Grabowski v. C.H. Robinson Co. (S.D. CA 2011)

• Kilgore v. KeyBank (9th Cir. 2012)
  – Public injunctive claims under CA Unfair Competition Law subject to arbitration
  – Rejects unconscionability argument:
    • arbitration clause in a conspicuous place; individuals allowed to opt out; clear instructions on how to opt out; plain language used; individuals warned to read agreement carefully before signing
Pros and Cons of an Arbitration Program

• Pros
  ▶ Avoid class / collective actions
  ▶ Confidentiality
  ▶ May be able to limit discovery in some jurisdictions
  ▶ Faster
  ▶ Arguably less expensive
  ▶ Avoid jury trials

• Cons
  ▶ Uncertainty over ability to enforce
  ▶ Possibility of class arbitration
  ▶ Possibility of converting an opt-in collective action into an opt-out proceeding
  ▶ Potential multiplicity of individual suits
  ▶ Difficulty in obtaining dismissal on papers
  ▶ Arbitrators may split the baby
  ▶ Employers may fare better before juries on certain claims
Discovery Concerns -- The Importance of a Plan
Understanding the Scope of Discovery

• Key to developing an efficient plan is for counsel and client to have a shared understanding of the scope of potential discovery, as well as a plan for collecting what will be needed

• The case will begin small. It is a reasonable position to argue that, pre-conditional certification, the scope of discovery is limited to the named plaintiff, and relevant general policy documents or at most extends to pre-conditional certification opt-ins and the documents relevant to them

• Understand the claims and defenses

• Understand the grounds to oppose conditional certification

• Understand that summary judgment, decertification, and (yes even) trial may be in your future
Information & Documents Helpful to the Defense

• Job titles and associated job descriptions
• Self-evaluations
• Resumes
• Supervisors’ names / titles
• Payroll summaries
• Paycheck stubs
• Pay plans. Bonus plans
• Clock rules
• Organizational charts
• Web pages
Conclusion and Questions