Emerging Defense Might Help End Wage and Hour Class Action War

By Allen Smith

PHOENIX—A new defense is on the horizon in wage and hour class actions and might help employers end the current class action war, management attorneys predicted on April 10, 2008, at Littler Mendelson's 25th Annual Executive Employer Conference in Phoenix.

Lee Schreter, a Littler Mendelson attorney in Atlanta, said she expects that the equivalent of a *Faragher-Ellerth* defense in equal employment opportunity (EEO) cases will emerge under wage and hour law.

But employers need to do a lot more than hope that this defense takes root in court, she cautioned, outlining numerous recommendations in an April 10 Littler Mendelson report on how to best shield employers from wage and hour class actions.

New Direction for Wage and Hour Law?

The U.S. Supreme Court's decisions in *Faragher v. City of Boca Raton* (524 U.S. 775 (1998)) and *Burlington Industries v. Ellerth* (524 U.S. 742 (1998)) revolutionized EEO law. The *Faragher-Ellerth* decisions held that an employer may avoid or limit liability for unlawful harassment, absent any tangible employment action, if:

- It took reasonable steps to prevent workplace harassment and correct problems.

- The plaintiff unreasonably failed to use the employer's preventative measures to let the employer correct the problem.

The Supreme Court built on the *Faragher-Ellerth* rulings in its 1999 *Kolstad v. American Dental Association* (527 U.S. 526) decision, deciding that employers should not be assessed punitive damages if they implement in good faith sound anti-discrimination policies and practices.

These decisions are outgrowths of the doctrine of avoidable consequences, which, Schreter observed, is an ancient Roman doctrine. She thinks that it should apply to wage and hour class actions as well as EEO litigation.

"I think that is absolutely where the law is going," agreed Garry Mathiason, a Littler Mendelson attorney in San Francisco.

Even if courts agree, this defense alone will not be enough to protect employers from the onslaught of wage and hour class actions. “It is a sad but true comment that many employers do not focus the same resources on wage and hour issues as they do EEO,” Schreter remarked. She said that wage and hour compliance often is neglected even though liability under wage and hour laws can be “100 times” liability under EEO laws.

‘Awaken to This Crisis’

Schreter and Mathiason collaborated with eight other Littler Mendelson attorneys, including the U.S. Department of Labor’s Former Wage and Hour Administrator Tammy McCutchen, to write a report, *Total Wage and Hour Compliance: An Initiative To End the Wage and Hour Class Action*, released on the first day of the conference.

The report notes that the number of wage and hour class actions filed in federal courts more than doubled from 2001 to 2006, and it says that the pace is not slowing. From Oct. 1, 2007, to March 28, 2008, Littler found 1,477 federal and 508 state wage and hour class actions, including 544 in California (137 in federal court and 407 in state court). More than 75 percent of class actions nationwide were related to wage and hour. While California leads the nation in employment class actions since Oct. 1, 2007, Florida—with a population approximately half of California’s—had the highest number of wage and hour class actions per capita (533 were filed in Florida during the same span).

The settlements can run into the millions of dollars, the report noted with the following industries among those hit the hardest in 2007:

- Package delivery industry—$87 million in wage and hour class action settlements.
- Computer industry—$65 million.
- Supermarket industry—$53.3 million.
- Office supply industry—$38 million.
- Financial services industry—$14 million.
- Beverage bottling and distribution industry—$14 million.
- Telecommunications industry—$12.6 million.

These settlements are damaging shareholder value, Mathiason pointed out.

“Employers need to awaken to this crisis and attack it from every direction,” the report stated. “Legislative reform, revised regulations, new case law and advanced litigation and settlement strategies are all a part of finding a solution. However, at the center of this

'war' comes an ear-shattering call for common sense and a recognition that the best immediate solution is within the employer's control."

Total Wage and Hour Compliance Initiative

The report outlined Littler's Total Wage and Hour Compliance Initiative, which features seven overarching components of best practices in wage and hour compliance:

- Conduct a wage and hour assessment of existing policies, procedures and practices.

- Protect the company through the establishment of revised 'state of the art' wage and hour policies and procedures.

- Protect the company through an individualized plan for implementing organizational changes.

- Implement an effective wage and hour complaint and reporting system.

- Create a cutting-edge wage and hour training program for managers and employees.

- Minimize future wage and hour exposure through technological innovation.

- Conduct periodic reviews and/or audits for the company's wage and hour compliance status.

Be careful though, Schreter cautioned conference attendees. The employer's compliance program should be designed to protect employer's attorney-client privilege, she noted.

Managerial training is particularly important, as missteps by first-level managers often lead to FLSA problems, Schreter said. Training not only can prevent claims but also can limit liability.

Brighter Day Ahead?

Mathiason ended the conference's opening session with the following predictions:

- Wage and hour class actions will result in a change in employers' priorities.

- In two to four years, half of the wage and hour issues will have nothing to do with wage and hour procedures but will revolve around the discovery of electronic files.

- By 2012, there will be a dramatic decline in wage and hour cases.

"No topic is more important in 2008 than ending the wage and hour class action war," he concluded.

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