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The future of wage-and-hour class actions

In the coming decade, complex issues will emerge, testing the definition of compensable work.

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In 1938, General Motors Corp. started mass-producing diesel engines, E.I. du Pont de Nemours and Co. began producing nylon fibers and most Americans worked in fixed brick-and-mortar worksites. That same year, the Fair Labor Standards Act (FLSA) was passed, establishing the nation's wage-and-hour laws. Factory whistles and manufacturing assembly lines have faded, yet the same laws that governed pre-World War II workplaces are being applied to jobs that did not exist in the 20th century. In this context, the recent history and future of wage-and-hour collective and class actions is examined. (Throughout this article the term "class action" is intended to include "collective actions" under the FLSA.)

In 1993, a major West Coast retailer settled a wage-and-hour class action for $15 million with notices sent to 160,000 current and former employees. Suddenly, off-the-clock work, unpaid overtime and pay records requirements took on new meaning. The success of such lawsuits spread throughout the plaintiffs' bar. From 2001 to 2006, federal court wage-and-hour class or "collective" action filings doubled, and the pace has accelerated. Michael Orey, "Wage Wars," Bus.Wk., Oct. 1, 2007. In 2008, at least 2,614 wage-and-hour class actions were filed in federal and state courts, based on "unofficial" information from various secondary sources, including Courthouse News and CourtLink.

In 2009, based on these sources and others, 5,786 such cases were identified. Although the number of filings in 2008 may be understated, in 2009 wage-and-hour class action filings clearly increased by at least 40%. The number of reported wage-and-hour class action settlements and verdicts also increased, from 86 in 2008 to 124 in 2009, based on sources such as Employment Law 360, the Daily Labor Report, newspapers and a variety of other publications. The settlement amounts used are the gross settlements reported, including attorney fees and costs. Despite the increase in numbers of settlements and verdicts, however, the average settlement and verdict decreased slightly from $8,876,357 in 2008 to $8,236,499 in 2009. Additionally, the amount awarded per work week for a full-time employee remained relatively constant, with $100 per work week representing the plaintiff's "rule of thumb" for lawsuits filed for California workers and significantly less ($25 to $35 per work week) for non-California settlements.

The growth of wage-and-hour class actions has been matched by the Obama administration's pledge to make wage-and-hour enforcement a priority. In September 2009, Secretary of Labor Hilda L. Solis announced, "Make no mistake, the DOL is back in the enforcement business." CCH WorkWeek, Week of Sept. 21, 2009, http://hr.cch.com/netnews/employment-law/emp092109.asp. This year, the DOL, together with advocacy groups, embarked on a "public awareness" program to inform workers about their rights. U.S. Department of Labor, Wage and Hour Division News Release, Nov. 19, 2009, www.dol.gov/opa/media/press/whd/whd20091452.htm. The DOL has hired 250 new investigators, a one-third increase. In 2008, the DOL found violations in 78% of its investigations and collected $185 million in back wages for 228,000 employees. See www.dol.gov/whd/statistics/2008FiscalYear.htm. As DOL enforcement initiatives engage, these numbers may seem modest.

To picture what has occurred, imagine a highway with 50-year-old speed laws, only an occasional highway patrol car monitoring traffic and many drivers who are used to years of traveling in excess of the speed limit. Suddenly, 250 new patrol officers arrive armed with tracking radar. Strict compliance with the decades-old speed law would become essential. This is exactly what is happening with wage-and-hour enforcement. Although the law has remained the same, class actions and government compliance efforts are skyrocketing, causing everything to change.

Until 2009, California led the nation both in number of wage-and-hour class actions and size of settlements. Between 2000 and 2005, employment class actions in California state courts grew more than any other type of class action, increasing by 313.8%. See www.courtinfo.ca.gov/reference/caclassactlit.htm. Most cases were filed under California's unique state wage laws, which are generally broader than the FLSA and provide greater penalties and damages.

Although many employers believed their FLSA-based pay practices had merely hit

uniquely California land mines, such as more stringent exemption requirements, pay issues were percolating on the East Coast and in the Midwest. Exemption from overtime, independent contractor status, off-the-clock work, commissions, tip pooling, travel time, pre- and post-work activities and meal periods were being raised as issues in employment litigation everywhere under the FLSA and various state laws. By 2009, more wage-and-hour class actions were filed in Florida than California, and every state recorded such lawsuits. Illinois, New York and Texas saw significant growth, totaling more than 1,200. Filings in Alabama, Georgia, Illinois, New Jersey, Ohio, Oregon and Pennsylvania reached triple digits. By the end of 2010, more than half of the wage-and-hour class actions will be filed outside of California and Florida, with accelerated growth in populous East Coast and Midwestern states.

INDUSTRYWIDE ACTIONS

In addition to national expansion, lawyers increasingly are identifying and challenging industry-based pay practices. For example, in 2009, actions against health care employers increased dramatically, starting with cases filed by a Rochester, N.Y., law firm against several large health care systems in the Northeast. See, e.g., *Hintergerger v. Catholic Health Sys.*, 2009 U.S. Dist. Lexis 97944 (W.D.N.Y. Oct. 20, 2009); *Taylor v. Pittsburgh Mercy Health Sys.*, 2009 U.S. Dist. Lexis 57328 (W.D. Pa. July 7, 2009); *Colozzi v. St. Joseph's Hosp. Health Ctr.*, 595 F. Supp. 2d 200 (N.D.N.Y 2009).

The initial suits have now snowballed and given rise to "copycat" suits across the country. See, e.g., *Bajestani v. Consulate Healthcare*, No. 1:10-cv-00030 (E.D. Tenn. Feb. 17, 2010); *Cason v. Vibra Healthcare*, No. 5:10-cv-10642 (E.D. Mich. Feb. 12, 2010); *DeMarco v. Northwestern Mem'l Healthcare*, No. 1:10cv397 (N.D. Ill. Jan. 20, 2010); *Creely v. HCR ManorCare Inc.*, No. 3:09-CV-02879 (N.D. Ohio Dec. 11, 2009). These cases typically assert claims for work allegedly performed during unpaid meal periods that are automatically deducted from work time. They often include claims for other off-the-clock work, violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Employee Retirement Income Security Act (ERISA) and breach of contract.

Claims for miscalculation of the regular rate of pay for short and long shifts are also prevalent in the health care industry. See, e.g., *Parth v. Pomona Valley Hosp. Med. Ctr.*, 584 F.3d 794 (9th Cir. 2009); *Huntington Mem'l Hosp. v. Superior Court*, 131 Cal. App. 4th 893 (Calif. 2d Ct. App. 2005). In time, many of these claims will disappear or become more tailored as court decisions signal the types of claims that will support class certification and survive motions for summary judgment.

Although the law has remained the same, class actions and government cases are now skyrocketing.

One consequence of class actions is the economic incentive they provide for legal compliance. Wage-and-hour audits, improved policies and closer monitoring of timekeeping and pay practices are increasing. Some early versions of these systems with automatic meal-period deductions have themselves fostered litigation. Nonetheless, as technology evolves, more accurate time reporting is inevitable.

The use of technology in the workplace has also facilitated widespread employee training online. Interactive programs expose managers and employees to workplace vignettes teaching wage-and-hour compliance requirements. Employees electronically pledge to report perceived violations such as unpaid time and receive assurance that their complaints will be welcomed without retaliation. In addition to gaining compliance, such training and complaint procedures increase the likelihood of establishing legal defenses and damage mitigation. However, as training becomes the norm, "failure to train" will likely be urged as a cause of action. Such compliance programs and training will likely become standard and either recommended or required by the DOL.

It is likely that wage-and-hour class actions will continue to increase dramatically during the next two years, especially outside California. For example, increased attacks on independent-contractor classifications are likely as laws and regulations change and government tax collection efforts intensify.

Beyond the next two years, wage-and-hour class actions will probably still be very significant, but their impact will decline. Compliance efforts will reduce the likelihood of litigation. Judicial decisions will answer decades-old questions, and there may be greater judicial consideration of the merits of the underlying claims as part of the class-certification process. Additionally, as wage-and-hour class actions become more commoditized and predictable, settlements will become easier. For cases not settling, increased predictability will increase the willingness to go to trial. Yet for the foreseeable future, it is unlikely that federal legislation will streamline wage-and-hour laws. In many situations, old laws and complicated rules will continue to make full compliance very challenging, especially in California.

During the coming decade, complex new issues will emerge testing the definition of compensable work as BlackBerrys, iPhones, iPads and multiple other devices evolve. What jurisdiction and law cover compensation requirements of virtual workers? When does work start and end for such workers? Are workers exempt who accomplish complex professional tasks with artificial intelligence systems that require increasingly simple human commands?

Eventually there will be greater recognition of the necessity for new wage-and-hour laws reflecting the reality of the digital workplace. It is also inevitable that technology will make national borders less significant as "digital work," remotely controlled robotics and employee "avatars" perform more tasks. Through the imagination and filmmaking of James Cameron, we can better envision workplaces where mental and physical tasks are performed across great distances.

Lawyers who are concerned about becoming idle as the wage-and-hour class action boom subsides need not worry. The class action tool has become such an established fixture of employment law that it is unlikely to fall into disuse. ERISA class actions have already increased as the population matures and retirement funds fail to meet expectations. New types of employment law class actions will follow. The creativity of the plaintiffs' bar is unlimited, and the resolve of the defense bar to challenge class certification is perpetual.

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