Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Surge In FLSA Suits Not Expected To End Soon

By Ben **James**

Law360, New York (January 22, 2009) -- Management-side employment lawyers point to gray areas in the Fair Labor Standards Act and the low threshold for winning conditional certification in collective actions as two reasons why the FLSA litigation boom refuses to die, but plaintiffs lawyers say the law lacks the teeth to give employers an economic incentive to comply.

Management-side and plaintiffs employment lawyers don't agree on much, but attorneys in both camps say the volume of new FLSA suits will continue to swell.

The FLSA has a three-year statute of limitations for willful violations, and there's been a well-publicized proliferation of FLSA suits since at least 2004, so companies have had some time to take steps to ensure that their practices are in step with the FLSA. Still, the pool of viable targets for FLSA suits hasn't dried up.

The reason employers are still finding themselves in the plaintiffs bar's crosshairs over wage-and-hour practices isn't that companies are dragging their feet on compliance, but because of the inherent difficulties in applying a Great Depression-era statute to the modern work place, according to Littler Mendelson PC shareholder Lee Schreter.

There are vague areas in the law that plaintiffs lawyers can exploit, even in light of clarifications like the the U.S. Department of Labor's 2004 regulations covering overtime eligibility for white collar workers. The DOL acknowledged the difficulties employers face in their efforts to keep in step with the FLSA in the preamble to the 2004 regulations, Schreter added.

In explaining the DOL's rationale for updating the regulations, the preamble notes that “confusing, complex and outdated regulations” can allow some employers to dodge their overtime pay obligations and may end up being a trap for “the unwary but well-intentioned employer.”

“This is a difficult law to comply with,” Schreter said. “There are very few clear, black-and-white answers, and any time you have a statute written that way, it can be challenging for employers.”

Gray areas with respect to issues such as employee classification mean that even the most scrupulous employer can't always be totally free from doubts about FLSA compliance, said Dennis Duffy, head of the labor and employment practice at Baker Botts LLP.

“Although we've gotten some clarity from the DOL, it is still the case that the FLSA is not a model of clarity,” Duffy said. “The lack of clear rules is a recipe for litigation.”

Plaintiffs lawyers have a different take, however.

The FLSA lacks the stiff penalties it needs to push employers into compliance, said Don Nichols, founder of Nichols Kaster PLLP.

Plaintiffs can get back pay and liquidated damages under the FLSA, but not punitive damages. Collective actions provide for an opt-in class, which means that the pool of plaintiffs in those suits usually consists of less than half of the workers the defendant is accused of underpaying.

Nichols said a 40 percent opt-in rate was considered good.

According to Nichols, the economic incentive for employers to comply just isn't there.

“You would have expected employers to get their act together, and it just hasn't happened. Frankly, I don't see why they need to worry about it,” Nichols said.

Kelly Dermody, a partner with Lieff Cabraser Heimann & Bernstein LLP, conceded that there might be some questions on the margins about how to apply the FLSA, but the same could be said of Title VII, the Employee Retirement Income Security Act or the tax code.

The bottom line is that some costs can be controlled and some can't, and labor costs fall into the first category, Dermody said.

The pressure on companies to keep costs down is intense, and the risk they face in terms of penalties they would suffer as the result of being hit with an FLSA suit is low, so some companies are erring on the side of cost-cutting if there's a question about whether or not pay practices run afoul of the FLSA, Dermody added.

“I don't think the law is that vague. The real problem is that there isn't that much of a downside for violating the law,” Dermody said. “We're talking about a law that doesn't have enough teeth to create proactive enforcement.”

Another factor that could explain the continuing surge in FLSA suits is the fact that it's easier to gain conditional certification in a collective action than it is to win class certification in a Rule 23 class action.

That's significant because many collective actions end up getting settled at that phase in the case, noted Michael Jones, a partner with Reed Smith LLP.

The burden on the plaintiffs to win conditional certification, which allows the plaintiff to send out notices to prospective class members alerting them to the suit, is light. The second stage in the certification process would occur later in the case, and involves more rigorous scrutiny. The court can decertify the group at the second stage.

While a decision to certify a class in a Rule 23 class action could potentially be appealed, a ruling granting preliminary class certification can't be, because it's not final.

“If there were one single change I would make to the FLSA, it would be to provide for appellate-level review of conditional certification decisions,” said Schreter, though she added she didn't expect that to happen any time soon.

Shifting strategies on the part of the plaintiffs bar could also help keep the number of new FLSA filings up. Plaintiffs could start looking at industrial sectors that haven't been hit hard by the wage-and-hour suit boom yet, and taking aim at smaller companies with more narrowly focused lawsuits.

“A lot of the low-hanging fruit has already been picked. You may have smaller potential claims, and you may see some different industries being targeted,” said Jones, adding that the hospitality and health care industries may have some pay practices subject to challenge.

Wage-and-hour suit filings have also begun to spread throughout the country, away from hot spots such as California, said Brian Greig, chairman of Fulbright & Jaworski's labor and employment department.

Greig compared the suits to a wave that begins on the West Coast and breaks toward the Atlantic.

In addition, the economy plays a role. The economic downturn doesn't explain the proliferation of FLSA litigation, but it is an aggravating factor, ratcheting up the pressure on employers to keep costs down and leading to work force reductions that could create prospective plaintiffs.

The downturn and the attendant increase in layoffs means ex-employees have less to lose by filing suit and creates a fertile climate for litigation, Greig said.

Plaintiffs lawyers are always adapting, Dermody said, but added that issues such as employees working off the clock and misclassification of workers were prevalent enough so that no major strategy shift was called for, at least for the time being.

“The demand for services is so high, it's a little like shooting fish in a barrel right now, because there are so many violators out there,” Dermody said.