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WAGE AND HOUR

Modern Workforce Realities Drive Record Pace in FLSA Suits

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Special to the Legal

As the fourth quarter of 2013 fast approaches, it appears certain that 2013 will be yet another record year in lawsuits brought under the Fair Labor Standards Act (FLSA). Statistics maintained on the U.S. courts' Public Access to Court Electronic Records (PACER) system show that a record number 7,688 FLSA lawsuits were filed in calendar year 2012. With 4,595 FLSA filings on record during the first seven months of 2013, it is all but certain that this year will see a new record for FLSA filings. These numbers do not, of course, take into account the myriad wage-and-hour lawsuits filed in state courts across the country that never find their way into federal court or that are filed in federal court and do not assert FLSA (as opposed to state wage and hour) claims.

The record number of FLSA lawsuits in 2012 continues a nearly 20-year trend that has seen huge year-over-year percentage increases in the number of wage-and-hour suits, many of which are asserted as collective actions brought on behalf of thousands of employees. In fact, according to the Federal Judicial Center, FLSA suits have increased some 517 percent since 1990.

In examining what is behind the astronomical growth in FLSA suits, there are a variety of factors to consider, ranging from an increasingly active plaintiff's wage-and-hour bar, to an archaic and outdated regulatory framework created to address workforce challenges in 1938 (the year of the FLSA's enactment) rather than 2013. The common theme is that growing workforces and other trends are fast outpacing the laws designed to regulate fundamental aspects of the employer-employee relationship, resulting in a complex and often overwhelming legal environment that is ripe for litigation. Given these headwinds, employers should be extremely proactive in taking measures to mitigate against the risk of wage-and-hour litigation.

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LEGAL TRENDS DRIVING THE INCREASE

One of the drivers of the substantial increase in wage-and-hour collective actions is the legal landscape, which traditionally had been more plaintiff-friendly to claims brought as collective actions as opposed to traditional class actions. This is a function of both the FLSA's statutory language and case law developments, which have created a two-step certification process for claims asserted under the FLSA as opposed to the more onerous one-step process required to achieve class certification in other types of cases, such as pattern and practice employment discrimination cases. The more favorable environment for FLSA collective actions stands in increasingly stark contrast to the shifting legal landscape for traditional class actions (since the Supreme Court's 2011 decision in *Wal-Mart v. Dukes*, 564 U.S. ___ (2011), and continuing in the most recent term with *Comcast v. Behrend*, 569 U.S. ____ (2013), the plaintiffs bar is facing a progressively more hostile environment to traditional class actions). And while there have been attempts to apply these employer-friendly decisions to the wage-and-hour collective action space, these efforts largely have been unsuccessful. Of course, these larger legal trends make the prospect of wage-and-hour litigation ever more appealing to the plaintiffs bar.

The data clearly bears out this trend. According to a 2012 report sponsored by ADP, a global provider of human capital management solutions, "of all state and federal class or collective actions filed in the United States, 90 percent are wage-and-hour claims."

TECHNOLOGY AND WORKPLACE TRENDS DRIVING THE INCREASE

The world was very different in 1938 when the FLSA was enacted; there was a far clearer demarcation between work and non-work time, making it easier for employers to determine what qualified as hours worked. Of course, in the more than seven decades since the passage of the FLSA, the proliferation of technology has revolutionized the workplace (and, some would argue, American society more generally), allowing work to be performed in infinite locations. A 2010 U.S. Census Bureau report, "Home-Based Workers in the United States," demonstrated "a steady increase in home-based workers since 1999." According to the report, "the number of people who worked at home at least one day per week increased from 9.5 million in 1999 to 13.4 million in 2010, increasing from 7 percent to 9.5 percent of

all workers." What's more, the lion's share of the increase has come in more recent years, with the largest increase between the years 2005 and 2010, when the share grew from 7.8 percent to 9.5 percent of all workers, an increase of more than two million during that time. Similar studies suggest that the trend has accelerated since that report was issued and will continue to do so.

The rise of the smartphone and tablet computer has been equally challenging from a wage-and-hour perspective, as the growing number of individuals working at home pales in comparison to the number of people working from home. A recent Pew Research Center study estimates that as of May, 91 percent of American adults have a cellphone, 56 percent have a smartphone, and 34 percent own a tablet computer. While many employers have embraced the advantages these devices can offer a company's workforce, the omnipresence of technology in the lives of working Americans also has provided opportunities for workers to perform work remotely, which can be challenging to track.

Moreover, the FLSA created ways of categorizing workers as exempt or non-exempt based upon the typical job duties of workers in 1938. Like the clear lines that divided work and non-work hours, the manufacturing-based economy generally provided an easier basis upon which to assess whether a worker was exempt or non-exempt (and therefore entitled to overtime for all hours worked over 40 in a workweek, or paid a salary and not entitled to overtime premium pay). With limited exceptions, the FLSA has not been modernized to address changes in the American workforce. Many of these larger workforce changes are attendant with a more service-sector and technologically focused economy, where it can in some instances be very difficult to apply the FLSA's outdated regulatory framework to the types of jobs held by workers to assess whether an employee should be classified as exempt or non-exempt.

In essence, courts (and of course, the U.S. Department of Labor) are looking at the world of 2013 through the lens of the world in 1938, trying to superimpose the precepts of 1938 in a manner that is often counterintuitive. Not surprisingly, the square peg of 1938 does not fit into the round hole of 2013. The ideal solution would be a congressional reshaping of the FLSA's statutory framework, and regulatory modernization to address the compliance challenges attendant with the modern work world. However, the contentious political climate, particularly around labor laws, means any significant congressional or regulatory changes to the FLSA seem unlikely.

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And, while the FLSA's regulatory framework has not kept up with the technological focus of the American workplace, unfortunately for employers, the plaintiffs bar has. With an increasing use of websites to solicit class members (for example, www.hospitalovertime.com and www.waiterpay.com), email and social media like Facebook, plaintiffs attorneys can much more easily access a large potential reservoir of litigants willing to submit opt-in forms and serve as party plaintiffs from the comfort of their own homes (or their work computers).

THE ECONOMY (AND ECONOMICS) PLAYS A ROLE

Meanwhile, as the FLSA has struggled to keep pace with the impact of technology in the workplace, the global economic slowdown has wreaked its own havoc and contributed to wage-and-hour lawsuits as well.

With the economic decline came difficult and understandable decisions by employers to reduce costs and eliminate staff. According to various media sources, the net effect of these actions over the past four to five years has not only been elevated unemployment levels, but also erosion in employee morale, and an associated decline in workplace satisfaction. A recent Gallup poll showed that "U.S. workers are more dissatisfied today ... than they were before the global economic collapse," with less than half of workers saying they "are completely satisfied with their job security."

This uncertainty and lack of satisfaction invariably plays a role in making workers more willing to participate in wage-and-hour litigation. To be sure, this is not a new trend as much as one exacerbated by a challenged economy.

PROACTIVE STEPS AND MITIGATING RISK

Fortunately, there are legal and organizational steps employers can take today in recognition of the rising tide of wage-and-hour litigation to better steel their organizations from becoming a statistic. The first step is organizational willingness to take a fresh look at pay practices, followed by an "audit" of pay practices, paying particular attention to industry-specific dynamics and risks. Any audit should of course be conducted by legal counsel to protect findings from future discovery in any subsequent wage-and-hour litigation.

Employers simply cannot ignore the confluence of factors that have led to this monsoon of wage-and-hour litigation that continues apace, and shows no signs of abatement. It is time to figure out how we found ourselves where we are and work toward a different tomorrow. •