Emerging Issues In Wage & Hour Class Actions: FLSA, Rule 23 and Hybrids

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I. Introduction

Recent statistics show that Fair Labor Standards Act and state wage claims by groups of employees are rising at an alarming rate and quickly outpacing other types of employment class actions. In fact, the number of FLSA collective actions for wage and hour law violations now exceeds all other types of employment class actions *combined*.

Generally speaking, most FLSA collective actions are comprised of two types of claims. "Misclassification" claims are brought by groups of employees who allege that they have been wrongfully classified as "exempt," and therefore denied overtime pay to which they are legally entitled. "Off-the-clock" claims are brought by groups of employees who allege that their employer has evaded the overtime provisions by having them work certain hours uncompensated.

Corporations have agreed to pay millions of dollars to settle claims that they improperly classified employees as exempt, failed to pay overtime, or otherwise failed to properly pay employees. In June 2006, Pizza Hut Inc. agreed to pay more than $12 million to employees who claimed the company misclassified managers as exempt employees and denied them overtime.[2] In November 2006, Pep Boys agreed to pay $4.55 million to settle allegations that it refused to pay overtime to hundreds of hourly auto parts and repair employees.[3] Desert Plastering LLC, a Las Vegas-based drywall and masonry contractor, agreed to pay $1.2 million to settle alleged

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[2] 131 Daily Lab. Rep. (BNA), July 19, 2006, at A-9.

[3] 231 Daily Lab. Rep. (BNA), Dec. 1, 2006, at A-8. The court had conditionally certified the suit as a collective action in 2003 and a court-approved notice regarding the case was sent to approximately 90,000 current and former Pep Boys employees.

overtime violations involving 1,060 current and former employees.[4] Likewise, in April 2007, Oak Street Mortgage agreed to pay $2.45 million to settle an overtime pay dispute with 193 of its mortgage brokers.[5] Additionally, in 2005, Smart & Final Inc., a California-based operator of nonmembership food and food service warehouses, agreed to pay more than $19 million to employees who claimed the company violated numerous state labor laws.[6]

Collective treatment of employees in wage and hour cases has been more prevalent than in other types of employment cases because employers often treat large groups of employees the same with respect to wage and hour matters. Class or collective claims undoubtedly create greater defense costs, higher risks, and greater incentives to settle. Additionally, there has been a snowball effect with regard to wage and hour litigation as news of large settlements and judgments has attracted the attention of both employees and the plaintiff's bar. Once one employer in a specific industry is entangled in a wage and hour class or collective action, similar claims are filed against other employers in the industry. Needless to say, employers have ample cause for concern over the prospect of costly wage and hour class action litigation.

II. FLSA Collective Actions

A. Actions Arising Out Of The Supreme Court's Decision In *IBP Inc. Alvarez*

The latest trend in FLSA collective actions involves claims that employers have failed to pay employees for duties that allegedly start and end the workday, and for all time thereafter, under a "continuous workday" theory. These collective actions have arisen as a result of the Supreme Court's ruling in *IBP Inc. v. Alvarez.*[7] At issue in *Alvarez* was whether the time spent by meat-processing employees walking from locker rooms to the production line after donning required protective gear and back from the line before doffing this gear should be compensated, or whether the official start of the "workday" for FLSA purposes was when the employees began their jobs on the plant floor.[8] The Court found that this time was not excluded from FLSA coverage by Section 4(a)(2) of the Portal-to-Portal Act as preliminary or postliminary to the principal activities the employees are employed to perform, and thus was compensable.[9] The

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[4] 138 Daily Lab. Rep. (BNA), July 19, 2007, at A-6. At least one employee questioned the pay practice through a toll-free helpline established by the Employment Education and Outreach initiative. That action prompted the DOL Wage and Hour Division's review of the contractor's pay practices.
[5] 75 Daily Lab. Rep. (BNA), April 19, 2007, at AA-2.
[6] 179 Daily Lab. Rep. (BNA), Sept. 16, 2005, at A-1.
[7] 126 S.Ct. 514 (2005).
[8] *Id*. at 522-23.
[9] *Id*. at 523-25.

Court held that the donning and doffing of protective gear are "integral and indispensable" to the employees' principal food-processing activities and are therefore themselves principal activities for purposes of Section 4(a) of the Portal-to-Portal Act under *Steiner v. Mitchell*.[10] Moreover, the Court found that during a continuous workday any walking time that occurs after the employees' first principal activity and before the conclusion of the employees' last principal activity is excluded from the scope of that provision, and thus is covered by the FLSA.[11]

Notably, the Court found that time spent walking to the locker rooms where the protective gear was donned was not compensable under the FLSA, since it occurred before the employees' first principal activity had been performed.[12] Similarly, the Court ruled in the companion case that time spent waiting to pick up safety gear was not compensable.[13]

Since the Supreme Court's decision in *Alvarez*, several actions by groups of employees have been brought regarding the compensability of certain beginning/end of day activities, with limited success. For example, in May 2006, an Arkansas poultry processing company agreed to pay over $ 1 million dollars in back overtime wages to 5,482 current and former employees in order to settle claims that it failed to pay employees for time they spent putting on and taking off protective clothing and other gear in violation of the FLSA.[14] However, in June 2007, the Eleventh Circuit Court of Appeals held that the FLSA did not obligate a poultry-plant operator to compensate union-represented employees for time spent donning and doffing protective clothing and gear, because the custom and practice under a collective-bargaining agreement did not require pay for such activity.[15] Further, the court rejected the employee's reliance on *Alvarez*, and found that the FLSA provision which excludes time spent changing clothes from compensable "hours worked," applied to the employees' donning and doffing of protective clothing such as smocks and hair nets, even though that process did not require the employees to disrobe.[16]

Additionally, in May 2007, the Second Circuit Court of Appeals found that nuclear power plant employees were not entitled to compensation under the FLSA for time spent going through

[10] *Id*. *See Steiner v. Mitchell*, 76 S.Ct. 330 (1956).
[11] *Id*. at 525.
[12] *Id*. at 524.
[13] *Id*. at 527-28.
[14] 90 Daily Lab. Rep. (BNA), May 10, 2006, at A-3.
[15] *Anderson v. Cagle's Inc.*, 488 F.3d 945, 955-959 (11th Cir. 2007).
[16] *Id*.

security or for donning and doffing helmets, safety glasses, and steel-toed boots.[17] The court first held that even though the time spent going through security was required to get into and out of the plant, and was therefore "indispensable" to the employees to work, this time was not "integral" to the performance of their work.[18] The court found that the security measures were not "essential to completion" of the employees' work, and they were therefore preliminary and postliminary activities exempt from compensation under the Portal-to-Portal Act.[19] Additionally, the court also found that the donning and doffing of protective gear was not integral to the performance of the employees' work, and was not rendered integral because it was required by the employer or by government regulation.[20]

Beyond collective actions involving the compensability of specific activities, the plaintiff's bar is now using *Alvarez* in an attempt to expand the beginning and end of the workday. As more employers are allowing their employees to perform certain administrative tasks at home or in transit at the beginning and end of the day, collective actions have formed alleging that these tasks are "integral and indispensable" to the "principal activity" of their jobs, and therefore, both the tasks at home and the drive to the main job are compensable under the "continuous workday" doctrine.

For instance, in *Smith v. Aztec Well Servicing Co.*,[21] a group of drilling rig employees argued that because they were required to meet at a convenience store before heading to work, the meeting represented the beginning of the workday, and the drop-off at the same place represented the end of the workday. As a result, the workers argued that their travel time of up to three hours to and from their job site was compensable.[22] The Tenth Circuit Court of Appeals found that even though the workers had to load their own personal safety equipment into vehicles, there was no evidence that they received necessary instructions at the convenience-store site related to their work at the well site, which was necessary to trigger the start of workday.[23] Also, the court found that the workers' loading of safety equipment, purchasing of food and drinks, and filling coolers with drinking water was merely preliminary in nature and not

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[17] *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2nd Cir. 2007).
[18] *Id*. at 593-94.
[19] *Id*.
[20] *Id*. at 594-95.
[21] 462 F.3d 1274 (10th Cir. 2006).
[22] *Id*. at 1287-88.
[23] *Id*. at 1289-90.

integral and indispensable to their principal activities.[24] Furthermore, because employees were free to sleep, eat, listen to the radio, or not even take part in the carpooling, their travel time was not covered by the FLSA.[25]

Likewise, in *Adams v. United States*,[26] federal law enforcement officers alleged that their travel time to and from work was compensable because they were required to commute to and from work in their police vehicles, carry their weapons and equipment, and ensure that their communication equipment remained on. They also were prohibited during this time from running personal errands. The Federal Circuit held that the activities alleged by the officers were insufficient under the Portal-to-Portal Act to prove that such time was compensable.[27] The court additionally found that the restrictions on the officers' activities during their commutes were de minimis and did not constitute part of their primary work activities.[28] The court noted that the plaintiffs were required to perform additional work while driving in order to be compensated for their time spent driving."[29]

B. Pay Scheme Collective Actions

Collective actions under the FLSA that challenge employer pay schemes have also become more prevalent. Many of these actions are initiated as a result of the Department of Labor's review of employer pay practices. For example, in March 2007, Goodyear Tire & Rubber Co. agreed to pay $227,792 to 211 of its Texas employees, in regard to allegations involving its pay practices.[30] The matter was initiated when the Department of Labor's Wage and Hour Division office in Houston discovered the alleged violations.[31]

In April 2007, the US District Court for Minnesota ruled that a pay scheme implemented by an Indianapolis based mortgage company violated the minimum wage and overtime provisions of the FLSA.[32] The mortgage company changed its broker compensation plan in 2005 from 100 percent commission basis, after consulting with the Department of Labor and its

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[24] *Id.*
[25] *Id*. at 1291.
[26] 65 Fed.Cl. 217 (Fed. Cl. 2005).
[27] *Id*.
[28] *Id.*
[29] *Id*. *See also*, Bonilla v. Baker Concrete Construction Inc., 487 F.3d 1340 (11th Cir. 2007). (Construction workers required to pass through security and travel on employer-provided buses or vans to an airport worksite had no right to compensation under the Fair Labor Standards Act for the time spent traveling or being cleared by security.)
[30] 46 Daily Lab. Rep. (BNA), March 9, 2007, at A-8.
[31] Id.
[32] *Saunders v. Ace Mortg. Funding, Inc*., Civ. No. 05-1437, 2007 WL 1190985 (D.Minn. April 16, 2007).

attorneys.[33] The new plan compensated the workers at the minimum wage of $5.15 an hour for 40 hours, plus overtime for 20 hours.[34] The minimum wage plus overtime was incorporated into any commission earned by a broker.[35] If a broker failed to make a commission, he/she would receive minimum wage plus overtime as a draw, which was offset from future commissions.[36]

Five brokers filed a collective action under the FLSA shortly after the new pay plan was initiated. The court granted summary judgment in favor of the brokers because the court found that the company did not pay a regular rate of pay to the brokers.[37] Specifically, the court determined that because commissions were included in the alleged regular rate of $5.15 an hour, this rate was in fact artificial.[38] Although the court found that the company had violated the FLSA, it sent the question of damages and willfulness to the jury.[39]

III. Hybrid State Class Actions And Hybrid Collective Actions

Because both FLSA opt-in collective actions and Rule 23 class actions under state wage and hour laws provide their own respective advantages to the plaintiffs' bar, "plaintiffs are increasingly attempting to combine FLSA and state-law wage claims in a single action."[40] For example, on July 13, 2007, the US District Court for the Southern District of New York found that a securities broker, who filed a FLSA collective action for unpaid overtime, could proceed in the same lawsuit with a class action allegation, base on New York state law, that his employer violated overtime and wage deduction provisions.[41] In another New York case, former telemarketing agents employed at various call centers, recently initiated a lawsuit as a collective action pursuant to the FLSA and as a class action to pursue claims under New York Labor Law, identifying as unlawful employer's alleged policies of automatically deducting 60-minute lunch breaks, off-the-clock work, and failure to include commissions in overtime calculation.[42] Furthermore, the US District Court for the Northern District of California has recently found that current and former Best Buy employees working in California may proceed as a class action with

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[33] *Id.* at * 2. However, the DOL did not provide written approval of the plan .
[34] *Id.* at * 3.
[35] *Id.*
[36] *Id.*
[37] *Id*. at * 7-9.
[38] *Id*. at * 9.
[39] *Id*. at * 10-11.
[40] Matthew W. Lampe and E. Michael Rossman, *Procedural Approaches for Countering Dual-filed FLSA Collective Action and State Law Wage Class Action,* Vol. 20, No. 3 Lab. Law. 311, 315 (Winter/Spring 2005)(citations omitted).
[41] *Klein v. Ryan Beck Holdings Inc.,* S.D.N.Y., No. 06 Civ. 3460 (WCC), 7/13/07).
[42] *Sherrill v. Sutherland Global Services, Inc*. 487 F.Supp.2d 344 (W.D.N.Y. 2007).

their state law wage claims for time spent undergoing security inspections to enter or exit the store. The plaintiffs are also pursuing a collective action under the FLSA.[43]

Another plaintiff has filed a class action against her employer, Buth-Na-Bodhaige, ("The Body Shop") for violations of the FLSA and state law arising out of its alleged failure to pay managers overtime and misclassification of its managers as "exempt" employees.[44] The plaintiff has asked the court to conditionally certify a collective action under FLSA and to certify a class action, but the motions were stayed pending a ruling on certain dispositive motions. Additionally, the US District Court for the District of Connecticut recently found that it would not exercise supplemental jurisdiction over class action claims for overtime compensation asserted under various states' wage and hours laws, in a FLSA class action for overtime compensation.[45] The plaintiff initiated the action on behalf of himself and other "Field Adjusters, Field Appraisers, and/or Outside Adjusters," against his employer, Metropolitan Property and Casualty Insurance Company, alleging failure to pay overtime compensation and asserting a collective action claim for violations of the FLSA, a class action claim under for violation of state wage and hour laws.[46]

> In such dual-filed wage actions, plaintiffs seek FRCP 23 certification of a state-law opt-out class *and* section 216(b) certification of a similarly defined FLSA opt-in class. Under this approach, application of FRCP 23 to the state claim serves as a vehicle to avoid the FLSA's opt-in requirement, since all persons falling within the FRCP 23 class definition (which typically mirrors the potential-plaintiff pool in the section 216(b) claim) will be swept into the case if class certification is granted. At the same time, application of section 216(b) to the FLSA claim provides something of a hedge against the possibility that FRCP 23 certification will be denied, and it preserves the possibility of early notice. Indeed, the settlement leverage that plaintiffs gain through section 216(b) notice dramatically increases if the possibility of a large FRCP 23 class is also looming.[47]

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[43] *Kurihara v. Best Buy Co*., Inc. 2007 WL 2501698, *1 (N.D.Cal. 2007).
[44] *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F.Supp.2d 178, 179 (W.D.N.Y. 2007).
[45] *Neary v. Metropolitan Property and Cas. Ins. Co.,* 472 F.Supp.2d 247 (D.Conn. 2007).
[46] Id.
[47] Lampe and Rossman, *supra* note 40, at 315-16 (citations omitted).

Rule 23 state law class actions may also provide for a longer statute of limitations than the FLSA or damages not available under the federal law.[48] Likewise, section 216(b) opt-in classes include the availability of liquidated damages and attorneys fees, which are not always available under certain states' laws.[49] Given the multiple problems posed by hybrid FLSA/state law wage and hour class actions, the relevant question quickly becomes – what are the defendant employer's options for defending against these complex lawsuits?

In their 2005 article, "Procedural Approaches for Countering Dual-Filed FLSA Collective Action and State Law Wage Class Action," Matthew W. Lampe and E. Michael Rossman set forth an excellent three option approach for defending against hybrid wage and hour class actions.[50] The first option is removal of the action from state court to federal court.[51]

> At a minimum . . . a defendant has the option of removing the FLSA component of a dual-filed wage claim. Whether the entire action may be removed is a more open question. The supplemental jurisdiction doctrine provides that were a claim is properly before a federal court, the court also may decide 'all other claims that are so related to claims . . . within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.'"[52]

However, Lampe and Rossman are quick to note that, in one recent decision, *Bartelston v. Winnebago*,[53] a federal court held that its supplemental jurisdiction covered only plaintiffs who had opted in to the FLSA claim, and other courts have simply declined to exercise jurisdiction over state wage and hour claims.[54] "Further – and even where a court accepts jurisdiction over an entire dual-filed action – plaintiffs who strongly prefer state court could seek to drop their state-law claims from the removed action and refile them in state court."[55] Finally, plaintiffs could also decide to drop their FLSA claims altogether.[56] "To the extent that the existence of the

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[48] *Id.* at 314 (citations omitted).
[49] *Id.*
[50] *Id.* at 325-337.
[51] *Id.* at 325.
[52] *Id.* at 326-27 (quoting 28 U.S.C. § 1367(a))(additional citations omitted).
[53] 219 F.R.D. 629, 636-38 (N.D. Iowa 2003).
[54] *Id.* at 326-27 (citations omitted).
[55] *Id.* at 327 (citations omitted).
[56] *Id.*

FLSA claim provides a compelling argument against certification of the state-law class, being relegated to state court, facing solely a putative FRCP 23 class could actually be the worst-case scenario for defendants."[57] In short, a defendant employer's removal of a hybrid wage and hour action is not, in and of itself, a complete answer to the multi-layered problems associated with hybrid suits.

The second option involves jurisdictional attacks on the state wage claim.[58] These attacks can be divided into two separate categories: "(1) attacks[s] on the court's ability to exercise jurisdiction over individuals who do not opt in to the FLSA claim and (2) appeal[s] to the court's discretion not to exercise supplemental jurisdiction."[59] Employers should be mindful, however, that the former type of jurisdictional "attack" "creates the risk of 'two separate lawsuits, one in federal court and one in state court on essentially the same question.'"[60]

> Indeed, the *Bartelson* court detailed several possible plaintiff responses to its decision, including (1) acceptance (*i.e.*, letting the case proceed in federal court solely with respect to those who had opted in); (2) named plaintiffs' refilling of the state claims in state court; and (3) plaintiffs' attorney finding new named plaintiffs to refile the state claims.[61]

It is interesting to note that one district court recently disagreed with the reasoning presented in *Bartelson*.[62] *Schultz v. American Family Mutual Insurance Company* involved claims for unpaid overtime under the FLSA and state laws by a claims adjuster, who alleged that he and other adjusters were improperly classified as exempt employees.[63] Relying on *Bartelson*, American Family argued that the federal court did not have supplemental jurisdiction over the plaintiff's class claims under state law.[64] The Northern District of Illinois "respectfully disagree[d] with the *Bartelson* court," and noted:

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[57] *Id.* (citations omitted).
[58] *Id.* at 326-27.
[59] *Id.* at 327.
[60] *Id.* at 328 (quoting *Bartelson*, 219 F.R.D. at 637 n. 4).
[61] *Id.* (citing *Bartelson*, 219 F.R.D. at 637 n. 4).
[62] *Schultz v. Am. Family Mut. Ins. Co.*, No. 04 C 5512, 2005 U.S. Dist. LEXIS 38848, *17-20 (N.D. Ill. Nov. 1, 2005).
[63] *Id.*
[64] *Id.* at *16-17.

> The plain language of [28 U.S.C.] section 1367 extends supplemental jurisdiction to 'all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.' State and federal claims are part of the same case or controversy if they 'derive from a common nucleus of operative fact. Schultz's FLSA claim and the putative class members' state-law wage claims derive from a common nucleus of operative fact: American Family's allegedly improper classification of them as exempt employees. Thus, the plain language confers supplemental jurisdiction over the state-law claims.[65]

The *Schultz* court noted, however, "[w]hether the exercise of jurisdiction over the state class claims is *appropriate* is a different question.[66]

The second type of jurisdiction "attack" presented by Lampe and Rossman is an appeal to a federal court not to exercise supplemental jurisdiction.[67] Pursuant to U.S.C. § 1367, a federal court may decline to exercise supplemental jurisdiction over a state law claim where:

> (1) the claim raises a novel or complex issue of State law,
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> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
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> (3) the district court has dismissed all claims over which it has original jurisdiction, or
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> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.[68]

According to Lampe and Rossman, "[i]ncreasingly, federal courts in dual-filed wage actions appear receptive to arguments that they should decline supplemental jurisdiction over the cases's state law claim because it 'substantially predominates' over the section 216(b) claim that creates the court's original jurisdiction."[69]

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[65] *Id.* at *18-19 (citations omitted).
[66] *Id.* at *19 (emphasis added).
[67] Lampe and Rossman, *supra* note 40, at 327, 329-31.
[68] *Schultz*, 2005 U.S. Dist. LEXIS 38848 at *19 (quoting 28 U.S.C. § 1367(c)).
[69] Lampe and Rossman, *supra* note 40, at 329 (citations omitted).

The third option for responding to dual FLSA/state law wage and hour claims posed by Lampe and Rossman is to "us[e] the existence of the FLSA claim to formulate an attack on FRCP 23 certification of the state claim."[70]

> Specifically, this approach contends that the availability of section 216(b)'s opt-in procedures – and, where appropriate, the relatively low number of persons who actually opted in to plaintiffs' FLSA claim – preclude a finding of numerosity under FRCP 23(a)(1) or superiority under FRCP 23(b)(3) with regard to the state claim.[71]

The advantage presented by this strategy is that it "urges a determination that the named plaintiffs have ailed to satisfy FRCP 23's prerequisites, as opposed to a decision to dismiss without prejudice or on supplemental jurisdiction grounds," which "may shield the employer, on issue preclusion grounds, from attempts to refile the putative class claims in state court," and "block the original cases's absent putative class members from making similar attempts."[72] Obviously, this strategy depends heavily on a certified section 216(b) collective action.[73]

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[70] *Id.* at 325, 331-337.
[71] *Id.* (footnotes omitted).
[72] *Id.* at 331-32.
[73] *Id.* at 331.