FLSA Claims Are Becoming More Difficult to Settle Prior to Class Certification

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On August 4, 2011, we reported on the case of *Dionne v. Floormasters Enters*, a case from the Eleventh Circuit Court of Appeals that effectively allowed an employer to avoid paying attorneys' fees in an FLSA lawsuit and also allowed the dismissal of an FLSA lawsuit prior to class certification where an offer of judgment made by the employer made the plaintiff-employee "whole." However, since then, several other circuits, namely the Third and Ninth Circuit Courts of Appeal, have published contrary decisions holding that an offer of judgment made by an employer to a plaintiff-employee in an FLSA case will not moot the case where the court has not yet ruled on class certification.

In *Pitts v. Terrible Herbst, Inc.* (Case No. 10-15965), the plaintiff-employee was owed less than $100.00 for unpaid wages. Despite the fact that the employer communicated an offer of judgment in the amount of $9,000.00 — almost ten times what the plaintiff could receive if he proceeded and prevailed at trial — the court would not dismiss the case because it had not yet ruled on class certification. As a result, the Ninth Circuit Court of Appeals decision makes it clear that employers who are being sued for unpaid wages can do little to dispose of an FLSA action without settling with the entire class.

More recently, in the Third Circuit Court of Appeal's decision in *Symczyk v. Genesis Healthcare Corp.* (Case No. 10-3178), the defendant-employer also made an offer of judgment in the full amount of the plaintiff's claim, plus reasonable attorneys' fees. Since the offer provided for all of the relief that the plaintiff-employee could have received had she pursued the claim through trial, the offer constituted "full relief" of her claims. Thereafter, the employer moved to dismiss the lawsuit on grounds that the court lacked subject-matter jurisdiction because the offer of judgment had mooted plaintiff's claim, which the trial court granted. However, on appeal, the Third Circuit Court of Appeals unanimously reversed the trial court ruling and rejected the defendant-employer's argument based on several policy and equity-based reasons. Among other reasons, the appellate court held that such a ruling would allow defendant-employers to "pick off" the claims of plaintiffs to avoid class certification. We believe these policy-

based reasons are flawed because they do not take into account the economic reality of FLSA claims. For example, unnamed but unsettled plaintiff-employees could still sue and would not be precluded from asserting their own FLSA claims, even on behalf of a class of similarly-situated employees against the defendant-employer. Thus, we believe the Third Circuit's concerns are somewhat theoretical in nature.

The Third Circuit's holding in *Symczyk* and the Ninth Circuit's holding in *Pitts* leaves a defendant-employer with virtually no recourse except to defend an FLSA collective action lawsuit. The employer cannot make an offer of judgment, even in the full amount of the plaintiff-employee's claim. Instead, it must proceed with discovery and do its best to defend against the conditional-certification motion. In other words, at least in Third and Ninth Circuits, employers faced with a collective FLSA lawsuit should be prepared to defend and/or settle with the entire class because an offer of judgment with the named plaintiff will not moot the FLSA claims prior to class certification.

In light of this split in authority, it is likely the U.S. Supreme Court will have to weigh in on the issue. However, until then, the effect of these differing cases on any pending FLSA case will likely depend upon the jurisdiction where the claim is pending.

Should you have any questions regarding these cases, or on the FLSA in general, please do not hesitate to contact E. Jason Tremblay of Arnstein & Lehr LLP at (312) 876-6676.