Ninth Circuit Rules That FLSA Opt-In Claims May Be Combined With Class Action Claims Brought Under State Law

Section 216(b) of the Fair Labor Standards Act ("FLSA") provides that employees may file a collective action against their employer seeking wages and attorneys' fees. Section 216(b) provides an employee is not bound by the judgment entered in a collective action under the FLSA unless the employee affirmatively "opts-in" to the collective action. This is typically done by each employee filing a consent to join form with the trial court. In contrast, Rule 23 of the Federal Rules of Civil Procedure governing class actions provides that all members of the class are bound by any judgment entered unless a class member affirmatively "opts-out" of the class action.

The Ninth Circuit Court of Appeals was recently asked to decide whether a district court erred in dismissing plaintiffs' hybrid action that was brought under both the FLSA "opt-in" procedures and also as a Rule 23 "opt-out" class action procedures. The specific issue was whether an FLSA collective action can be brought in the same lawsuit as a Rule 23 class action based on state law and on the same underlying allegations. In Busk v. Integrity Staffing Solutions, Inc., 2013 WL 1490577 (9th Cir. Apr. 12, 2013), the Ninth Circuit held that the fact that Rule 23 class actions use an "opt-out" procedure while FLSA collective actions use an "opt-in" procedure does not create a conflict warranting dismissal of the state law class action claims.

Plaintiffs Busk and Castro were employed as warehousers by Integrity Staffing Solutions, Inc., ("Integrity") which provides staffing at nationwide warehouse facilities of Amazon.com. Plaintiffs were employed as hourly employees at two Amazon warehouses, located in Nevada, filling orders placed by Amazon customers. At the end of each workday, Integrity required Plaintiffs and all other employees to pass through a security clearance, which took approximately 25 minutes. Employees were not compensated for these 25 minutes because they were required to clock out prior to going through security.

Plaintiffs filed lawsuit as a collective and class action on behalf of themselves and all others similarly situated in the Nevada Federal District Court, alleging violations of the FLSA and Nevada wage and hour laws. The Nevada District Court dismissed all of Plaintiffs' claims based on a perceived conflict between the "opt in" and "opt-out" mechanisms of plaintiffs' FLSA collective action and Rule 23 class action.

The Ninth Circuit Court of Appeals reversed. The Ninth Circuit noted that neither the plain text nor the legislative history of FLSA Section 216(b) support the contention that Section 216(b) was intended to eliminate "opt-out" class actions. The Ninth Circuit rejected the employer's argument that allowing both claims to proceed simultaneously would cause unnecessary confusion for potential class members who would receive notices stating both that they must opt-in to have their compensation issues adjudicated under the FLSA and that they must opt-out to avoid having their compensation issues adjudicated under Nevada law. The Ninth Circuit noted that there is a much greater risk of generating confusion among potential class members if the FLSA action and State law class action were to proceed separately with uncoordinated collective and class notices in federal and state court. Thus, the Ninth Circuit concluded that the different procedures under the FLSA and Rule 23 do not create a conflict warranting dismissal of the state law class claims. Accordingly, Plaintiffs may maintain an FLSA collective action and seek class certification on their state law claims in the same action.

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