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WAGE AND HOUR
JUNE 2013 CASE LAW UPDATE

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Wage-and-hour litigation continues to dominate the non-criminal dockets of our court system. In a recent survey by Fulbright & Jaworski, a large sample of corporate general counsel cited labor and employment litigation as the number one type of litigation pending against their companies. Labor and employment litigation was also cited as the number two area of anticipated increased spending, just behind electronic discovery. Wage and hour actions have consistently been the area with the greatest increase in multi-plaintiff actions, as well as the area in which respondents believe will see the greatest increase over the next twelve months. The responding general counsel also stated that wage and hour claims are the claims that carry the largest monetary exposure for their companies.

According to the Federal Judicial Center, a record-high 7,064 Fair Labor Standards Act ("FLSA") cases were filed in federal court during the past year. And this startling-high number is only the tip of the iceberg, as state law class actions continue to rise throughout the country. Respondents to the Fulbright study, for example, indicated that 80% of their wage and hour cases are filed in state court. This legal update addresses some recent trends in this increasingly important area.

I. Continued Division of Authority on the Applicability of *Dukes.*

While the recent trend, including the only Circuit Court to address the issue (the Seventh Circuit), is to apply the Supreme Court's commonality analysis in *Dukes* to wage and hour actions, some district courts continue to view *Dukes* as inapplicable to wage and hour cases. To illustrate the difficulty in predicting litigation outcomes in this area, two federal district courts in New York—within two days of each other—reached completely different conclusions regarding the application of *Dukes* to wage and hour actions.

Applying *Dukes* to deny certification. *Xuedan Wang v. Hearst Corp.*, Civil Action No. 12 CV 793(HB), Slip Copy 2013 WL 1903787 (S.D.N.Y. May 8, 2013)

In *Xuedan Wang*, the Court denied the plaintiffs' motions for partial summary judgment and class certification. Plaintiffs—former unpaid interns who worked at various

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magazines owned by the defendant—alleged that they were "employees" under the FLSA and New York labor law and were entitled to compensation. Over the past six years (the statute of limitations for the NY claims), the defendant had employed approximately 3,000 interns. Since 2008, the company worked to reduce headcount and expenses, and discovery showed that unpaid interns were used for various tasks, including those previously performed by paid messengers. *Id.* at *1.

According to the plaintiffs, the following common issues of law and fact existed: (1) whether Hearst derived an immediate advantage from the interns' work; (2) whether paid workers were displaced; (3) whether an educational experience was provided; (4) whether the members derived benefit, and (5) whether the economic reality of the relationship was one of employment. *Id.* at *6. The Court rejected the plaintiffs' proposal to use representative testimony as the "common proof" to answer these common questions. Citing *Dukes*, the Court held that a general policy of not paying interns is insufficient for commonality, as liability will be determined on individual testimony, and the named plaintiff and various opt-ins testified to various experiences among the different magazine titles, and even among different departments within the same magazine.

Having determined that the plaintiffs failed to establish commonality, the Court applied that analysis to conclude that common issues would not predominate. Interestingly, the Court also cited the Supreme Court's recent decision in *Comcast* to note that individualized damage inquiries can also defeat predominance.

A contrary view of *Dukes*. *Morris v. Alle Processing Corp.*, No. 08–CV–4874 (JMA), Slip Copy 2013 WL 1880919 (E.D.N.Y. May 6, 2013)

In *Morris*, employees of a slaughtering plant brought claims under the FLSA and New York labor law for donning and doffing activities, as well as time-shaving, spread of hours (hours over 10 hours by minimum wage employees) and various off-the-clock claims. The Court acknowledged that *Dukes* raised the bar for commonality, but held that it did not apply to wage and hour cases. *Id.* at *9. The Court also held that factual variations will not defeat certification, though its citations are to cases involving variations in *damages*, not liability determinations. For whatever reason, the defendant focused exclusively on the donning and doffing claim to challenge predominance. *See id.* at *13 ("Notably, defendants fail to make any arguments regarding plaintiffs' time-shaving claims, overtime wages claims, and spread of hours compensation claims in their predominance discussion.") This was a mistake, as the general defense to donning and doffing—that it is not integral and indispensable to the job—is a common legal question. Had the defendant focused on variations in the other claims (e.g., some supervisors shaved time while others did not), the result may have been different.

II. The Role of Evidence in Conditional Certification.

Recognizing that discovery can illuminate differences among, and thereby doom, the putative class, the plaintiffs' bar has tactically begun to seek conditional certification sooner. Now it is not surprising for a plaintiff to move immediately for certification before the exchange of a single document in discovery. Even when there is discovery—or where an employer without discovery provides evidence regarding the individualized nature of the claims—some courts refuse to consider

any evidence when deciding whether to grant conditional certification. Fortunately, we may be seeing a trend growing with more courts willing to evaluate evidence at the conditional certification stage, recognizing the potential waste of enormous resources if a conditional class is later decertified.

***Creel v. Tuesday Morning, Inc.*, Civil Action No. 2:09cv728–MHT, Slip Copy 2013 WL 1896162 (M.D. Ala. May 6, 2013)**
In *Creel*, the court denied the plaintiff's request for nationwide conditional certification in the mistaken-classification context. Plaintiff was a store manager for Tuesday Morning, which operates 841 stores in 46 states. In support of nationwide conditional certification, she offered the deposition testimony of a District Manager (who oversaw 15 stores in GA and AL) about the limitations of authority exercised by managers. Plaintiff also provided declarations from four current and former store managers (who worked in AL, FL, and IL).

While the Court did not ratchet up the level of scrutiny, it held that it would be illogical and inefficient to do what several courts do—ignore evidence indicating that class treatment is inappropriate:

> In short, the court should make use of whatever information it has available at the time; it would be a waste of judicial resources to do otherwise. Indeed, it would be illogical and wasteful to all concerned to certify a collective action if the evidence is already sufficient to indicate that a decertification is likely to follow.

Id at *4.

<u>Size matters</u>
Another important conclusion for the Court is the recognition that the size and scope of the proposed collective action should be considered. As the scope gets broader and more complex, courts have to be "more careful," because the consequences for a mistake are larger. "In short, the court must be reasonably certain that the proposed litigation is not biting off more than can be chewed." *Id.* at *6. The Court denied conditional certification because the plaintiff sought *nationwide* certification, which would include a class of 1,250, despite only being able to provide information from a few people in a handful of states. "This evidence does not provide an adequate platform from which to make the grand leap to a national collective action." *Id.*

<u>III. Application of the Fluctuating Workweek Method in Mistaken-Classification Cases</u>

Use of the fluctuating workweek method (overtime premium of one half the regular rate of pay) to compensate salaried employees offers significant cost savings over traditional overtime payments of time and a half. Even though every Circuit Court to address the issue has concluded that some variant of the fluctuating workweek method is appropriate in the mistaken-classification context, assuming that the criteria is otherwise satisfied, a few district courts in the Second and Ninth Circuits continue to conclude that it is inappropriate.

***Wallace v. Countrywide Home Loans Inc.*, Civil Action No. No. SACV 08–1463–JST (MLGx), Not Reported in F. Supp. 2d, 2013 WL 1944458 (C.D. Ca. Apr. 29, 2013)**

In *Wallace*, the court rejected the use of the fluctuating workweek ("FWW") method in the mistaken-classification context. Plaintiffs are former Branch Account Executives who were previously classified as exempt. The defendant changed the classification to non-exempt, which prompted a series of lawsuits. Here, the Court was addressing partial summary judgment as to the method of calculating back pay, with the defendant arguing that the fluctuating workweek method is permissible in the mistaken-classification context.

The Court acknowledged that every Circuit Court to address the issue has concluded that the FWW method is permissible, either because the regulations permit such an application (1st, 5th, and 10th Circuits) or because the Supreme Court's decision in *Overnight Motor Transport Co. v. Missel* supports this method of calculation (7th and 4th Circuits). According to the Court, however, the Ninth Circuit has not addressed the issue, and some district courts in the Ninth and Second Circuits have held that the FWW method is not permissible in the mistaken-classification context. According to this minority view, the regulations and *Missel* require a clear understanding of the manner of payment for *overtime* (and the nature of mistaken-classification cases is that the employer had no understanding that the employee was entitled to overtime). The Court sided with these district courts, and granted partial summary judgment for the plaintiffs, permitting back-pay calculations to be determined at 1.5 times the regular rate of pay rather than 0.5.

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