PROGRAM MATERIALS
Program #3294
April 21, 2022

Employment Class & Collective Actions Caselaw Update

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

Employment Class and Collective Actions Update

Presented by Orin Kurtz, Gardy & Notis, LLP

New York, NY

Class And Collective Action Primer

- Federal Rule of Civil Procedure is the Basis for Class Actions in Federal Court
- 29 USC Section 216(b) is the Basis for Collective Actions Under the FLSA
- Claims covered under Rule 23: State law claims including failure to pay OT, gap time claims (NY), unlawful deduction of gratuities (NY), pay notification and pay statement claims (NY), discrimination
- Claims covered under 216(b): minimum wage, OT

Class v. Collective Action

- Class: opt-out, class members automatically included
- Collective: opt-in, members must affirmatively join
- Advantages of collective action: Multiple clients, can reach well into the hundreds; similar testimony from this many clients is hard to rebut. Nominal showing required to obtain collective certification, unlike class action which requires preponderance of the evidence.
- Advantages of class action: Few clients to manage. Absent class members are not subject to discovery; collective members are.

Federal Rule of Civil Procedure 23 Updates

- Business Groups Seek Higher Bar for Class Certification
- Earl v. Boeing Company, 339 FRD 391 (E.D. Tex. 2021)
- District court granted class certification
- Passengers sued over Boeing 737 Max 8 system that cause plane crashes
- District Court granted certification
- On interlocutory appeal, the US Chamber of Commerce and defendants have argued that individual class member standing should be assessed at class certification. The case is still *sub judice*.
- If adopted, this could wreak havoc on class actions by requiring individual inquiries, thus defeating the purpose of a class action

Federal Rule of Civil Procedure 23 Updates

- 11th Circuit Eliminates Class Representative Service Awards
- Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1259 (11th Cir. 2020).
- 11th Circuit eliminated service awards to class representatives based on an 1880's era Supreme Court decision that denied compensation to a plaintiff for "personal services and private expenses" incurred in successful lawsuit
- Practical effect: This will take away incentive of class reps to take risks on behalf of a class
  - I've litigated at least two class actions in which a named plaintiff or class members have faced direct retaliation from an employer.

- In all class cases, the named plaintiff takes on reputational risk and this would disincentivize them. In consumer cases moreso, individual awards are very small

- Responses by Courts Outside 11th Circuit:
- *Knox v. John Varvatos Enterprises Inc.*, 520 F. Supp. 3d 331, 348–49 (S.D.N.Y. 2021): "Recently, the Eleventh Circuit has held, in light of two nineteenth-century Supreme Court decisions, that service payments are impermissible. See Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1259 (11th Cir. 2020). The Second Circuit, however, in upholding a service payment, held that those same Supreme Court decisions do not prevent the award of a service payment, see Melito v. Experian Marketing Solutions, Inc., 923 F.3d 85, 96 (2d Cir. 2019). Thus, we conclude that we are authorized to approve such a payment.

- *Somogyi v. Freedom Mortg. Corp.*, 495 F. Supp. 3d 337, 353–54 (D.N.J. 2020): "Until and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances. Here the incentive payments to the class plaintiffs is appropriate given their substantial contribution to the successful settlement of the case."

- My Response: Congress has recognized the legitimacy of service awards in the Private Securities Litigation Reform Act of 1995: "Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."
    - Although this is cutting back on incentive awards by allowing only reimbursement of costs, it nonetheless recognizes that a class representative can be awarded something beyond their allocated damages.

Update on Nationwide Collective Actions

- *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392, 394 (6th Cir. 2021).: 6th Circuit Dismisses Claims of Out of State Employees Against Out of State Defendant (but sustains in-state claims). This effectively upended 70 years of nationwide collective actions.
- Basis of the ruling: Courts do not have personal jurisdiction over a non-resident defendant for out of state claims
- **Practical effect:** Large employers in the 6th and 8th Circuits could now find themselves defending the same case in multiple states, brought by employees who do not work in the forum state. This is highly inefficient
- 8th Circuit Agrees
- ***Vallone v. CJS Solutions Group, LLC*, 9 F.4th 861 (8th Cir. 2021). The day after *Canaday*,** the Eighth Circuit affirmed the district court's exclusion of FLSA claims with no connection to the forum state because "[i]n order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy."

- First Circuit Disagrees with Canaday. *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 86 (1st Cir. 2022).
- District court had declined motion to dismiss out of state FLSA opt-in plaintiffs.

- In affirming, the First Circuit reviewed the text of Federal Rule of Civil Procedure 4 and the legislative history of the FLSA, ultimately concluding that "[i]nterpreting the FLSA to bar collective actions by out-of-state employees would frustrate a collective action's two key purposes: '(1) enforcement (by preventing violations and letting employees pool resources when seeking relief); and (2) efficiency (by resolving common issues in a single action.'" Citing the dissent in *Canaday*, the court opined that "[h]olding that a district court lacks jurisdiction over the non-resident opt-in claims would **'force[] those plaintiffs to file separate lawsuits in separate jurisdictions against the same employer based on the same or similar alleged violations of the FLSA.'**" It characterized *Canaday* and *Vallone* as "rely[ing] on an erroneous reading of Rule 4" and dismissed the authorities those opinions relied upon as inapposite.

- Practical effect: Circuit split could give Supreme Court a reason to weigh in.

FLSA Conditional Certification Update

- **Fifth Circuit Raises Bar for Conditional Certification**
- Conditional certification is liberally granted under 29 USC Section 216(b). For the most part, courts only look to see if the plaintiffs are all subject to a common plan or policy that may violate the law. This showing is usually satisfied by citing the complaint and the plaintiff's affidavit. The plaintiffs only need to be "similarly situated" within the meaning of the FLSA. There is little to no inquiry into the merits. Motions for conditional certification are usually made at the outset of the case, before discovery.
- *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 436 (5th Cir. 2021): The Circuit rejected the preliminary motion that is usually made. Instead, out of concern that conditional certification under the FLSA could be used to put too much pressure on a company, the district court should conduct a more rigorous test and look to determine whether the merits questions in the case can be answered collectively. This could require some discovery to answer.

- Practical effect: This will make conditional certification more difficult in the 5th Circuit. This is part of a growing trend under the FLSA and other employee-friendly statutes where the courts expressly cut back protections based on concerns for employers and corporations.
- This decision also creates a circuit split with most or all other circuits that have a more lenient conditional certification standard and increases the chance that the Supreme Court will weigh in.
- Out of circuit courts have generally refused to follow this decision.

Wage and Hour Update

- **New Laws That May Affect Class Actions**
- Washington state: Effective January1, 2022, agricultural workers are now entitled to overtime pay. This is in contrast to federal law which considers them exempt.
- The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, signed into law on March 3, 2022. The act amends the Federal Arbitration Act to make pre-dispute arbitration agreements for sexual assault and sexual harassment claims invalid and unenforceable. Parties remain free, however, to mutually agree to arbitration after a claim has been asserted. The new law delegates any disputes regarding the Act, including as to the arbitrability of claims, to the courts, and not an arbitrator, to decide.
- New York minimum wage increased to $15/hr for fast food workers in Nassau, Suffolk, and Westchester counties (It was already $15 in NYC). Effective 12/31/2021.
- New York Salary Threshold Increased for Exemption from OT. Effective 12/31/2021, the salary basis threshold for executive and administrative employees to be classified as exempt will increase for employees working in Nassau, Suffolk, or Westchester counties to $1,125.00 per week ($58,500 annually), matching the salary threshold already set for New York City employees. For employees who work elsewhere in the state of New York, the threshold will rise to $990.00 per week ($51,480 annually).

- **Laws That May Not Affect Class Actions But Are Still Interesting**

- **Employees can now get high just about anytime.** NY recently legalized recreational cannabis use. By law, employees are protected from disciplinary action or discrimination for their lawful use of cannabis during legal recreational activities and use before or after work hours (including paid and unpaid breaks and meals) off employer premises and without use of employee equipment or property. An employer can, however, take action (including discipline) against an employee when the employee is impaired by cannabis use, which must be manifested by "specific articulable symptoms" that decreases the employee's work performance or interferes with workplace safety obligations.

- **Notice of Electronic Monitoring**. Effective May 7, 2022, all New York employers must provide employees with written notice upon hiring of electronic monitoring, including interception or monitoring of telephone conversations or transmissions, email, or internet usage.

- **New York City Passes "Just Cause" Legislation for Fast Food Industry.** Employers may now only discharge workers for two reasons: (1) just cause and (2) for a bona fide economic reason. Employers may establish a 30-day probationary period.
- The statute has progressive discipline requirements before a "just cause" termination and sets out a number of factors that help determine whether just cause exists. There are also definitions of "bona fide economic reasons" in the statute.
- Although an in-depth analysis is beyond the scope of today's presentation, it's important to note that this is a substantial change to "at will" employment and the law reads more like a collective bargaining agreement than a labor law.

- **Salary Posting Notification.** The New York City Human Rights Law has been amended to require employers to post the salary range in job advertisements. Failure to do so is a discriminatory practice under the NYCHRL. The NYC Human Rights Commission can impose fines for a violation.

Settlement Update

- How Courts Have Handled Rule 23’s More Stringent Settlement Approval Standards

Arbitration Clause and Class Action Waiver Update

- **NLRB Allows Employers To Require Arbitration Clauses and Class Action Waivers**
- *Cordúa Restaurants, Inc.*, 368 NLRB No. 43 (2019). Recognizing the Supreme Court's decision in Epiq, the NLRB held that an employer may require employees to sign class action waivers EVEN after a case has already been filed.
- **Court Denies Motion to Compel Arbitration in ERISA Class Action**
  - Hensiek v. Bd. of Dirs. of Casino Queen Holding Co, SD Ill. 2021.
    - Plaintiffs filed a class action arising out of an ESOP—employee stock ownership plan.
    - The court brought it back to first-year contracts: The arbitration provision failed for lack of consideration.
    - The fiduciaries had amended the plan document and added the arbitration provision.
    - The court held that the amendment lacked consideration. It required the Plan or its members to arbitrate their claims individually, but did not require arbitration of claims brought by the defendants against plan members. So, the court said, the plan took away the plaintiffs' right to a choice of forum, but didn't do the same to the defendants. It made things better for only one of the parties.

Practical Thoughts on Class Action Waivers

- Any benefit to employee?
- Detriments to employee
- How to Avoid Enforcement
- Arguments That Don’t Work
- Mass-filing of Arbitrations
- Pitfalls for Small Employers: Very Expensive

Joint Employer Rule

- Biden DOL Rescinds Trump DOL's Joint Employer Rule
- Courts developed a "joint employer" rule over the years that allowed employees to hold more than one party responsible for employment law violations.
- This is particularly potent where you have a small employer that folds during the litigation—sometimes there's another company that acted as an employer or an owner who acted as an employer.
- The key consideration is control. A joint employer may not perform all the functions of an employer—for instance, maintaining employment records or issuing paychecks.

- The Trump administration's DOL enacted a rule that substantially narrowed the definition of "joint employer," requiring the potential joint employer to
  - Hire and fire employees
  - Supervise work schedules or conditions of employment to a substantial degree
  - Determine employees' rate and method of payment, and
  - Maintain employment records.
- This made it nearly impossible to have a joint employer, because there will rarely if ever be two parties who hire and fire, or maintain employment records.
- The Biden administration rescinded this rule, effectively reverting the analysis to the rules crafted by various circuits.
- Second Circuit's joint employer rule under the FLSA is an "economic realities" test and is not confined to specific factors.

ERISA Class Action Update

- *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 211 L. Ed. 2d 558 (2022). Supreme Court holds that offering *some* prudent investment options does not categorically bar a claim alleging that other options are imprudent.
- ERISA fiduciaries have a duty of prudence. Under Supreme Court precedent, fiduciaries of an ERISA plan have a duty of prudence to monitor the investments in that plan and remove imprudent investments.
- The plaintiff was an employee of Northwestern who alleged that the defendants breached their duty of prudence/failed to monitor by retaining record keepers that charged excessive fees, offering options likely to confuse investors, and failing to provide cheaper and otherwise-identical alternative investments.
- ERISA plan fiduciaries must discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." §1104(a)(1)(B).
- In *Hughes*, the Supreme Court addressed whether defendants had complied with their duty of prudence/monitoring when there were many options aside from certain challenged funds that were doing quite well. The 7th Circuit said that because the other funds in the plan were prudent and available, and the plaintiff had a choice of funds including the prudent ones, the plaintiff could not complain about the imprudent option.
- The Supreme Court unanimously reversed. The Court held that offering some prudent investment options does not categorically bar a claim alleging that other options are imprudent or that the selection of options as a whole is imprudent. Rather, the Court clarified, ERISA's duty of prudence is a "context-specific inquiry," which requires plan administrators to "monitor" all its fund offerings and "remove" the "imprudent ones."