

New Jersey Law Journal

VOL. CLXXXVIII—NO.2—INDEX 118

APRIL 9, 2007

ESTABLISHED 1878

EMPLOYMENT & IMMIGRATION LAW

Wage and Hour Class Actions

Courts grapple with conflict between Rule 23 and FLSA's opt-in requirement

**By Thomas A. Linthorst and
Richard G. Rosenblatt**

Employers across the nation have been confronting an explosion of mass litigation under the federal Fair Labor Standards Act (FLSA) and related state wage and hour laws. These claims typically fall into one of three categories: (1) "misclassification claims," which are claims for overtime pay filed by workers who argue that their employers have misclassified them as exempt from overtime; (2) "off the clock" claims, which are claims for overtime pay and wages filed by workers who argue that, although they are eligible for overtime, they are not compensated for all hours worked; and (3) miscellaneous state law claims, such as claims for unlawful deductions from wages or failure to provide meal and rest breaks.

Many recent cases have been brought on behalf of relatively highly compensated, "white collar" employees who have long been considered exempt from overtime requirements. Examples

Linthorst and Rosenblatt are with Morgan Lewis of Princeton.

include insurance agents, loan officers, stockbrokers and, most recently, pharmaceutical product or sales representatives. Some of these lawsuits have led to massive settlements and verdicts. For example, in February 2006, a financial services company agreed to pay up to \$89 million to settle wage and hour litigation relating to its stockbrokers.

Most practitioners are familiar with class actions under Fed. R. Civ. P. 23. Congress, however, constructed a different mechanism for group actions under the FLSA. FLSA collective actions are governed by 29 U.S.C. § 216(b). The principal difference between a collective action under Section 216(b) and a class action under Rule 23 is that individuals who wish to join an FLSA collective action must affirmatively "opt in" by filing their written consent in the case. Until an individual "opts in," he is not bound by any judgment rendered in the action. By contrast, in a Rule 23 class action, all those who fall within the description of the class are bound by any judgment rendered in the case unless they affirmatively "opt out" of the class. The reality, moreover, is that a class action will have many more putative

class members than will an FLSA collective action because many class members will not read or respond to the notice (either to opt in or to opt out) for a variety of reasons. In short, the presence of a Rule 23 class action can radically increase the participation in a case.

Employers, however, have been fighting back. Courts have grappled with a number of legal theories attacking the permissibility of an opt-out Rule 23 class action as a procedural vehicle by which to assert state wage and hour claims.

In its 1947 amendments to the FLSA (Portal-to-Portal Act), Congress expressly prohibited representative actions under the FLSA by requiring that putative class members file a written consent to join such lawsuits. Congress went so far as to title the relevant statutory provision "Representative Actions Banned." Pub. L. 49, ch. 52 § 61 Stat. 84, 87 (1947). As set forth in its "Congressional findings and declaration of purpose," Congress stated that it adopted the Portal-to-Portal Act, inclusive of its opt-in-only mechanism for group claims, out of concern that employers were facing "the payment of...liabilities [that] would bring about financial ruin of many employers...[and] the courts of the country would be burdened with expensive

and needless litigation and champertous practices would be encouraged.” 29 U.S.C. § 251(a)(1), (7).

Although there are some cases that have allowed state law wage and hour class actions to proceed under certain circumstances, a string of recent decisions recognizing the foregoing legislative intent — with the federal courts in New Jersey leading the way — have barred plaintiffs from bringing state law class actions for overtime as incompatible with the FLSA’s opt-in requirement. In *Moeck v. Gray Supply Corp.*, 2006 WL 42368, at *5-6 (D.N.J. Jan. 6, 2006), Judge Bassler rejected an attempt to maintain simultaneous claims under the FLSA and the New Jersey Wage and Hour Law, holding that a Rule 23 class action for overtime wages is incompatible with the FLSA’s written consent requirement. The court reasoned that “[a]llowing Plaintiff...to circumvent the opt-in requirement and bring unnamed parties into federal court by calling upon state statutes similar to the FLSA would undermine Congress’s intent to limit these types of claims to collective actions.” More recently, in *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006), the court held: “To allow an [FLSA] opt-in action to proceed accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress’s intent in crafting...[the] opt-in requirement. To so hold would be contrary to the *clear path blazed by our sister district*, [the District of New Jersey], as well as the *direction taken by some of our sister circuits*” (citations omitted, emphasis added).

In addition to arguing “inherent incompatibility,” a number of employers recently have argued that allowing a claim for overtime to proceed as a Rule

23 “opt out” class action violates the federal Rules Enabling Act (REA), which states that the federal rules of civil procedure “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). Although it sounds complicated, the argument is simple. First, by virtue of its opt-in requirement, the FLSA creates the substantive right of employees to have their FLSA claims adjudicated only with their written consent. As the United States Secretary of Labor recently explained in an amicus brief in *Long John Silver’s Rests., Inc. v. Cole*, No. 05-3039 (D.S.C. Dec. 13, 2005), “Section 16(b) of the FLSA unambiguously provides employees the right not to have their statutory claims litigated without their written consent.... The advance written consent requirement...goes to the right not to be included as a plaintiff in a lawsuit.” Congress also granted employers the substantive right to defend claims for overtime only against individuals who bring or affirmatively opt into an action. See *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

Second, in the Rule 23 class action context, all employees — unless they go to the trouble of opting out — are, in effect, parties to the litigation, bound by the final disposition of the case — win, lose or settle. Because the provisions of many state wage and hour laws closely track the provisions of the FLSA, these absent class members will have had their FLSA claims adjudicated, under principles of res judicata and collateral estoppel, by any judgment rendered in the Rule 23 action. See *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 923 (9th Cir. 2003) (affirming dismissal of FLSA claim of one of eight employees where that employee had previously litigated a

state law claim for overtime against her employer).

Third, because the Rule 23 case’s determination will affect an employee’s rights to bring his own FLSA claim, and the employer’s right to litigate overtime claims only against individuals who bring or opt into an action, the operation of Fed. Civ. P. Rule 23 has “abridged” these substantive right under the FLSA in violation of the REA.

Other theories to defeat state wage and hour class actions also are being pursued. For example, a number of courts have rejected state wage and hour class claims for lack of supplemental jurisdiction. See, e.g., *De Asencio v. Tyson*, 342 F.3d 301 (3d Cir. 2003). Other courts have rejected such claims under the express terms of Rule 23, holding that “opt out” wage and hour class actions do not meet the “superiority” prerequisite for class certification, finding that the FLSA’S opt-in mechanism is superior to a Rule 23 class. See, e.g., *Leuthold v. Destination America*, 224 F.R.D. 462, 469-70 (N.D. Cal. 2004) (declining to certify Rule 23 class because opt-in FLSA action is a superior method to adjudicate claims in that it affords individuals greater control over the adjudication of their rights); *Edwards v. City of Long Beach*, 2006 WL 3775941 (C.D. Cal. Dec. 12, 2006).

There are no signs that the wave of mass wage and hour cases will subside any time soon. Plaintiffs are likely to continue to bring state law wage and hour opt-out class actions under Rule 23, and employers are likely to continue to oppose that effort. Advocates on both sides of the question should stay tuned for additional decisions from the courts. ■