WHEN SHOULD YOU BRING STATE LAW WAGE AND HOUR CLAIMS IN ADDITION TO, OR INSTEAD OF, FLSA CLAIMS?

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A. INTRODUCTION

Most employees know that they are entitled to minimum wage, and overtime compensation for hours worked in excess of 40 per week, because of required Fair Labor Standards Act ("FLSA") postings by the time clock, in break rooms, or otherwise. And when employment lawyers think about wage and hour violations, they too tend to think about federal rights and remedies. In evaluating any wage and hour claim, however, it is important to see what additional rights or remedies may be provided under state law. As discussed below, the laws of many states provide substantive and procedural advantages over the FLSA. In fact, there are many cases in which an employee may have *only* a claim under state law, and may not have an FLSA claim at all.[1] This article discusses the potential benefits of bringing state law wage and hour claims, either in addition to, or instead of, FLSA claims.

B. OFF-THE-CLOCK CASES

Unfortunately, an increasingly common problem for low-wage workers seems to be "off the clock" work. These cases take several forms. Some employers have a specific policy and practice of not paying their employees for certain work, claiming that time spent performing required activities such as "donning and doffing" protective gear, or cleaning utensils or shop machinery before and after shifts, is not compensable work. For example, the meat packing and poultry processing industries have recently come under fire for such practices, and, in some cases, have settled cases by agreeing to modify their practices and pay employees in the future for this work (as well as providing current and former employees with backpay). Other employers may claim to pay employees for all hours worked, and yet exert subtle or not-so-subtle pressure for employees to perform work "off the clock"—either by working through rest or meal breaks, or

[1] In contrast, some states' minimum wage and overtime laws only apply to employers who are *not* subject to the FLSA. *See, e.g.,* Ark. Code Ann. § 11-4-203(4); Ind. Code Ann. § 22-2-2-3; Kansas Stat. Ann. § 44-1203-1204.

clocking out and continuing to work. For example, Wal-Mart has been sued in over 30 states by employees who allege that they have been forced to work off the clock, and have not been paid for all hours so worked.

Many of these off the clock cases can be brought *only* under state law. This is because many companies schedule their employees to work less than forty hours per week, such that a few extra unpaid hours per week do not amount to FLSA violations. The FLSA provides remedies for workers who are not paid minimum wage for each hour worked, and for workers who are not paid overtime compensation for working more than 40 hours a week. If an employee earning $7 per hour, and scheduled to work 30 hours per week, works an additional 5 hours per week off the clock, that employee does not have a remedy under the FLSA: She is not entitled to overtime compensation because she has not worked more than 40 hours, and she is still being paid the minimum wage for her 35 hours of work. (Seven dollars per hour times 30 hours is $210; even if that $210 is spread over 35 hours, she still received six dollars per hour, so there is no minimum wage violation under the FLSA.)

In contrast to federal law, most states have wage collection statutes, which mandate that employers pay employees all wages earned and due, generally within a certain time frame (e.g. within two weeks of the work being performed). *See, e.g.,* Cal. Lab. Code §§ 204, 216. Employees may be able to assert effective claims for off the clock work under these state wage collection statutes, even if they do not have valid FLSA claims for overtime or minimum wage. Although not all states have minimum wage or overtime laws, almost all states have a wage collection statute. For example, Delaware, Mississipi, South Carolina, and Texas do not have state overtime laws, but do have wage collection statutes. 19 Del. C. §1102; Miss. Code Ann. §71-1-35; S.C. Code Ann. § 41-10-4; Tx. Labor Code Ann. § 61.011. These statutes are often not mentioned in treatises on minimum wage and hour law, or on state Department of Labor websites, but can be located through a simple on line search of the state statutes in question.

Many states have a minimum wage that is higher than the federal minimum wage. This may make an off the clock case that is not viable under the FLSA viable under state law. In the example discussed above, a worker making $7 per hour who is paid for 30 hours of work but works 35 hours, would not have an FLSA minimum wage claim, because she would still be earning $6 per hour, which exceeds the FLSA minimum wage of $5.15 per hour. However, she would have a valid minimum wage claim in California, Connecticut, Delaware, Massachusetts, Oregon, and Washington, all of which have a minimum wage that exceeds $6 per hour.

C. MISCLASSIFICATION CASES

Misclassification cases, or "exempt/non-exempt" cases, involve employers who wrongfully classify their employees as "exempt" from the overtime requirements of the FLSA and state law. Because the employers have classified these workers as exempt, they generally fail to keep records of hours worked, and fail to compensate employees for all hours worked over forty. For example, the California Court of Appeal recently found that Farmers Insurance Exchange had misclassified thousands of insurance claims representatives as "exempt" administrative employees when they were in fact non-exempt. *Bell, et al. v. Farmers Insurance Exchange*, 105 Cal. Rptr. 2d 59, *cert. denied*, 122 S.Ct. 616 (2001). This later resulted in a jury verdict of $90 million for a class of California plaintiffs.

Here too there may be instances in which an employee has a valid claim under state law, but not under the FLSA. Attorneys speaking with clients who have been classified as exempt should not assume that an employee who is exempt under the FLSA is also exempt under state overtime laws. State overtime laws vary, and many do not have the same exemptions as those found in the FLSA. Large nationwide employers often fall afoul of particular state overtime laws by looking only at the FLSA.

An exhaustive recitation of the differences between exemptions under the FLSA and the overtime laws of the many states which have overtime laws is not possible here. A few examples suffice: The FLSA, and the overtime laws of many states, exempt from overtime protection "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49." 29 U.S.C. §213(b)(1). This broad "Motor Carriers Act" exemption eliminates overtime protection not only for truck drivers, but for drivers' helpers, loaders, and any number of other workers involved in transporting goods across state lines. Some states, such as New Mexico and Michigan, do not exempt such employees from their overtime laws. S*ee generally* N.M. Stat. Ann. § 50-4-21; Mich. Comp. Laws 408.384(a). Other states, such as Colorado and Washington, have a more narrow Motor Carriers Act exemption, that applies only to truck drivers and their assistants, rather than to all those for whom the Secretary of Transportation has the power to establish qualifications. *See* 7 Colo. Code Regs. 1103-1 at § 5; Wash. Rev. Code § 49.46.130(2)(f). Under the FLSA, the white collar exemptions require only that employees' "primary function" be exempt work. In contrast, California takes a quantitative approach--employees are exempt only if they spend over 50% of their time performing exempt tasks. *See, e.g., Ramirez v. Yosemite Water Co., Inc.*, 978 P.2d 2, 10, 20 Cal.4th 785, 797 (Cal. 1999). In Alaska, if supervisors spend more than a limited number of hours per week performing the same tasks as those they supervise, they are not exempt. Thus, some managers may be exempt under the FLSA, but not under

corresponding Alaska law. *Grimes v. Kinney Shoe Corp.*, 902 F. Supp. 1070, 1071-72 (D. Alaska 1995); 8 Alaska Admin. Code § 15.910(a)(14).

Thus, it is possible for an employee to be exempt from the overtime pay requirements of the FLSA, but still subject to state law overtime protections. Federal law does not preempt state law in such instances. *Overnite Transportation Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir. 1991); *Pacific Merchant Shipping Association v. Aubry,* 918 F.2d 1409, 1415 (9th Cir. 1990); *Maccabees Mutual Life Ins. Co.,* 641 F.2d 45, 46 (1st Cir. 1981); *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258, 1261 (D.C. Cir. 1972).

D. <u>STATUTE OF LIMITATIONS</u>

Some potential clients may come to you so late that their FLSA claims are barred by the statute of limitations. It is always wise to consult state statutes in such instances, because many states have longer statutes of limitations than does the FLSA. Moreover, even if an employee's claim is not completely time barred under the FLSA, state law may allow an employee to make a claim for additional years of backpay.[2]

Under the FLSA, the statute of limitations is two years, but is extended to three years for "willful" violations. 29 U.S.C. § 255(a). Many states have longer statutes of limitation. In New York, the statute of limitations is six years. N.Y. Lab. Law § 663(3). In California, wage and hour claims may be pled under Business & Professions Code Section 17200, which extends the statute of limitations to four years. *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 178 (2000). Illinois, Michigan, and Washington all have unqualified three year statutes of limitation—that is, there is no need to prove wilfullness, as there is under the FLSA. 820 Ill. Comp. Stat. 105/12; *People el rel. Dept. of Labor v. Soccer Enterprises, Inc.,* 302 Ill. App. 3d 481, 484, 707 N.E.2d 108, 110 (Ill. Ct. App. 1998); Wash. Rev. Code § 4.16.080(2); *Seattle Professional Engineering Employees Ass'n. v. Boeing Co.*, 139 Wash.2d 824, 836, 991 P.2d 1126, 1133 (2000); Mich. Comp. Laws Ann. § 408.393 (13)(1); *Zimmer v. Bergstom, Quinn and Oole*, 1989 WL 223111, *3 (W.D. Mich. 1989).

E. <u>HOURS WORKED</u>

The FLSA only requires overtime pay if an employee works over 40 hours in one work week. 29 U.S.C. §207(a)(1). Some states, in contrast, also require overtime pay if an employee works more than a set number of hours per day. In

[2] Note that many states have one statute of limitations for violations of the wage collection statute, and a different statute of limitations for minimum wage and overtime violations.

Alaska, California and Nevada, for example, an employee working more than eight hours in one day is entitled to overtime compensation. Alaska Stat. § 23.10.060; Cal. Lab. Code § 510; Nev. Rev. State. § 608.018. Colorado provides a 12-hour daily maximum where the imposition of the daily maximum provides greater wages to an employee than the 40 hour per week maximum. 7 Colo. Code Regs. 1103-1 at § 4.

F. REMEDIES

Under the FLSA, only the Secretary of Labor, and not individual employees, may seek injunctive relief. 29 U.S.C. § 211; *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). In contrast to federal law, most state laws do not prohibit employees from seeking an injunction. Such relief has been explicitly recognized in several states, including Illinois and Minnesota. *See Ladegaard v. Hard Rock Concrete Cutters*, *Inc.,* 2000 WL 1774091 at n.7 (N.D. Ill. 2000); Minn. Stat. § 177.27(8); Minn. Stat. § 177.27(7).

Many state laws also provide for additional damages remedies not permitted under the FLSA. Double liquidated damages are available under the FLSA (29 U.S.C. § 216(b)), and also under the laws of several states. However, under the FLSA, upon a certain showing of "good faith," the court has discretion to decline to award liquidated damages, or to reduce the amount of liquidated damages. 29 U.S.C. § 260. In contrast, some states that allow liquidated damages do not allows employers to escape liability by demonstrating "good faith." Minn. Stat. § 177.27(8); *Bot v. Residential Services, Inc.*, 1997 WL 328029, *4 (Minn. App. 1997); N.M. Stat. Ann. § 50-4-26(B)(1). In Washington, double damages are available against an employer that willfully withholds wages due, and the Washington standard for willfulness appears to require only that the employer's withholding of pay was "volitional." Wash. Rev. Code § 49.52.070; *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 160, 961 P.2d 371, 375 (1998). And Massachusetts law provides for *treble* damages. Mass. Gen. Laws Ann. ch. 151, § 20.

Many states impose "waiting time penalties" on employers that fail to pay terminated employees all wages due at the time of termination. *See* Or. Rev. Stat. § 652.150; Cal. Lab. Code § 203; Alaska Stat. § 23.05.140(b). Illinois provides for punitive damages of two percent of the amount of underpayments for each month following the date of payment during which the underpayments remain unpaid, if the employer's conduct was willful. *See* 820 Ill. Comp. Stat. 105/12; 56 Ill. Admin. Code Tit. 210, §§ 1000-1010.

G. COLLECTIVE ACTION V. CLASS ACTION

It is rare than an employer is violating wage and hour laws with respect to one employee only. Wage and hour violations generally occur in the context of a uniform payroll system. If an employer has a policy of not paying its employees

for donning and doffing protective gear, all employees in the company are probably subject to the same unlawful pay practice as is your client. Similarly, the exempt/non-exempt determination is generally a company policy applicable to all employees with a certain job title. Thus, if you have one client with a good wage and hour claim, chances are that her colleagues are being subjected to the same unlawful practices. Accordingly, the employment lawyer should always consider whether to bring an individual action or a class case. Although a class case may take longer and require more resources, it may bring greater rewards, both to the client and the attorney. Individual attorneys without the resources or expertise to bring a class action are urged to seek co-counsel.[3]

It may be particularly desireable or necessary to bring off the clock cases as class actions. In cases in which an employer exerts pressure upon its employees to work off the clock, the employer may be able to convince a judge or jury that it did not know that your client was working off the clock. The employer's excuse will start to look much weaker, however, when a number of employees all testify to the same pressure to work off the clock.

Claims brought under the FLSA cannot be brought as class action lawsuits under Federal Rule of Civil Procedure 23, or under corresponding state class action statutes. Instead, FLSA claims must be brought as "collective actions" in which each individual employee must affirmatively "opt-in" to the lawsuit by filing a consent to join. 29 U.S.C. § 216(b). The statute of limitations continues to run for each individual employee until she opts in. 29 U.S.C. § 256(b). Courts often authorize early notice in FLSA collective actions, allowing potential employees to be notified of the lawsuit and the opportunity to opt in. *Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989). However, many employees, particularly current employees, may be reluctant to opt in.

In contrast, a state law wage and hour claim may be brought as a traditional "opt-out" class action under either Federal Rule of Civil Procedure 23, or corresponding state class action procedures. This has several advantages: First, under federal law and the law of most states, the statute of limitations is tolled as of the date that the class action lawsuit is filed. Second, employees may be included in the lawsuit without having to risk retaliation or other consequences by affirmatively opting in to the lawsuit. Third, the number of people opting-in to

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[3] There are not many published decisions granting class certification in state law wage and hour cases, but there are a number of unpublished trial court decisions which do grant class certification. Attorneys should be aware that the California Supreme Court recently granted review of a Court of Appeal decision holding that, under the specific facts of the case before it, class certification of an exempt/non-exempt case was improper under California law. *Sav-On Drug Stores, Inc. v. Superior Court*, 97 Cal. App. 4th 1070, *review granted* July 17, 2002.

a suit may be quite small, which may make the case less attractive from a resource allocation point of view.

It is also possible to bring an FLSA collective action and state law class actions concurrently in one federal case. This may provide the best of both worlds: You can file a nationwide FLSA collective action, which will provide a remedy for the many employees who live in states that do not have their own state minimum wage and overtime law. You can use the FLSA collective action device to gain early, pre-discovery notice to the class to give them an opportunity to "opt in." This early expression of class member interest can help you when filing your later motion for class certification of the state law claims. You can add pendent state law claims under the laws of those states that have laws that are more favorable than the FLSA. These will be traditional "opt out" subclasses under Federal Rule 23, thus allowing more workers to be included in the lawsuit.

H. RESOURCES

Many state Departments of Labor maintain websites with helpful links to statutes and regulations. These are important sources of information, especially since many state wage and hour laws are not statutory, but are enacted through regulations or wage orders. The United States Department of Labor has a helpful website link to state labor departments, at www.dol.gov/esa/contacts/state of.htm. An excellent synopsis of state minimum wage and overtime laws is Laurie E. Leader, *Wages and Hours: Law and Practice*, Chapter 13 (LexisNexis 2002).