THE FAIR LABOR STANDARDS ACT: UPDATES FROM THE 6TH AND 7TH CIRCUITS

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The Fair Labor Standards Act of 1938 (FLSA) has received much attention over the last several years. Many decisions, while providing guidance and clarifying what types of claims may subject employers to liability, have seemed to be employee friendly. Several recent decisions, two from the Seventh Circuit and one from the Northern District of Ohio (Sixth Circuit) provide some ammunition for employers, at least for now.

A. The 7th Circuit Provides Protection to Union Employers

The 7th Circuit recently decided the case of *Sandifer v. U.S. Steel Corp.,* 678 F.3d 590 (7th Cir., 2012). The *Sandifer* case involved claims under the FLSA by both current and former steel workers seeking compensation for time spent putting on and removing work clothes, as well as time spent walking from the locker room to the work area. Under the FLSA an employer is not required to compensate employees for time spent changing clothes. However, the workers argued that the gear required by U.S. Steel amounted to safety equipment, and not clothing, as contemplated by the FLSA. The gear at issue includes "flame-retardant pants and jacket, work gloves, metatarsal boots … a hard hat, safety glasses, ear plugs, and a "snood" (a hood that covers the top of the head, the chin, and the neck)." *Id.* at 592.

U.S. Steel filed for summary judgment on both issues (changing of clothes and travel from locker room to work area). The district court granted summary judgment for U.S. Steel finding that the FLSA does not require compensation for changing clothes. However, the district court certified for interlocutory appeal the issue of whether the travel time to and from the locker room was compensable. The Plaintiffs cross-appealed the grant of summary judgment related to the changing of clothes, but the 7th Circuit dismissed the cross-appeal on procedural grounds.

Despite the interlocutory appeal only involving the question compensability of travel time to/from the locker room, the 7th Circuit initially focused its attention on whether the changing of clothes was covered under the FLSA. Per the 7th Circuit, "if the ruling on clothes-changing time was erroneous, the plaintiff's case for compensation for travel time is … irrefutable." *Id.*

Focusing on the history of the legislation, the 7th Circuit noted that the FLSA excludes "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time … by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o). In *Sandifer*, the plaintiffs were part of a collective bargaining agreement which did not require compensation for changing of clothes. The 7th Circuit also noted that none of the prior collective bargaining agreements required compensation for changing of clothes.

The main issue was whether the gear required by U.S. Steel fell under the category of clothing or safety equipment, otherwise known as personal protective equipment. The 7th Circuit pointed out that clothing often has a protective component. Based on this analysis, the 7th Circuit affirmed the district

court's grant of summary judgment in favor of U.S. Steel on the issue of whether changing clothes before and after the shift was compensable.

The 7th Circuit next focused its attention on whether the travel time to and from the locker area was compensable. The 7th Circuit noted that the FLSA does not apply to "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a). Based on this language, and with the holding that the changing of clothes was not compensable, the 7th Circuit determined that travel to and from the locker area was exempt from the FLSA. Importantly, the 7th Circuit pointed out that the employer and union specifically agreed in the collective bargaining agreement that the workday would not start until the employee reached the work station.

Notably, the 7th Circuit's holding regarding travel time not being compensable conflicts with the 6th Circuit's decision in *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010) In *Franklin,* the 6th Circuit deemed that compensation for changing of clothes was excluded, but that travel time from the changing area to the work station was compensable. The 7th Circuit pointed out that the *Franklin* opinion only provided a conclusion without any reasoning, and thus felt that the 6th Circuit's decision was wrong.

We do not have to wait long to find out which Circuit's analysis is correct. The U.S. Supreme Court granted certiorari on February 19, 2013.

B. The 7th Circuit Restricts FLSA Collective Actions Based on Damage Calculations

Collective actions under the FLSA are not uncommon. Employees may file a collective action on behalf of themselves and other employees who are similarly situated to recover, for example, unpaid overtime. Courts have developed a two-step process to determine whether an FLSA lawsuit should proceed as a collective action. First, the employee must receive conditional approval to move forward with a collective action by making a "minimal showing" that potential class members are victims of a common policy or plan. *Smith v. Safety-Kleen System, Inc.*, 2011 U.S. Dist. LEXIS 40670, *4 (N.D. Ill. Apr. 14, 2011). The *Smith* decision recently found that a plaintiff satisfies this minimal burden by merely establishing that an employer's policies and practices *may* violate the FLSA. *Id.* at *14 (emphasis added). If this "modest burden or "modest factual showing is met," notice is sent to potential class members giving them an opportunity to opt-in as plaintiffs. Next, and after discovery occurs, the employer may move to decertify the collective action. Thereafter, to proceed as a collective action, the employee must demonstrate that sufficient similarities exist between the named and opt-in plaintiffs. Unlike the low burden placed on plaintiffs in step one, step two requires more; an employee must overcome a more stringent evidentiary standard. *Id.* at *5.

On February 4, 2013, the 7th Circuit issued an Opinion authored by Judge Richard Posner that is very favorable to employers. The Court ruled that employees cannot sue for unpaid overtime as a group unless they can propose a rational way to calculate damages without engaging in a specific factual inquiry for each employee. *Espenscheid v. DirectSat USA, LLC,* 705 F.3d 770 (7th Cir., 2013).

In *Espenscheid*, the District Court initially certified a class of 2,341 plaintiffs who claimed they did not receive overtime wages in violation of the FLSA. The plaintiffs consisted of a group of home satellite-

dish installers who were paid by the job rather than by the hour. Hence, many of the employees worked fewer than forty hours and many may have worked substantially more than forty hours. The Seventh Circuit decertified the class and ruled that the case could not continue as a collective action because there would have to be an individual factual inquiry for each employee regarding his or her damages. The Court held that the collective action could not go forward because each separate evidentiary hearing would have "swamped" the District Court.

The Plaintiffs attempted to avoid the individual inquiry by stating that there could be 42 representative class members. The Seventh Circuit rejected that approach because the plaintiffs could not present a logical explanation for how the selected 42 plaintiffs accurately represented the class.

This ruling provides an opportunity for employers to argue at the outset of FSLA collective action classes that the potential class should not be certified because there will need to be an individual inquiry for damages.

C. The Northern District of Ohio Decertifies a Collective Action – Class Members Not Similarly Situated

The FLSA permits employees to file a collective action for unpaid overtime on behalf of themselves and other employees who are "similarly situated." The initial threshold for conditional approval to certify a collective action is very low. Upon receiving notice of the action, putative class members can opt into the action by providing their written consent. The court will conditionally certify the class during the notice stage; however, a more stringent factual determination of whether the class members are in fact similarly situated occurs after discovery. During the second stage, the court considers (1) the disparate factual and employment settings of the individual opt-in plaintiffs; (2) the various defenses available; and (3) fairness and procedural considerations. A recent case out of the Northern District of Ohio provides solace to employers that the second hurdle is significantly higher.

In *Creely v. HCR ManorCare, Inc.*, 2013 U.S. Dist. Lexis 13305 (N.D. Ohio Jan. 31, 2013), the United States District Court for the Northern District of Ohio decertified a collective action filed pursuant to the FLSA holding that plaintiffs failed to present substantial evidence that they were similarly situated with respect to defendant's electronic auto-deduct timekeeping policy.

In *Creely*, a group of 318 registered nurses, licensed practical nurses, certified nursing assistants, and admissions coordinators opted into a collective action against their employer HCR ManorCare ("HCR"), a nationwide provider of short and long-term rehabilitation facilities, alleging that they were denied overtime wages in violation of the FLSA. Defendant implemented an electronic timekeeping system that automatically deducted a thirty minute break period from timecards of hourly employees who worked a set amount of hours per day. Defendant's policy indicated that any employee who was unable to take the pre-determined break period was required to fill out and submit a "missed punch form" to their manager who would coordinate with payroll to adjust the employee's time card accordingly.

Plaintiffs argued that employees who missed or worked through the pre-determined break period were not paid because defendant illegally shifted the burden of monitoring "compensable work time" to its employees and failed to properly train employees on how to report missed time. Moreover, plaintiffs

contended that managers at some of defendant's facilities actively discouraged employees from reporting missed meal breaks.

The court determined that although defendant's auto-deduct policy applied to all members of the class, the application of the policy varied extensively based on an employee's job duties, individual managers, and the patient population at a particular HCR facility. For example, employees at some facilities were encouraged to use the "missed punch form," while employees at other facilities were not. The court reasoned that because the auto-deduct policy was implemented in a decentralized manner, plaintiffs failed to demonstrate that they were similarly situated. Furthermore, the court noted that defendant's defenses would turn on individual inquiries into plaintiffs' experiences at each HCR facility. Accordingly, the court concluded that given the varying circumstances at each facility, class certification would hinder, not promote judicial economy.