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Wage-Related Claims Seek Class-Wide Relief

Some workers want compensation for pre- and post-work activities

By LARRY PEIKES

For several years now, employers have been plagued by an ever-increasing volume of wage-related claims. These claims are well-suited for litigation on a class-wide basis because: 1) they typically involve employer policies or practices of general application; 2) although each individual claim ordinarily raises the specter of a modest monetary award, when litigated collectively the stakes rise dramatically; and 3) the stakes are further escalated by the availability of liquidated damages and attorneys' fees under the Fair Labor Standards Act (FLSA).

Hence it is not difficult to see why wage and hour claims have become, and continue to be, the apple of the plaintiffs' bar's eyes.

To date, Connecticut courts have hosted only a relative handful of wage and hour suits seeking class-wide relief; the hotbeds are California, New York and Florida. However, there has been an uptick in FLSA litigation in Connecticut over the past few months. With that in mind, this article will highlight some recent trends that Connecticut employers ought to be on the lookout for.

Compensable Time Issues

The FLSA generally requires employers to compensate employees for the performance of a "principal activity" as well as "any activity that is 'integral and indispensable' to a 'principal activity.'" So observed the U.S. Supreme Court in *IBP Inc. v. Alvarez,* 546 U.S. 21 (2005), which holds that during a continuous workday any activity that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is covered by the FLSA.

Much litigation has ensued over whether a particular task is a "principal activity" that starts and/or concludes the continuous workday. *Musch v. Domtar Industries Inc.,* 587 F.3d 857 (7th Cir. 2009) is a good example. There, the Seventh Circuit concluded that maintenance employees at a paper mill were not entitled to compensation for time spent changing clothes and showering because they "failed to demonstrate that chemical exposure is so pervasive that it requires these post-shift activities...."

Employers in the food processing industry have been bombarded with FLSA suits alleging that time spent donning and doffing protective clothing is integral to the employees' principal activities and therefore compensable. Unfavorable results in highly publicized cases such as *DeAsencio v. Tyson Foods Inc.,* 500 F.3d 361 (3rd Cir. 2007) have no doubt been the impetus for many of the big-dollar settlements reported over the past couple of years. Somewhat ironically, unionized employers have had greater success defending against donning and doffing claims. This is largely because Section 3(o) of the FLSA expressly provides that time spent changing clothes is non-compensable if it has been excluded from measured working time by custom or practice under a bona fide collective bargaining agreement. Recently, in *Allen v. McWane Inc.,* the Fifth Circuit held that Section 3(o) applies to a long-standing practice of non-compensation for changing time even if the subject was never addressed in collective bargaining.

A multitude of class-type claims have been brought by office workers seeking compensation for a variety of pre- and post-work activities. For example, in one recent case a federal district court in Wisconsin conditionally certified a class of customer service workers who claimed they were unlawfully denied payment for time spent booting up their computers, logging on to the employer's network, opening computer programs, reviewing company notices and training notes on the intranet, and completing or correcting customer credits and orders. Similar pre-shift tasks, in particular checking work-related e-mails and conducting computer research, were found to be compensable in *Von Friewalde v. Boeing Aerospace Operations Inc.,* 2009 U.S. App. LEXIS 17346 (5th Cir. Aug. 4, 2009).


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Another work time issue that has spawned a substantial volume of litigation, especially in California, concerns meal breaks. Although the FLSA does not obligate employers to provide respites of any kind, most states, including Connecticut, require that breaks be given at certain intervals in the work day.

For instance, under Connecticut law, employees who work 7½ or more consecutive hours are generally entitled to at least a 30-minute meal break. Are employers required to ensure that employees actually take statutorily mandated breaks or is the obligation limited to making the breaks available? That

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issue is pending before the Supreme Court of California in *Brinkley v. Public Storage Inc.,* a case being closely watched by employers.

Overtime Exemptions

Many, perhaps most, overtime pay cases center on the so-called "white-collar" exemptions for executive, administrative, professional and outside sales employees.

One hotly contested exemption issue that has been litigated in Connecticut concerns pharmaceutical sales representatives, who, due to legal restrictions on the sale of prescription drugs, do not actually sell product; rather, they provide marketing materials, product information, samples and the like in an effort to encourage doctors to prescribe the drug to patients.

In *Ruggeri v. Boehringer Ingelheim Pharmaceuticals Inc.,* 585 F. Supp. 2d 254 (D. Conn. 2008) and *Kuzinski v. Schering Corp.,* 604 F. Supp. 2d 385 (D. Conn. 2009), Judge Janet Bond Arterton determined that the outside sales exemption did not apply to these employees because they were not in fact responsible for "making sales." A majority of district courts have concluded otherwise. See, e.g., In re *Novartis Wage and Hour Litigation,* 593 F. Supp. 2d 637 (S.D.N.Y. 2009). The issue is currently pending before several courts of appeals, including the Second Circuit.

Insurance companies have been ravaged by overtime pay suits brought on behalf of claims adjusters. Courts have been largely consistent in finding that adjusters, other than those at the lowest levels, qualify for the administrative exemption.

Most recently, the D.C. Circuit ruled that auto damage appraisers responsible for assessing, negotiating and settling automobile damage claims were properly classified as exempt administrative employees. The decision in *Robinson-Smith v. Government Employees Insurance Co.* may prove especially beneficial to Connecticut-based carriers since, in reaching the opposite conclusion in *Neary v. Metropolitan Property and Casualty Ins. Co.,* 517 F. Supp. 2d 607 (D. Conn. 2007), Judge Arterton relied principally on the now discredited district court opinion in the *Robinson-Smith* case.

Optimism must be guarded, however, as the Second Circuit recently cited *Neary* approvingly in *Davis v. J.P. Morgan Chase & Co.,* 587 F.3d 529 (2d Cir. 2009), where the court held that underwriters were engaged in production work—i.e., the production of loans—and so did not qualify for the administrative exemption.

Hybrid Claims

The opt-in procedure applicable to FLSA "collective" actions invariably yields a lower participation rate than traditional Rule 23 opt-out class actions. In an effort to bring more claimants into the fold, plaintiffs' lawyers have increasingly filed hybrid suits in federal court and moved to certify a collective action as to the FLSA claims and a class action as to the state claims.

Although this tactic has met with some success, there is a growing concern about the mixed message sent to putative class members: "One notice would have to explain to the employees that they need to take affirmative steps just to back out of the suit, while the other would ask for affirmative steps just to join." *Powers v. Centennial Communications Corp.,* 2009 U.S. Dist. LEXIS 116819 (N.D. Ind. Dec. 14, 2009).

Employers facing hybrid wage and hour suits will certainly want to emphasize this inherent tension between the collective action and class action procedures in opposing certification under Rule 23. ■