Practice Area
briefings

sponsored content graciously presented by FordHarrison LLP

Innovative Strategies for Defending Against the Rising Tide of Wage and Hour Class and Collective Action Claims

By Aaron Zandy and Jessica Walberg, Partners, FordHarrison LLP

"If you always do what you always did, you will always get what you always got." — Albert Einstein

Introduction

Over the last decade, employers increasingly have been bombarded with wage and hour lawsuits filed by current and former employees under the Fair Labor Standards Act (FLSA) and various state law equivalents. These wage and hour lawsuits, which began as single plaintiff one-off cases, have now bloomed into a cottage industry where collective and class actions have become the norm. Why, you may wonder, has a law that has been around since 1938, with no punitive damages available as a remedy, caught the attention of so many employment and non-employment (read: personal injury) lawyers? The answer is quite simple: there are no administrative prerequisites to filing a wage and hour lawsuit, unlike other employment-related claims; employer violations are common and often easy to find; the burden of proof generally rests with employers; and … wait for it … attorneys' fees are awarded automatically to prevailing employees.

So what's an employer to do? Employers all over the country have struggled with this precise question and searched desperately for a magical answer. Though no talisman exists, it is time for employers to re-emerge from their bunkers, put aside their collective dread, and begin thinking outside the box about how best to protect themselves from the onslaught of wage and hour litigation. While there is no one-size-fits-all solution for every employer in every jurisdiction, below are five innovative strategies to consider implementing at your business.

1. Require Comprehensive Timesheet Acknowledgements

Unless employers are prepared to hire a film crew (in the vein of reality TV) to track and record every movement of their employees, employers should use comprehensive timesheet acknowledgments as often as possible. Unfortunately, the

Leading local HR lawyers in one global group

With 24% more HR lawyers ranked globally than any other legal services organization*, Ius Laboris offers local HR legal services by English speaking lawyers in 44 countries.

*Source: Chambers & Partners' guides to leading business lawyers, June 2014

www.iuslaboris.com

Ius Laboris USA Global HR Lawyers
FordHarrison

www.fordharrison.com

good ole' days when employers simply could ask employees to fill out standard timesheets are over, and this is no longer a sufficient method to prove the number of hours an employee worked. Indeed, it has become routine for employees to file lawsuits claiming that they worked before or after the time recorded on their timesheets, or worked during their meal periods.

Comprehensive timesheet acknowledgements usually take the form of a simple paragraph followed by an employee signature line, which can be in paper or electronic format. By signing a timesheet with an acknowledgment, employees are expressly agreeing that all hours worked have been reported fully and accurately, including any time worked before or after regularly scheduled hours and during meal periods. Acknowledgments should also include a statement that employees have not performed any work off-the-clock. For employees who take a meal period, an acknowledgment regarding being "completely relieved of work" during a meal period may also be appropriate. Employees should also be required to acknowledge that they understand that they may be subject to disciplinary action for misrepresenting the number of hours they worked.

Absent video surveillance, it is exceedingly difficult for employers to prove that employees did not work when they say they did. Fortunately, however, comprehensive timesheet acknowledgments will go a long way toward deterring off-the-clock claims or, at the very least, will undermine the claims' credibility.

2. Develop Solid Policies and Procedures

Another important, albeit traditional, strategy for employers to fend off FLSA lawsuits is to develop smart timekeeping processes. To that end, employers should conduct regular wage and hour assessments and continually audit their timekeeping policies, procedures, and practices. Audits and assessments should be performed with the oversight and advice of counsel in order to maintain privilege over the process and outcome. Employers also should implement and publicize to their workforce an effective wage and hour complaint reporting process. In other words, employers should institute a formal process that employees can use to report violations of the FLSA they have witnessed or to which they have been subjected. Some employers even utilize a 1-800 number for this purpose. Additionally, it is critical that employees are encouraged to report their concerns without fear of reprisal. Employers also should consider implementing "safe harbor" policies that will permit preservation of exempt status in situations where an impermissible deduction has been made from an exempt employee's paycheck. Under certain circumstances, employers with clearly communicated policies that prohibit unlawful deductions are afforded the benefit of maintaining an employee's exempt status, despite an impermissible deduction. This exempt status preservation is permissible where the employer provides a complaint procedure for reporting the improper deduction, reimburses the employee, and makes a good faith effort to comply with the law in the future.

Perhaps the greatest weapon in an employer's arsenal to combat wage and hour claims is having well-trained and knowledgeable supervisors and managers. Employers should educate managers on the requirements of the FLSA by providing training and educational materials regarding the law and the company's corresponding policies and procedures. Further, managers should be encouraged to enforce the company's FLSA policies consistently and should be given the responsibility of ensuring FLSA compliance for their direct reports. This is especially important because individual supervisors can be found personally liable for violating the FLSA. There are many ways managers can help ensure compliance with wage and hour laws, including prohibiting automatic meal break deductions, monitoring overtime work and/or working from home, requiring employees to complete their own timecards and sign comprehensive acknowledgments, and disabling remote access to electronic systems (e-mail and remote desktop).

Managers also should be trained to address common FLSA concerns, including situations where unapproved overtime or off-the-clock work is performed. In these cases, managers should administer discipline for failure to follow policies, but also should be responsible for avoiding an FLSA violation by ensuring an employee performing "unapproved" work is still compensated. Employers should never withhold pay if an employee misrepresents

hours worked. Rather, employers should use disciplinary action or termination as the primary tool to address and enforce timekeeping violations. Employees who work off-the-clock and do not record their time properly and accurately have still performed compensable work for the employer and should be paid accordingly. Failure to pay an employee because he performed work without approval is a typical FLSA violation that can be avoided if managers are knowledgeable and held accountable for FLSA compliance of their direct reports.

3. Mandate Arbitration Agreements

Have you considered asking an employee on his or her first day of work to sign an arbitration agreement requiring the employee to pursue wage and hour claims through binding arbitration, rather than filing a lawsuit through the court system? If not, you should give the idea some serious thought. Although the use of arbitration agreements had been under legislative, administrative, and judicial attack for quite some time, in a series of recent opinions, the Supreme Court re-affirmed that arbitration agreements are indeed enforceable in the employment context, so long as they are drafted properly. For example, employers will want to make sure that their arbitration agreements satisfy state contract law requirements and that sufficient consideration exists. (In some states, continued employment is *not* sufficient consideration). In addition, employers should ensure that the agreements are clearly and fairly drafted. If properly drafted, the only remaining question is whether the pros of implementing an arbitration agreement at your workplace outweigh the cons.

Of course, there are distinct advantages and disadvantages to consider before rolling out arbitration agreements to your workforce. On the upside, arbitration agreements will dispense with unpredictable, emotional, and presumably "employee-friendly" juries. Arbitrators act as both judge and jury and are far less likely to be swayed by emotional appeal. They also are unlikely to award large "run-away jury" type awards. In addition, in theory at least, arbitration is less expensive than traditional litigation because a case usually can be arbitrated much more quickly than it can proceed through a back-logged court system. Arbitrations also allow employers to avoid unwanted publicity, as there are no public records created and no right of public access to hearings and trials. Additionally, the stringent standard for overturning an arbitrator's decision means that the decision usually brings immediate closure (which also can be a disadvantage, as discussed below). Lastly, one of the key advantages to using arbitration agreements is that they require employees to waive their right to bring bet-the-company class actions and collective actions, as discussed below.

On the downside, because the standard for overturning an arbitrator's decision is so difficult, in the great majority of cases the employer will be stuck with the arbitrator's decision, with no realistic possibility of appeal. In addition, the rules of arbitration are far more relaxed than their litigation counterparts, limiting employers' ability to file evidentiary, procedural, or dispositive motions to dispose of or narrow an employee's claim prior to the arbitration hearing, which often leads to the introduction of extraneous matters that may serve to confuse and distract the arbitrator from the main issues under consideration. Also, arbitrators are more likely to "split the baby," that is, enter an award and provide a remedy, as opposed to dismissing a case on the lack of merits. Unlike judges, arbitrators are paid by the parties. As a result, they have a personal interest in being viewed as "middle of the road" and fair-minded so that parties will continue to select them for future arbitrations. Further, mandatory arbitrations for employees generally increase the overall number of claims filed against an employer due to the relative ease of filing a claim, and the employer usually bears this cost. Finally, having a binding arbitration agreement does not prevent an employee from filing a charge (individually or as a class) with the EEOC, NLRB, DOL or state agency for an investigation.

In addition to weighing these pros and cons, employers should consider additional factors before requiring their employees to sign arbitration agreements. For instance, employers should consider their corporate and human resources culture, litigation history, philosophy, and risk tolerance. Also, employers should do their homework and determine whether the particular states and

jurisdictions in which the employers operate favor the arbitration of employment disputes.

4. Implement Class and Collective Action Waivers (Within or Outside of Arbitration Agreements)

Another innovative strategy employers should consider implementing to protect themselves against multi-plaintiff litigation is requiring employees to sign class and collective action waivers as a pre-condition of employment. Class and collective action waivers are agreements between an employer and an employee in which an employee expressly waives his or her right to participate in a class and collective action against the employer. Class and collection action waivers can be contained within arbitration agreements, or in stand-alone agreements. In the arbitration context, there is significant Supreme Court precedent on the enforceability of class and collection action waivers of employment law claims because of the strong public policy favoring arbitration and because the waivers do not require employees to relinquish any substantive rights.

In the non-arbitration context, there is a dearth of case law on the enforceability of stand-alone class and collective action waivers; however, employers continue to argue that just like an arbitration agreement, stand-alone waivers can and should be scrutinized by courts under a contract theory.

As a caveat, employers considering the use of arbitration agreements with class and collective action waivers need to know that in 2012, the National Labor Relations Board (NLRB) invalidated an arbitration agreement containing a class action waiver on the grounds that such an agreement violated employees' rights under Section 7 of the National Labor Relations Act to engage in concerted protected activities for mutual aid and protection. In addition, the NLRB struck the agreement's class action waiver because it did not explicitly carve out an exception that would allow employees to file an unfair labor practice charge with the NLRB. Even though the Court of Appeals rejected the NLRB's decision in late 2013, the NLRB's administrative law judges likely will continue to rely on the Board's decision until the Supreme Court, or the Board itself, overturns it.

Obviously, this is an area that will continue to be litigated and attacked from multiple fronts. However, given the strong support for the enforceability of class and collective action waivers, employers should certainly give this idea serious consideration.

5. Require Stand-Alone Jury Waivers

As an alternative to arbitration agreements (with or without class and collective action waivers), employers should consider requiring employees to enter into stand-alone jury waivers (or agreements for bench trials) as a pre-condition of employment. Although some employers may choose to use arbitration agreements based on their many advantages, other employers may prefer litigating in the court system, especially when the fear of a "run-away" jury is removed through an effective jury waiver. Generally, courts will enforce jury waiver provisions so long as the waiver is considered "knowing and voluntary." Because arbitration agreements, which have the effect of waiving a jury trial, are so favored, employers have a good chance of convincing a court that mandatory jury waivers are likewise enforceable. Thus, when compared to arbitration, jury waivers permit employers to avoid the drawbacks of arbitration, while retaining the benefit of trying a case to the court, instead of the jury.

Conclusion

These innovative ideas to defend against wage and hour claims are not for every employer in every jurisdiction. Employers need to take a close look at their corporate culture, claims experience, litigation philosophy, management team and capabilities, state and jurisdiction, and other important business factors to determine whether these ideas can be implemented effectively at their businesses. One thing is for certain. Whether employers implement one of these strategies or try something different, they must continue to be proactive and creative in the way they defend against wage and hour class and collective action claims. **PAB**