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Pragmatic Strategies to Consider When Defending Wage and Hour Class or Collective Actions for Multi-State Employers

By Madeleine K. Lee

This article will overview proactive techniques that can be implemented outside of litigation and during litigation to mitigate risk from such claims.

Wage and hour litigation remains an evergreen and prolific area for employers operating in the US. Although some areas can be state-specific, there are common, proactive strategies employers operating in multiple jurisdictions and their counsel can take to mitigate exposure and place the employer in a strong position when faced with class, collective, and representative wage and hour litigation. Reactive approaches to wage and hour litigation often mean the litigation will last longer, with higher litigation expenses, missed opportunities to correct or prevent problems, a failure to learn from mistakes, and a poorer outcome for the client. This article will overview proactive techniques that can be implemented outside of litigation and during litigation to mitigate risk from such claims.

Implementing Defense Tools

Maintaining an Arbitration Program

The arbitration process is not necessarily a panacea, at the very least because it can be costly with high arbitration fee retainers that can be six-figures, a slow process, and potential for a neutral to grant an award to the employee that results in significant attorneys' fees. Nevertheless, an enforceable arbitration agreement with a class action waiver that eliminates class action risk cannot be denied as having significant upside. Generally, as of this writing, arbitration programs for wage and hour claims can be mandatory even in employee-friendly venues such as California (with certain caveats noted below). If an employer opts for a mandatory program, an employer will want to be prepared to enforce the mandatory implementation from the outset of an employment relationship, even as early as the application process, to avoid an argument that the employer waived the arbitration agreement by permitting a new employee to continue employment without executing an arbitration agreement.

The employer will also want to maintain the program and update agreements for current and new employees as the law surrounding arbitration agreements under the Federal Arbitration Act ("FAA") and state laws continues to evolve. Generally, arbitration agreements will include the following aspects: a carve out for sexual harassment and assault claims, bifurcation or severance of claims that cannot be arbitrated, stay of claims and litigation that cannot be arbitrated pending arbitration of arbitrable claims, a class action waiver, and (for employers that conduct business in California) a carefully crafted representative action waiver that handles the delicate situation of California's Private Attorneys General Act. The sooner arbitration agreements are implemented in the employment relationship the better, as it can be complicated to implement amongst the workforce population when litigation is pending. It is also ideal to work closely with traditional labor relations lawyers and labor relations professionals early to navigate the implementation of arbitration and grievance

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programs in an organization with a unionized workforce where specialized defenses and exemptions might be raised.

Oftentimes the challenges to the enforceability of arbitration agreements are basics that can be overlooked in practice such as: keeping the electronic chain of custody as to electronic signatures; failing to present arbitration agreements or to update arbitration agreements for employees that transfer between jurisdictions; implementing and documenting a review and execution procedure to defend procedural unconscionability challenges as years pass; presenting the document in the employee's native language; and avoiding employer actions inconsistent with the intent to arbitrate. The failure to consider the foregoing and to update arbitration agreements may invalidate a class action or jury trial waiver.

Wage and Hour Audits

Although potentially burdensome and costly, wage and hour audits can be powerful tools to prevent, mitigate, and defend litigation and may become more expected by the trier of fact for larger employers. Particularly for employers operating in multiple jurisdictions, audits can help identify and fine tune practices that may need to be adjusted based on the locality. Plaintiffs' theories of liability are fast-evolving and constantly being tested against employers' operational practices and realities.

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retrieval of information and data beyond basic payroll and timekeeping records (e.g. security records, badge swipes, security records, computer/tech login records, temporary worker/independent contractor records). Audits can position the employer to organize the data and information in usable, easily retrievable formats. This helps to avoid being at a disadvantage once the litigation is filed and the consequent sudden rush to produce data for mediation or discovery purposes. It is also advantageous for defense purposes, if the employer's counsel (ideally at the counseling phase) queries the quality and format of the data to guide the employer in adjusting payroll or timekeeping formats with third party vendors outside of the pressures and limitations of litigation.

Key areas to consider covering during internal audits to test compliance include: meal break records; attestation response data; timekeeping audit trail; employee complaints and recorded resolutions; training records; and methods of compensation calculations (including any rounding, regular rate calculations, commission, and bonus details). As time passes and personnel change, the details on how payroll/human resources calculated or determined the non-discretionary or discretionary nature of bonuses/incentives and the periods covered by the bonuses/incentive pay may become less available.

For nondiscretionary bonuses, an employer may want to draft a narrative that describes the nature, purpose and period covered by the bonus program, and requirements.

Additional (potential) audit areas may be:

(1) Exempt status/overtime exemptions because some states have their own overtime exemption tests more stringent than the Fair Labor Standards Act ("FLSA"), and the fact that many states have varying exemption tests for white collar exemptions;
(2) Minimum wage because several states and cities have minimum wages higher than the federal minimum wage;
(3) Overtime and premium pay given some states have daily hour thresholds that require overtime beyond the federal weekly thresholds and the regular rate of pay for calculating overtime premium pay involves various forms of compensation that can be complicated by shift differentials, bonuses, and commissions;
(4) Deductions from pay which varies between states;
(5) Meal and rest periods/breaks which can vary between states;
(6) Business expense reimbursement which is required in some states;
(7) Final Pay Upon Termination which is regulated in the majority of states;
(8) Frequency of Pay which varies by job positions and is usually regulated by state law; and
(9) Pay statements, which are required by most states.

As technology and the theories of liability evolve, a lot of strife can be avoided if the employer has defense counsel examine their business operations for potential adjustments. This proactive approach can make huge differences in defending a variety of claims that are now trending, such as: donning and doffing (e.g., placement/location of the personal protective equipment/uniforms relative to timeclocks within the facility); and off the clock claims (cell phone and mobile device usage for workplace purposes, timeclock placement within the facilities, security checks, pre-shift and post-shift activities). Often the defense to these technical claims is in semantics that the employer would likely not realize when focused on running a business until attacked by creative Plaintiffs' counsel. Also, variations between facilities and employee roles can be beneficial to class and collective action defense and can be strategically designed with defense counsel.

Audits and remedial actions taken might also permit the employer to invoke the good faith defense under FLSA and potentially reduce penalties in onerous jurisdictions such as California.

Defense counsel can tailor the employer's objectives and risk tolerance in presenting options following identification of vulnerable practices. An employer might consider a voluntary remediation program by proactively paying employees in exchange for releases if the releases can be realistically obtained and will be effective in mitigating or resolving the exposure. Such direct settlement programs are privately negotiated releases without court approval. They can be effective before class certification and are authorized in many states. However, direct settlement programs are likely not effective against FLSA claims which generally need court or US Department of Labor ("DOL") approval. There is conflicting case law on this. For decades, employers and employees in most jurisdictions have been obligated to obtain either DOL or court approval to settle FLSA disputes for those settlements to be binding without question. More courts are beginning to challenge that obligation. They are also not effective against California's PAGA claims.

Attestations & Training

Properly implementing an attestation program for hourly employees can be an effective defense tool. Attestation programs collect responses from employees to confirm aspects of their shift for compliance. For example, whether they were provided with an opportunity for required breaks and whether their time records for the shift reflect all time worked. They can be effective for showing compliance for meal break, rest break, and timekeeping practices (off the clock claims).

The programs do require ongoing management as employers will need to respond to any claims of non-compliance by an employee through the programs. The key is to create an individualized reporting, investigation, and response process to support future class certification defenses.

The attestations would need to be customized per jurisdiction and the technological limitations of the timekeeping/timeclock vendors' modules. The attestations ideally would be dynamic. That is, the query presented to an employee will result in a series of questions depending on the response input from the employee. The key is the employer would want to make sure that the responses are saved and can be traced back to a particular shift.

Moreover, regular training of employees, managers, supervisors, human resources, payroll, and operations on timekeeping and break policies and any attestation program can be a great defense tool. The training would ideally be provided at least once a year and from the outset of the employment relationship. The training should provide examples in plain language so everyone understands what the requirements mean, the internal reporting process, and the process to address any non-compliant instances timely. The key is to retain documentation of the training including training materials and written acknowledgment from employees that the training was received.

The managers/supervisors can send more frequent reminders to employees reaffirming the training and those communications should be retained as potential future defense evidence. The training can be reinforced by testing the employees, supervisors, and managers on the rules as part of regular employee training, obtaining written commitments of compliance and enforcement, and emphasizing to employees that there can be no retaliation against employees for any complaints regarding non-compliance with wage and hour laws.

Defense Approaches after the Litigation Has Been Filed

Depending on the jurisdiction and the type of litigation – FLSA, Rule 23 class action, or state-specific action (e.g., California's PAGA), there are various strategies that can be deployed to limit liability and the scope of claims.

Motions

From the outset, there may be options to remove the matter to federal court under the Class Action Fairness Act ("CAFA"). Additionally, defense counsel should carefully consider a variety of potential motions, including: to compel arbitration; to stay the action; to dismiss/strike/demurrer/challenge the sufficiency of pleadings; to challenge the venue; to challenge whether proper parties have been named; a motion for early summary judgment/judgment on the pleadings. Motion practice may facilitate early mediation and limit the scope of issues and claims to be defended.

Potential Individual Settlement Offers

Potentially direct individual settlement offers and offers of judgment to the named plaintiffs can be options depending on the jurisdiction and type of case. Generally, prior to certification, the employer may attempt individual settlements with employees who are potential members of the class/collective action. Contacting members of the class after certification has ethical issues because the entire class is considered represented by the named plaintiff's counsel.

Discovery

Certification of Rule 23 class actions and conditional certification of FLSA collective actions have been trending upwards in recent times. The strategy is to position your early discovery efforts to oppose certification. Ideally, defense counsel has been working with the employer pre-litigation to implement tools, processes, and structures that make certification more difficult. Nevertheless, there needs to be a backup plan.

The backup plan is to position your discovery on opt-in plaintiffs for decertification. This begins with seeking bifurcation of class certification/merits discovery and propounding written discovery on opt-in plaintiffs.

To oppose class certification and bring dispositive motions, declaration gathering campaigns are an option to establish evidence from putative class members. The key is to obtain a cross-sampling from the putative class members that illustrates the differences, including the ideal and less than perfect situations in the putative class to defeat class certification. Contacting putative class members may trigger ethical issues in some states where putative class members are considered represented.

Experts

Additionally, seasoned experts are key in defending class or collective actions. Experts can help the defense present its own narrative and affirmative case by highlighting differences among putative class members, challenging the statistical certainty of a sampling, deconstructing the theories of liability, and even, potentially, preparing alternative damages models.

For nondiscretionary bonuses, an employer may want to draft a narrative that describes the nature, purpose and period covered by the bonus program, and requirements.

Data Analytics

Utilizing data analytics tools are invaluable in defending class action lawsuits. The data tells a story and makes abstract concepts more tangible. Analytics can help with the following: evaluating judges; the jurisdiction; plaintiffs' counsel; navigating the expectations of business decisionmakers; gauging the probability of certain events and outcomes; making informed decisions regarding case strategy, exposure calculations and modeling; evaluating arguments that may work with a particular jurisdiction, judge, or plaintiffs' counsel; preparing settlement authority based on settlement history in a particular jurisdiction/venue with a plaintiffs' counsel, before a particular judge, using a particular mediator for the same claims; evaluating whether to appeal; and in conducting jury selection. The costs associated with using data analytics may be outweighed by the return on investment.

If the employer is utilizing a data analytics specialist to model exposure analysis

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and analyze payroll/timekeeping records the key is to investigate and cross-reference why any observed issues in the data are occurring. For example, if the issue is a significant cluster of employees are clocking in for meal breaks early - is it because they are under the impression that they will receive attendance points if they clock in a bit later than 30 minutes? Is there a timeclock equipment technical issue? Is there a timeclock location/configuration issue? Is there a misconception amongst employees inconsistent with actual company policy?

Data analytics and factual investigation complement each other. Investigation of the employer's payroll and operations helps to gauge what you'd expect or not expect to see in the data. In turn, understanding the employer helps to validate and interpret the data from the client. Defense counsel can then design the exposure analysis to develop defenses and to support a resolution strategy.

Conclusion

By implementing such tools and techniques, the employer can position itself to defend against wage and hour litigation across the country.