

The Tidal Wave of Wage and Hour Class Actions

By Julie A. Vogelzang

If you Google any combination of the words “California,” “wage and hour” and “class actions,” you will get thousands of hits. A tsunami of sorts has arrived and those companies that do not know or acknowledge it stand the greatest risk of being sued for wage and hour violations.

The number of these lawsuits increases significantly each year. Wage and hour class actions are relatively easy to prosecute because they address systemic programs or practices, like hiring, overtime, meal and rest breaks, pay stubs, equipment and uniforms. Plaintiffs’ class action lawyers are assured a large chunk of the settlement pie for their fees, and so they are motivated to find and exploit these types of issues in the workplace.



Julie A. Vogelzang is a partner in the San Diego office of Duane Morris. She focuses her practice on employment law with an emphasis on California wage and hour class actions. She regularly defends large, medium and small companies sued for alleged wage and hour violations.

Court reports reveal that these cases are filed weekly, if not daily, up and down the state, and that significant amounts of money are at stake. While the trend started largely in California, it has become a wave moving throughout the country. Certainly, large employers’ misfortunes receive the publicity. Wal-Mart settled for over \$640 million for dozens of class actions claiming it did not pay employees for all hours worked. A federal judge in Minnesota recently upheld a class certification ruling of more than 1,500 call center employees of Qwest Communications International Inc., who claimed they had not been paid for time spent booting up and shutting down their computers. An Arkansas judge certified a class of former Butterball employees who claimed that the company did not pay them for putting on and taking off their clothing and equipment. Workers for UPS argued they had been improperly treated as independent contractors instead of employees, and that class action recently settled for over \$18 million. Though

the most high-profile cases involve large employers, this epidemic is not limited to them.

Many employers mistakenly think it is not a big deal if they are out of compliance on their paystubs or applications. Traditionally, these omissions were relatively minor in nature. Currently, however, they are the stuff of class action litigation.

One employee can bring a claim on behalf of all employees in similar categories. These wage claims are typically brought in conjunction with a business violation claim under California Business and Professions Code Section 17200 et seq., which expands the claim and permits the complaining party to go back four years from the filing of the lawsuit. This means that for current and former employees who were/are paid weekly, the employer will need to analyze back pay data (and possibly pay employees) on a weekly basis for each employee, going back four years from the lawsuit’s filing date and up to the present.

Potential damages in these cases can be enormous. Employers face paying weekly back pay for four years for all class members, often a difficult calculation to run and a large number by the end of the calculation process. Employers may also be required to pay interest on the back pay. In addition, employers face penalties for each employee, amounts which can often be greater than the back pay amounts. Damages, interest on damages, and penalties are just the beginning.

The big ticket item is attorneys’ fees. Attorneys who sue an offending employer for unpaid wages are entitled to recover attorneys’ fees, costs and interest. Attorneys’ fees may amount to 30 to 40 percent of the plaintiffs’ total recovery.

Here are the top five tips to prevent a wage and hour class action lawsuit:

Conduct a Comprehensive Internal Audit: Companies should focus serious attention on these issues and take a hard look at their policies, practices, and procedures. As some examples, the following areas should be analyzed and brought into compliance with state and federal laws, if necessary: hiring documentation; categorizing employees; pay practices; bonuses, pay stubs; meal and rest breaks, job descriptions; and performance evaluations. For example, all exempt positions should be reviewed to determine whether the employees in those positions are actually

doing exempt work and are being paid correctly pursuant to the applicable exemption. As part of this process, job descriptions and performance evaluations should be audited to confirm that these employees are actually required to and are doing exempt work. Once a "major" audit has occurred and changes have been implemented, then, at least quarterly spot-check audits should occur.

Train HR and Supervisors: It is critical to educate your company about the serious nature of these lawsuits, the applicable laws and regulations, and ways to minimize the chances of your company being targeted. Human resources personnel and supervisors should have training about California's payroll and timekeeping requirements, data retention, job descriptions, and performance evaluations. It is extremely beneficial to companies when their lawyers are able to describe to plaintiffs' lawyers the training and audit practices the companies utilize. This sort of behind-the-scenes work on the part of companies can and does serve as a deterrent to these lawsuits.

Develop Different Practices/Operations Between Employees and/or Locales: If your company can show that its practices vary by individual and/or by location, the chances of a class action succeeding against the

company are minimized because the "commonality" element necessary for class action treatment will not be met. As an example, if there are managers who run local offices, consider giving them discretion to create specific practices for their locale. This way, the employees from all of the offices would have great difficulty joining as a "class" against the company because they would be subject to different operations/practices.

Create the Right Documentation: In conducting the audit noted above, the company should update and/or replace those outdated or inaccurate documents (applications, hire letters, handbooks, job descriptions, background check forms, etc.). It should make sure that payroll and time-keeping processes are accurate and accessible. It should also put into place an electronic policy about the use, maintenance and preservation of all electronic data, which has become an explosive issue in these lawsuits.

Consider Employee Morale: In addition to the audit and training items described in this article, another item that is not as obvious has to do with workforce opinions about fairness. Employees often bring lawsuits because they

believe they are not being treated fairly. If the workforce perceives that decisions are made fairly and based on logic, the chances of these lawsuits are lessened. Along these lines, steps should be taken to educate employees about company policies and practices, the open door policy and respect in the workplace.

Companies in California and, increasingly, across the country should be vigilant in developing and maintaining workplace policies that reduce the significant risks associated with wage and hour class action lawsuits.

The combination of back pay, interest, penalties and attorneys' fees awarded to class members if the class prevails in court can wreak havoc on a company's bottom line. The tips above outline crucial initial steps in keeping employers ahead of the oncoming tidal wave of these class actions.

Lisa K. Widdecke and Liseanne Kelly of Duane Morris contributed to this article.

