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The Economic Realities of Employment Class Actions

By Lisa Sherman – April 23, 2015

Employment class actions receive significant attention because of the shockingly large recoveries reported in the news and the ever-changing standards applied by state and federal courts, as well as the highest court in the land, the U.S. Supreme Court, which leaves employers of all sizes nationwide in a constant state of panic.

As a former in-house corporate counsel, I will let you in on a well-kept secret among my colleagues who are responsible for minimizing their company's exposure and controlling costs. We fear employment class actions and multi-plaintiff lawsuits the way Californians fear the "big one," i.e., earthquake. In whispered tones, we remind our superiors ad nauseam that we must prepare for the "big one," which is always reflected in our annual legal budgets.

Little has been written on the economic realities of employment class actions for individual employee class members, who must consider whether it is economically worth pursuing or joining. Likewise, employers, large and small alike, are faced with complying with standards that continually change, exorbitant defense costs before even reaching the merits, and total potential liability that alone can bankrupt any size company. Through my own experiences and those my colleagues have shared with me regarding their experiences, as well as the most recent research available on this topic, this article provides an uncensored look at the economic realities of employment class actions for employees and employers alike.

The Frequently Touted Benefits of Employment Class Actions

If you search for "employment law class action counsel" on Google, you will find hundreds of law firms touting the benefits of filing or joining an employment class action. For example, Adam Klein, partner and chair of a large law firm's class action practice group, states boldly, "together Class Actions level the playing field. They are an agent of change and a potent tool to remedy injustice." The following are frequently touted benefits of employment class actions:

> **Strength in numbers will result in the employer discontinuing the practice.** The employment class action is essentially a form of leverage to force companies to pay, with interest, wages that were not paid to employees at the time those wages were due. The plaintiffs' employment bar claims that the class action is an invaluable tool for large groups of employees who might never see the recovery of the wages owed to them in any other way and is virtually a guarantee that the employer will discontinue these practices.
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> **The class action allows an employee who could not afford to sue individually to obtain representation and recovery.** Workplace Fairness is a nonprofit corporation, working to promote employees' rights in all 50 states. It explains the basis for large attorney fee recoveries in class actions:
>
> > [M]ost class actions take two to five years, thousands of man hours and often from $500,000 to $1,000,000 in cash to bring to court, all of which are generally funded by the law firm representing the plaintiffs and class. Since most plaintiffs in employment class actions are not wealthy, and cannot afford to pay their attorneys by the hour, these cases are often handled on a contingency fee basis, meaning that the attorneys pay these large costs over many years and only get paid if they win or settle the case. Finally, the probability of success on any employment class case is generally no better than fifty percent.

Where class members have suffered small losses, a class action increases the likelihood that individual employees may recover even though they could not afford to file an individual claim against their employer. Moreover, where there are numerous employees with the same issues, the class action is a valuable savings of judicial time and resources and will prevent inconsistent judgments.

Class certification is easy. For years in California, for example, commentators would joke that a group of plaintiffs could certify even a ham sandwich. Indeed, most recently, on September 3, 2014, the U.S. Court of Appeals for the Ninth Circuit upheld certification of a class of approximately 800 nonexempt insurance claims adjusters who claimed they worked overtime without compensation despite the employer's lawful written policy to pay nonexempt employees for all hours worked. Notably, the court held that whether the employer should have known that employees were working off the clock could be resolved with statistical sampling.

And even if the claims themselves are without merit, the employer will typically settle anyway. If a court approves certification of a proposed class, even if the claims themselves are completely frivolous, employers are likely to settle because there is too much at stake and the costs of defense are prohibitive. If the company loses the class action, the judgment and attorney fees will likely bankrupt the entire company.

Potential Drawbacks of Employment Class Actions for Employees

Class action waivers in arbitration agreements. Employers are engaging in preemptive strikes by asking employees to sign away their rights to participate in class and any other collective actions by relying on the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,which increased the likelihood of enforcement. These waivers are often buried in the stacks of employment policies, handbooks, and the like, provided to new hires at the beginning of employment or to current employees who are periodically provided with new or changed policies and handbooks and a new and improved arbitration agreement. In the technological age we live in, this too is being accomplished through an online click-through system, which is rarely recommended because it is highly unlikely the employees even read what they were agreeing to, as appropriately noted by the comedian Mindy Kaling in her commencement address to Harvard University law students: "You wrote the terms and conditions I scroll through quickly when I download the update for Candy Crush. ITunes may own my ovaries for all I know."

Multiple hurdles, longer time, and limited recovery. Almost without exception, class actions will take longer to get to trial than an individual employment lawsuit because the court must first decide "as early as possible" whether the proposed class can be maintained. The investigation of the class claims will take a minimum of several months, followed by complex motions filed by the parties in support of and opposition to class certification. Only after the court rules on the class claims will an individual class member's claims be addressed, which can last a year or two longer than an individual case. Moreover, it is difficult for class members to recover compensatory and punitive damages because the court will normally not certify a class if there is going to be an individualized determination of damages for each class member. As a result, class actions often seek only back pay and interest and injunctive relief, which does not amount to much for the individual class members.

Employers are defeating, fracturing, or devaluing employment class actions resulting in fewer settlements and at lower amounts. Recent rulings by the U.S. Supreme Court in *Wal-Mart Stores v. Dukes* (2011) and *Comcast Corp*. *v. Behrend*(2013) placed a greater burden on plaintiffs seeking class certification, including requiring that plaintiffs put forward a realistic class-wide damage approach tailored to

their claims. More recently in California, in *Duran v. U.S. Bank National Assn*, the California Supreme Court insisted that the plaintiffs allege more than the existence of a uniform policy to support their effort to certify a class. This has resulted in employers settling fewer employment discrimination class actions last year than at any time over the past decade and at a fraction of the levels of 2006–2012. *See*Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report: 2014 Edition*2 n.1. The same is true with wage and hour, Employee Retirement Income Security Act, and governmental enforcement litigation, with the aggregate recoveries in 2013 the lowest overall since 2006. *Id.* at 2 n.2.

Actual recovery to individual class members is far less than class action proponents contend. Mayer Brown LLP, a leading global law firm, conducted an empirical study of class-action lawsuits filed in, or removed to, federal court of 148 putative consumer and employee class-action lawsuits from 2009 that had reached a final resolution by September 1, 2013, the date when the study ended. *See*Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Study of Class Actions*.

The vast majority of cases examined produced little to no benefits to most members of the putative class but, not surprisingly, evidenced that the attorneys representing the class and the defendants were the only winners. The study concluded the following:

- Not one of the class actions ended in a final judgment on the merits for the plaintiffs, which means there was no final determination of the case's merits.
- None went to trial before either a judge or a jury.
- Twenty-one cases (14 percent) of the class actions remained pending four years after filing because either no motion for class certification had been filed or the court had not ruled on the motion. (From my own experience, the class-certification motion may never be ruled on before the case is ultimately dismissed or the court's ruling will be without prejudice, which precludes appeal because there is no final judgment.)
- Of the 127 class actions that reached resolution
    - 45 cases, over one-third (35 percent), were resolved and dismissed voluntarily by the plaintiffs. This means either the plaintiff simply decided not to pursue the class action or the parties settled only the individual named plaintiff's claim, while class members received nothing; no benefit to the class at all.
    - 41 cases, just under one-third (31 percent) of those class actions, were dismissed on motions to dismiss or summary judgment motions, which also meant that, absent an appeal, the plaintiffs recovered nothing.
    - one-third (33 percent) of resolved cases were settled on a class basis. The settlement rate is half the average for federal court litigation, which means that a class member is much less likely to recover more than an employee suing on his or her own. For those cases that did settle, the recovery to the individual class members was significantly small.
- 40 of the 2009 class actions (28 percent of the resolved cases) settled on a class-wide basis, which is much lower than individual plaintiff federal court cases settled as a whole (33 percent). Accordingly, Mayer Brown concluded that "class actions are significantly less likely to produce settlements, and therefore less likely to produce any benefit to class members, than other forms of litigation." *Id*. at 7. And even if the class action results in class-wide relief, the employees have no say in the method or amount of distribution.

The study summarized the three kinds of class-action settlements: (1) "claims-made agreements," in which class members must submit claims to recover compensation and leftover money either goes back to defendants or to a charity; (2) "automatic distribution" settlements, in which the settlement amount is divvied up to class members when their identity is already known; and (3) "injunctive relief/*cy pres*" cases, in which class members receive no monetary compensation, only a promise by the employer to stop the unlawful conduct or money is paid to charitable organizations rather than class members.

"[A] common formula in class actions for damages is to distribute the net settlement fund *after* payment of counsel fees and expenses, ratably among class claimants according to the amount of their recognized transactions during the relevant time period. A typical requirement is for recognized loss to be established by the filing of proofs of claim. . . ." 4 *Newberg on Class Actions* § 12:35 (4th ed. 2013) (emphasis added). Moreover, the actual benefit to individual class members from the settlement is rarely revealed. Why? The attorneys do not wish to reveal the low payout because their attorney fees will appear grossly overstated. Where claims-made settlements were reached, distributions to individual class members were lower than 10 percent. Injunctive relief and *cy pres* awards do nothing more than inflate attorney fee awards while benefiting third parties having nothing even to do with the class! Injunctive relief permits class counsel to recover attorney fees, while*cy pres* payments artificially inflate the size of the benefit to the class to justify higher awards of attorney fees to class counsel. Not surprisingly, a disproportionate allocation of settlement funds went to attorney fees.

The Mayer Brown study's most important point is that we know nothing about what happened after settlement in 34 of the 40 settled cases in the study. While the study confirms that class actions will result in either no recovery or minimal benefits to class members, the true injustice is that the public never learns the actual amount that is paid to each class member, which is not even the focus of a court's inquiry in reviewing the recommended settlement by the parties. Most judicial opinions assess the fairness of the entire settlement pool and accompanying fees for class counsel, not the total amount of money each class member actually was paid after the settlement was administered or whether anyone in the class at all subsequently files a claim. Plaintiffs' lawyers don't want courts to see that only a few class members actually submitted claims. Defense counsel don't want to upset plaintiffs' lawyers because they fear that in future class-action cases, class counsel will refuse to settle. Also, they know that their clients are benefiting from a low claims rate in settlements that call for unclaimed money to be returned to them or donated. Judges don't want to add to their burdensome dockets by requiring post-settlement review of claims. It is no coincidence that claims administrators who are the keepers of these secrets mostly operate under a confidentiality agreement that precludes them from disclosing such information unless ordered by a court.

The survey concluded that "*in over half of all putative class actions studied [between 2009 and September 1, 2013]—and nearly two-thirds of all resolved cases studied—members of the putative class received zero relief.*" *Do Class Actions Benefit Class Members?*, *supra*, at 6. Finally, although the distribution of class-action settlements is rarely available, six cases in the data set revealed settlement distributions, and in five of the six cases, class members were paid as little as 0.0000006 percent, 0.33 percent, 1.5 percent, 9.66 percent, and 12 percent of the total distributions! *Id.* at 2.

Conclusion

One thing we know for sure in 2015: Employment class-action lawsuits are not going away. Employers need to wake up to the new reality by making compliance and financial readiness a priority. No longer can employers disregard the various insurance options available to survive employment litigation lawsuits. Similarly, no longer can attorneys file

rote class-action complaints and await a quick payoff. What remains to be seen is whether the statistically low rate of return for employees will ultimately force the plaintiffs' bar to change the current structure.

Keywords: litigation, employment law, labor relations, class action, attorney fees, back pay, recovery

Lisa Sherman is with Sherman Law Corp. in Los Angeles, California.

An Update on Supreme Court Labor and Employment Cases

By Damien Munsinger – April 21, 2015

Midway through its present term, the U.S. Supreme Court has already weighed in on several important labor and employment matters. Decisions about compensable time, retiree health benefits, and pregnancy discrimination have been issued, while critical questions about Equal Opportunity Employment Commission conciliation and religious accommodation await answers. Here is a quick breakdown of the top decisions and cases granted certiorari that all labor and employment lawyers should be aware of:

Integrity Staffing Solutions, Inc. v. Busk examined whether employees at a warehouse and order-fulfillment center for Amazon.com should be compensated for time spent in a daily security screening. In a procedure to prevent inventory theft, warehouse employees must line up and remove all metal from their persons before passing through a metal detector. This procedure took place after the hourly employees clocked out but before they left the warehouse facility. The two hourly workers who filed the class-action suit alleged that wait times to be searched reached 25 minutes at times.

While the district court found for the employer, the Ninth Circuit reversed and held that the time was compensable because the employer required the screening and because the screening was done for the employer's benefit. The employer (joined by the federal government as an amicus) argued that the Ninth Circuit got the test wrong and that security screenings are not compensable because they are not "an integral and indispensable part of the principal activities" of the employees.

The Supreme Court reached the same conclusion as the district court and other circuits that have considered the issue. The Court held that the time spent in security screenings is not compensable because it is not an "integral" part of the job. Justice Thomas noted in his opinion that the warehouse employees were hired to pick and pack items for shipment to Amazon customers, not to undergo security screenings. Focusing on whether or not the employer required the activity, as the Ninth Circuit had done, was incorrect. *Integrity Staffing*builds on the Supreme Court's January 2014 decision that time spent donning and doffing protective gear is not compensable.

M&G Polymers USA, LLC v. Tackett settled a circuit split on the duration of retiree health-care benefits. The Sixth Circuit had held that a collective bargaining agreement's silence regarding the duration of retiree health benefits shows the parties intended such benefits to continue indefinitely. The Third Circuit, meanwhile, had held that retiree health-care benefits do not continue beyond the termination of a collective bargaining agreement unless the parties manifest a clear intention to the contrary. In the Seventh and Second Circuits, courts construing collective bargaining agreements look for language that could reasonably support an interpretation that benefits continue beyond the life of the agreement.

Two interesting amicus briefs were filed in this case, neither of which advocated a particular interpretation standard. The first brief provided context for the retiree health-care benefit issue by pointing out that several decades ago, when defined-benefit plans were the norm, retiree health-care costs were so minor as to be negligible. These benefits were commonly vested (they did not expire along with the collective bargaining agreement). Only after defined-contribution plans began to dominate defined-benefit plans, and health-care costs skyrocketed, did vested retiree health-care benefits become a rarity. The second amicus brief offered an empirical study of the types of language collective bargaining agreements employ and argued that most are silent or ambiguous as to the duration of retiree health benefits.

The Supreme Court found that the Sixth Circuit was wrong to place a thumb on the scales in favor of lifetime retiree health benefits and held that ordinary principles of contract interpretation should decide the issue. At oral argument, both sides argued that those principles favored their position. The Supreme Court did not actually apply any contract interpretation principles to the contested agreement before it; it merely remanded the case back to the Sixth Circuit.

The opinion by Justice Thomas cited several instances where the Sixth Circuit impermissibly favored employees when construing the agreement, suggesting that employers may have the upper hand when litigating whether retiree health benefits have vested. However, a concurrence penned by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan highlighted several examples from the agreement that supported the employees when ordinary contract interpretation principles were applied.

Young v. United Parcel Service arose under the Pregnancy Discrimination Act and requires the justices to consider whether, and in what circumstances, an employer providing work accommodations to non-pregnant employees with work limitations must accommodate pregnant employees who are similarly situated as to their ability (or inability) to work.

A United Parcel Service (UPS) driver took leave to undergo a round of in vitro fertilization, which was successful. A medical restriction on lifting anything over 20 pounds prevented her from returning as a driver because lifting up to 70 pounds is an essential job function. UPS also determined she was ineligible for a light-duty assignment because pursuant to UPS policy and a collective bargaining agreement, light-duty was available only to employees injured at work, employees eligible for accommodation under the Americans with Disabilities Act (ADA), and employees who had lost their Department of Transportation certification. (UPS has since changed this policy.) The employee took unpaid leave and lost her medical coverage before her child was born.

The Fourth Circuit reasoned that the policy did not discriminate on the basis of sex because it “treats pregnant workers and nonpregnant workers alike” and that the driver’s situation was too different from the situation of those who were accommodated for accommodated individuals to qualify as similarly situated comparators. Therefore, the employee could not rely on or receive the more favorable treatment afforded workers with temporary lifting restrictions who had been injured at work, were eligible for ADA accommodations, or who had lost their Department of Transportation certification. As the Supreme Court considered the case, the Equal Employment Opportunity Commission signaled that it may issue new enforcement guidance on this exact issue.

A divided Supreme Court vacated the Fourth Circuit’s grant of summary judgment for UPS in an opinion by Justice Breyer. The Supreme Court held that the driver created a genuine dispute as to whether UPS provided more favorable treatment to other employees whose situation could not be reasonably distinguished from hers. The Supreme Court also held that a pregnant worker with indirect evidence of disparate treatment may make use of the*McDonnell Douglas* framework.

The following two cases have had oral argument before the Supreme Court, but as of this writing, no opinion has issued.

Mach Mining v. Equal Employment Opportunity Commission considers the congressionally mandated step-by-step plan the Equal Employment Opportunity Commission must use to enforce the Equal Employment Opportunity Act. One of those steps requires the commission, upon finding reasonable cause to support charging a violation of the act, to “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” If the commission is unable to secure a satisfactory settlement during conciliation, it may then file suit.

After Mach Mining was accused of refusing to hire a miner because of her gender, the commission sued the company following an unsuccessful conciliation. Mach Mining asserted a "failure-to-conciliate" affirmative defense, arguing that the suit should be dismissed because the commission did not expend sufficient efforts toward conciliation. The district court found that the commission's efforts toward conciliation were reviewable, but the Seventh Circuit reversed, finding that an alleged failure to conciliate is not an affirmative defense to a discrimination suit and that judicial review was unwarranted.

This case should resolve a persistent circuit split on whether the commission's efforts at conciliation are subject to judicial review as an implied affirmative defense to a discrimination suit. Oral argument was heard on January 13, 2015.

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc., should determine how much knowledge an employer must have before the duty to explore whether a religious accommodation must be provided is triggered. The Tenth Circuit in this case held that only when an employer has "particularized, actual knowledge of the key facts" is the duty to accommodate triggered. Four other circuits have held that the duty to accommodate is triggered when the employer has sufficient understanding about an employee's religious needs to understand that those needs may conflict with the employer's practices.

Here, an applicant for a position as a "model" at an Abercrombie & Fitch clothing store wore a black headscarf during her job interview. The interviewer did not inquire, and the applicant did not state, that the headscarf was worn for religious reasons. However, the interviewer assumed that the headscarf was worn for religious reasons, and the applicant was not offered the job because of a company policy prohibiting store "models" from wearing "caps." The district manager interpreted the policy to include headscarves.

While the district court granted summary judgment for the commission, on appeal the Tenth Circuit reversed, finding that the employer had inadequate notice of the need for an accommodation. This case should provide guidance on how to balance employees' superior knowledge about their own religious beliefs with the employer's superior knowledge about which company policies may be in conflict. Oral argument was heard on February 25, 2015.

Keywords: litigation, employment law, labor relations, Supreme Court, compensable time, retiree health benefits, pregnancy discrimination

Damien Munsinger is an associate with Barran Liebman LLP in Portland, Oregon.

Regular Rate: Navigating Risk Areas and Complexities

By Jeremy Guinta and Angela Sabbe – April 21, 2015

Under the Fair Labor Standards Act of 1938 (FLSA), employers are required to compensate employees for their time worked based on all compensation received. Premiums for overtime are to be paid as a factor of the employee's "regular rate." Although the terms are often used interchangeably, the employee's regular rate does not refer to the employee's base hourly rate. This article examines errors frequently made by employers and litigators in calculating an employee's regular rate.

Background

As codified in the FLSA, the regular rate must include all payments to the employee, except those specifically excluded by the act. This includes wages, non-cash wages in the form of other benefits, commissions, piece rates, and certain shift differentials and gratuities. Shift premium payments—for example, nighttime premiums or hazard payments—are included in the regular rate, whereas weekend premiums or holiday premiums are typically not required to be included. Non-discretionary bonuses, including bonuses based on productivity, attendance, or safety metrics, are also included.

Conversely, discretionary bonuses, including holiday bonuses and one-time financial bonuses paid when the company meets a certain financial target, are excluded. The regular rate also excludes premiums paid for overtime worked, service rewards (such as gifts), reimbursement of expenses, and vacation, sick, or other paid time off for non-worked time (e.g., jury duty).

The total remuneration, as described above, is then divided by the number of hours *worked* to yield the hourly regular rate. The calculation is performed for each workweek; therefore, an employee's regular rate may vary from week to week, while the employee's base hourly rate remains constant.

Example. Suppose an employee works a 50-hour workweek (40 regular hours, 10 overtime hours) and earns $10 per hour. In addition, 10 of the hours worked were paid a night-shift premium of $2 per hour. The employer incorrectly paid the following:

	Hours	**Rate**	**Paid**
Straight Time	30	$10.00	$300.00
Night Shift	10	$12.00	$120.00
Weekly Overtime @ 1.5 x Straight-Time Rate	10	$15.00	$150.00
		Total	$570.00

The employer failed to properly include the night-shift premium payment in the calculation of the regular rate. The corrected payment is as follows:

	Hours	**Rate**	**Paid**
Straight Time	40	$10.00	$400.00
Night Shift	10	$12.00	$120.00
		Subtotal	$520.00
Regular Rate: $520/50			$10.40

Weekly Overtime			
@ 0.5 x Regular Rate	10	$5.20	$52.00
		Total	$572.00

Additional Complexities and Related Errors

Regular rate calculations become even more complex if, for example, the employee received a quarterly attendance bonus for never being late to work, or the employee received commission payments as part of his or her compensation. In those cases, the additional compensation would need to be allocated over the entire period during which it was earned and properly factored into any overtime payments made in each week during that period.

Example. For an individual paid on a piece-rate basis, working 50 hours in a week, and earning $500, the employee's regular rate would be $10 ($500/50 hours). The employee would also need to be compensated for 10 overtime hours. In this example, the employee should be paid $500 plus ($10 x 0.5 x 10 overtime hours), or a total of $550.

Income	$ 500.00
Hours	50
Regular Rate: $500/50	$ 10.00
Overtime Premium @ 0.5 x Regular Rate	$ 5.00
Overtime Hours	10
Weekly Overtime $5 x 10	50.00
Total Pay (Income + Weekly Overtime)	$ 550.00

Tipped employees also present unique complexities. The regular rate for food and beverage servers, who are partially compensated by gratuities, would include their base hourly rate and an allocated portion of their gratuities. Employers paying an overtime premium based solely on the servers' base wage rate are underpaying their employees.

Example. A server earns an hourly wage of $10, works 45 hours in a week, and earns $500 in gratuities for that week. The regular rate would be calculated as $10 times 45 hours ($450) plus $500 in gratuities divided by 45 hours for an hourly regular rate of $21.11 ($950/45 hours). The overtime portion of the hours worked for this individual would be calculated using the $21.11 an hour.

	Hours	Rate	Paid Incorrect	Correct
Weekly Wages	45	$10.00	$450.00	$450.00
Weekly Gratuities			$500.00	$500.00
Weekly Earnings			$950.00	$950.00
Regular Rate			$10.00	$21.11
Overtime Premium @ 5 hours (0.5 x Regular Rate)			$25.00	$52.78
Total Pay (Weekly Earnings + Overtime Premium)			$975.00	$1,002.78

The above example excludes reduction of the regular rate for tip credit.

Collective Action Implications

Employers that use a standard pay structure and do not have differential payments, non-discretionary bonuses, commissions, or other nonstandard payments face little liability in the collective action arena. However, employers that have shift premiums for differing types of work or times of day and employers that have non-discretionary bonus or commission structures, or pay their employees on a piece-rate basis, are ripe for potential errors and potential litigation.

Further, if the employer had a payroll system that resulted in the systematic underpayment of its employees, class certification of the employees would likely be very easy. In this regard, the issues surrounding class certification in collective actions are easily met:

1. Numerosity. The payment policy likely affected many employees even at a small company.
2. Commonality. The potential class was likely affected in a similar fashion because the payroll policy was applied across the entire business.
3. Typicality. The potential class was likely affected in the same manner as the named plaintiff.
4. Adequacy. The named plaintiff will likely adequately represent the class.

When defining the class or opposing class certification, there are mitigating factors that should be considered:

- Can portions of the class be decertified because they either were ineligible for overtime or never worked overtime during class period?
- Are there certain groups of employees that were not eligible for bonus or differential payments that would trigger a regular rate issue in the first place?
- Does the named plaintiff fall into either of these categories?

Conclusion

The examples above reflect differentials for one employee in a single pay period. Imagine, however, the impact of dozens, hundreds, or even thousands of employees over the course of three years (the FLSA-mandated look-back period). Although the financial impact may appear nominal on an individual basis, employers must not underestimate the financial consequences of incorrectly calculating the rate at which overtime should be paid.

Keywords: litigation, employment law, labor relations, regular rate, overtime, Fair Labor Standards Act

Jeremy Guinta and Angela Sabbe are associate directors in the Los Angeles, California, office of Navigant Consulting, Inc.

Three Strategies to Becoming a Legal Rainmaker

By Steve Fretzin – November 17, 2014

When successful attorneys speak about what it takes to “make it rain” in today's legal industry, it pays to listen. I recently interviewed Mike Delrahim, managing partner of Brown, Udell, Pomerantz & Delrahim, LTD, and he clarified how he is able to generate business while also taking extra special care of his clients.

Mike began his legal career closing small real-estate transactions, and this is where he happened on something that allowed him to dramatically grow his practice. At each closing, Mike started asking his clients questions about their business. The answers revealed a myriad of needs that did not necessarily fall under the heading of “real estate.” With this new information in hand, Mike intuitively directed his clients on how he might better serve them, leading to expanded business opportunities.

Posing intelligent, thought-provoking questions to clients was only one step toward Mike becoming a rainmaker. During our conversation, Mike shared a variety of other steps he has taken to become successful in “making it rain.” Here are a few of his strategies and some thoughts of my own.

Strategy No. 1: Questioning to Better Cross-Market
One of the earliest strategies Mike used to develop his book of business was to focus on asking more and deeper questions. Interestingly, the questions he asked were not always directly related to his area of the law. Mike understood that asking broader questions might uncover opportunities typically missed by most attorneys. “You’re likely to get more work out of the person if you ask the right questions,” he explains.

At real-estate closings, Mike would ask about his clients' businesses to possibly uncover opportunities related to employment-contract work or future property-investment needs. These questions became the gold standard for Mike in his efforts to fully serve his clients while at the same time allowing him to drive more business into his practice.

Mike describes his approach at these real-estate closings, which he continues to repeat today, as consultative in the sense that he asks questions that elicit possible needs. Mike never hard sells or pushes because, as he puts it, then “you’re just a door-knocking salesperson and people get turned off by it.” By asking questions related to a client’s overall business, Mike is able to unearth legal needs that have not been properly addressed. This approach allows the *client* to come up with the idea to handle a particular matter, without Mike having to really sell it.

One of the keys to “rainmaking” is to properly use your law firm’s partners to assist you with areas where you are not as experienced. The ability to let go of control and hand off work to trusted partners is critical to growing one’s book of business. This one strategy alone can make you, as Mike describes it, the “one-stop shop” for your clients. This also allows you to dramatically grow your personal practice, while keeping your clients coming directly to you for everything, not just one particular thing.

Strategy No. 2: Creating the Perception of Being THE Expert in the Room
After you have invested a number of years learning the practice of law, Mike recommends creating the “perception that you are the expert in the room.” While this does not happen overnight, it is important to put yourself out there. In this sense, getting out of the office is the only way to make things happen. Mike suggests:

- **Finding quality networking events.** Meeting new people and showing them that you can listen and understand their businesses will give you more insights on how you can help others. This also helps to brand yourself in the community where you work.

- **Writing on subjects to demonstrate your expertise.** Even if it's only one or two articles a year, get going. These articles can help you build a foundation as an expert in your particular area of the law.
- **Using the networks that you've built to get on some panels.** Getting up on a stage and answering questions can build immediate credibility with your audience and the other panelists. Speak clearly and to the point, and try to use specific examples to illustrate the point you are making.

As mentioned in Strategy No. 1, you can build the perception that you are an expert by asking great questions. The idea of asking questions may seem simple, but actually applying this skill with the people you interact with can be very difficult to achieve. Think about it, when you are asked a legal question, what does your experience or instinct tell you to do? Probably to solve the problem, right? This is a great lesson to learn if you have not already. *Prescription before diagnosis is malpractice.*

Do your best to hold off on solving a problem until you have asked more questions and uncovered a problem compelling enough to solve. Then, when the person you are speaking with believes that you have the solution, ask if he or she would like to visit your office to discuss how you might work together on this matter. This process will further propel prospective clients toward believing that you are an expert worthy of their time.

Strategy No. 3: Taking Your Practice to the Next Level

Many attorneys hit a proverbial wall when attempting to build a practice. Some hit the wall at $500,000 of origination a year and others closer to $1,000,000. No matter the number, Mike has some ideas as to how attorneys can move up from senior associate/ income partner to equity partner.

First, relying on the wisdom of his first mentor, Mike recommends that **"if you want to be a partner, act like a partner."**This means taking responsibility for growing your book of business and not making excuses for yourself. We all know it is easier to get absorbed in the work versus putting yourself out there and developing more new business. But, if you want to grow a practice within your firm, it is imperative that you make time and execute on your plan to drive your book upward.

Second, Mike advises that it is important to **"delegate the work."** It is impossible to grow your practice when you are doing all of your own work and that of your partners as well. You need to try to use the smartest and hardest-working people around you and delegate. "By delegating the work," Mike shares, "it frees up your time to be able to sell your services and network with other individuals."

One might think that giving up the work to others shows weakness to your client—when in reality, the opposite is actually true. When your clients see you directing work toward others, they view you as a leader and "the guy running the show." Delegating to the right people will go a long way toward cementing long-term relationships. Taking this step to delegate is not easy, but it is necessary if you want to get beyond a particular tipping point.

Finally, Mike counsels that your ***actions*** **need to demonstrate your commitment to growing your practice** if you want support from the leadership within your firm. When you are all talk and no action, the law firm will be less likely to take on the expense of an assistant, paralegal, or associate attorney to help you out. By staying active and bringing in more work, you will gain the eye of your firm and hopefully their support as well.

As you consider Mike Delrahim's strategies, take some time to think about what you are trying to accomplish in your own practice. What bold actions are you prepared to take to accomplish your goals? In Mike's case, learning to be a great lawyer was only the beginning. By sharpening his soft skills, he found a path to becoming a "rainmaker" and managing partner. What will you do?

Keywords: litigation, young lawyers, practice, pretrial

Steve Fretzin is with Sales Results, Inc., in Chicago, Illinois.

"Three Strategies to Becoming a Legal Rainmaker," by Steve Fretzin, Young Advocates 5:1, Fall 2014, pp. 2–4.

NEWS & DEVELOPMENTS

March 30, 2015

SCOTUS Issues Ruling on Accommodation of Pregnant Employees

The U.S. Supreme Court on March 25, 2015, decided *Young v. United Parcel Service, Inc. (UPS)*, 575 U.S. ___ (2015).The issue in the case was whether, and in what circumstances, the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to also provide work accommodations to pregnant employees who are "similar in their ability or inability to work." UPS offered a "light duty program" to workers who were injured on the job, were disabled under the Americans with Disabilities Act (ADA), or had lost their Department of Transportation (DOT) certifications. UPS, however, did not provide any such accommodations to pregnant employees who were not medically disabled. Young challenged the policy, arguing that the PDA requires an employer to provide pregnant employees light duty work if it provides similar work to other employees in other circumstances.

Young worked as a part-time driver for UPS where her responsibilities included pickup and delivery of packages. She had suffered several prior miscarriages so when she became pregnant, her physician limited her to lifting 20 pounds during the first 20 weeks of her pregnancy and 10 pounds thereafter. Her normal job requirement was that she be able to lift parcels weighing up to 70 pounds herself and 150 pounds with assistance. UPS did not allow Young to work under this restriction, resulting in her staying out of work without pay for most of her pregnancy and ultimately losing her health-insurance benefits. Young filed suit, and UPS responded by saying that other employees who had been accommodated fell within one of the three categories referenced above; and since Young did not, there had been no discrimination.

The Fourth Circuit Court of Appeals granted UPS's motion for summary judgment, ruling that (1) the employer did not "regard" a pregnant employee as disabled under the Americans with Disabilities Act (ADA); and (2) employers are not required under the PDA to provide pregnant employees with light duty assignments as long as the employer treats pregnant employees the same as non-pregnant employees with respect to offering accommodations. That court further referred to UPS's policy as "pregnancy blind," showing no discriminatory animus toward pregnant workers.

The Supreme Court reversed the decision and remanded the case back to the trial court to allow Young to pursue her claim. The Court, refusing to accept the interpretation of the PDA espoused by either party, concluded that because Young had alleged disparate treatment, she could seek to prove her claim using the burden-shifting framework of *McDonnell Douglas Corp. v. Green.* In other words, Youngwould first need to make a prima facie showing of discrimination "by showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under Title VII." In her case, this meant showing that she belonged to the protected class, that she sought accommodation, that the employer did not accommodate her, but did accommodate others "similar in their ability or inability to work." Thereafter, the burden would shift to UPS to justify its refusal to accommodate Young based on "legitimate, non-discriminatory" reasons. The fact that the accommodation might be expensive or inconvenient for the employer is not necessarily sufficient justification. Even once the employer presents its justifications, the employee has an opportunity to show that the reasons offered are pretext for discrimination.

The Court concluded that Young had created a sufficient factual issue regarding whether UPS provided more favorable treatment to non-pregnant employees in situations that could not be distinguished from hers to allow her to take her case to a jury.

— *Charla Bizios Stevens, McLane, Manchester, NH*

March 27, 2015

Three-Month Drug Abstention Is "Currently Engaging" under ADA

The U.S. District Court for the District of Puerto Rico recently dismissed a terminated employee's Americans with Disabilities Act (ADA) discrimination claim on the basis that she was "currently engaged" in the illegal use of drugs—despite the allegation of her complaint that she had ceased her illegal use of drugs three months prior to her termination. *Quinones v. Univ. of Puerto Rico*, D.P.R. No. 14-1331 (JAG) (Feb. 13, 2015). The plaintiff's current illegal drug use did not constitute a "disability" under the ADA, and the effects of that drug use established that she was not a "qualified" disabled individual under the ADA. However, the plaintiff's complaint *did* state a viable claim for retaliation under the ADA.

Underlying Facts

In July 2011, plaintiff Dr. Karina Quinones was admitted to the ophthalmology residency program of the University of Puerto Rico School of Medicine (UPR). In March 2011, prior to her admission to the residency program, Quinones had enrolled herself in an alcohol-rehabilitation program to treat her alcoholism. Upon release from that program with a number of prescriptions, Quinones began to use the drugs in a manner not prescribed by her physician.

Once enrolled in the residency program, Quinones developed an addiction to Soma, Ambien, and Adderall. Her addiction to Adderall caused visual disturbances, speech problems, and dizziness. As a result of her active addiction to those prescription drugs, the plaintiff began having problems complying with the requirements of the residency program. She met several times with a committee overseeing the program to discuss her performance. However, on September 12, 2012, the plaintiff was terminated from the program.

On September 27, 2012, Quinones sued UPR in the Superior Court of Puerto Rico to gain readmission into the program. In response, UPR agreed to stay its termination of the plaintiff and granted her a temporary leave while UPR considered her request for a reasonable accommodation. On April 29, 2013, UPR rejected Quinones's accommodation request because: (1) she could not comply with the essential functions of her position; (2) she had a high risk of relapse; and (3) she would require constant supervision, which would impose an undue hardship on the residency program. Quinones sued UPR (and certain UPR employees) asserting claims, inter alia, of disability discrimination and retaliation under the ADA. The UPR defendants moved to dismiss the complaint for failure to state a claim pursuant to FRCP 12(b)(6).

Disability Analysis

The district court dismissed Quinones's disability-discrimination claim because "current," active illegal drug use does not constitute a "disability" under the ADA.

42 U.S.C. §12114(a) expressly provides that " . . . a qualified individual with a disability shall***not*** include any employee or applicant who is ***currently engaging*** in the illegal use of drugs,***when the covered entity acts on the basis of such use.***" (emphasis added).

42 U.S.C. §12114(b) provides a "safe harbor" for "recovering" drug addicts:

> Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who:

> (1) has successfully completed a supervised drug rehabilitation program and ***is no longer engaging in the illegal use of drugs***, or has otherwise been rehabilitated successfully and ***is no longer engaging in such use;***
>
> (2) is participating in a supervised rehabilitation program and ***is no longer engaging in such use***; or
>
> (3) is erroneously regarded as engaging in such use, but is ***not engaging in such use***[.] (emphasis added).

The statutory provisions do not set forth a bright-line test for an employer to determine if an employee is "currently" engaging in illegal drug use or is "no longer engaging" in such use. Is an employee "currently" engaging in illegal drug use if he smoked a joint a week ago, a month ago, or a year ago? To answer that question, a number of courts have adopted a conceptual standard that an employee may be considered to be "currently" using drugs if the employer has a "reasonable belief" that the drug abuse remains an "ongoing problem." *See Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1187 (10th Cir. 2011); *Zenor v. El Paso Healthcare System, Ltd.,* 176 F.3d 847, 856 (5th Cir. 1999).

With respect to defining *the length of time* necessary for abstinence to dispel a conclusion of active drug use, courts have found that an employee is still "currently" engaging in illegal drug use if his or her period of abstinence from drugs is *one month* (*Shafer v. Preston Mem'l Hosp. Corp.,* 107 F.3d 274, 278 (4th Cir. 1997), abrogated other grounds, *Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999)); *six weeks* (*McDaniel v. Miss. Baptist Med. Ctr.*, 877 F.Supp. 321, 328 (S.D. Miss. 1995)); *seven weeks* (*Baustian v. State of La.* (910 F.Supp. 274, 277 (E.D. La. 1996)); and *two months* (*Vedernikov, M.D. v. W.Va Univ.*, 55 F.Supp. 518, 522–23 (N.D. W.Va 1999)).

Conversely, a court has indicated that *one year* of abstinence establishes that an employee is no longer "currently" engaged in illegal drug use. *U.S. v. Southern Mgm't Corp.*, 955 F.2nd 914 (4th Cir. 1992).

In the *Quinones* case, the plaintiff's complaint asserted that she had abstained from illegal drug use for "a little over three months" at the time she was fired. The district court held that this use was recent enough for UPR to conclude that the plaintiff was not a "recovering drug user" under the ADA safe-harbor provision. Thus, Quinones's "current" drug use was not a disability under the ADA.

Qualification Analysis

The district court held that Quinones's complaint would have to be dismissed on the separate ground that she was not a "qualified" disabled person. The essential functions of the ophthalmology residency program require a resident to perform delicate and potentially hazardous procedures involving patients' eyes. The plaintiff's admitted "visual disturbances, speech problems[,] and dizziness" caused by her illegal drug use made it clear that she could not perform the essential functions of the job.

Retaliation Analysis

Incredibly, the *Quinones* court held that the plaintiff's complaint *did* state a legally sufficient claim for retaliation under the ADA—despite the fact that the plaintiff was neither "disabled" nor "qualified" for the residency position.

The district court held that there was, plausibly, and at the pleading stage, a causal connection between Quinones's filing of her ADA claims and her termination. The court concluded that there was sufficient "temporal proximity"

between her September 28, 2012, initial complaint, UPR's October 9 temporary rescission of the plaintiff's termination, and UPR's ultimate termination of the plaintiff on April 29, 2013, to establish a causal connection for a retaliation claim at the pleading stage.

The district court's finding that there could be a causal connection between Quinones's termination and the filing of her ADA claims is surprising in light of the fact that the court was required, under 42 U.S.C. § 12114(a), to conclude that UPR's termination of the plaintiff was "on the basis of [her 'current' illegal drug] use." It is fundamentally inconsistent for the court to conclude that UPR did not engage in disability discrimination because it terminated Quinones *on the basis of her current illegal drug use*, but then also conclude that there is a causal connection between her termination and Quinones's protected activity for proposes of an ADA retaliation claim.

—John Stock, Benesch Friedlander Coplan & Aronoff LLP, Columbus, OH

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