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Shutting the Gate: Temporary Worker Excluded From FLSA Collective Action

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After conditionally certifying a collective action under Section 216(b) of the Fair Labor Standards Act (FLSA), the U.S. District Court for the District of Kansas recently struck an opt-in consent filed in the case. The court found that as a temporary worker, the opt-in plaintiff did not fit the collective action definition because she was not an "employee."

In Lundine v. Gates Corporation, the named plaintiff filed suit "on behalf of herself and others similarly situated to recover alleged unpaid overtime wages from" the defendant employer. The court conditionally certified an FLSA collective action defined to include "[a]ll current and former nonexempt manufacturing employees." Thereafter, an individual who worked at the defendant employer's facility through a temporary staffing agency filed a consent to join the collective action. The defendant employer moved to strike the opt-in consent, arguing that as a temporary worker, the opt-in plaintiff did not fall under the collective action definition because she was not "employed" by the defendant employer. The court agreed, and struck the consent.

The court cited the Fifth Circuit's "economic realities" test to determine "whether an individual is an employee under the FLSA," and explained that courts look to such factors as:

- The degree of control exerted by the alleged employer over the worker
- The worker's opportunity for profit or loss
- The worker's investment in the business
- The permanence of the working relationship
- The degree of skill required to perform the work
- The extent to which the work is an integral part of the alleged employer's business

According to the court, no single factor is dispositive. Examining the "totality of the circumstances," the court determined that the opt-in plaintiff was "not an employee of [the defendant employer] for purposes of this FLSA collective action." The court focused on the fact that, given the arrangement with the staffing agency, the defendant employer did not hire or fire specific temporary employees, did not dictate the temporary employees' conditions of employment, and did not determine their rates of pay. As the court explained, the defendant employer did not pay the opt-in plaintiff's wages; rather, it paid a lump sum to the staffing agency based on the staffing agency's calculations.

Ultimately, the court found that given the “unique business relationship” between the staffing agency and the defendant employer, the opt-in plaintiff was not employed by the defendant employer “in the traditional sense of the word.” Thus, the opt-in plaintiff and “other similarly situated temporary workers” did not fit the collective action definition, and her opt-in consent was stricken.

The *Lundine* decision is a useful reminder to employers defending collective actions under Section 216(b) of the FLSA that the validity of an opt-in consent should not always be presumed, particularly when there are categorical differences among the populations at issue. Employers of temporary workers may also want to review the court’s analysis to determine which entity is the employer for purposes of the FLSA.

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