Published on *The National Law Review* https://natlawreview.com

Class Action Trends Report: Other Class Action Developments

Article By:

Mia Farber

David R. Golder

Eric R. Magnus

Lisa A. Milam

Kirsten A. Milton

William Robert Gignilliat, IV

Collective action waivers in severance agreements enforceable. Former employees who entered into severance agreements in which they agreed not to join any collective actions against the employer asserting claims under the Age Discrimination in Employment Act (ADEA) failed to convince the Seventh Circuit that the district court erred in denying their bid for an injunction barring the employer from enforcing the collective action waivers contained in the agreements. The employees, who were 56 or 57 years old at the time they were terminated as part of a reduction in force, agreed to the collective action waiver in exchange for a lump-sum payment, 12 months of health and life insurance, career counseling, and reimbursement for job-related skills training. Relying on the U.S. Supreme Court's decision in 14 Penn Plaza LLC v. Pyett, the Seventh Circuit agreed with the district court that Section 626(f)(1) of the ADEA applied to "substantive rights." Because a collective action is a "procedural mechanism," not a substantive right, a collective action waiver did not trigger any "right or claim" under the ADEA.

FCRA plaintiff did not suffer concrete harm. The U.S. Court of Appeals for the Eighth Circuit held that a job applicant lacked Article III standing to bring a purported class action against her prospective employer for alleged violations of the Fair Credit Reporting Act (FCRA). The plaintiff's job offer was revoked based on the contents of a third-party background screening report. She sued, contending that she should have been given an opportunity to explain the information contained in the report, among other claims. In 2016, the parties reached a tentative settlement agreement but four days later, the U.S. Supreme Court issued Spokeo, Inc. v. Robins, which held that a FCRA plaintiff had to show more than a "bare procedural violation" of the FCRA in order to have standing to sue. The Court said the plaintiff had to show she suffered an "injury in fact." The Spokeo decision

prompted the defendant to move to dismiss for lack of standing. The district court approved the settlement without addressing standing, and the defendant filed an appeal. In an April 4, 2022, decision, the Eighth Circuit vacated the order approving the settlement and remanded for the district court to decide the standing issue. When the district court found the plaintiff had standing, the employer filed another appeal. The appeals court vacated the order, holding that the plaintiff did not establish concrete harm. It remanded with instructions to dismiss the suit for lack of standing. Subsequently, in a May 3, 2022, decision, the appeals court instructed the district court to return the case to state court.

Objection to PAGA settlement dismissed, class settlement vacated. The Ninth Circuit provided mixed results for two truck drivers who objected to a class settlement agreement resolving various wage and hour claims and allegations brought pursuant to the California PAGA for violations of California Labor Code Sec. 2802, which requires indemnification of expenditures and losses. The settlement provided that the employer would pay $7.25 million for the class claims, $2.4 million for attorneys' fees, and $500,000 for the PAGA claim. The appeals court held that one objector could not object to the PAGA portion of the settlement because he was not a party to the underlying PAGA action, and so dismissed his appeal. With regard to the second objector, the appeals court vacated the district court's approval of the class action settlement agreement and remanded the class action for further proceedings because the lower court abused its discretion by applying an incorrect legal standard when evaluating the settlement.

CAFA minimum met in wage and hour class action. An employer that removed a state wage and hour putative class action to federal court amply established the $5 million amount in controversy required for federal jurisdiction under the Class Action Fairness Act (CAFA), the Ninth Circuit ruled. It found the district court erred in (1) imposing a presumption against CAFA jurisdiction and (2) assigning a $0 value for the amount in controversy for each of the claims where it disagreed with the employer's calculations. The district court's "zeroing out" of several claims because it disagreed with the employer's valuation was a "draconian" approach that required reversal. Under the proper analysis, the suit clearly met the $5 million requirement.

Premiums for meal, rest period violations are wages. In a class action suit brought under the California Labor Code's meal period provisions, the California Supreme Court held that extra pay provided to employees for missed meal and rest periods constitutes "wages" and, therefore, must be reported on statutorily required wage statements pursuant to Labor Code Sec. 226 and paid within statutory deadlines when an employee separates from employment pursuant to Labor Code Sec. 203. The decision means that if a California employer fails to pay premium pay for missed meal and rest periods, additional penalties for failure to provide an accurate wage statement and waiting time penalties also may be recoverable by plaintiffs.

Certification of collective gets interlocutory appeal. In a putative collective FLSA action brought by call center operators, a federal district court in Virginia granted an employer's request for certification of an interlocutory appeal to determine whether a two-step or one-step process should be used for FLSA collective certifications in light of the Fifth Circuit's recent adoption of the new one-step process. Under this process, district courts strictly scrutinize whether putative collective members are truly similarly situated at the outset of the case and, if needed, will authorize preliminary discovery to assist in this determination. In addition to noting the split in the circuits created by the Fifth Circuit's ruling and the Fourth Circuit's lack of clear precedent, the district court agreed with the employer that certifying an interlocutory appeal would materially advance the outcome of the litigation as resolving the issue would have a significant impact on the size of the collective.

Court lacked jurisdiction over out-of-state opt-ins. In the latest court ruling to address personal jurisdiction over out-of-state opt-in plaintiffs in FLSA collective actions, a federal district court in North Carolina held that it lacked jurisdiction over individuals who did not work for the defendant employer within the state, were not hired in the state, or whose employment with the defendant was not otherwise related to the state. In so ruling, the court determined that the U.S. Supreme Court's decision in Bristol-Myers Squibb Co. v Superior Ct. of Cal. applies to FLSA collective actions.

Court approves $23 million settlement for bakery distributors. A federal district court in Maine has granted final approval to a $23 million settlement of three related cases, ending a six-year battle pertaining to the employment status of bakery distributors for a national baked foods company and two of its subsidiaries. The distributors will receive offers of employment and monetary compensation from the $9 million settlement fund to address claims of unpaid overtime wages and to compensate the class members for business expenses and administrative fees they paid while classified as independent contractors. In addition, the distribution agreements will be terminated, and the bakery will repurchase the distribution rights for an estimated $6.6 million. The settlement also requires the company to pay $7.5 million in class counsel fees and costs.

Collective action over boot-up time advances. A federal district court in Pennsylvania held that pre-shift time spent by employees logging into company computers and work programs was compensable under the FLSA because the employees' work both depended and centered on their computer access. Denying a motion for summary judgment brought by the defendant applicant screening firm on the putative collective FLSA action, the court reasoned that employees booting up their computers was akin to preparing a tool that must be used throughout the workday. Moreover, whether the time spent by the employees was de minimis was a fact-specific inquiry for a jury to decide. However, the court granted the employer's bid for summary judgment on claims that it had a policy of allowing supervisors to shave time from employee timecards.

Preliminary approval of $2 million settlement for wage statement claims. A federal district court in California granted preliminary approval to a proposed $2 million settlement in a case involving allegations that a fast-food chain's wage statements failed to identify and account for overtime correctly. The proposed settlement class included approximately 5,500 class members and would result in an average recovery of $35 per wage statement. The court found that Rule 23(a), 23(b), and 23(e) requirements were met, with the only potential deficiency being the attorney fee provision and the seemingly excessive $10,000 service award to the named plaintiff. However, the court granted preliminary approval and indicated that those issues will be resolved as part of final approval.

Court approves $1.6M settlement for pizza delivery drivers. A federal district court in Colorado approved a $1.6 million class action settlement of claims brought by delivery drivers employed by a national pizza chain's franchisee. The drivers alleged the employer violated the FLSA and Colorado wage and hours laws when it paid drivers minimum wage while requiring them to pay their delivery expenses and failing to reimburse the costs. The settlement fund will be shared with 2,227 class members employed by the franchisee.

Scott Jang, Samia Kirmani, Linda O'Brien, and Marjorie Johnson also contributed to this article.

National Law Review, Volumess XII, Number 182