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FALL 2017

# CLASS ACTION TRENDS REPORT

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## Minimum wage traps

*Teen Scene is expanding in leaps and bounds—the youth fashion retailer is entering new markets and seeing robust sales growth at existing store locations. With a presence in malls across America and increasing online sales, the clothing chain is hiring new employees at a steady clip—primarily "'look' consultants" for its brick-and-mortar stores, but also warehouse workers at the company's numerous distribution centers, online customer care associates, and team members at Teen Scene's corporate offices. But there are growing pains.*

*Look consultants are mad about Teen Scene's new baggage-check policy, implemented to reduce shrinkage at the retail stores. One consultant complained that consultants spend "half their break time" waiting for a manager to inspect their belongings before they can leave the store. Another consultant says she's being "held hostage" by her manager, who routinely orders the staff to clock out when the store closes and then stay after to help straighten up the sales floor. Another consultant contends she can't afford to purchase the minimal (but required) uniform—a teal "TS" baseball cap—with her "paltry minimum wage pay." And her coworker claims that Teen Scene docked his pay to make up for a cash register shortage. A consultant in the flagship New York City store brazenly removed her name from the mandatory "on call" schedule, insisting her manager's on-call policy was against the law. A consultant in a Philadelphia store staged a minor protest after learning that her counterparts in New Jersey "get paid a lot more for the exact same job."*

*There are similar grumblings in Teen Scene's back-end operations. Customer care center associates are angry that they must arrive at work 10 minutes early to be "call-ready" when their shifts start—which is essential to ensuring seamless customer service. The warehouse crew, who have been working through lunch to keep up with demand, was upset to find their standard 30-minute lunch periods automatically deducted from their paychecks, as usual. (The warehouse manager insists the workers are paid well above the minimum wage rate anyhow, so "it all evens out by the end of the week.") Meanwhile, several home delivery drivers have griped openly on Facebook about being made to wait for packages at distribution centers. The drivers are independent contractors, who sign on via Teen Scene's cutting-edge "On the Scene" platform to deliver customer purchases on a pay-per-package basis. One driver posted on an unofficial "On the Scene" Facebook page that he waited more than 20 minutes to pick up a package. "I would have never taken the delivery," he fumed. "We don't get paid to stand around!"*

**Minimum wage traps continued on page 3**

# A WORD FROM WILL AND STEPHANIE

As a modern fictional character has said: "a trap is only a trap if you don't know about it." The same can most certainly be said about minimum wage laws and ordinances across the United States. The concept appears rather simple and straightforward: an employer must pay an employee $X per hour to comply with the applicable minimum wage law or ordinance. However, compliance is never as simple as it may seem. Employers, in fact, maintain operations at multiple locations, pay employees by means other than an hourly rate, and utilize credits (*e.g.*, the tip credit and meal credit) that may raise complications. Put simply, an employer's practice may be perfectly legal in one jurisdiction but may not be lawful in another. The best way to avoid these traps is to be aware of them and develop a unique compliance strategy for each jurisdiction in which your business operates.

As the federal hourly minimum wage remains unchanged at $7.25, Massachusetts and Washington have $11.00 per hour minimum wages and New York City's minimum wage will increase to $15.00 per hour at the end of 2018. Employers with operations in multiple jurisdictions—or even those that simply perform work in jurisdictions with differing minimum wage rates—face compliance challenges on a weekly basis. For example, a company based outside of a state with a higher minimum wage may have employees who perform the majority of their work inside that state with the higher minimum wage. Additionally, if your establishment utilizes tip credits and meal credits, is your company's tip notification sufficient to pass muster in all of the jurisdictions with operations?

In addition to the above minimum wage compliance issues, company timekeeping, break, and meal break practices also may place your business at risk of a minimum wage class or collective action. Auto-deduction and compensable travel time policies continue to be the subject of countless collective actions against employers. Likewise, donning and doffing claims (*i.e.*, seeking pay for compensable time spent putting on and taking off protective gear) remain a palpable risk. Knowledge of your company's policies and procedures in the specific jurisdictions in which the business operates is essential to avoiding these minimum wage traps.

Lastly, to the extent your business relies upon the services of independent contractors, state agencies may vigorously pursue misclassification investigations and actions. A business faces the conundrum of intentionally not tracking contractor hours because those contractors are not employees and the risk posed by *not* tracking such hours. Absent some sort of records or time tracking, the contractor's testimony or records of service hours may be credited by an agency or court. Furthermore, it is often difficult to determine whether the compensation paid to a contractor (flat-fees, piece-rates, and so on) covers the minimum wage when documentation regarding those service hours are absent. Accordingly, businesses utilizing independent contractors need to conduct risk assessments and develop strategies to counter the risks.

We encourage you to learn about the possible minimum wage "traps" that exist for your business. Knowledge and proactive compliance can spring these traps before your business becomes embroiled in a lawsuit or Department of Labor action.

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## About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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**MINIMUM WAGE TRAPS continued from page 1**

Will Teen Scene fall victim to its own success? Increased labor needs and greater demands placed on employees by the retailer's rapid growth bring with them increased legal risks. Potential violations of federal and state minimum wage laws are lurking around every corner. Exacerbating the risk, of course, is the ever-changing minimum wage requirements at the state (and sometimes local) level that a company must juggle when operating nationwide.

## The compliance challenge

Rare indeed is the employer that is unaware most employees must be paid at least an hourly wage that does not fall below a minimum rate set by law. Equally rare is the employer that, cognizant of this mandate, deliberately flouts it. More commonly, employers faced with the complexities of the state and federal laws governing wage payment commit inadvertent technical violations of the statute. Because the Fair Labor Standards Act (FLSA) and many state wage laws are "strict liability" statutes, the employer's intent is irrelevant. Then there's the maze of state and, in some cases, local minimum wage laws that employers also must heed. Especially for companies that operate in multiple jurisdictions, such as Teen Scene, it takes an affirmative, sustained effort to keep pace with the various mandates in order to avoid unintended breaches of the law.

*Because the Fair Labor Standards Act (FLSA) and many state wage laws are "strict liability" statutes, the employer's intent is irrelevant.*

The Teen Scene scenario above illustrates how easy it can be to accidentally violate the law while management's attention is focused on running and growing a successful business. Teen Scene's employees raise a number of legal questions regarding minimum wage compliance:

- What time must be compensated? Must the call center associates be paid for coming in early to prepare for their shifts? Do the look consultants have a legitimate complaint about unpaid baggage checks and post-clock-out clean-up?
- Can't a retailer expect its employees to be available to work in the event of unforeseen customer traffic?
- Is it enough that the warehouse workers earn at least the hourly minimum wage when averaged out over 40 hours of work in a week? Or must they be paid at least the minimum hourly wage for every single hour of work, including those working lunches? Does it matter what state the warehouse is in?
- Who is an "employee" entitled to be paid at least the statutory minimum wage rate? Are the per-package "gig" drivers Teen Scene employees?
- What happens if a paycheck deduction—for the cost of providing uniforms, or to recoup losses resulting from an employee's lapse—drops an employee's pay below the applicable minimum wage rate?
- What is the applicable minimum wage? Can it vary from location to location?

**Employee status.** For several years, the plaintiffs' bar (and government agencies) has attacked the independent contractor business model, arguing that broad classes of workers who have willingly entered into independent contractor arrangements with a company are legally its "employees" and are therefore entitled to the minimum wage and overtime protections of federal and state wage laws. The litigation wave shows no sign of receding. "Who is an employee?" is one of the most significant points of contention in employment litigation today.

The rapid ascendance of the "gig," or on-demand, economy has raised the stakes. Even reviewers posting on a crowd-sourced restaurant review site have sued, seeking compensation for sharing their opinions online about the evening's meal! While it would seem obvious that drivers who use a phone app to make a few extra dollars on the weekends and individuals bidding to perform one-off home deliveries are independent entrepreneurs, here, too, the lawsuits have begun to emerge—and have had surprising traction, resulting in significant settlements. (We can take some solace in the Department of Labor's recent withdrawal of its Administrator's Interpretation on narrowing the meaning of "independent contractor" while expanding the definition of "employee." Still, the plaintiffs' bar and state enforcement agencies are not relenting.)

**Minimum wage traps continued on page 4**

MINIMUM WAGE TRAPS continued from page 3

**"Working" time.** Assuming the workers in question are employees, what portion of their time must be compensated? The FLSA defines "employ" as "to suffer or permit to work," which has been interpreted to mean an employer does not need to expressly *request* the work—it must only *allow* the employee to perform the work or know (or have reason to know) the employee is doing the work. For example, an employee whose employer has reason to know she consistently works extra hours may have a viable minimum wage claim (or, if those added off-the-clock hours exceed 40 in a workweek, an overtime cause of action).

*Plaintiffs' attorneys test new theories of minimum wage liability as quickly as the nature of work itself changes.*

More frequently, however, the extra time is worked at the employer's direct request: those ten minutes that customer service associates spend booting up their computers before the start of their shifts; the mandatory baggage checks; and the missed lunches in the warehouse. These are common and potentially thorny scenarios. Whether such activities are compensable under the FLSA is a complicated question that depends on a number of factors. Indeed, there are many lawsuits regarding this issue.

To determine whether these "preliminary" and "postliminary" *(i.e.,* pre-shift and post-shift) activities must be compensated, the law looks at whether they are "integral and indispensable" to the employee's "principal activity." For example, a federal appeals court recently concluded a 911 dispatcher who comes in five minutes early each day for debriefing by the outgoing dispatcher is entitled to pay for the pre-shift briefings because this preliminary activity is integral and indispensable to performing her job. An employee who comes in early to drink coffee and talk sports with the outgoing shift is not so entitled.

"The integral and indispensable test is tied to the productive work that the employee is employed to perform," Justice Clarence Thomas explained in a 2014 case finding that "baggage check" time was not compensable under the FLSA. The court of appeals had gone astray, Justice Thomas said, focusing on the fact that the activity in question had been *required* by the employer. That wasn't enough to make it *compensable* by the employer. (Baggage check claims have not necessarily been ruled out under state laws, however. In fact, the Ninth Circuit has asked the California Supreme Court to provide guidance on whether such claims are viable under California wage laws.)

But these are fact-intensive analyses, and judges often disagree as to the correct legal outcome. Moreover, plaintiffs' attorneys test new theories of minimum wage liability as quickly as the nature of work itself changes. There are the tried-and-true minimum wage claims, of course—lawsuits seeking compensation for time spent in pre-employment training, traveling to and from worksites during the workday, or donning and doffing essential work gear. Today, we also see claims for writing online reviews (as noted above) or for the time spent interfacing with a rideshare app between passengers. Although lawsuits seeking pay for waiting time or on-call time are nothing new, the factual scenarios evolve with the times. For instance, what happens when "gig" workers are made to wait for their "gig"?

**Deductions.** May an employer "auto deduct" unpaid meal periods from employees' time records? May an

Minimum wage traps continued on page 5

## Over 40 hours?

A *minimum wage* case becomes an *overtime* case under the FLSA once the total working time (including any disputed compensable work) surpasses 40 hours in a week. An employee working a standard full-time schedule likely will be entitled to time-and-a-half compensation for any alleged off-the-clock work performed.

**MINIMUM WAGE TRAPS continued from page 4**

employer do so even when an employee occasionally (or frequently, as is often alleged) works through designated lunch breaks? Increasingly, auto deduction invites class litigation. In addition to timeclock deductions, plaintiffs' attorneys frequently target employer practices of taking deductions from employees' wages to recoup such costs as uniform expenses, cash shortages, debit card user fees, and processing background checks.

*"The biggest minimum wage issue affecting employers today is the numerous state and local laws being passed," Barnes stressed.*

"The wage deduction issue is a common one that employers face, from a litigation standpoint," notes Justin R. Barnes, a Principal in the Atlanta office of Jackson Lewis. "Many states have wage deduction statutes, and are enacting 'wage theft' statutes. These are increasingly tacked on to minimum wage or overtime claims," he warns. "There are countless state laws on wage deductions—addressing such issues as when you can do it and, if you can, how you're supposed to do it, whether you need a written authorization. There are intricate rules depending on the jurisdiction where the employee is located."

"The challenge is particularly acute for smaller employers," Barnes said. For the most part, large companies are able to absorb the costs of uniforms and cash register shortages. They also are more likely to have looked into the relevant legal issues and to have implemented an approach that ensures compliance. However, these costs can be significant to smaller employers operating on narrow profit margins. These businesses also are more apt to be paying workers the minimum wage, so paycheck deductions of this sort can indeed run the risk of dropping employee pay below the statutory minimum.

**What is the minimum wage?** "The biggest minimum wage issue affecting employers today is the numerous state and local laws being passed," Barnes stressed. Notwithstanding the FLSA, the majority of minimum wage cases are brought as state-law claims because most states have minimum wage mandates that exceed the federal rate (currently $7.25 an hour). In some states, the minimum wage rates are *significantly* higher. Moreover, the rates vary widely across states, creating an administrative challenge for multistate employers. In recent years, county and local governments have gotten into the act, imposing even higher wage floors within their narrow jurisdictions. This patchwork of regulations means employers must juggle an even greater array of pay rates across multiple worksites. (We take a closer look at this problem in "Only in California" on page 12.)

Claims brought pursuant to state laws have significantly different procedural implications in class actions. Thus, the state-law-centric nature of minimum wage claims is also consequential from a litigation standpoint:

- The Rule 23 class action mechanism applies to state-law minimum wage claims. Despite dogged efforts by plaintiffs' attorneys to recruit employees to join FLSA collective actions, employees are less likely to affirmatively opt *out* of a Rule 23 class than to affirmatively opt *in* to an FLSA collective action. Thus, Rule 23 classes tend to be larger.
- Alternatively, in large, multistate (and perhaps nationwide) class cases, the employer may find itself defending a dual or "hybrid" FLSA/state-law case, implicating both the Rule 23 opt-out mechanism and the opt-in collective action in the few states where the federal minimum wage floor is controlling.

**Minimum wage traps continued on page 6**

## Rounding up?

May an employer round its employees' time to the nearest quarter-hour or other increment? If the rounding benefits the employer more than the employee, then the employer could be on the hook for unpaid time. As the Department of Labor's FLSA regulations provide, rounding is permissible only "in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."

**MINIMUM WAGE TRAPS continued from page 5**

- Increasingly, state minimum wage claims are accompanied by one or more additional claims arising under state wage-payment laws, "wage theft" statutes, and even common-law claims.
- The statute of limitations for the state minimum wage claim may be different from the FLSA standard. For example, Florida's statute changes the limitations period for a minimum wage claim to 5 years from 2 years (for a non-willful claim).

*On the plus side, the fact that state minimum wage rates vary can have the positive effect of narrowing a potential minimum wage class.*

- On the plus side, the fact that state minimum wage rates vary can have the positive effect of narrowing a potential minimum wage class. Are employees not similarly situated if they're paid different hourly rates? Typically, a plaintiff's counsel needs to find a "class rep" for each state to assert different claims under different state laws. If successful, it simply may be a matter of plaintiffs asking to certify subclasses for the state-law claims.
- Relatedly, nuances in state-law claims can help preclude class certification by making it more difficult for the class representative(s) to satisfy the Rule 23 factors.
- Do some (but not all) of the potential class members have a state-law claim for improper wage deductions? Did some (but not all) get paid for meal breaks or other time that can be credited against unpaid time? Additional claims or additional defenses, if they are not common to all the putative class members, may be enough to "break up" a minimum wage class.

## Avoiding class claims

"Minimum wage classes can be more difficult to fight than other types of wage class action claims," Barnes said, as they could be seen as ready-made for class treatment. "If the minimum wage rate is $10 an hour and you're paying just $9 an hour, that could present a clear violation, and if so, it would be the same for everyone in the potential class. That's a much harder class to fight. Even when the issue is not that clear-cut, like wage deductions, you're talking about common issues," he added. "If you improperly deduct for the cost of replacing damaged equipment, for example, and that deduction policy applies to everyone, then that can be a harder issue to fight than some of the other types of wage class action claims that we see."

"Still, the defense has a lot of arguments to fight class certification on these minimum wage issues, particularly if it's an off-the-clock claim that turns into an individual analysis of who did what and when," Barnes said. He

**Minimum wage traps continued on page 7**

# Mind the gap.

Two circuit courts, thus far, have rejected the notion that the FLSA provides a cause of action for "gap time." Hours in which employees worked "off the clock," but *not* more than 40 hours (and thus, not statutory overtime) are referred to as gap time. As long as the employees are being paid the minimum wage (*i.e.*, their effective hourly pay meets or exceeds the minimum wage rate when averaged out across all hours worked in a week), and as long as they do not work overtime, most courts have held that there is no recourse under the federal statute for unpaid work below the 40-hour threshold. However, some states have enacted "gap fillers"—measures requiring employees be paid for *every* hour worked at the agreed rate of pay.

Is it enough, then, that the Teen Scene warehouse workers earn at least the hourly minimum wage when averaged out over 40 hours? Or must they be paid at least the minimum hourly wage for every *single* hour of work, including those working lunches? The answer turns on where that warehouse is located.

**MINIMUM WAGE TRAPS continued from page 6**

offers the following strategies for employers:

- Identify the numerous disparities in employees' daily on-the-job experiences, particularly to the extent you can demonstrate that different employees were impacted differently by the alleged unlawful policy. Armed with these facts, the employer can thwart plaintiffs' attempt to show the putative class members are subjected to an unlawful, uniformly applied company policy.
- Emphasize the wide discretion afforded managers to impose wage deductions, coordinate employees' meal periods, or mandate post-shift duties to demonstrate that localized violations of wage-hour laws do not reflect the company's standard operating procedure.
- If there is an established system in place for reporting missed meal breaks, point to the fact that some employees complied with the employer's reporting procedure, while others failed to do so, in order to show that they are not similarly situated and thus, the claims are not amenable to class treatment.
- When faced with a "hybrid" class claim, point to the limited number of employees who have "opted in" to the FLSA collective action in order to challenge whether the plaintiffs can establish the requisite numerosity to bring their state-law class claim under Rule 23.
- Where a minimum wage violation is discovered, consider making an offer of judgment to the named plaintiff to compensate him or her fairly for the inadvertent lapse while possibly avoiding a potentially significant classwide claim.
- As discussed below, are there credits (such as paid meal breaks) that can be used as a credit against any unpaid time? If so, such credits often require an individualized analysis of each plaintiff's claims to determine whether the credits fully subsume any alleged unpaid time (in which case there would be no liability).

Partnering with outside counsel is crucial to mapping a successful defense strategy.

This is the first of two *Class Action Trends Reports* focusing on class minimum wage claims. In our next issue, we'll discuss some of the particular, peskier minimum wage problems that employers face, especially the challenges when paying tipped employees. ■

## Crediting paid breaks against alleged off-the-clock time

Can an employer use paid meal periods as a credit toward alleged unpaid off-the-clock time? That is the subject of a petition pending before the U.S. Supreme Court.

In the case before the Court, the company provided three paid 30-minute breaks to workers over the course of their 12-hour workdays. However, the workers alleged they spent 30 to 60 minutes every day donning and doffing work gear and performing other preliminary and postliminary activities. They sought pay for that alleged off-the-clock time. The employer wanted to call it a wash, since the 90 minutes of paid meal periods exceeded the workers' off-the-clock time. The district court agreed, but the Third Circuit reversed.

The petition for *certiorari* in the case, *E.I. DuPont de NeMours and Company and Adecco USA, Inc. v. Smiley* (Docket No. 16-1189), was filed by Jackson Lewis on the employers' behalf, and asks the Supreme Court to resolve a circuit court split on the question.

# Prevention pointer

**By Justin R. Barnes**

Proactive efforts to ensure compliance and minimize risk are always the best defense to avoiding liability. Failing prevention, the following measures also can help the company defend itself against minimum wage claims if it does face class litigation:

- State clearly in your employee handbook that employees must accurately record all hours worked, and that they will be disciplined for failing to do so (including either under-reporting or over-reporting their hours). Include a policy requiring employees to obtain supervisor approval before working any unscheduled time (but noting that they should record all time worked regardless of whether they obtained approval or not). Enforce these policies consistently.
- Implement a complaint procedure that allows (and requires) employees to report any and all inaccuracies with their time records or pay. Make the complaint procedure practical and accessible to all employees.
- Require employees to sign off on their timesheets to attest the time records are accurate and they have not worked any hours not recorded therein.
- If utilizing a timekeeping system that "auto-deducts" employee lunch periods, ensure an override procedure is available to employees when they need to work through a lunch period. Make sure the override procedure is not merely "illusory," but is well-known and actually followed.
- Program your payroll and timekeeping software to catch potential violations. For example, if you are making deductions for things like mandatory uniforms, make sure the software is programmed not to allow a deduction below minimum wage.
- Train supervisors in efficiently managing workflow and staffing in a manner that ensures employees are able to take their scheduled lunch and break periods.
- Consider whether your compensation and promotion policies encourage your managerial team to place controlling payroll costs above all else, including employee morale and legal compliance. Considering adding "legal compliance" as a factor in managers' performance reviews and compensation decisions. Highlighting the importance of other factors, such as employee retention, can help to avoid any unintended incentive to "time shave" or otherwise breach company policy or the law.
- Require supervisors to document the reasons for adjusting employee time records and to obtain employee approval before doing so. Periodically review such adjustments to catch troublesome trends, such as a particular supervisor routinely revising employee work hours downward.
- Keep detailed, accurate employee records. The information collected should include hire and termination dates, job titles and duties, pay grades, hourly rates, work schedules and shifts, supervisor, department, worksite, and unionized status. (Collective bargaining agreements often dictate wage rates and work hours and, in some instances, can serve as a defense to certain causes of action, such as donning and doffing claims.) The more detailed the information, the better prepared you'll be to identify the differences among putative class members (to defend against class certification) and to show these employees are not subject to a challenged common policy.
- Keep detailed, accurate time and pay records. Regardless of whether employees are paid on a weekly, biweekly, or monthly basis (note that some states require specific pay periods), retain these records on a weekly basis in order to properly calculate employees' rate of pay for a 40-hour workweek and to ensure they have been compensated at the minimum wage or above for all hours worked. In addition, remember that overtime and minimum wage must be calculated on a weekly basis.
- Maintain employee records electronically. It will go a long way toward expediting the process of identifying potential class members when faced with a class action

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**PREVENTION POINTER** **continued from page 8**

lawsuit and avoiding the time and cost of collecting the information from paper files. If you utilize the services of an outside vendor to maintain archived pay records, ensure the records are stored in electronic format and are readily retrievable if needed.

- If employees are paid varying hourly rates as a consequence of state or local minimum wage mandates, communicate this reason clearly to them. Stress to employees who are paid a lower hourly rate than their counterparts elsewhere that the disparity does not mean their efforts are of less value to the company.
- Maintain an "open door" policy so that employees bring problems and questions to the employer first. A company official should be available at each site, who is approachable and is empowered to either resolve pay questions or to elevate the issue to human resources or the legal department.
- Implement an internal dispute resolution procedure that provides for binding, individual arbitration—and prohibits class arbitration—as a final mechanism for resolving an employee's wage disputes. Require employees to sign and acknowledge they have received, read, and consented to these procedures as a condition of continued employment and agree to adhere to them in lieu of filing suit. Consult with experienced counsel in drafting the policy to ensure that it is enforceable and lawful. Certain states reject "continued employment" as acceptable consideration for such agreements. More important, the U.S. Supreme Court will rule soon on whether mandatory class waivers are permissible.
- State and local minimum wage increases, laws seeking to bar local minimum wage ordinances, and a dizzying array of new legislative "wage theft" and "predictable scheduling" measures add considerably to the already daunting challenge of wage-hour compliance. Assign an individual within the organization's legal or HR department to keep apprised of ongoing changes in the law in the jurisdictions where the company maintains operations. The ideal solution is to partner with outside counsel to this end or use reliable tools such as *workthruIT®*, Jackson Lewis' digital compliance solution.

# STAY IN THE KNOW!

Don't wait until our next issue of the *Class Action Trends Report* for the latest developments in class and collective actions. Jackson Lewis' **Employment Class and Collective Action Update** blog will keep you apprised and enlightened on what's happening in this critical area of the law.

Also visit Jackson Lewis' **Wage & Hour Law Update** blog for recent news and expert analysis.

# The legislation

Section 206 of the FLSA provides: "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at" the currently mandated federal rate ($7.25 an hour, since 2009). A politically contentious issue at the federal level, there are no indications that this rate will increase in the near future.

However, FLSA, Section 218 states: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, of the Act." This provision, combined with the modest federal minimum wage rate, means that the state minimum wage is the operative wage floor for employees in some 30 jurisdictions that have enacted a higher minimum wage than the federal rate (and, in some localities, a still-higher municipal or county-imposed wage mandate applies).

**Portal-to-Portal Act.** As we have noted, a large number of minimum wage collective actions arise from claims that employees are performing unpaid work before or after their scheduled shifts. The Portal-to-Portal Act controls whether much of this pre- and post-shift activity, in fact, is compensable. This 1947 amendment to the FLSA provided the criteria for determining whether federal law requires an employer to pay employees for the time they spend on "preliminary" or "postliminary" activities and, specifically, whether the time it takes an employee to get to the physical location where his productive work takes place.

The Portal-to-Portal Act provides that employers shall not be liable for failing to pay the minimum wage (or overtime compensation) for or on account of any of the following activities of such employee engaged in...:

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform; and
(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

**THE LEGISLATION continued on page 11**

# DOL adds "continuous workday" concept

Department of Labor regulations implementing the Portal-to-Portal Act provided a definition of "workday" as "roughly . . . the period from 'whistle to whistle.'" DOL further instructs that "periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked." That is, the first "principal activity" in which the employee engages marks the start of the employee's "continuous workday," and everything thereafter—even activities that wouldn't be considered integral and indispensable to an employee's principal activity, or is otherwise excluded based on custom or practice—also is compensable.

For example: An employee spends 10 minutes in the locker room donning protective gear—an integral and indispensable part of her job—and then spends 5 minutes walking from the locker room to the shop floor, where she punches in. The 10 minutes donning safety gear is a principal activity; therefore, the time spent walking to the shop floor before punching in also is compensable under the continuous workday rule.

**THE LEGISLATION continued from page 10**

(Employers are *not* relieved from paying employees for this pre- and post-shift time if it has been deemed compensable by an express provision in a collective bargaining agreement or through a "custom or practice consistent" with a union contract or an ongoing collective bargaining relationship between an employer and the union representing its workers.)

*The U.S. Supreme Court ... interpreted "principal activities" to include "all activities which are an 'integral and indispensable part of the principal activities' of work."*

The U.S. Supreme Court, in its 1956 decision in *Steiner v. Mitchell,* interpreted "principal activities" to include "all activities which are an 'integral and indispensable part of the principal activities' of work."

**"Integral and indispensable," applied.** Fast-forward to the "baggage check" security screening cases arising in recent years. Looking to the Portal-to-Portal Act, the Supreme Court held that the time spent by hourly workers going through security checks at an online retailer's warehouses (25 minutes every day allegedly spent removing wallets, keys, belts, and similar items, and passing through metal detectors) was noncompensable because the screenings were not integral and indispensable to the principal activities that the workers were employed to perform. The Court's 2014 decision effectively put an end to security check collective actions under the FLSA.

Security screening cases *may* continue to be viable, however, under state wage laws. California offers a ready illustration of what can happen when the Portal-to-Portal Act *doesn't* come into play. Under California law, whether preliminary or postliminary activities are compensable does not turn on whether the activity is a "principal activity" of the employee or whether the activity in question is "integral and indispensable" to the employee's work. Rather, what matters under California law is whether the employee is "subject to the control of the employer" while engaged in the activity. Will that distinction make all the difference? In August, the California Supreme Court agreed to decide the question. ■

# *(Not)* Only in California

When it comes to minimum wage compliance and class actions, state law is often the primary consideration. The majority of states mandate a higher minimum wage rate than the current federal rate of $7.25 per hour. Moreover, in the past few years, some municipalities and county governments have adopted their own, more stringent requirements. Often these measures provide steep wage hikes incrementally over the course of several years. For example, California has adopted a state minimum wage that, as of January 1, 2017, is $10.50 per hour. The minimum wage is scheduled to increase annually until it reaches $15.00 per hour on January 1, 2022. Nearly a dozen municipalities in the state have even higher minimum wage rates.

This is by no means an "only in California" issue. Local minimum wage ordinances are popping up in cities across the country, and they require employees working within a given municipality to be paid as much as $15.00 per hour.

**The "patchwork" problem.** The problem isn't merely the higher wage rates that employers must pay their workers. The more daunting challenge for corporate legal and HR is the complexity of navigating a patchwork of legal provisions across multiple jurisdictions.

"Having drastically different minimum wage rates in different locales presents a couple of issues for employers," said Justin R. Barnes, a Principal in the Atlanta office of Jackson Lewis. "The obvious issue is, are you paying the minimum wage? You have to make sure you're keeping up with all the various laws. Employers have to be proactive and have a method in place to ensure they are staying up-to-date on what those laws are."

"The difficulty is not just from a compliance perspective," Barnes added. "The increasing changes in wage rates present an employee morale issue, too. If you're an employee in Georgia being paid $7.25 an hour and someone in California is being paid a lot more than you in the same job, you're going to think it's not fair. When that other employee is just one county over, it becomes even more of a problem."

"What can an employer do to make sure everyone is being compensated fairly? I'm not suggesting providing an across-the-board $15 pay rate," Barnes said. Still, he cautioned, "the unhappy employee is typically the employee who sues you."

**"Scheduling" laws.** In addition to higher minimum wage rates, employers must heed a growing list of state and local provisions related to employee scheduling. These measures afford far greater substantive protections to employees than the U.S. Congress had ever envisioned in drafting the FLSA. The latest legislative inventions are "predictable" or "fair scheduling" laws. (The first such law, the "Retail Worker's Bill of Rights," was passed in San Francisco in 2014.) These require employers to give employees notice of their precise work schedules several weeks in advance and to compensate them for any schedule changes. They also may require employers to offer work hours to current part-time employees before hiring new employees to cover them, and to give employees greater flexibility and a "say" in their schedules.

New York City recently enacted an ordinance prohibiting fast-food and retail industry employers from canceling an employee's shift without at least 72 hours' notice. Other provisions bar employers from using "on call" shifts, in which employees are to be ready to work and to call in to see if they're needed, but with no guarantee of actually working a paid shift. ("On-call" time, related but distinct from on-call *shifts*, may be compensable under the FLSA, too. Whether an employee is entitled to pay for such time turns largely on the extent to which he or she is restricted from engaging in other activities for his or her own benefit or enjoyment.)

These laws have taken hold in several California municipalities, as well as Seattle—another key employment law "trendsetter." Oregon has become the first to impose such a measure statewide. New York State could well be next. At the direction of the governor, the Department of Labor is holding public hearings around the state on implementing such regulations.

**(NOT) ONLY IN CALIFORNIA continued on page 13**

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The hope for employers is that these jurisdictions will remain "outliers," and not set the tone for the rest of the country. These restrictions not only add to the practical burdens of running a business, but can have a harsh impact on the bottom line. This is particularly true, of course, in the retail and service industries, which typically operate under the slimmest of margins, and have increasingly sought to control rising labor costs through the use of "just-in-time" scheduling.

**Other time-tested provisions.** In addition to the latest novel and worrisome legislative trends, longstanding state-law provisions constrain employers and remain an ever-popular sources of class litigation. California's meal and rest period provisions, which require employers to make breaks available to their nonexempt employees, are routinely implicated in California employees' minimum wage and overtime suits. The provisions require that employees who work at least 3.5 hours per day be provided an off-duty, paid rest break of 10 minutes for each four hours (or major fraction thereof) worked. Employees who work more than five hours per day are to be given at least a 30-minute lunch, while employees who work more than 10 hours are entitled to a second 30-minute rest or meal period. Meal periods may be unpaid so long as employees are completely relieved of all work and the employer does not exercise any control over the employee for the duration of the meal period. Employees are entitled to receive one hour of additional pay at the regular rate for each day the employer does not provide a required meal or rest period.

Other common state-law measures long in effect in California and elsewhere mandate reporting-time pay (for employees who report for duty, but are sent home when not needed), split-shift or "spread of hours" pay, stand-by pay, and other requirements.

**Keeping track of state-law measures.** What new legislative trends threaten to create new causes of action—or, at minimum, to impose new restrictions on employers' ability to ensure economical, lean, but flexible staffing? It is critical that employers closely monitor the changing legal landscape at both the state and local levels wherever they employ workers. It can be dizzying trying to keep up, let alone comply. "Increased regulation too often means increased ambiguity and confusion which, as always, continues to serve as a breeding ground for litigation," cautions Noel P. Tripp, a Principal in the Long Island office of Jackson Lewis.

Barnes recommends assigning an individual within the organization as the "go to" charged with keeping track of the changes, partnering with outside counsel, or using compliance tools like *workthruIT®*, Jackson Lewis' digital compliance solution.

There are signs of hope for employers. Recently, state legislatures are beginning to push back against local wage ordinances, enacting state laws preempting any such efforts by cities and counties in the state and restoring the applicable statewide minimum wage rate for employees within these jurisdictions. For example, the Missouri legislature passed a law invalidating St. Louis' $10.00 an hour minimum wage ordinance, restoring the statewide wage floor of $7.70 an hour for workers within that city's confines. Likewise, Wisconsin law treats the minimum wage as a matter of "statewide concern" and prohibits cities and counties from setting their own wage. While welcomed by employers, these developments nonetheless add to the uncertainty, impose administrative burdens, create potential employee morale issues, and further illustrate the ever-in-flux nature of state and local minimum wage laws.

# Regulatory roundup

The U.S. Department of Labor plays a significant role in enforcing the minimum wage provisions of the FLSA. The DOL's Wage and Hour Division is the federal government's enforcement arm, and its investigators have wide latitude to investigate suspected violations of the Act. Investigators have authority to inspect an employer's worksite, including employment records (and, if necessary, to issue subpoenas to compel an employer to produce documents) and interview employees. The DOL takes its prosecutorial function seriously when enforcing the minimum wage in particular.

The majority of DOL investigations are prompted by employee complaints. However, the agency also acts on its own initiative in accordance with its stated enforcement priorities. During the Obama administration, the focus was on low-wage industries, sectors that employ large numbers of immigrants and other "vulnerable" groups of workers, and "fissured" industries that tend to utilize independent contractor arrangements and outsourced service providers as part of its business model. The Trump DOL, however, has signaled a shift toward compliance assistance—supporting employers to ensure they have the information needed to avoid violations of the law.

**Opinion letters resurrected.** This shift is most clearly reflected in the Trump DOL's withdrawal of the controversial "Administrator Interpretations" of the Obama era. As discussed in the last issue of *Class Action Trends Report*, these documents set forth an exceedingly narrow understanding of "independent contractors" and a radical reinterpretation of what constitutes a "joint employer" under the FLSA. Under new DOL chief R. Alexander Acosta, the agency also announced in June that it would resume issuing opinion letters, which had been put on hold during the Obama years. Opinion letters are a critical compliance tool, allowing employers to seek guidance directly from the Wage and Hour Division on the application of specific questions of law to a unique set of facts. In this way, they assist employers in following the mandates of a complex federal statute and ensuring employees are properly compensated *without* having to resort to class or other types of litigation.

"Reinstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes," Acosta said in a press release announcing the welcome news. "The U.S. Department of Labor is committed to helping employers and employees clearly understand their labor responsibilities so employers can concentrate on doing what they do best: growing their businesses and creating jobs."

**Overtime rule dies another death.** While the DOL files suit on behalf of employees, the private plaintiffs' bar brings the great majority of class minimum wage claims. Still, the DOL can affect class litigation significantly through its rulemaking activity, which has the potential to breed widespread uncertainty and, with it, a wave of new class claims. A prime example was the Obama DOL's thwarted attempt to substantially revamp the FLSA "white collar" overtime rules, including drastically increasing the minimum salary required for exempt employees to almost $50,000. While the revised regulations were of questionable benefit to the nation's workforce, their implementation surely would have been a boon to the plaintiffs' bar. A successful court challenge enjoined the rule from taking effect. The Obama administration sought to overturn the injunction in the U.S. Court of Appeals in the Fifth Circuit. In September, however, the Trump administration formally asked the Fifth Circuit to dismiss its appeal. It also opened a new comment period on the overtime regulation (specifically, the minimum salary threshold), effectively starting the rulemaking anew.

In another piece of good news for employers, particularly those in the restaurant and hospitality industries, the DOL signaled its intent to rescind a controversial 2011 regulation that restricted employers from using "tip pools," even when the employer pays the full minimum wage to its employees and does not take the "tip credit." Notice of the DOL's intent came in the agency's July 2017 semi-annual agenda, which outlines the rulemaking plans for the next six months. (We'll look more closely at tipped employees and the minimum wage in our next issue of the *Class Action Trends Report*.) ■

# Class action trends—the top ten

Here's a look at other significant developments in class action litigation since our last issue of the *Class Action Trends Report*:

**Voluntary-dismissal tactic rejected.** In a June decision near the close of its 2016-2017 term, the Supreme Court held that a plaintiff cannot "shortcut" his or her appeal if the trial court denies a motion for class certification. That is, plaintiffs may not voluntarily dismiss their class action claims upon receiving an adverse class certification decision and then invoke the general rule that appeals can be taken only from a final judgment (28 U.S.C. § 1291) to appeal the decision as a matter of right. The plaintiffs were denied Rule 23(f) permission to appeal the district court's refusal to grant class certification. Rather than pursuing their individual claims to final judgment on the merits, they stipulated to a voluntary dismissal of their claims "with prejudice," but reserved the right to revive their claims if the court of appeals reversed the district court's certification denial. The Ninth Circuit accepted the plaintiffs' appeal and reversed the district court's decision rejecting class-based adjudication, ultimately holding that the lower court had abused its discretion in striking the class allegations.

The Supreme Court reversed, stating that the plaintiffs' voluntary-dismissal tactic "invites protracted litigation and piecemeal appeals." The "final judgment" rule preserves the proper balance between trial and appellate courts, minimizes harassment and delay that would result from repeated interlocutory appeals, and promotes the

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## SCOTUS considers class waivers

The U.S. Supreme Court heard argument on October 2nd in three consolidated cases on the lawfulness of mandatory arbitration agreements that require employees to resolve disputes through individual arbitration and waive their right to class or collective actions in any forum. At issue: whether Section 7 of the National Labor Relations Act (NLRA), which protects the rights of employees to engage in concerted activity for their "mutual aid or protection," extends beyond the workplace to the arbitration forum and the courts. Was the issue at hand *arbitration*, Justice Stephen Breyer wondered, or the right to proceed as a class in any forum? Justice Ruth Bader Ginsburg suggested that employees don't necessarily object to arbitration itself—but rather, "the one-on-one, the employee against the employer."

Justice Breyer also expressed concern that the employers were seeking to undermine the NLRA and strike "at the entire heart of the New Deal." However, the attorney arguing for the employers pointed to the National Labor Relations Board's own history, noting that, "for 77 years, the Board did not find anything incompatible about Section 7 and bilateral arbitration agreements, and that includes in 2010 when the NLRB general counsel looked at this precise issue." He said from the beginning, "the most that has been protected is the resort to the forum, and then, when you get there, you are subject to the rules of the forum." (That would include proceeding individually, if that's what the parties agreed to.) But National Labor Relations Board General Counsel Richard Griffin, Jr. countered that this was "an inaccurate summary of the Board's precedent." The Board "has always said that individual agreements that require employees to individually waive their right to proceed collectively are violations of the National Labor Relations Act," he asserted.

On the other side of the legal argument is the Federal Arbitration Act. The FAA encourages arbitration of disputes and has been granted considerable deference by the Supreme Court in recent years. The decision in the case will turn on which federal statute ultimately holds more sway.

The stakes are high. Some 55 percent of private nonunion employees are covered by mandatory arbitration agreements—23 percent of which preclude proceeding on a multi-plaintiff basis. That amounts to 25 million employees. For employers, the significance of the case cannot be overstated; an adverse ruling would hamper sharply their ability to enter into such agreements with their employees in order to control the rising costs and potential liability of class litigation.

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efficient administration of justice, the majority stressed. The plaintiffs' attempt to secure appeals as of right from adverse class-certification orders stretched § 1291 too far.

While the plaintiffs argued that their position promoted efficiency (because after dismissal with prejudice, the case is over if the plaintiff loses on appeal) the Supreme Court disagreed. It noted that the plaintiffs overlooked the prospect that plaintiffs with weak merits claims readily will assume the risk in order to leverage class certification for a hefty settlement. Additionally, the majority was concerned that if plaintiffs' voluntary-dismissal tactic was allowed, Rule 23(f)'s careful calibration (as well as Congress' intent behind the rule) would be "severely undermined." Further, the plaintiffs' theory would permit only plaintiffs, and never defendants, to force an immediate appeal of an adverse certification ruling.

*[The Supreme Court] noted that the plaintiffs overlooked the prospect that plaintiffs with weak merits claims readily will assume the risk in order to leverage class certification for a hefty settlement.*

The decision, which was in a non-employment case, was an important procedural win for class action defendants. While the ruling was not surprising, a different outcome would have had severe consequences for companies defending against class actions.

**Representative sampling condoned.** The Sixth Circuit Court of Appeals, for the second time, affirmed a district court's order certifying an FLSA collective action brought by cable technicians who alleged that their overtime hours were systematically underreported due to their employer's companywide time-shaving policy. The divided panel decision came in a case on remand from the Supreme Court, which had vacated the Sixth Circuit's prior opinion in light of the High Court's subsequent decision in *Tyson Foods, Inc. v. Bouaphakeo*. In its earlier decision, the appeals court had condoned the use of representative sampling and testimony in the case, rejecting the employer's plea that it had been denied the right to raise separate defenses by examining each individual plaintiff on the number of unrecorded hours he or she worked. But the appeals court noted that in FLSA cases, the use of representative testimony to establish classwide liability has long been accepted—and other circuits overwhelmingly recognize the propriety of its use to establish a pattern of violations that include non-testifying, but similarly situated employees. In a divided June decision that featured a sharp back-and-forth between the panel judges on the use of representative testimony and the wisdom of an "all or nothing" approach to certifying a collective the Sixth Circuit held that the intervening *Tyson* decision did not compel a different resolution. *Tyson* essentially validated the use of representative evidence allowed by the district court below; the High Court expressly declined to set broad rules limiting the types of evidence permissible in FLSA collective actions, the appeals court reasoned. The court also held that sufficient evidence supported the jury verdicts in favor of the 300-member class, but again reversed the lower court's damages calculation.

**EEOC on the hook for $1.8 million.** Concluding that most of the EEOC's sexual harassment claims in a pattern-or-practice suit filed on behalf of 78 claimants were frivolous, unreasonable, or groundless, a federal court in Iowa awarded the defendant employer more than $1.8 million in attorneys' fees and costs. The court said the fee award was also justified by the dismissal of 67 other claims due to the EEOC's failure to satisfy its pre-suit statutory duties. The court's 82-page opinion came in a long-running case on remand from the Supreme Court, which had overturned a decision of the Eighth Circuit Court of Appeals finding that a fee award was not justified for those claims that were dismissed not on the merits, but on the EEOC's failure to investigate or conciliate.

**DOL tip rule invalid.** Deepening a split among the circuit courts, the Tenth Circuit Court of Appeals held in June that the Department of Labor exceeded its authority when it promulgated a rule categorically prohibiting employers from retaining tips *regardless* of whether they avail themselves of the tip credit. The FLSA clearly states that restrictions on employers' use of tips apply only if the employer seeks to offset employees' tips as a credit

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against the minimum wage. Consequently, if the employer pays employees an hourly wage greater than the minimum wage, without regard to tips, then the employer may use those tips as it sees fit, as far as the FLSA is concerned. Such was the case here, brought by a catering employee whose employer pocketed the gratuities added by customers when paying the final bill for catering events. But the caterer did not take the tip credit—in fact, the server earned well above the minimum wage—so the tip-credit provision did not apply, and she had no recourse.

Collective actions brought by tipped employees are a steadily rising trend; and the law on tip credits is in flux. The Department of Justice had filed an *amicus* brief in the case to defend the DOL regulation to no avail. However, the DOL recently revoked the rule at issue here, and the Ninth Circuit Court of Appeals stands alone in endorsing the rule's reasoning. A petition for *certiorari* is pending in the Supreme Court on the question.

*If the employer pays employees an hourly wage greater than the minimum wage, without regard to tips, then the employer may use those tips as it sees fit, as far as the FLSA is concerned.*

**Gig economy trendsetter.** In a high-profile "sharing economy" wage suit, delivery drivers will proceed with their California Labor Code class action alleging they were employees, not independent contractors of an online restaurant delivery service and seeking back minimum wage, expense reimbursements, and overtime pay. In a July ruling, a California federal district court found there was sufficient indicia of an employment relationship between the drivers and the online service, using California's multi-factor test of employee status—the most significant of which is the company's right to exercise control of the details of their delivery work.

**Aggregating hours from two jobs.** County employees who worked two part-time jobs did not present enough evidence to avoid a directed verdict on whether the county's failure to aggregate their hours worked in both jobs when calculating their overtime pay was willful. In a September decision, the Third Circuit Court of Appeals affirmed judgment for the employer on that issue after concluding that the record evidence did not suggest the county was subjectively aware of the FLSA problem at the time of the violations. In this collective action, the employees challenged whether the trial court should have granted judgment as a matter of law on the willfulness question. However, the appeals court said that, while willfulness is a "question of fact," a district court may take the question from the jury and grant a Rule 50(a) motion if "there is no legally sufficient evidentiary basis for a reasonable jury to find for" the non-moving party. The appeals court also rejected the employees' challenge to the district court's calculation of attorneys' fees.

**No notice of off-duty device use.** In an August decision, the Seventh Circuit Court of Appeals held that police officers were not entitled to pay for off-duty time spent on their mobile devices because the city did not know about the overtime work. The nature of their role in the organized crime bureau required them to work outside their shifts on occasion. The police department had "time due" slips for the officers to report any overtime work. Although there was a formal procedure in place for reporting overtime, the officers did not submit any slips for the time for which they now sought compensation, and there was no evidence of an unwritten policy discouraging the officers from reporting their overtime. The officers were able to convince the district court that they worked the overtime alleged, but they could *not* persuade the court that the department knew, or should have known, about the unpaid overtime. They argued the employer had constructive knowledge—that it could easily have discovered their off-the-clock work by comparing their time slips to the call and email records generated by their mobile devices. However, the reasonable diligence standard asks what the employer *should* have known, not what it *could* have known, the appeals court said, affirming a bench trial ruling in favor of the police department on the officers' FLSA collective action.

**No harm, no FCRA foul.** A job applicant alleging a violation of one of the procedural requirements of the Fair Credit Reporting Act (FCRA) lacked standing to sue because he failed to show he suffered a "concrete"

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injury in fact, apart from the alleged statutory violation itself, a unanimous panel of the Seventh Circuit ruled. The FCRA requires that before an employer may obtain a consumer background report on an employee or job applicant, the employer must give the person a "clear and conspicuous" written disclosure that a background report may be obtained. The disclosure must be "in a document that consists solely of the disclosure." This is known as the "stand-alone disclosure" requirement. In addition, the person must give written consent authorizing the employer to obtain the background report. The plaintiff had received and signed a disclosure and authorization form before the employer obtained a background report on him. However, he alleged the disclosure and authorization forms he received and signed did not comply with the FCRA's stand-alone disclosure requirement because they contained extraneous information, including a release of liability. He did not allege that the inclusion of this extraneous language confused him, though, or that he would have done anything differently had the form complied with the statute. Still, he brought a FCRA class action asserting that he suffered two types of concrete injuries: an informational injury and a violation of his right of privacy. Applying the Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins* (which held that a plaintiff must have suffered a "concrete" injury apart from the underlying statutory violation itself to have Article III standing), the appeals court rejected these asserted injuries and affirmed the lower court's dismissal for lack of standing.

*Decisions dismissing [FCRA] cases for lack of standing presently outnumber decisions that find standing approximately two-to-one.*

*Spokeo* has been applied to class and other actions brought under many different statutes, including the FCRA. Courts applying *Spokeo* in FCRA stand-alone disclosure cases are divided on the standing question. The Seventh Circuit is the second appeals court to decide the question of whether a plaintiff alleging a violation of the FCRA's stand-alone disclosure requirement has standing. The Ninth Circuit reached the opposite result. Decisions dismissing cases for lack of standing presently outnumber decisions that find standing approximately two-to-one.

**No hostile work environment class.** A federal district court in New York declined to certify a class of African-American and Hispanic plain-clothes security guards in their suit against a pharmacy retail chain alleging they were subjected to a hostile work environment. The plaintiffs contended that the 12 regional loss prevention managers who supervised them used racially charged language and, using racial epithets, directed them to racially profile black and Hispanic customers. But the evidence showed only four of the 12 managers instructed the plaintiffs to profile, and the evidence of actionable conduct differed as to severity and pervasiveness. They also claimed that at least 59 store managers (out of 142 stores) had committed at least one act of racial discrimination over the class period, and submitted evidence from 14 guards who had filed individual hostile work environment suits. However, these allegations were "store-specific."

Courts "have generally approved of hostile work environment class actions where the environment is localized" and where employees are working near one another, thus creating an "echo chamber" in which racial slurs are gossiped about and their hostile effect experienced by all. But courts have been reluctant to certify a class in multi-site scenarios, the court explained. In these instances, "individual differences between the spatially different work sites tend to predominate—even if a class could establish commonality." Some companywide policies might bridge that gap, but "a policy against racial discrimination that leaves compliance to the discretion of its employees" would not. ■

# Jackson Lewis' digital tools can help employers reduce the risk of class action claims

Navigating potentially inconsistent laws and regulations across states—or even among counties of a single state—while making sure your company complies with all applicable legal requirements is a challenge for most employers. Jackson Lewis' *workthruIT®*, a web-based suite of tools, enables employers, in-house counsel, human resource executives and managers to instantly access reliable legal and compliance information and assessments for all relevant jurisdictions. Jackson Lewis' tools can help safeguard against costly class action litigation and systemic discrimination claims.

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- **Wage Hour Map:** Helps employers comply with minimum wage laws in either the state or county of operation. An employer can easily look up minimum wage and other key information about each state and locality, even if the company operates in several states or counties. This tool also assists in determining what hourly rate to pay employees being reclassified as nonexempt (overtime-eligible) and assessing employees' exempt status under the FLSA.

Jackson Lewis has also developed a suite of privacy tools to help preempt data breaches by providing a high-level assessment of breach and other cybersecurity risks. These tools can also help employers prepare a data breach response. Additional *workthruIT®* tools include calculators, checklists, databases/maps, and sophisticated assessment tools that address multiple areas of employment law.

With the assistance of *workthruIT®*, human resources professionals and in-house counsel can focus on more complex issues while reducing legal risk. You can access *workthruIT®* via a desktop or mobile device.

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## Up next...

Continuing our look at minimum wage class and collective actions, our next issue of the *Class Action Trends Report* will discuss tipped employees and the challenges facing their employers. We'll also look at other thorny minimum wage issues, including timekeeping, how to compensate piece rate workers, other credits against minimum wages, alternative minimum wage provisions for government contractors and other industries and workers, as well as other special minimum wage considerations.