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A Workplace Law Update

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Sixth Circuit Court of Appeals Decision Underscores Critical Need to Review Wage & Hour Policies

By: Melissa M. Tetreau, Member, Workplace Law Group

Wage and hour laws are complex, compliance can be difficult, and mistakes can be very costly. An allegation of a mistake based on application of a policy or practice among a group of employees can result in a Fair Labor Standards Act ("FLSA") collective action claim. Between penalties for non-compliance, statutory double damages and mandatory attorney fee awards, an employer who miscalculated overtime could be looking at millions of dollars in liability. A key juncture in defense of a collective action case is determining whether other employees can join in the litigation, which requires a showing that the group was similarly situated with regard to the pay issue being litigated.

Historically, federal courts used a two-step approach to determine which employees could partake in the collective action. They would allow notices of the lawsuit (allowing the employees to opt-in as additional plaintiffs) to be sent to any employee for whom there was some evidence that he or she "performed the same tasks and were subject to the same policies – as to both timekeeping and compensation – as the original plaintiffs." This lenient standard allowed many employees to join in the bulk of the litigation before the court made a final determination as to whether or not they were proper plaintiffs. Employers often spent a significant amount of time and money sending written discovery requests to, and taking depositions of, employees who were later not permitted to partake in the lawsuit.

Last month, the Sixth Circuit Court of Appeals rejected this historical approach in *Clark v. A&L Home Care and Training Center, LLC*. Moving forward, in Michigan, Ohio, Kentucky, and Tennessee, federal courts will utilize a stricter standard to decide which employees can join FLSA collective litigation. Now, lead plaintiffs in an FLSA collective action must show a "strong likelihood" that other employees are similarly situated before notice can be sent to those other employees. This is important because employers who face such claims may have an opportunity to significantly reduce the size of the potential claim and defense costs by opposing the addition of these employees.

For human resource professionals, this decision does not impact the day-to-day application of wage and hour laws, but it underscores the critical importance of doing so correctly. While the *Clark* decision is a positive for employers facing collective action claims, as it may lower

defense costs and arguably provides an employer a better chance to defeat an expansion of the group of plaintiffs, it does not diminish the importance of ensuring that all timekeeping, payroll, and deduction policies and practices comply with the FLSA, and ensuring that all supervisors and managers are properly trained on these policies.

Please contact any member of **Bodman's Workplace Law Group** if you need assistance with reviewing/drafting your non-discrimination policies, or for advice on investigating/responding to complaints. Bodman cannot respond to your questions or receive information from you without establishing an attorney-client relationship and clearing potential conflicts with other clients. Thank you for your patience and understanding.

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