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Courts Get Discovery Guidance for Federal Wage Cases

By Jon Steingart

Federal judges have a new tool to help them manage wage and hour cases.

The judiciary's research and education agency, the Federal Judicial Center, recently developed a set of protocols for plaintiffs and defendants in wage and hour cases to exchange information and documents early in litigation.

At least one federal court in Texas already has embraced the new guidelines.

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"They seem to be working exactly as intended," Judge Lee H. Rosenthal told Bloomberg Law Jan. 26. She's chief judge of the U.S. District Court for the Southern District of Texas' Houston division, where she implemented the protocols a few months ago.

The nonbinding protocols call on litigants to produce records within a certain timeframe relating to work schedules, employment contracts, collective bargaining agreements, and other materials that may be relevant to a wage and hour claim.

Brett Bartlett, a national co-chair of the wage and hour practice at management-side law firm Seyfarth Shaw LLP, said the protocols would benefit FLSA litigation. "Any time you add structure to how a case begins so that parties are forced to exchange information and speak with one another, it becomes more likely that they'll work together," he said. Bartlett, who wasn't involved in the creation of the protocols, is chair of the firm's labor and employment department in its Atlanta office.

The protocols are intended to streamline litigation by exchanging information up front, so the two sides don't have to spend time and money fighting over it. It builds on protocols the FJC drew up in 2011 for employment cases.

"The idea is not to have a one size fits all approach to anything but to say here's a starting point," Jeremy Fogel, director of the FJC and a senior judge on the U.S. District Court for the Northern District of California, told Bloomberg Law Jan. 29. "The reason why they're protocols and not rules is to permit that flexibility."

Judges manage litigation before them by issuing orders they find appropriate for a particular case, or standing orders that apply to all cases. There may be local rules that apply across a district. More than 50 judges have adopted the 2011 employment case protocols.

The FJC collaborated with the Institute for the Advancement of the American Legal System, a think tank housed at the University of Denver that comes up with ideas for more efficient judicial administration of justice, and a committee of attorneys who practice wage and hour law under the Fair Labor Standards Act.

‘Flood of FLSA Cases’

“What you see now since there’s been a flood of FLSA cases around the country is that there are a number of federal judges who have adopted discovery and case management protocols for these types of cases,” committee member Dennis McClelland told Bloomberg Law.

Some courts already had adopted disclosure requirements that are more extensive than what the Federal Rules of Civil Procedure call for, committee member David Borgen told Bloomberg Law. “At least from the plaintiff’s perspective it’s fair to say that some of the courts that started this were one sided, onerous, burdensome, and anti-employee,” Borgen said.

McClelland is a partner in management-side law firm Phelps Dunbar’s Tampa, Fla., office. Borgen is of counsel at worker-side law firm Goldstein, Borgen, Dardarian & Ho in Oakland, Calif. Both are members of the board of editors of a treatise on the Fair Labor Standards Act published by Bloomberg Law.

The protocols aren’t intended for collective actions. A collective action is a method for litigating cases under the FLSA with a large number of plaintiffs that’s similar to a class action.

Protocols Can Help Even When Not Adopted

Even if a court doesn’t adopt the protocols, the information can help attorneys determine how to draft their discovery requests. “We believe they may be useful for crafting discovery requests whether the court orders it or not,” McClelland said. “I think the plaintiffs’ lawyers would share this view that the protocols would assist those that normally don’t practice in this area if they had one of these cases.”

Borgen, the plaintiffs’ lawyer, agreed. “When you get into the collective actions, because they’re larger cases, both sides lawyer up with more sophisticated counsel, more experienced counsel,” he said. A smaller case involving one or two workers suing a small employer likely would be handled by a general practice lawyer who handles a variety of matters, he said.

“That was where the need was most pressing,” he said. These types of cases can benefit from and are more amenable to early required disclosures that may help the case resolve faster, he and McClelland said.

Justin Swartz, another committee member, said initial disclosures aren’t the end of discovery. “The fact that something’s excluded from the protocols doesn’t mean that it’s not discoverable,” he said. “The protocols are just to get things started. They’re the automatic disclosures,” he said.

Swartz is a partner with worker-side law firm Outten and Golden LLP in New York whose practice includes wage and hour cases.