WAGE & HOUR CLASS CERTIFICATION: PERSPECTIVES ON COMMUNICATIONS AND DISCOVERY ISSUES

DAVID BORGEN

GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
www.gdblegal.com

WAGE & HOUR CLAIMS AND CLASS ACTIONS FORUM
AMERICAN CONFERENCE INSTITUTE
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1. INTRODUCTION

A. Scope of Paper

This paper addresses how both potential class counsel (plaintiffs) and defense counsel may seek to investigate class action wage/hour claims filed in state or federal court. This paper was initially drafted for the ACI Wage/Hour Seminar in San Francisco (2006) and had a California law focus. The author has attempted to broaden the scope here to provide more federal law relevant to practice in New York.

B. Pre-Complaint Investigation

Once a complaint has been filed, it may be assumed that potential class counsel have already completed a certain minimum amount of due diligence in investigating the class action allegations both as to merits of the wage/hour issues and as to the requirements for class certification under FRCP 23 and/or analogous state law. Typically, before a class action complaint has been filed, potential class counsel have thoroughly investigated these issues to the maximum extent possible without the aid of formal discovery. Such steps may have included: (a) interviewing the named class representative plaintiff(s); (b) interviewing witnesses including other putative class members, former supervisors, and/or co-workers in non-class job positions; (c) reviewing documents made available by the plaintiffs and other witnesses, including job descriptions, employee handbooks, wage statements (pay stubs), training materials, and

corporate websites; (d) reviewing corporate information available on the internet including SEC filings and annual reports, press releases, and recent news articles; and (e) collecting information about other legal proceedings or DOL or state labor agency complaints from PACER searches, FOIA requests, and public records.

Therefore, potential class counsel have had some amount of "head start" in getting ready for litigating the critically important class certification motion, although much more discovery and investigation typically needs to be done to get beyond the standard of readiness required for filing a class action complaint (think FRCP 11) to the level of evidence required to meet the evidentiary burden of proving up the requirements of a class action.

On the defense side, the filing of the class action complaint will typically trigger a rush of activity to investigate the merits of the complaint. The supervisors of the named plaintiffs have to be interviewed and the personnel records of at least the named plaintiffs and possibly potential class members have to be obtained and preserved. Counsel will want to consult with the corporate IT managers and/or risk management personnel to determine what kind of computer records are available which may provide evidence of the hours worked by the potential class members. These IT records also need to be preserved against possible spoliation. Counsel may want initiate some sort of internal survey or audit (but see, Order Granting Motion for Class Certification in Tierno v. Rite Aid Corporation, 2006 WL 2535056, 11 Wage & Hour Cases 2d (BNA) 1499 (N.D. Cal. 2006) relying on company audit in granting class certification).

Defense counsel also will be researching the company's records to determine what wage/hour compliance activities have taken place already, if any; whether any legal or agency advice has been sought in the past; what the actual job duties of class members are; and what factors may provide ammunition to oppose class certification (multiple job descriptions; differences in work locations; company organization, etc.). Counsel will want to investigate the types of organizational units involved, whether any unions or collective bargaining agreements are relevant to the issues raised in the complaint, what

arbitration agreements or severance packages may exist, what kind of personnel records may touch on job duties or hours worked, what decision makers were involved in classification or other wage/hour issues.

Both sides will want to prepare thoroughly for class certification litigation by talking to as many potential class members and managers/supervisors as privacy and ethical considerations will allow. Absent an early ADR initiative, and even when early settlement is pursued, the parties will need to consider the extent of discovery (formal and/or informal) that is appropriate to the scope and complexity of the case and will want to consider the potential costs of such discovery.

This paper will first discuss the communications issues that arise as counsel seek to interview potential class members and/or supervisors before class certification and then will turn to the discovery issues that arise in the context of preparation for the class certification motion.

2. COMMUNICATIONS WITH POTENTIAL CLASS MEMBERS AND FORMER SUPERVISORS (PRE-DISCOVERY)

Before undertaking formal discovery, most experienced counsel will want to gather as much information relevant to the merits and the class certification issues as early as possible and without the expense related to or interference from opposing counsel that formal discovery entails. Typically, counsel on both sides will seek to interview or survey as many potential class members and supervisors/managers as the applicable ethical rules will permit.

A. California Law

Some of the rules under California law applicable to pre-class certification communications with potential class members have been discussed at length elsewhere. See two related articles in Volume 17, No. 5 (September 2003) issue of California Labor & Employment Law Review (State Bar Labor and Employment Law Section periodical), back issues available on line at www.calbar.ca.gov: Tullman and Loeb, "The Conflicting

Appellate Decisions on Communications With Class Members," and Borgen, "'Can We Talk?' Or, Keeping Your Eyes on the Prize." There are far too many disputes regarding pre-certification communications and counsel are well advised to meet/confer early to see if some ground rules can be agreed upon pre-dispute.

As a general rule, prior restraints on counsel's ability to communicate with potential class members pre-certification are unconstitutional and inappropriate absent a specific evidentiary showing of some abusive conduct. Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981); Atari v. Superior Court, 166 Cal. App. 3d 867 (1985). A motion for leave to engage in pre-certification communication with potential class members is unnecessary under California state law. Parris v. Superior Court, 109 Cal.App.4th 285 (2003). Potential class members are generally not considered to be clients of putative class counsel or "represented parties" subject to the ethical rules. Rule 2-100, California State Bar Rules of Professional Conduct; Koo v. Rubio's Restaurant Corp., 129 Cal.App.4th 719 (2003). See also, Manual for Complex Litigation (Fourth), ("Manual"), § 21.12, "Precertification Communications with the Proposed Class"; Debra Bassett, "Pre-Certification Communications Ethics in Class Actions," 33 Ga. L. Rev. 353 (2002); Andrei Greenwalt, "Limiting Coercive Speech in Class Actions," 114 Yale L.J. 1953 (June 2005).

B. Websites

Another ethical issue that may arise in today's "Information Age" comes up when potential class counsel post a case website and/or seek to obtain information from potential class members by sponsoring a website which permits potential class members to log on and provide certain information that may be relevant to the class certification litigation. Aggressive defense counsel have sought to discover this information over the objections of plaintiffs' counsel. While this is an evolving area of the law, it appears that courts will not require disclosure of this type of information. Tien v. Superior Court, 139 Cal. App. 4th 528 (2DCA, May 15, 2006)(responses to class counsel's letter protected from discovery by California right to privacy); Barton v. U.S. District Court, 410 F.3d

1004, 1110 (9th Cir. 2005)(responses to online questionnaire protected by attorney-client privilege based on potential class members' reasonable expectation that they were submitted in the course of an attorney-client relationship). See also, Abdallah v. Coca-Cola, 186 F.R.D. 672 (N.D. Ga. 1999) (plaintiff's counsel ordered to "earnestly request" that independent third party website be purged of the complaint and referral to plaintiff's counsel); Belt v. Emcare, 299 F.Supp.2d 664 (E.D. Tex. 2003) (plaintiff ordered to notify defendant to provide opportunity to object to any future changes to website).

C. Court Supervision of Pre-Certification Communication's

Courts maintain a duty to make sure that potential class members are not coerced or mislead about the pending class action litigation. Similarly if one party engages in some sort of mass communication and the other party has no access, some courts will be concerned about an unequal playing field. Either party may alert the court to abusive communications and seek an order to correct such the situation. See generally: Manual For Complex Litigation (Fourth), ("Manual"), § 21.12 (FRCP 23(d) authorizes court to regulate communication with potential class members; court may cure miscommunications); Ralph Oldsmobile, Inc. v. GM Corp., 2001 WL 1035132 (S.D.N.Y. 2001)(curative notice sent to members of the proposed class at the expense of defendant); Hampton Hardware, Inc. v. Cotter & Co., 156 F.R.D. 630 (N.D. Texas 1994)(barring further defense communication after improper communication); Babbitt v.Albertson's Inc., 1993 WL 128089 (N.D. Cal. 1993)(suggesting prophylactic measures defense may take when communicating ex parte with potential class members that may prevent issuance of an order for corrective notice).

There are a number of recent cases in which courts have resolved disputes about allegedly improper pre-certification communications by the parties or their counsel. Some courts have even found that employer communications are inherently coercive enough to justify a modicum of protection for potential class members. EEOC v. Morgan Stanley & Co., 206 F.Supp.2d 559 (S.D.N.Y. 2002)(in EEOC pattern and practice action, magistrate allowed employer to communicate with potential class members but required

safeguards including mandatory notice to employees in writing on a form approved by the court that there was a pending lawsuit they could join, that it was unlawful for the employer to retaliate, that the employees had a private right of action, and providing employees with an approved summary of the action so that they could make an informed decision regarding whether to participate in the action). See also, In re Currency Conversion Fee Antitrust Litigation, 361 F.Supp.2d 237 (S.D.N.Y. 2005)(confirming court's broad supervisory authority over defendant's communications with putative class members); 5 Newberg on Class Actions, § 15.19 (4th Ed.)(responsibility of the court to protect against coercive threats discouraging putative class member participation).

Other recent employment and wage/hour cases in which courts grappled with pre-certification communication issues include: Dziennik v. Sealift, Inc., 2006 WL 1455464 (E.D.N.Y. 2006)(denying defense motion for protective order as wage/hour plaintiffs have a right to contact members of the putative class); Recinos-Recinos v. Express Forestry, Inc., 2006 WL 197030 (E.D. La. 2006)(due to threats made to putative class members including Guatemalan and Mexican migrant workers and their families, defendants and their agents barred from contacting potential class members and opt-in plaintiffs or their families outside the bounds of formal discovery for the purpose of discussing the pending litigation); Saunders v. Ace Mortgage Funding, Inc., 2005 WL 3054594 (D. Minn. 2005)(due to pre-notice company emails describing lawsuit as "bogus," collective action notice to include "no retaliation" paragraph and statement that employees "may disregard any communications sent by [employer] that contradicts this Notice" and advising employees that they may decline to discuss lawsuit with employer; also declining to impose equitable tolling as remedy); Threatt v. Residential CRF, Inc., 2005 WL 2454164 (N.D. Ind. 2005)(refusing to strike pre-notice FLSA consent to join forms, but requiring plaintiffs' counsel to file amended consent forms which would relate back to original filing dates for tolling purposes); Frank v. Gold'n Plump Poultry, Inc., 2005 U.S. Dist. LEXIS 20441 (D. Minn. 2005)(rejecting defense argument on 216b notice that certification should be denied based on failure to demonstrate that others wish to join the lawsuit where plaintiffs presented evidence that defendant had discouraged

employees from participating by suggesting the lawsuit had no merit); Basco v. Wal-Mart Stores, Inc., 2002 WL 272384 (E.D. La. 2002)(denying plaintiffs' motion for protective order where there was insufficient evidence of employer threats); Addallah v. Coca-Cola Company, 186 F.R.D. 672 (N.D. Ga. 1999)(order regulating pre-certification communications in putative Title VII class action with plaintiffs' counsel prohibited from contacting potential class members at work unless they have previously signed retainers and defendant prohibited from discussing lawsuit with potential class members – except to the extent it needs to communicate with managerial employees to investigate their acts/statements that could expose defendant to liability; employer may issue emails to employees but emails must contain the following statement: "The foregoing represents Coca-Cola's opinion of this lawsuit. It is unlawful for Coca-Cola to retaliate against employees who choose to participate in this case."[1]).

D. Post-Certification Communications

Of course, once a class is certified, then all class members (who do not choose to opt out of the certified class for litigation) are clients of the designated class counsel and are represented parties thereafter for purposes of the ethical rules. Manual at § 21.33; Winfield v. St. Joe Paper Co., 20 FEP 1093 (N.D. Fla. 1977). During the notice period while class members are considering whether to opt out or not, the status of class members is somewhat amorphous. However, prudence dictates that defense communications during this period be minimal and scrupulous as otherwise courts may take corrective action. Impervious Paint Indus., Inc. v. Ashland Oil, 508 F.Supp.720 (W.D. Ky. 1981). Normal business communications with class members are generally permissible even post-certification. Manual at § 21.33.

After the court has ruled and certified a Rule 23 class action or a Section 216(b) collective action, there is considerable risk that the court will take action if there are

[1] Citing author's firm's case, Shores v. Publix Super Markets, Inc., 1996 WL 859985 (M.D. Fla. Nov. 25, 1996)(requiring employer to include similar information in internal communications with employees).

improper extra-curricular communications. Manual at § 21.33. Corrective actions may include extending deadlines for opting in or out, curative notice, exclusion of evidence, sanctions such as fines, or disqualification of counsel. Id. The following inexhaustive list of recent cases illustrates this sort of judicial intervention:

Wang v. Chinese Daily News, Inc., 236 F.R.D. 485 (C.D. Cal. 2006): After the class was certified and notice was mailed, at least 155 of the approximate 200 class members opted out. During the opt out period, the company held captive audience meetings and a large sign was posted that read in Chinese "Don't Tear the Company Apart! Don't Act Against Each Other." There was also evidence that at least one employee was threatened with retaliation. Overlapping with the opt out period was an aggressive anti-union campaign waged by the employer. The Court concluded that the opt outs were "the product of a coercive environment that pressured employees to opt out lest they risk losing their jobs" and granted the plaintiffs' motion to invalidate the opt outs. The Court granted the plaintiffs' motion to defer a further notice and opt out period until after judgment. The Court also granted the plaintiffs' motion for an order restricting the employer's communications with the class and requiring the plaintiffs to submit a proposed order suggesting appropriate restrictions.

Veliz v. Cintas Corporation, 2004 WL 2623909 (N.D. Cal. 2004): In this overtime collective action, after notice was ordered, the employer failed to timely provide plaintiffs with a collective action mailing list to mail the approved notice. In the interim, the CEO issued a letter stating "we think everyone will see that the allegations of this lawsuit for what they really are, baseless." The Court concluded that this "improperly serves to discourage the joining of the instant lawsuit" and ordered corrective notice at the employer's expense. The Court also extended the period for opting in.

Taillon v. Kohler Rental Power, Inc., 2003 WL 2006593 (N.D. Ill. 2003): Granting notice to overtime collective action class and rejecting the employer's objection to an order banning defendant from communicating with class members regarding the action. The Court held that courts have the authority to limit such communications.

There was no harm to the employer and the ban would promote a fair notification procedure.[2]

Belt v. Emcare, Inc., 299 F.Supp.2d 664 (E.D. Tex. 2003): In this misclassification overtime collective action under the FLSA, the defendants mailed their own unapproved letter to potential opt in plaintiffs shortly before plaintiffs' counsel had a chance to mail the court approved notice. The Court found the letter to be misleading and coercive in that it misrepresented the lawsuit as an attack on the Nurse Practitioners' status as "professional," failed to mention the availability of liquidated damages, suggested that attorneys fees would be deducted from any recovery (rather than as a separate element of damages), and likened the lawsuit to a medical malpractice case. The Court ordered defendants to refrain from future communications with class members and required them to pay for corrective notice (with an extended opt in period). The text of the corrective notice is attached in full to the opinion as "Appendix C" and contains headings like "This Lawsuit is Not an Attack on Your Professionalism" and "This Lawsuit in Not Equivalent to a Medical Malpractice Action."[3]

Bullock v. Automobile Club of Southern California, 2002 WL 432003 (C.D. Cal. 2002): In FLSA overtime collective action, after the Court ordered notice and the parties entered into a stipulation that defendants would not solicit or encourage employees not to join the lawsuit, the employer issued a memorandum to employees. The Court ordered defendant to pay for corrective notice because the memorandum was improper and violated the parties' stipulation. The Court also ordered the defendant to include a non-

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[2] The author is aware of unpublished orders of district courts that once having ordered collective action notice assume that it is implicit that no other communications about the case occur. Query for instance whether a court would countenance plaintiffs' counsel to mail a second copy of the approved 216b notice to potential opt ins who had not yet timely responded to the first court approved mailing?

[3] The corrective notice also stated that it was being sent to cure confusion caused by the defendant and corrected the information regarding the potential remedies.

retaliation clause in any future writings addressed to class members concerning the lawsuit.

3. DISCOVERY OF THE CLASS LIST

Potential class counsel will promptly seek to obtain a list of the names, addresses, telephone numbers, and Social Security Numbers of all potential class members in discovery, usually by means of a document request and/or an interrogatory. Obviously, these people are witnesses with relevant information about both the merits and the class allegations. See, Howard Gunty Profit Sharing Plan v. Superior Court, 88 Cal. App.4th 572, 578 (2001). See also in California, CCP 2017(a), (discovery available as to identity of persons with knowledge of discoverable matter); California Judicial Counsel Form Interrogatories Nos. 12 and 16 (seeking names, addresses, telephone numbers of witnesses to incident). See also, Tierno v. Rite Aid Corp., 2006 WL 2535055 (N.D. Cal. 2006) (ordering production of putative class member home contact information).

Issues arose under California law as to how to balance the parties' discovery interests with privacy concerns. Courts in California had adopted two approaches to this. Some courts mandated a pre-certification notice to potential class members that they could "opt out" of having their names and contact information disclosed to plaintiffs' counsel. Olympic Club v. Superior Court, 229 Cal.App.3d 358 (1991). Other courts mandated the use of a process in which a pre-certification notice was mailed to potential class members (usually by either the defendant or a mailing service) and potential class members could "opt in" to have their names and contact information disclosed to plaintiffs' counsel. Colonial Life & Accident Co. v. Superior Court, 31 Cal.3d 785 (1982).[4] The "opt-in or opt-out" for discovery issue was denied by the California

[4] This "opt in for discovery" process is distinct from the FLSA collective action opt-in process under 29 U.S.C. 216(b) and is also distinct from the certification of a California "opt in class action" which is precluded by state law. Hypertouch, Inc. v. Superior Court, 128 Cal.App.4th 1527 (2005).

Supreme Court in Pioneer Electronics (USA) Inc. v. Superior Court, 40 Cal. 4th 360 (Cal. Jan. 25, 2007) (opt out notice sufficient).[5]

Once a class has been certified, of course, the mailing list must be provided as due process standards usually dictate the use of first class mail for class notice. In some circumstances, other forms of class notice may be considered including posting at jobsites or in the community, internet or email notice, notice by publication in major newspapers, etc. In some cases, courts may require that class notices be translated into one or more foreign languages to facilitate communication where the class consists of members with limited ability in reading or understanding English language documents. See California Rule of Court 3.766 (manner and allocation of cost of class notice).

4. FORMAL DISCOVERY IN WAGE/HOUR CLASS ACTIONS

Plaintiffs bear the burden of proving up the requirements of a class action. A court may not deny plaintiffs the opportunity to conduct discovery related to the class action requirements so that they may attempt to meet the evidentiary burden on this issue.

In almost every case, the depositions of the named plaintiffs are taken. In addition, the employer will usually seek to depose one or more of any declarants who have provided written sworn statements in support of class certification. Class counsel generally will take corporate designee depositions pursuant to FRCP 30(b)(6) and possibly the depositions of defense declarants and/or supervisors of the named plaintiffs. In federal courts, discovery is generally limited to the class representative plaintiffs and discovery as to absent class members may only be taken upon a showing of cause. See, Manual, § 21.41; Dellums v. Powell, 566 F. 2d 167 (D.C. Cir. 1977). However, California Rule of Court 3.768 provides for depositions of class members, although interrogatories of class members may only be served after the defense obtains a court order.

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[5] But see, Steven B. Katz, "Class Action Dissonance," S.F. Daily Journal (March 5, 2007), p. 7 (arguing for continued vitality of opt in rule).

The parties will generally exchange extensive written discovery demands, including form and case specific interrogatories, document requests, and requests for admission. There is an increasing trend requiring production of electronic discovery (computerized personnel records, emails, payroll records, computer and VPN log on/off records, entry/exit logs from computerized "swipe card" systems, and the like).

Often, discovery can be bifurcated when some efficient and practical steps can be taken to separate out "merits" from "class certification" discovery. See, Blair v. Source One Mortgage Services Corp., 1997 WL 79289 (E.D. La. 1997).

Where state law class actions have been removed to federal courts, which is increasingly the trend since CAFA, counsel will necessarily have to comply with discovery management techniques mandated by FRCP 26-37.

Finally, given the size of many of the wage/hour class actions now being litigated, courts will continue to consider suggestions for limiting discovery based on representative evidence. Sav-On Drug Stores, Inc. v. Superior Court, 17 Cal.Rptr.3d 906, 917-918 (2004); Bell v. Farmers Ins. Exchange, 115 Cal.App.4th 715 (2004)("Bell III"). Proposals to limit discovery to some statistically significant sample will usually be based on the expert testimony of statistician, as in Bell III.

5. CONCLUSION AND OBSERVATIONS

This paper has focused primarily on communications and discovery issues arising in the litigation of California state court wage/hour class actions. Many diverse additional issues will arise from litigation in the federal courts, including the panoply of notice and discovery issues that stem from the increasingly popular FLSA collective action notice (available upon a minimal showing of "similarly situated" employees)[6]

[6] Realite v. Ark Rest. Corp., 7 F.Supp.2d 303, 306 (S.D.N.Y. 1998).

under 29 U.S.C 216(b) and Hoffmann-LaRoche v. Sperling, 493 U.S. 165 (1989), or in "hybrid" wage-hour actions[7].

Given the myriad potential pitfalls as to communications and discovery, it behooves counsel to communicate and cooperate early on in the litigation to attempt to manage these issues in a manner that is fair, reasonable, and cost effective. The enormous costs of litigating first the class issues and then the class merits issues may make it prudent for the parties to explore early ADR alternatives to litigation or to explore some form of a "two track" approach (simultaneous litigation and settlement discussions). The parties are also well advised to make full use of electronic document management programs like Summation and to coordinate such use so as to minimize the need for voluminous paper discovery where files may be exchanged in electronic formats. Given the mandate in Sav-On to explore innovative case management techniques, the parties will be pushed by the courts to propose discovery solutions that serve the interests of justice in a cost effective manner (sampling, surveys, test trials, etc.).

[7] "Hybrid actions" generally combine FLSA opt-in claims under 29 U.S.C. 216(b) with opt-out class action claims arising from one or more state labor laws.