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
SAN FRANCISCO, CALIFORNIA

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1. INTRODUCTION

This paper addresses how both potential class counsel (plaintiffs) and defense counsel may seek to investigate class action wage/hour claims once a class complaint has been filed in state or federal court.

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 CCP 382. 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) reviewed documents made available by the plaintiffs and other witnesses, including job descriptions, employee handbooks, wage statements (pay stubs), training materials, and corporate websites; (d) reviewed corporate information available on the internet including SEC filings and annual reports, press releases, and recent news articles; and (e) collected

information about other legal proceedings or DOL/DLSE complaints from PACER searches 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, No. C05-02520 TEH, 8/31/06, N.D. Cal., in which Judge T. Henderson relied 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.

Some of the rules 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."

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). Similarly, a motion for leave to engage in pre-certification communication with potential class members is unnecessary. 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).

However, in today's "Information Age," potential class counsel often seek to obtain information from potential class members by sponsoring a website (or using "snail mail" surveys) 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).

Courts also 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"), Section 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).

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. 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.

Plaintiffs' counsel will also typically seek to communicate ex parte with former supervisors and managers of potential class members. Such witnesses often provide the best and least biased information about the job duties and work hours of class members. Liberated from the potentially coercive influence of the employer, such witnesses will often provide accurate information to class counsel that may be highly persuasive as to any testimony they may provide to the court. Former managers/supervisors may also provide documents relevant to the merits or to class certification issues. In California, there is no ethical bar limiting communications regarding non-privileged information and class counsel generally can and will seek to communicate with former managers/supervisors. Rule 2-100 does not apply to communications with persons no longer employed by the adverse party. Triple A Machine Shop, Inc. v. State of California, 213 Cal.App.3d 131 (1989). See also, State Farm Fire & Cas. Co. v. Superior

Court, 54 Cal. App.4th 625 (1997); Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Corp, 6 Cal. App.4th 1256 (1992). Of course, it remains advisable in such circumstances to initiate any such contacts with clear information about who counsel represents and to elicit information first to ascertain the employment status of the witness. Counsel should not inquire as to matters that may otherwise be subject to the attorney-client privilege, which may survive the termination of the employment relationship.

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, CCP 2017(a), discovery available as to identity of persons with knowledge of discoverable matter; Judicial Counsel Form Interrogatories Nos. 12 and 16, seeking names, addresses, telephone numbers of witnesses to incident.

However, issues have arisen as to how to balance the parties' discovery interests with the privacy protections conferred to the potential class members by Article 1 Section 1 of the state constitution. Courts in California have adopted two approaches to this. Some courts have mandated a pre-certification notice to potential class members that they can "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 have mandated the use of a process in which a pre-certification notice is mailed to potential class members (usually by either the defendant or a mailing service) and potential class members can "opt in" or choose to have their names and contact information disclosed to plaintiffs' counsel. Colonial Life & Accident Co. v. Superior

Court, 31 Cal.3d 785 (1982).[1] The "opt-in or opt-out" for discovery issue is presently fully briefed and pending scheduling of oral argument before the state Supreme Court in Pioneer Electronics (USA) Inc. v. Superior Court, 128 Cal.App.4th 246 (2005), review granted and opinion superseded, 32 Cal.Rptr.3d 3 (July 27, 2005)(No. S133794).[2] Employment lawyers anticipate a ruling on this issue in 2007.

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 CRC 1856 (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 "person most knowledgeable" depositions and possibly the depositions of defense declarants and/or supervisors of the named plaintiffs. In federal

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[1] 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).

[2] See amici briefing by Employers Group, 2006 WL 1759502 and Asian Law Caucus, The Impact Fund et al. (for employee advocates), 2006 WL 951487.

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 1858 provides for depositions of class members, although interrogatories of class members may only be served after the defense obtains a court order.

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)[3] under 29 U.S.C 216(b) and Hoffmann-LaRoche v. Sperling, 493 U.S. 165 (1989), or in "hybrid" wage-hour actions[4].

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.).

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

[4] "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.