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High Court OKs Law of Averages for FLSA Claims

Where the employer failed to keep adequate time records, pork processing plant workers relied on employee testimony, videotapes and an industrial relations expert's study to support class claims to recover overtime pay. After the 8th Circuit affirmed a $5.8 million judgment for the workers, the employer appealed. On March 22, the Supreme Court upheld the action, ruling that workers could rely on a representative or statistical sample to establish classwide liability under the FLSA. The decision underscores the importance of accurate wage and hour recordkeeping, and the potential consequences for employers of noncompliance.

Background

The federal Fair Labor Standards Act (FLSA) generally requires covered employers to pay nonexempt employees at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked, and to keep records of hours worked and wages paid. The Portal-to-Portal Act of 1947 and subsequent court decisions made clear that the FLSA requires employers to pay for time spent on activities that either occur before or after the employee's regular working hours only when they are an integral and indispensable part of the employee's principal job activities.

Employees in the kill, cut, and retrim departments at a pork processing plant in Storm Lake, Iowa are required to wear certain protective gear, which varies depending on the tasks they are performing. Until 1998, employees were paid only for the time spent at their workstations, not for time spent putting on and taking off protective gear ("donning and doffing time"). From 1998 until 2007, the employer paid all employees for an additional four minutes of donning and doffing time each day. In 2007, the payments were eliminated for some employees while others continued to be paid for an additional 4 to 8 minutes daily. The employer did not, however, record the time each worker actually spent donning and doffing.

Statistical Evidence of Work Hours

Workers sued, claiming that donning and doffing was an integral part of the job, and the employer violated the FLSA and state law by failing to pay overtime wages for time spent before and after their regular shifts doing so. They sought certification of their state wage and hour claims as a class action and certification of their FLSA claims

as a collective action. The employer objected, arguing that the claims could not be resolved on a classwide basis because they were too individualized. The district court disagreed, and certified both classes, leaving the jury to decide whether and to what extent the employer had failed to compensate workers properly for time spent donning and doffing.

Whether federal or state overtime pay requirements were violated depended on whether employees worked more than 40 hours a week (including donning and doffing time). In the absence of adequate employer records, the workers relied on employee testimony, video recordings and a study by an industrial relations expert (collectively, representative evidence) to prove how much time they spent donning and doffing. Their expert estimated that employees in the cut and retrim areas averaged 18 minutes per day and employees in the kill department averaged 21.25 minutes per day.

Finding that pre- and post-shift donning and doffing time was compensable, the jury awarded the class roughly $2.9 million in unpaid wages, and a subsequent ruling added nearly $3 million in liquidated damages. The U.S. Court of Appeals for the 8th Circuit affirmed the $5.8 million judgment and the employer appealed.

High Court Says Workers Can Rely on Statistics in Some Circumstances

The central issue in *Tyson Foods v. Bouaphakeo* was whether or not the average time for donning and doffing could be assumed, making classwide — rather than individual — resolution both possible and appropriate. In a 6 to 2 decision on March 22, the Supreme Court approved the substitution of statistical evidence for individualized proof and upheld the class claims.

The majority found the most significant question common to all class members to be whether the time employees spent donning and doffing the required protective gear is compensable under the FLSA. If compensable, the time would count toward hours worked and the employees' entitlement to overtime pay.

In approving the use of statistical evidence in this case, the Court relied heavily on the employer's failure to keep individualized records — which, it said, created an "evidentiary gap." To fill that gap, workers had no alternative but to use a representative sample to establish time spent on compensable work under the FLSA. The Court acknowledged that it has permitted plaintiffs to "infer" hours worked in other wage and hour cases, and observed that Tyson's failure to challenge the expert's study as unrepresentative or inaccurate left it to the jury to decide its persuasiveness.

While the Court said that these employees could use their expert's study to show the time they spent donning and doffing on average, it did not adopt a broad or categorical rule on the use of statistical evidence, or so-called representative evidence, in class or collective actions. Rather, it endorsed a case-specific approach, noting that whether and when such

Class or Collective Action?

Cases alleging violations of state wage and hour laws may be brought as class actions — where one or more representatives sue on behalf of a larger group or class. The issues in dispute must be common to all class members, and the large numbers of persons affected must make it impractical for courts to try their cases individually. Resolution of the suit binds all members of the class certified by the court.

Cases claiming FLSA violations only must be brought as collective actions — not class actions. Class members in collective actions must be "similarly situated" — subject to a common decision, policy, practice or plan — and actively opt in to the lawsuit by filing an individual consent to join.

evidence can be used to establish classwide liability will depend on why it is being introduced and the underlying cause of action.

Notably, the Court did not decide whether the employer could be ordered to pay damages to an uninjured worker. Rather, it concluded that it was premature to consider disbursing damages from the jury award, leaving it to the district court to address the issue in later stages of the proceedings. In his concurring opinion, Chief Justice John Roberts expressed concern that the district court may not be able to find a way to screen out class members who are not entitled to recover, in which case the jury award cannot stand.

> **Comment.** The class approved by the district court included employees who changed protective gear even if they did not work more than 40 hours per week. Whether the district court will be able to determine a mechanism to allocate the jury award to prevent the payment of damages to uninjured class members remains to be seen. If not, the Court may again be asked to decide whether a class may properly include uninjured class members.

In Closing

Although the Supreme Court stopped short of categorically permitting the use of statistical or representative evidence to establish classwide liability, the decision expands the types of proof that workers may be able to use in pursuing FLSA and state wage and hour claims against their employers. Importantly, it reminds employers of the crucial role wage and hour recordkeeping plays, as the failure to maintain adequate and accurate records may open the door to class claims based on statistical sampling.

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