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EMPLOYER LAW BLOG

Chicago Federal Court: Affidavits Not Enough to Bring FLSA Collective Action

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On November 10, 2022, the United States District Court for the Northern District of Illinois issued an order denying a plaintiff's request to certify a collective action. The Court concluded the plaintiff failed to make a "modest factual showing" that others were similarly situated in relation to the alleged unlawful policy.

The decision itself highlights the importance of employers having appropriate workplace policies prohibiting off-the-clock work. In this case, the plaintiff—a bartender at high-end restaurants in Chicago—sued her employer, claiming she was required to work off the clock. She also alleged, when she did record overtime, her employer reprimanded her for violating its policies.

The plaintiff claimed violations of the Fair Labor Standards Act (FLSA), among other Illinois wage laws. In doing so, she asked the Court to certify a collective action under the FLSA—that is, asked the Court to approve a class of individuals to whom she could disseminate notice of the lawsuit and the right to join it. The plaintiff provided her own affidavit, as well as an affidavit of one of her supervisors, to support her request.

The Court began its analysis, like many other courts, noting that the standard for collective action certification is "low." However, this Court added that the standard is "not toothless." Under the standard, the plaintiff must provide a "modest factual showing" that she is similarly situated with others with respect to an unlawful common policy or plan.

Some courts have conditionally certified FLSA actions based upon a few affidavits; however, this Court did not. The Court reasoned: the plaintiff's "declaration focuses on her unique experience, detailing the compensation structure and missed overtime hours. Critically absent are affidavits from any other similarly situated employees who worked at the defendants' restaurants."

The Court also took issue with many of the plaintiff's affidavit statements about other workers as "unsupported assertions." Importantly, the Court noted: "[t]he need for additional support is particularly pronounced where, as here, the defendants maintained a facially lawful policy. The relevant manual specified that '[a]t no time may a staff member perform work of any kind off the clock,' and any violations of that policy 'will result in disciplinary action, up to termination of employment.'" (emphasis added).

Given the employer's written policies, the Court found "the barebones affidavits" insufficient. This is significant in that some courts—correctly or not—rely upon cursory affidavits from one or more employees to certify collective actions about "off-the-clock" work (regardless of whether an employer prohibited such work by policy), which invariably heightens the stakes of litigation for employers early on in a lawsuit.

This Court's decision and reasoning can be read to signal that courts will, or at least should, require something more than an affidavit or two to certify "off-the-clock" collective action wage claims where an employer has an express policy prohibiting such work.

The caveat to the Court's decision, however, is that this plaintiff may have another bite at the apple after further discovery. But the decision is nonetheless significant, in that it serves as an important reminder to employers that written policies matter and can help control or rein in the trajectory of costly collective- or class-based litigation.

The lesson: do not hesitate to contact a member of our Labor & Employment Team to review and update your wage and hour policies.