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The Wage and Hour Nightmare Continues: Plaintiffs in the Seventh Circuit Can Now Combine FLSA Collective Action with Rule 23 Class Action

In this day and age, when wage and hour lawsuits are arguably the single greatest threat to employers and businesses across the country, employees planning to file multi-plaintiff wage and hour claims in the Seventh Circuit have reason to celebrate. On Jan. 18, 2011, the United States Court of Appeals for the Seventh Circuit ruled in *Ervin v. OS Restaurant Services, Inc.*, No. 09-3029 (7th Cir. Jan. 18, 2011), that wage and hour plaintiffs may proceed with both a collective action under the Fair Labor Standards Act ("FLSA") and a state class action under Federal Rule of Civil Procedure 23 ("Rule 23") in the same suit and at the same time.

Under the federal FLSA, similarly situated individuals must affirmatively "opt-in," or join the suit, to become a plaintiff. Under Rule 23, individuals automatically become party plaintiffs following certification unless they affirmatively "opt-out" of the suit. By specifically rejecting the view that the opt-in requirements of an FLSA collective action are inherently incompatible with the opt-out parameters of a Rule 23 class action, the Seventh Circuit's decision enables plaintiffs to take advantage of the lower threshold of achieving class certification under the FLSA while avoiding the FLSA's opt-in limitations by way of the opt-out features of Rule 23. Although this

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ruling puts to rest an issue that has divided the district courts in the Seventh Circuit and sister circuits for quite some time, it ultimately offers plaintiffs and the plaintiffs' bar an additional avenue for bringing protracted and costly litigation against employers, along with a platform for a dramatic increase in settlement demands.

In *Ervin*, current and former hourly and tipped employees of an Outback Steakhouse ("Outback") restaurant brought suit against Outback claiming that the company violated the applicable tip-credit provisions of both the FLSA and the Illinois Minimum Wage Law ("IMWL"). The plaintiffs also alleged violations of the Illinois Wage Payment and Collection Act ("IWPCA"), claiming that Outback altered its employees' time records in order to pay them less than they actually worked. The plaintiffs moved for conditional certification of an FLSA collective action for a class of employees who had worked as tipped employees at Outback since 2005. At the same time, the plaintiffs sought class certification under Rule 23 for three other classes of employees alleging state-law claims under the IMWL and IWPCA.

At the district court level, the United States District Court for the Northern District of Illinois adopted the recommendations of a magistrate judge that the court permit the federal collective action to proceed but deny without prejudice certification of the Rule 23 class action in connection with the state-law claims. The district court refused to certify the Rule 23 classes because of the "clear incompatibility" between the opt-out nature of a Rule 23 class action and the opt-in nature of an FLSA collective action. The district court also concluded that this incompatibility between the two different forms of aggregate litigation prevented the court from finding that class treatment of the state-law claims under Rule 23 was a superior way to structure the case and adjudicate the Outback employees' claims.

The Seventh Circuit disagreed. Examining the FLSA's statutory language, the Seventh Circuit found nothing to indicate that a Rule 23 class action could not be combined with FLSA proceedings, or that the FLSA was not "amenable to state-law claims for related relief in the same federal proceeding." Because there was no "insurmountable tension" between the FLSA and the Rule 23 requirements, the court concluded that a combined collective and class action was "consistent" with the regime Congress has established in the FLSA.

The Seventh Circuit also addressed Outback's concern that allowing a Rule 23 plaintiff to move forward with a state-law claim by merely not opting-out of the class was "in tension" with the idea that disinterested parties were not supposed to take advantage of the FLSA. It concluded that such plaintiffs were not entitled to an FLSA remedy, as they were not part of the FLSA litigation group and were entitled only to the relief prescribed under the law governing that part of the case. The court further allayed Outback's fear that a combined action was highly confusing to potential group members given the dichotomy between the opt-in and opt-out requirements of the state and federal-law claims by noting that the problem was similar to others that district courts faced with class actions.

Finally, the Seventh Circuit touched upon the issue of supplemental jurisdiction. It first noted that the requirements for supplemental jurisdiction were generally satisfied in those cases where a state-law labor claim was "closely related" to the FLSA collective action. As it related to a federal court's denial of supplemental jurisdiction over a state-law claim, the Seventh Circuit specifically reasoned that a mere disparity in numbers between a larger state-law class and a reduced FLSA collective action should not lead a federal court to conclude that a state claim "substantially predominated" over the FLSA claim and, therefore, decline to exercise supplemental jurisdiction over the state-law claim. To

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that end, it concluded that the disparity between the Outback employees' larger state-law classes - estimated to include 180 to 250 participants - did not "substantially predominate" over the FLSA collective action - estimated to include 30 participants - and, therefore, did not affect the court's supplemental jurisdiction analysis.

Defending a multi-plaintiff wage and hour lawsuit can be daunting. Indeed, with this decision from the Seventh Circuit, employers' best bet is to take preventive measures to avoid these claims altogether, such as auditing their payroll practices to ensure full compliance with both the FLSA and state wage and hour laws. By being proactive in anticipating and managing exposure to wage and hour claims, employers can effectively eliminate what, in many cases, can be considerable monetary exposure.