

Recent Trends in FLSA Hybrid Collective/Class Actions

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In 2008, 5,302 suits were filed under the Fair Labor Standards Act (FLSA) in the nation's federal courts. Statistics Div., Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics. By 2010, that number had jumped to 6,081. One source of the uptick appears to be the flood of “hybrid” actions, in which plaintiffs assert violations of state wage and hour laws, styled as purported Rule 23 class actions, and FLSA claims, which must be brought as a collective action.

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Employers have responded with two arguments. First, they have urged district courts not to take supplemental jurisdiction over the state law claims, arguing that the state claims predominate over the federal claims or that the conflict between Rule 23's opt-out mechanism and Section 216(b)'s opt-in mechanism is an exceptional circumstance compelling the court to decline jurisdiction. Employers also

have made similar arguments on Rule 12 motions to dismiss, stressing the “inherent incompatibility” of opt-in collective actions and opt-out class actions.

Courts across the country have struggled with these arguments, with most recognizing the tension between the two procedures, but nonetheless accepting jurisdiction over the state claims. See *Peterson v. Cleveland Inst. of Art*, 2011 WL 1297097 at *4, n.1 (N.D. Ohio 2011) (recognizing that both types of cases – those permitting hybrid actions, as well as those declining supplemental jurisdiction – are “legion”). Unfortunately for employers and their counsel, many courts have provided only a perfunctory analysis of the issues. See, e.g., *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, — F. Supp. 2d —, 2011 WL 806792 at * 11 (E.D.N.C. 2011) (summarily declining to adopt the “inherent inconsistency” argument); *Kaiser v. At The Beach, Inc.*, 2009 WL 4506152 at *5 (N.D. Okla. 2009). While employers have had variable success in opposing the exercise of supplemental jurisdiction, the evolving case law has revealed certain trends that may assist an employer facing a hybrid collective/class action.

To date, the D.C., Ninth, and Seventh Circuit Courts of Appeal have held that a federal court may, in its discretion, exercise supplemental jurisdiction over state law putative class claims. See *Lindsay v. Gov’t Employees Ins. Co.*, 448 F.3d 416, 420-425 (D.C. Cir. 2006); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761-762 (9th Cir. 2010); *Ervin v. OS Restaurant Servs., Inc.*, 632 F.3d 971, 981 (7th Cir. 2011). However, these appellate courts stressed the discretionary nature of supplemental jurisdiction, so this avenue remains open. Defendants should consider emphasizing the distinct elements of the state law claim (if any), any undecided issues of state law implicated by the suit, and whether disparate types of proof are called for by the state law claims. However, the sheer size of the state law opt-out class, as compared to the FLSA opt-in class, generally has not been persuasive to courts (unless the state law class truly dwarfs the number of FLSA opt-ins). See, e.g., *Cortez v. Nebraska Beef, Inc.*, 266 F.R.D. 275, 285-286 (D. Neb. 2010) (“[T]he relevant consideration for the defendants’ motion to dismiss is the type of claims involved, rather than the potential difference in size of the two classes.”).

Defense counsel also have argued that permitting a hybrid action to proceed violates the Rules Enabling Act, the statute authorizing the Supreme Court to promulgate rules of procedure. The argument is that any rules promulgated cannot “abridge, enlarge, or modify a substantive right,” that the FLSA (including its opt-in procedure) contains substantive rights, and that maintenance of a hybrid action abridges or modifies the substantive rights contained in the FLSA, such that the state law claims should be dismissed. See *Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 455-56 (W.D. Pa. 2007). Many courts, including some which have rejected the “inherent incompatibility” argument, failed to address the Rules Enabling Act argument. While a number of courts have rejected this argument, still others have reserved ruling or have dismissed state claims based on the Rules Enabling Act. See, e.g., *Dillworth v. Case Farms Processing, Inc.*, 2009 WL 276691 (N.D. Ohio 2009) (holding that a Rule 23 action based on state law that was coextensive with the FLSA would violate the Rules Enabling Act, and dismissing all such claims); *Knepper v. Rite Aid Corp.*, — F. Supp. 2d —, 2011 WL 563006 (M.D. Pa. 2011) (dismissing state law class claims as inherently inconsistent with an FLSA collective action, reserving holding on the

defendant's Rules Enabling Act arguments). Finally, no circuit court has yet evaluated this argument. Accordingly, employers should consider this avenue when evaluating whether to move to dismiss a purported hybrid action.

Even if a court opts to extend supplemental jurisdiction over a putative state law class, or refuses to dismiss the state claims under Rule 12, that does not necessarily mean that the court will ultimately certify the state law class or include in that class those who did not opt in to the FLSA actions. Some courts find that, in a hybrid action, plaintiffs have an uphill battle to show that Rule 23 certification is the superior method for adjudicating their claims. See *Campanelli v. Hershey Co.*, 2010 WL 3219501 at *5 (N.D. Cal. 2010) (motion for class certification denied because the Rule 23 vehicle is not superior to “allowing opt-in plaintiffs to prosecute their pendent state law claims as part of the FLSA collective action”). When actually faced with certifying both an opt-in and an opt-out class, many courts worry about how to give effective notice of these divergent options to the putative class, and some courts have found the potential for confusion sufficiently significant to warrant dismissing or denying certification of the putative Rule 23 class. *Id.* at *5; but see *Peterson*, 2011 WL 1297097 at *5 (“[T]he fact that potential plaintiffs may be confused by the existence of both FLSA claims and state-law class action claims within one suit is not a reason to prohibit the claims from proceeding in the same case.”).

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