



Labor: New trends in misclassification cases

An update on where courts stand on employee misclassification

BY CHERYL ORR

Wage and hour class actions are here to stay. In 2012, misclassification lawsuits have burgeoned in new states, new industries and new areas of focus.

Where are they filed?

Traditionally, California and New York see the majority of wage and hour class and collective action filings. While it is true that not a day goes by in California where at least two or three wage and hour class actions are filed (and much of the leading case law still stems from these jurisdictions), increasingly we see suits filed elsewhere. While plaintiffs may seek known favorable forums, they are branching out, for convenience or otherwise, and companies are now likely to have the suit filed in their home state. Employers should view this trend favorably because it gives them the opportunity to help shape the case law in their own backyard.

Who is getting hit?

This year has brought many important decisions, but the industry focus remains largely with the heavyweights of the last few years – industries with deep pockets and large employee bases, i.e., insurance companies, financial institutions, pharmaceutical companies and retail chains.

Of particular focus right now in the insurance industry is *Harris v. Superior Court*, on remand from the California Supreme Court. Insurance companies were cautiously optimistic when the California Supreme Court issued its ruling last year rejecting the administrative/production worker dichotomy as the ultimate test to determine if adjusters qualified for the administrative exemption. The Supreme Court remanded the case to the lower court to determine whether the claims adjusters at issue were misclassified using the Supreme Court's analysis. The appellate court largely rejected the California Supreme Court's guidance (and analogous federal case law and regulations) and determined that the adjuster's duties were non-exempt production duties. In the wake of the uncertainty created by the new appellate decision, plaintiffs' attorneys have already begun filing new class actions. It is fully anticipated *Harris* will go up again on review, but until definitively resolved, adjuster classifications will remain at issue.

The Supreme Court is reviewing another matter from the heavily-hit financial sector. On Feb. 16, the California Court of Appeal decertified a class of business bankers in *Duran v. U.S. Bank Nat'l. Ass'n.*,

and overturned a \$15 million judgment. U.S. Bank had claimed the bankers were properly classified under the administrative, commissioned sales and outside sales exemptions. In deciding certification, the trial court relied on a sample of 21 class members to determine liability and damages. The appellate court rejected this "trial by formula" as violating the bank's due process rights. While this decision may be a game changer in how wage and hour class actions are litigated, the suits in the banking industry just keep coming. In *Hauer v. HSBC Bank USA, N.A.*, et al., the plaintiff, an ex-employee of SHBC Bank USA N.A. has filed a putative class action alleging he and those similarly situated were misclassified as exempt and not paid overtime.

More clearly resolved is the issue of whether pharmaceutical sales representatives are exempt. Earlier this year, the Supreme Court in *Christopher v. Smithkline Beecham Corp.*, resolved the split between the 9th (exempt) and 2nd Circuits (non-exempt). The high court affirmed the 9th Circuit's position concluding that, under the most reasonable interpretation of the Department of Labor's regulations and the Fair Labor Standards Act (FLSA), drug representatives qualified as outside sales employees even though regulations barred them from making traditional sales. Following the Supreme Court's ruling, the district court judge in *Burdine v. Covidien Inc.*, lifted a stay and granted Covidien's motion for summary judgment, finding that Covidien sales representatives were not entitled to overtime pay. The pharmaceutical companies greeted these decisions with collective relief. Before the Supreme Court issued its decision, however, Novartis Pharmaceuticals Corporation settled their own nationwide wage and hour class action on behalf of 7,000 Novartis sales representatives for \$99 million to eligible class members and \$33 million in attorneys' fees.

What are the new areas of emphasis?

No industry is immune from misclassification lawsuits. As with many areas of litigation, plaintiffs' counsel may find a niche and file a host of copycat suits. These waves can be driven by industry or the types of claims, and frequently, a combination of the two.

Currently, there is a renewed focus on independent contractors and interns. State and federal agencies, followed by the private sector, show a heightened interest in the classification of independent contractors. For example, a federal judge found that a class of 800 newspaper carriers for the San Diego North

County Times who alleged they were misclassified as independent contractors had enough common proof to survive Lee Publication's motion to decertify. *Dalton et al. v. Lee Pubs, Inc. et al.*

Similarly, a wave of lawsuits by interns have led employers to rethink their summer programs. Courts in New York recently conditionally certified an FLSA collective action against Hearst Corporation by its interns. Former interns for PBS' "The Charlie Rose Show," Fox Entertainment Group and jewelry maker Fenton Fallon Corporation and Fox Entertainment Group have also filed suit. The potential liability, however, isn't limited to the entertainment industry. All employers should be mindful of the [criteria set forth by the DOL](#) for determining whether an internship is paid or unpaid.

Where do we go from here?

Essentially, what's old is new. Employers have always had an obligation to classify their workers properly. Most industries have been long aware of their obligations but continue to be plagued by challenges to their classifications. Others put their heads in the sand, ignoring very real risks. All should engage in regular and thorough audits to minimize risks and properly record best practices. If these practices are followed, employers will be prepared whatever the trends.