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# 'Worst-Ever' FLSA Settlement Shows Attys What Not To Do

By **Scott Flaherty**

Law360, New York (June 11, 2014, 10:17 PM ET) -- Federal judges have recently nixed several settlements in Fair Labor Standards Act suits — including a deal meant to resolve overtime claims against Aeropostale Inc. that a judge called "one of the worst I've ever seen" — in a string of rulings that experts say highlight pitfalls for the unwary attorney.

Over the past few weeks, federal judges in California and Florida have, for various reasons, denied preliminary approval of proposed settlements in FLSA suits brought against several employers, including clothing retailer Aeropostale, media research firm **The Nielsen Co. LLC**, insurer **MetLife Inc.** and restaurant chain **Bubba Gump Shrimp Co. Restaurants Inc.**

Judges overseeing these cases had varying rationales in shooting down the proposed settlements — taking issue with the way funds would be distributed or with provisions that required class members to broadly release future legal claims — though in all except the Aeropostale suit, the judges gave the two sides a chance to rework the deals or approval motions.

"These rulings set a floor for what is likely to be permissible," said Michael Rubin, a partner with Altshuler Berzon LLP, a firm that often represents workers and labor unions in employment disputes.

In the **Aeropostale** suit, which alleged in California federal court that the retailer failed to pay employees overtime in a timely manner, U.S. District Judge William H. Alsup criticized the amount of money that would go to workers who had opted into the settlement class.

Under the terms of the deal, which Judge Alsup said was "one of the worst I've ever seen," 594 employees who opted into the class would have received between zero and $588 each while having to give up their right to bring future FLSA claims.

"You're selling them down the river for nothing," Judge Alsup said during a May 29 hearing, referring to the proposed settlement's treatment of those who opted into the collective action. "They signed up, thinking they were owed something."

The judge in late May denied preliminary approval of the settlement and on Tuesday decertified the class based on a stipulation between the two sides.

Attorneys say issues like those raised by Judge Alsup are often among the first things courts look at when considering whether to approve a deal.

"Whenever there's a classwide settlement, the court has to review the proposed settlement to make sure it's fair to the class," said Douglas Wigdor of Wigdor Law LLP, which represents plaintiffs in employment cases.

Constangy Brooks & Smith LLP partner James Coleman said that, in general, courts are trying to determine whether there appears "to be collusion between the defendant and plaintiffs' counsel, to basically buy off plaintiffs' counsel."

How the settlement amount would be divvied up was an issue that presented itself in the MetLife case, in which U.S. District Judge Josephine L. Staton said a proposed $1.97 million settlement, intended to resolve claims that financial service representatives were stiffed on overtime pay, was "not equitable."

Judge Staton took particular issue with the way a portion of the settlement would be divided among certain subclasses of employees, depending on how long they had worked for MetLife — financial service representatives who had been employed for more than 10 quarters deserved additional relief but were treated the same as those who had worked fewer than 10 quarters, the judge said.

That sort of analysis is not uncommon, according to Coleman, who said he often takes pains while crafting a settlement to ensure that the funds will be distributed based on a formula that takes into account factors like an employee's tenure with the company or the amount of allegedly unpaid overtime hours he or she has worked.

"The courts are looking at, 'How fair or equitable is the allocation of the formula that decides who gets what?'" he said.

While separate from the distribution of funds to class members, courts also look at the amount of money under the deal that would go toward the class counsel's attorneys' fees, compared with the amount that would go to class members, according to Jeffrey Mandel, a Fisher & Phillips LLP partner. Attorneys' fee issues did not come up in the judges' rulings in Aeropostale or the other recent denials, but Mandel said the amount of that award is often among the first factors a judge will consider.

"There has to be some kind of reasonable basis for the attorneys' fee award," Mandel said. He also mentioned that enhancement payments, which typically give named plaintiffs a higher share of a proposed settlement, are also frequently scrutinized by courts looking to assess the fairness of a deal.

Attorneys mentioned two other types of provisions, often sought by employers, that may contribute to a settlement's not passing muster with a judge: a general release of future legal claims and an insistence on confidentiality.

Both of those issues cropped up in the Bubba Gump suit, which alleged in Florida federal court that the restaurant failed to pay its wait staff overtime and forced them to work off the clock.

In denying the proposed settlement, U.S. Magistrate Judge Karla R. Spaulding criticized the "sweeping release" that "releases individuals and entities not named in the complaint or otherwise identified and which releases claims other than those asserted in the complaint."

Judge Spaulding also questioned a provision in the agreement that bound the named plaintiff to a confidentiality agreement that extended to the terms of the settlement, the basis for her claims against the restaurant and the fact that the claims existed at all.

Mandel said courts sometimes cast a critical eye on releases that would require class members to waive employment-related claims that would go beyond the scope of the FLSA. With respect to confidentiality, he added, different judges react differently to instances where the parties in a given case try to file a settlement agreement under seal or include a confidentiality provision in the agreement.

"A lot of courts are … not allowing FLSA settlement agreements to be filed under seal, and secondarily, rejecting settlement agreements that have confidentiality provisions in them," Mandel said.

Despite the recent string of decisions shooting down proposed settlements, some attorneys balked at the idea that these rulings are reflective of a broader trend toward courts taking a harder look at FLSA settlements. Wigdor, for one, explained that judges are obligated to assess the fairness of FLSA settlements like they would any other deal meant to provide relief to a class of people.

"This issue comes up not only in the context of FLSA settlements, but in the context of any class settlement," Wigdor said.

Still, Wigdor, along with management-side attorneys, noted that there is a high volume of FLSA suits wending their way through the courts, which might partially explain some of the scrutiny recent settlements have received from federal judges.

"Certainly there are a lot of these FLSA cases now, and perhaps judges are wanting to make sure that the lawyers aren't just filing these cases and settling them quickly without regard to the rights of class members," Wigdor said.

While courts may not necessarily be taking a harder look these days at FLSA settlements, they will continue to evaluate whether a deal is fair. As a result, attorneys representing both employees and management agreed that if the two sides in an FLSA suit do reach some agreed-upon resolution, at that point, it's in their mutual best interest to go to the court with a deal that a judge can look favorably on.

"When you're negotiating the details, it's just all about structuring it in a manner that you think the court will approve," Coleman said.

--Editing by Jeremy Barker and Edrienne Su.