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## FLSA Collective Actions Gain Popularity

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Lawsuits by disgruntled employees are troublesome enough. What about a lawsuit involving entire classifications of certain employees? What if someone told you that it is relatively simple for employees to bring such lawsuits?



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A recent trend in employment law has been an increasing number of class actions – lawsuits involving numerous persons claiming to have suffered similar mistreatment by the same entity. Until recently, the most common type of class actions were those brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended (“Title VII”). These “glass ceiling” lawsuits typically involve claims of discrimination based on race or gender.

Interestingly, collective actions under the Fair Labor Standards Act (“FLSA”) have now surpassed Title VII class actions as the preferred tool for massive legal action against employers. [BNA Wage Hour & Leave Report](#), March 29, 2002. During 2001, employees brought 79 FLSA collective actions against employers, an increase from 71 cases in 2000. Conversely, Title VII class actions were down from 89 in 2000 to 77 in 2001.

Lawsuits under the FLSA typically involve claims for unpaid overtime, working off the clock or being misclassified as employees who are exempt from receiving overtime. The FLSA has specific statutory and regulatory guidelines for determining how an employer should properly classify its employees. Unfortunately, employers are often not in full compliance with these statutes and regulations.

A Department of Labor study of 51 poultry processing plants revealed that none of the plants complied with the FLSA. ([Wall Street Journal](#), January 16, 2000). Other studies have shown that employers in Los Angeles and New York City complied only 33-35% of the time. Borgen, David, *An Introduction To Litigating FLSA Collective Actions For The EEO Lawyer*, American Bar Association, March 29, 2001.

Why is FLSA compliance so important to employers? The results of FLSA collective actions can be devastating. For example:

- ~~///~~ July 2002, RadioShack settled FLSA claims with 1,300 managers for \$29.9 million;
- ~~///~~ Spring 2002, Starbucks settled an FLSA action for \$18 million;
- ~~///~~ December 2001, SBC Pacific Bell paid a group of engineers \$35 million to settle FLSA claims;
- ~~///~~ Summer 2001, Eckerdts settled an action involving 1,100 employees for \$8 million;
- ~~///~~ May 2001, Perdue paid \$2.4 million to settle an FLSA action involving 100 employees;
- ~~///~~ March 1999, Shoney's settled three FLSA lawsuits, involving over 19,000 employees, for \$18 million; and
- ~~///~~ In 1998, the grocery store chain Albertson's settled off the clock overtime claims for approximately \$37 million.

There are several reasons for the popularity of FLSA collective actions. They provide plaintiffs' attorneys with statutory attorneys' fees and the potential outcome is measured in millions of dollars. Unions also use FLSA actions to garner favor with employees they would like to represent. Further, employees can find legal representation on the Internet. Firms experienced in representing employees against employers in FLSA actions are simply a few mouse clicks or e-mails away. Experienced firms are often willing to provide expertise to other plaintiffs' attorneys, and frequently place "how to" articles on the Internet.

Employers should conduct an audit to determine their compliance with the FLSA. This includes reviewing pay policies, employee job duties and responsibilities, employee classifications, and overtime payment practices. For example, if an employer wants to determine if it has properly classified a salaried production supervisor who earns more than \$250.00 per week under the FLSA "executive" exemption, the employer should determine whether:

- ~~///~~ the employee's job duties primarily consist of managing the agency, department or subdivision as opposed to performing production duties; and
- ~~///~~ the employee customarily supervises two or more employees.

FLSA classification cases turn on the actual facts and not job titles or descriptions alone. Close calls usually warrant a legal opinion to help avoid the type of financial consequences experienced by the employers listed above.