BARNES & THORNBURG LLP

COVID-19 False Alarm Triggers Tipped Worker Collective Action

July 23, 2020 | Labor And Employment

Kathleen M. Anderson
Partner
Wage and Hour Co-Chair

Mark Wallin
Partner

With more than 200 cases, the Barnes & Thornburg Wage and Hour Practice Group's COVID-19 related workplace litigation tracker, continues to catalog and summarize complaints filed in courts around the country. With the list of wage and hour lawsuits related to COVID-19 ever growing, the tracker's interactive functionality allows readers to digest the summaries and see the evolving trends in a number of useful ways, and includes a breakdown of the number cases filed in each state as well as the timeline of these cases organized by topic.

As employees and employers alike continue to settle into the "new normal," it seems the plaintiff's bar has also honed its ability to tie the pandemic to workplace suits, including workplace class and collective actions. This week's spotlight follows this trend and shines on a light on a putative FLSA collective action, seemingly precipitated by the plaintiff's termination in alleged violation of the Families First Coronavirus Relief Act (FFCRA).

In *Mackie v. Coconut Joe's IOP LLC, et al.*, the plaintiff, a former server, alleges his termination violated the FFCRA. He also alleges, on behalf of a putative collective of tipped employees, that the defendants violated the FLSA's minimum wage provisions. Before the COVID 19 pandemic, the plaintiff was a server at the defendants' restaurant, which temporarily closed

RELATED PRACTICE AREAS

Class and Collective Actions
COVID-19 Resources
Employment
Labor and Employment
Wage and Hour

RELATED TOPICS

Tipped Employees
Collective Actions
Fair Labor Standards Act (FLSA)
Termination

on March 18, 2020. When the restaurant re-opened on May 4, the plaintiff was told to work as a fry cook. The plaintiff claims that he is missing his paycheck as well as his alleged portion of a "tip pool" for the period of May 4 to May 10.

The plaintiff also claims that on May 12 he reported to his manager that he was having difficulty breathing, but was told to "to get back in the kitchen or he could find another job." The plaintiff reported he could not catch his breath and thought he could have COVID-19. He told a manager that he was going to see a doctor and was not quitting, and left work. Another manager allegedly texted the plaintiff to say that the employer interpreted the plaintiff's action as a resignation, because he left without permission. On May 13, the plaintiff texted the employer a picture of a doctor's note showing the diagnosis of a "panic attack." The plaintiff claims that he engaged in "protected activity under the FLSA's anti-retaliation provision when he left work to seek a medical diagnosis because he was experiencing COVID-19 symptoms."

The plaintiff further alleges, for himself and putative collective members, that the restaurant did not properly structure its tip pool such that it could pay less than minimum wage to tipped employees. He claims that the restaurant violated the FLSA by requiring tipped employees to share their tips with non-tipped kitchen employees. The plaintiff, for himself and others, requests collection action certification, reinstatement, retained tips, unpaid minimum wages, liquidated damages, and attorney fees. The plaintiff also requests compensatory and emotion damages related to his allegedly retaliatory discharge.

This case is yet another example of a plaintiff linking seemingly-unrelated allegations pertaining to COVID-19 to a class or collective action complaint. During these tumultuous times, it is as important as ever to remain vigilant with wage and hour policies and practices to mitigate the risk of becoming the next defendant in a workplace class or collective action. Contributors to the COVID-19 Related Workplace Litigation Tracker will present on this and other trends on July 29. We will continue to track these trends as they unfold, and will continue to update the tracker each week. As always, stay tuned.