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ALERTS

Labor And Employment Law Alert - Supreme Court Holds Employees May Use Representative Evidence To Establish Employer Liability In Class Action Suits

March 23, 2016 | Atlanta | Chicago | Los Angeles | Columbus | Delaware | South Bend | Elkhart | Dallas | Grand Rapids | Indianapolis | Minneapolis | Fort Wayne

The U.S. Supreme Court affirmed the use of representative statistical evidence as proof of liability in a labor and employment law class action. *Tyson Foods, Inc. v Bouaphakeo et al.*, No. 14-1446 (March 22, 2016). While the Supreme Court stated its holding did not amount to "broad and categorical rules governing the use of representative and statistical evidence in class actions," the decision widens potential liability for employers defending class action suits because such liability now may be based on generalized, class-wide proof.

Tyson Foods grew out of a wage and hour class action suit initiated by Tyson's employees, who alleged the company failed to adequately pay them overtime pay for donning and doffing protective gear at a pork processing plant. The amount of time that employees spent on donning and doffing varied. Despite these individualized differences, however, a lower court certified the 3,344 member class. The case went to trial, and based largely upon a statistical sample offer by an expert witness for the plaintiff, the jury awarded the class $2.9 million in damages. Tyson challenged the distribution of this sum. On review, the Supreme Court made the following determinations:

- First, the Supreme Court held the class representatives could adequately prove liability through a statistical, representative study of the members' claim for overtime pay. The Court reasoned that if such a study constituted sufficient proof from which the jury could infer the amount and extent of each individual's work, in an individual case, it should also be sufficient in a class case, even though there were differences in each employee's donning and doffing.

- Second, the Supreme Court addressed whether a class action may be certified or maintained when the class contains hundreds of members who were not injured. On this point, the court was more divided. The majority stated that the question of whether the damages award could be distributed to uninjured class members was not yet ripe, as the award had not yet been distributed. Accordingly, the majority returned the case to the district court for a determination of how the award would be divided among the various class members. In his concurring opinion, however, Chief Justice John Roberts expressed doubts about the lower court verdict being awarded in a manner that complied with prior precedent. As he stated, since the jury awarded a lump sum reward, there was no way to "reverse engineer the verdict" to determine which plaintiffs the jury found to be injured.

RELATED PEOPLE

Kenneth J. Yerkes
Partner
Indianapolis

P 317-231-7513
F 317-231-7433
ken.yerkes@btlaw.com

William A. Nolan
Partner
Columbus

P 614-628-1401
F 614-628-1433
bill.nolan@btlaw.com

Mark S. Kittaka
Partner
Fort Wayne, Columbus

P 260-425-4616
F 260-424-8316
mark.kittaka@btlaw.com

Robert W. Sikkel
Of Counsel (Retired)

P 616-742-3978
robert.sikkel@btlaw.com

In its ruling, the Tyson Foods Court cited to a "representative proof" approach based upon a 1946 decision in *Anderson v. Mt. Clemens Pottery Co.,* which permitted the use of representative evidence as common proof where employers have not maintained records in a manner required by law. The Justice Roberts wrote separately to state that he did not view the Supreme Court's decision as based upon *Mt. Clemens*. Further, Justice Thomas noted in dissent that the *Mt. Clemens* approach had been rejected by Congress just one year after the decision issued. The *Tyson Foods* majority went out of its way to insist that it was not adopting a "trial by formula."

In the wake of Tyson Foods, employers should brace for the possibility of a further increase in wage and hour class actions, particularly in connection with issues involving recordkeeping violations.

To obtain more information, please contact the Barnes & Thornburg Labor & Employment attorney with whom you work, or a leader of the firm's Labor & Employment Law Department in the following offices:

Kenneth J. Yerkes
Department Chair
(317) 231-7513

John T.L. Koenig
Atlanta
(404) 264-4018

David B. Ritter
Chicago
(312) 214-4862

William A. Nolan
Columbus
(614) 628-1401

Mark S. Kittaka
Fort Wayne
(260) 425-4616

Robert W. Sikkel
Grand Rapids
616-742-3978

Peter A. Morse
Indianapolis
(317) 231-7794

Scott J. Witlin
Los Angeles
(310) 284-3777

Teresa L. Jakubowski
Washington, D.C.
(202) 371-6366

Janilyn Brouwer Daub
South Bend/Elkhart

John T.L. Koenig
Partner
Atlanta

P 404-264-4018
F 404-264-4033
john.koenig@btlaw.com

Peter A. Morse, Jr.
Partner
Indianapolis, Washington, D.C.

P 317-231-7794
F 317-231-7433
pete.morse@btlaw.com

Scott J. Witlin
Partner
Los Angeles

P 310-284-3777
F 310-284-3894
scott.witlin@btlaw.com

David B. Ritter
Partner
Chicago

P 312-214-4862
F 312-759-5646
david.ritter@btlaw.com

Teresa L. Jakubowski
Partner
Washington, D.C.

P 202-371-6366
F 202-289-1330
teresa.jakubowski@btlaw.com

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(574) 237-1130

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