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Four Things Every Restaurant Owner Should Know About Wage & Hour Collective and Class Actions

While the thought of being sued by a single worker for unpaid wages is enough to give most restaurant owner's heartburn, the implications of being sued by a large group or class of workers can be a real life nightmare. Wage and hour collective and class action lawsuits against restaurants are a prime target for plaintiffs' attorneys.

Below is a Q&A regarding class and collective actions, with several preventive steps a restaurant or restaurant chain can take to greatly reduce its legal exposure.

1. What are wage and hour collective and class actions, and how do they differ from each other?

Both collective and class actions are forms of litigation where the named plaintiff can bring forth an action for wage and hour violations on behalf of himself/herself and other affected current and former co-workers. For alleged violations under the federal Fair Labor Standards Act ("FLSA"), the worker can file a collective action and other similarly situated workers can voluntarily join the litigation as an opt-in plaintiff. For alleged violations under a state wage and hour statute (and/or a state wage payment and collection statute), the law provides for a class action mechanism where one worker (or several workers) can assert that everyone in a particular group, or class, have been harmed. If a court agrees that class-wide litigation is appropriate, then all workers within the class are part of the lawsuit unless they specifically opt-out. In most wage and hour lawsuits, the worker files a hybrid action which includes both collective and class actions. This adds to the level of complexity of the case, since the procedural rules, legal standards, and claims process do not always align. Regardless of whether the lawsuit is a collective action, class action or hybrid action, the result is that tens or hundreds of workers (and sometimes thousands for big restaurants) can join together to sue the restaurant or restaurant chain in one lawsuit.

2. Why are restaurants particularly susceptible to these types of claims?

Many restaurants take advantage of the so-called "tip-credit" which allows employers to pay tipped workers a sub-minimum wage and apply the amount a worker receives as tips towards satisfying the actual minimum wage requirement. While this can be a huge financial benefit to an employer, one misstep can destroy the restaurant's use of the "tip-credit" and require the restaurant to pay the full amount of the minimum wage, retroactively. Some of the most commons missteps in the restaurant industry occur when restaurants improperly withhold tips or other wages from their workers, fail to calculate the proper overtime rate when using the "tip-credit," allow back-of-the house workers or managers to participate in a tip pooling arrangement, and/or require workers to engage in off-the-clock work or side-work without proper payment.

In many cases, when a restaurant pays one worker improperly, it also has paid others the same way. Thus, what may be a small amount of damages in a single-plaintiff case, can be significantly magnified if the worker files the lawsuit as a collective and/or class action and asserts that the restaurant paid 100s (or 1000s) of workers improperly.

3. What types of damages can a worker claim for wage and hour violations?

At its core, wage and hour claims seek to compensate workers for their unpaid wages. However, under the federal FLSA, the aggrieved worker is typically entitled to liquidated (double damages) and reimbursement of attorney's fees and other costs (which can be substantial). Similarly, under many state wage and hour laws, the aggrieved worker may have a claim for three or four times the amount of the

wages owed, plus attorneys' fees and other costs. In general, the look-back period when calculating the damages is typically two to three years from the date that the lawsuit is filed, depending if the claims are brought under federal or state law and/or if the plaintiff is asserting a willful violation. Multiply this by many plaintiffs and the damages amounts can be staggering.

One other unique twist to the FLSA and most state wage and hour statutes is that personal liability can attach to restaurant owners and operators who are responsible for making payroll decisions. Thus, in many cases, the collective or class action lawsuit is against both the restaurant and its owner or operators.

4. What preventive steps can a restaurant take now to limit potential collective and/or class actions?

First, and foremost, accurate payroll records are essential. All non-exempt workers must be paid for all hours worked. It is the employer's burden to make sure that it maintains accurate payroll records. A restaurant must have the proper policies, systems, and technology in place to ensure proper reporting by its workers.

Second, a restaurant should perform a wage and hour audit. With the assistance of a skilled wage and hour attorney, a restaurant's payroll practices can be reviewed to ensure compliance with both state and federal law. This is by far, the best way to limit exposure against a collective and/or class action. As explained above, the wage and hour laws can be extremely complicated, especially for restaurants who take advantages of the tip-credit and/or have multiple locations in different states. What may be permissible in one state, may be prohibited in another state. By way of example, a restaurant located in Maryland may be permitted to make wage deductions for uniforms if they receive the worker's consent (and assuming minimum wage rules are followed), while a restaurant located in DC is prohibited from making such wage deductions. Only a detailed audit can uncover potential costly payroll errors.

Third, as a final consideration for reducing potential liability from collective and class actions, a restaurant should consider having its workers sign an arbitration agreement that requires the worker to submit certain claims to arbitration and require that the claims be filed individually (as opposed to a class and/or collective action). This solution is not as perfect as it sounds, as it can be riddled with legal issues and may actually result in the employer having to pay an exorbitant amount of arbitration fees and defend a voluminous amount of individual cases filed by workers. Again, this is an option that should be discussed with experienced wage and hour legal counsel.

Paley Rothman's Employment Law Group has extensive experience with wage and hour compliance issues and can assist restaurants and restaurant chains with both preventive measures and defending against single-plaintiff and collective or class action wage and hour lawsuits.

