

The Class Action Plaintiff's Bar is on the Offensive: What's Your Game Day Strategy?

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Agenda

- ◆ **Plaintiff's Bar Targeting Online Hiring Practices**
- ◆ **Is the FCRA Class the New Wage and Hour Class?**
- ◆ **Incorrectly Calculating OT Pay**
- ◆ **New "Fouls"**

ONLINE HIRING PRACTICES

Online Hiring Practices

- ◆ Plaintiff's Bar Targeting Online Hiring Practices
- ◆ Recent quote from plaintiff's attorney on these cases:
 - ***"This case is really about the future of equal opportunity in our digital economy. It really boils down to whether our civil rights are going to be equally respected and implemented in the digital economy."***

Online Hiring Practices

- ◆ Legal arguments being asserted
- ◆ Potential arguments against these types of claims
- ◆ What are the potential next class actions as a result of the increased use of technology in the hiring process?

FCRA CLASS ACTIONS

Is the FCRA Class the New Wage and Hour Class?

- ◆ FCRA class actions are on the rise
- ◆ Why the continued increase?
 - Complex, highly technical statute that is easy to violate
 - Allows for recovery of statutory damages, actual damages, punitive damages, and attorneys' fees (which can easily reach into seven figures)

Is the FCRA Class the New Wage and Hour Class?

- ◆ Growing split among the courts
 - i.e. Ninth Circuit, Third Circuit, Seventh Circuit case results
- ◆ Best practices for employers and how to stop the flood of FCRA class litigation

CALCULATING OVERTIME

Incorrectly Calculating OT Pay

- ◆ How is overtime pay calculated?
 - We all think of “time and a half”... of what?
- ◆ The “regular rate of pay”
- ◆ Regular rate = total compensation for week / hours worked
- ◆ Pay half of the regular rate for each OT hour
- ◆ Numerator includes not just hourly wage but other payments too, such as bonuses

Incorrectly Calculating OT Pay

- ◆ Discretionary bonuses can be excluded (but very narrow definition)
- ◆ Include bonuses that are:
 - Based on productivity
 - Based on hitting company or individual goals
 - Based on safety
 - Based on attendance
 - Based on anything (other than the company's whim)
 - Described in a plan

The background is a blurred office scene. On the left, a window shows a reflection of the word 'JACKSONLEWIS'. In the center-right, a person is sitting at a desk, working on a computer. The overall lighting is bright and professional.

OFF THE CLOCK CLASS ACTIONS

Off the Clock Class Actions

- ◆ Allegation that employers failed to pay employees for their “off-the-clock” work.
- ◆ Filings have increased, workplace has become more mobile and technology-driven.
- ◆ Typical concerns:
 - Pre and post shift work
 - Traveling
 - Working through lunch
 - Remote employees

Off the Clock Class Actions

- ◆ Some of the most common recent filings by:
 - Customer service reps
 - Retail employees
 - Call center employees
 - Sales representatives
 - Healthcare workers
 - Middle-management positions
 - Field technicians
 - Security personnel
 - Fitness instructors
 - Food service workers

NEW "FOULS"

BIOMETRIC DATA

Biometric Data

- ◆ Employers are starting to face class litigation under various state laws addressing the collection, use, and safeguarding of biometric information.
 - Fingerprints, voice prints, vein patterns in a person's palm
 - Biometric identifies are no longer “futuristic,” and are commonly used for routine functions such as unlocking smartphones and laptops
 - For example, with a simple scan of a fingerprint, biometric tools can validate and record an employee entering or leaving the building

PAY EQUITY CLASS ACTIONS

Pay Equity Class Actions

- ◆ Last month, 28 U.S. women's soccer players filed a class action in California against the U.S. Soccer Federation alleging unequal pay
- ◆ The women's team is currently ranked number one in the world. Notwithstanding their team's success, they allege they have been paid on average just 38% of what men's team members have been paid for matches
- ◆ They also allege the unequal compensation extends to tryouts – women are paid \$15,000 while men are paid \$55,000 along with performance bonuses.

ADA IN CYBERSPACE

ADA in Cyberspace

- ◆ Website accessibility lawsuits are being filed in droves.
- ◆ What do the typical challenges look like?
- ◆ Who are the main targets?
 - Retail and hospitality industries (including restaurants)
 - New York and California hit particularly hard

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Thank You

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