Supreme Court Limits Wal-Mart, Approves Representative Proof in Employee Class Actions

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In a highly anticipated decision, the Supreme Court last week affirmed a $5.8 million judgment against Tyson Foods and held that damages in a class action can be established by "statistical sampling" – a phrase that may now haunt many employers for years to come.

The Plaintiffs in *Tyson Foods Inc. v. Bouaphakeo et al.* are pork-processing workers at a Tyson facility in Iowa, who sought to bring a class action **on behalf of approximately 3,000 employees in the same facility** seeking compensation for their time "donning and doffing" protective gear.

Tyson challenged the class on many grounds claiming, among other things, that damages would be impossible to ascertain for the class, as no two people will put on or take off a uniform in the exact same fashion. Plaintiffs faced an uphill battle to construct a damages model, relying primarily on an expert who had observed hundreds of videotapes, to calculate the average number of minutes which various donning and doffing activities took.

The company also faced its own challenges, as Tyson had not recorded the time employees spent donning and doffing. Tyson did not challenge the expert report with a Daubert motion, nor did it produce a rebuttal expert in opposition. In its opposition to class certification, Tyson argued that the varying times it took employees to don and doff protective gear was too speculative for class-wide recovery and that the study overstated donning and doffing time.

However, a class was certified and the case went to trial. In 2011, a federal jury found in favor of the employees, and the Eight Circuit later affirmed, and so they all ended up at the Supreme Court.

I am sure the high court judges never imagined they would be so immersed in the world of pork processing!

Many expected a reversal of the decision to certify the Tyson class, as contrary to the Court's recent landmark opinions in *Wal-Mart Stores Inc. v. Dukes* and *Comcast Corp. v. Behrend*. In *Comcast*, the Court held that the lack of a common methodology for proving damages is fatal to Rule 23 predominance because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." The *Wal-Mart* decision reversed the certification of a class of nearly 1.5 million women across the nation who accused the retailer of gender bias on the basis of representative evidence of the treatment of over 100 female employees. The Court found such representative proof deprived Wal-Mart of the right to litigate individual defenses.

In a decision that came as a surprise to many, the Supreme Court rejected Tyson's reliance on *Wal-Mart* and upheld the jury verdict, holding that "*Wal-Mart* **does not** stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability." Rather, the Court found that representative sampling could be appropriate on a case-by-case basis, and that the circumstances of Tyson's case were distinguishable. "While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy." Unlike the putative class members in *Wal-Mart*, each of the over 3,000 Tyson employees would likely be able to rely on the same statistical analysis presented for the class if they were to bring their actions individually.

All told, the Supreme Court refused to draw a bright line on the use of representative samples, and rejected the broad and categorical rules proposed by both sides. The decision will cause employers' counsel to attack faulty representative evidence through an evidentiary challenge to the Court or through rebuttal expert reports, rather than rely solely upon *Wal-Mart*, *Comcast*, and general arguments regarding commonality and predominance under Rule 23.

- **What can employers and their counsel take away from this decision?**
    - Class actions are back (assuming they ever went away)! The Tyson decision did not overrule *Wal-Mart* or *Comcast*, but it certainly weakened these decisions and sent a strong signal that SCOTUS never intended to say that representative sampling can never be used for a damages model in class actions, even where the plaintiffs had some individual experiences.
    - Plaintiffs' counsel will now certainly be revving up their engines, and looking for more areas to construct class-wide claims against employers.
- **What should you do?**
    - It sounds "old," but the constant changes in wage/hour law required employers to regularly review and revamp their timekeeping polices.
    - Look for those 'hidden pockets' of the workday which for some reason may not be captured, such as: meal and rest breaks, 'work' time at the start or end of the workday, time spent 'opening' or 'closing', time spent cleaning up after clocking out, travel time between jobs or assignments, and training time. The list can go on and on. If that time is not paid, you need to make sure it is not compensable time.
    - Even if you do not think the time is compensable, you may want to informally keep track of it – in case you are sued later. Think about Tyson.

- Also, the more you can get employees to ‘agree’ that their hours are accurate, the better. Make them sign off, on paper or electronically, at the start and end of the work shift and affirmatively indicate that they have been paid properly and that all of their hours are accurate.
- Create a record that meal breaks (especially if unpaid) were taken.
- Post notices everywhere, on the walls and on your company websites, and remind employees two, three and four different ways that it is their ‘job’ to tell their manager when they work extra time or miss a break.
- Make it ‘easy’ for employees to report extra hours, and again remind them of those procedures over and over.
- Get employees to ‘sign off’ that they have received these reminders.

As Justice Thomas lamented in his dissent: “[Employers] must either track any time that might be the subject of an innovative lawsuit . . . or they must defend class actions against representative evidence that unfairly homogenizes an individual issue.”