IADC COMMITTEE NEWSLETTER

EMPLOYMENT LAW

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IN THIS ISSUE

The Supreme Court's recent decision in Tyson Foods, Inc. v. Bouaphakeo reveals important Fair Labor Standards Act evidentiary issues regarding liability for unpaid compensable time and allocating damages among class action plaintiffs. Tyson Foods illustrates the need for employers to implement preventative maintenance measures to decrease the risk of wage and hour lawsuits.

Tyson Foods, Inc. v. Bouaphakeo, et al.: Employees Win on Liability, but Will They Ultimately Bring Home the Bacon?

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The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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The Supreme Court recently issued its opinion in favor of a class of employees in Tyson Foods, Inc. v. Bouaphakeo, a case litigated under the Fair Labor Standards Act for employees seeking overtime pay for time spent donning and doffing protective gear at a pork processing plant.[1] FLSA donning and doffing cases seem to be a dime-a-dozen, but this case has some unique implications for employers to consider regarding consequences for not recording compensable time and whether damages can be allocated appropriately.

The employees wore various types of protective gear to perform the "grueling and dangerous" work of slaughtering, cutting, and re-trimming pigs for consumption.[2] Tyson compensated some employees for the time spent donning and doffing the gear by automatically adding between 4 and 8 minutes to the employees' time (depending on the employee's assigned task) and other employees received no extra time. Tyson did not keep any records on how long it took employees to actually put on and take off the gear. Thus, when over 3,000 employees filed suit alleging that this was compensable time, and they were due overtime under the Fair Labor Standards Act, proof of liability and damages was hotly contested.

Tyson first challenged the certification of the class action, arguing that employees wore different types of protective gear depending on their position, such that their claims were not "substantially similar" as the law required.[3] The Supreme Court held that even if the gear was different, the plaintiffs' claims were essentially the same because each employee "worked in the same facility, did similar work, and was paid under the same policy," unlike other cases, such as Walmart Stores, Inc. v. Dukes[4], where workers were spread throughout the country with varying management and localized policies and each claim of discrimination involved an individual inquiry.[5]

The next two challenges are the meat and potatoes of the opinion.

The second issue that Tyson challenged was the employees' reliance on "representative evidence" to establish liability and quantify the amount of overtime due to each employee. Since actual data was unavailable, the employees added a uniform average amount of time to their time worked each day, regardless of how long it actually took each employee to take on and off the protective gear. To calculate this average, the employees relied on a study using videos of the donning and doffing procedure and an average time was calculated to don and doff each type of gear to determine the amount of time for which each employee actually worked, but was not compensated.

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[1] Tyson Foods, Inc. v. Bouaphakeo et al., No. 14-1146 (Mar. 22, 2016) (slip op.). p. 2.

[2] *Id.* at p 2.

[3] *Id.* at p. 4.

[4] 564 U.S. 338 (2011).

[5] Tyson Foods, p. 14.

Tyson challenged the statistical evidence, arguing that the averages overstated how long it actually took employees to gear up and gear down. The Court sided with the employees on their use of "representative evidence," holding it was ultimately Tyson's fault that there were no actual time records available. Moreover, the Court reasoned that even if employees filed 3,000 individual lawsuits instead of one class action, each employee could have relied on the same representative evidence due to the dearth of timekeeping records.[6] The underlying study was properly held admissible because, as the Court noted, Tyson failed to even attempt to attack how the sausage was made, so to speak. Therefore, statistical averages were admissible to build the employees' case for liability, as well as damages.

The company's final challenge concerned the threshold question of a claim for overtime compensation: whether or not each employee worked more than 40 hours per week in the first instance. There were several hundred employees in the class action who did not reach 40 hours in a week even after the average donning and doffing time was added. Thus, Tyson argued, these employees had no right to any recovery and the employees needed to present the Court with a "mechanism" to identify the non-injured class members and ensure that they do not receive any compensation.[7] The Court recognized that this concern is "one of great importance," but rejected the issue as premature, and then, punted the issue to the district court to distribute damages among the class members, directing Tyson to contest the damages distribution at a later date.[8] This admittedly precarious issue will be one to watch, as the Court did not decide whether all of the employees will actually receive the damages awarded.

Employers can take a few lessons from this decision. First, employers should carefully consider preventative maintenance measures to ensure that they are compensating employees for all hours worked, which in some cases may include preliminary and postliminary activities. This opinion is a clear reminder that courts are not lenient in the face of an employer's failure to keep time records. Second and relatedly, generalized statistical averages can be used to assess injury and damages, if there is no other data available, even if the data is inaccurate or unfair. If an employer does not attempt to derail the methodology used to calculate the statistics, such as through a Daubert[9] challenge, the employer may be stuck with them. Finally, in a case where some employees may not be eligible for damages, employers should consider bifurcating the trial on liability and damages to make this determination easier. Indeed, the Court lambasted Tyson, who had vehemently opposed a bifurcated trial, but then "[sought] to profit from the difficulty it caused" on appeal.[10] While it remains

[6] *Id.* at pp. 12-14.
[7] *Id.,* at pp. 15-16.
[8] *Id.,* at pp. 16-17.
[9] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[10] Tyson Foods , p. 17.

unclear if all of the employees will bring home the bacon in this case, Tyson Foods, Inc. v. Bouaphakeo certainly gives employers facing wage and hour claims some food for thought.

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