Ruling Urges Swiftness For FLSA 'Pick-Off' Bids

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The Company's recent failed attempt to end a potential Fair Labor Standards Act collective action by offering to pay the named plaintiffs' wage claims prompted a New York federal court ruling that attorneys say demonstrates the need to act quickly — for employers looking to complete an FLSA "pick-off" as well as plaintiffs looking to avoid one.

U.S. District Judge Raymond Dearie on Oct. 9 denied the Company's motion to dismiss a putative FLSA collective action, finding that although the retailer had made an offer to pay the claims of four named plaintiffs, he was "not entirely confident" that the offer accounted for all of the remedies those plaintiffs could have recovered. And although Judge Dearie found flaws in the company's offer of judgment and denied the Company's offer in the case, attorneys say the ruling did affirm that the strategy — often known as a "pick-off" — can be a legitimate tactic for employers, even when employees don't accept the employer's offer.

"The judge essentially gives a boost to the notion that unaccepted offers of full relief can moot an action," said Fisher Phillips partner Christine Howard, referring to the ruling by Judge Dearie, whose opening line says "sometimes surrender is the best option."

The Company had made the offers under Federal Rule of Civil Procedure 68, hoping that satisfying Afza Anjum and other named plaintiffs' allegations that they were owed wages for work they performed off-the-clock would render the case moot and allow the retailer to avoid a potentially costly collective action. The plaintiffs turned down the retailer's offer of judgment, prompting the company to file a motion to dismiss.

Judge Dearie determined that even in cases in which an employer's offer does fully resolve the named plaintiffs' claims, the case is not moot until a court actually enters judgment, answering a question that the U.S. Supreme Court left open after its 2013 decision in Genesis HealthCare Corp. v. Symczyk, which gave employers a green light to use the pick-off strategy in FLSA actions.

Although the Company ruling's impact might be mostly limited to the 2nd Circuit, attorneys said Judge Dearie provided guidance on what could make for a successful pick-off attempt.

Howard also suggested that early action can serve an employer well, even though courts in other jurisdictions have reached different conclusions from Judge Dearie's on when a case becomes moot in the context of a pick-off attempt.

“With all the court decisions that have come out after Genesis, you're still going to have situations where the offer of judgment is an excellent tactic,” Howard said. “Employers really have to look at the opportunities for these offers almost from the moment they get these lawsuits served upon them.”

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Related People

Christine E. Howard
Executive Partner, Management Committee
813.769.7503
Email