



Court Rejects Kentucky Wage-Hour Representative Actions

Insights

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The Kentucky Wages and Hours Act provides the mechanism for pursuing redress for minimum-wage or overtime violations under that law. KRS 337.385 provides, in pertinent part, that "[s]uch action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves."

This language differs significantly from the federal Fair Labor Standards Act's analogous provision for private lawsuits. The FLSA says that a lawsuit may be brought "by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated.*" 29 U.S.C. § 216(b) (emphasis added). The highlighted words establish that the FLSA specifically contemplates representative actions; some had argued that the KWAH permits them also, despite the absence of a similar clause in KRS 337.385.

Earlier *Dictum* Rejected Representative Actions

A number of state and federal cases had allowed class actions brought under KRS 337.385 to proceed in that form. But in its November 2013 ruling in *Toyota Motor Manufacturing, Kentucky, Inc. v. Kelley*, the Kentucky Court of Appeals stated in *dictum* that the KWAH does not permit this approach.

The court approvingly noted the argument of Fisher Phillips attorneys Jeff Savarise, Jim Polkinghorn, and Tim Weatherholt that the plain language of the Act precluded representative actions and said that it would rule that way if called upon to do so. However, the court ultimately resolved the case on other grounds.

Issue Squarely Resolved

The Kentucky Court of Appeals has now expressly decided against KWAH representative actions in *McCann v. Sullivan Univ.* Following *Kelley, McCann* found that the wording of KRS 337.385 "contrasts sharply" with the FLSA's language.

The court noted, "[KWAH] plainly expressed that an action may only be brought by one or more employees on behalf of himself, herself, or themselves It did not permit actions to be brought on behalf of employees who are similarly situated." Interestingly, the court also determined that no class action was available under the state's procedural rules.

The Bottom Line

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It is of course possible that the Kentucky Supreme Court might accept discretionary review in *McCann* to address whether representative actions are available under the KWA. For now, though, Kentucky law does not authorize such actions.

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