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THE LONG AND WINDING ROAD: WAGE AND HOUR CLASS ACTIONS NOW VIABLE IN KENTUCKY

Insights
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The Kentucky Supreme Court ruled today that wage and hour class actions for unpaid wages may be maintained in the state, the first-ever time such lawsuits have been ruled viable. The court's decision concludes more than a decade of uncertainty surrounding the proper interpretation of the Kentucky Wages and Hours Act, and opens the door for significantly greater liability for Kentucky employers in the future (*McCann v. Sullivan University System, Inc.*).

HISTORY OF STATE WAGE AND HOUR LAW

For years, the Kentucky Wages and Hours Act (the Act) has provided remedies for individuals who can demonstrate minimum wage, overtime, or other wage and hour violations. Prior to 2005, however, individuals seeking to bring a claim under the Act were not permitted to directly pursue a claim in court. Instead, they had to first exhaust administrative remedies – a time-consuming process in which a claim needed to first be considered by an administrative agency before a judge would examine the case.

After the law changed in 2005 to allow wage and hour actions to directly proceed in court, several groups of workers filed class actions against their employers, primarily in federal court, in which they alleged violations of both the Act as well as violations of its federal counterpart, the Fair Labor Standards Act (FLSA). The plain language of the Act would become a focal point of critical court decisions.

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PLAIN LANGUAGE OF THE LAW

KRS 337.385(2) provides that an action to address unpaid wage violations “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.” In other words, one could argue the plain language of the statute only permits an employee to maintain an action for and in behalf of him or herself, or for two or more employees to maintain an action for and in behalf of themselves.

But this reading does not support a conclusion that employees may sue for and in behalf of anyone else; that is, for and in behalf of anyone who has not also commenced an “action” to assert his or her own rights under the Act. Employers raised this defense in one such case, and the Kentucky Court of Appeals embraced it in several key cases. In October 2015, the Kentucky Supreme Court granted discretionary review in the *McCann* case to once and for all resolve the issue of whether the Kentucky Wages and Hours Act permits class actions.

SUPREME COURT’S DECISION

In its decision, the Supreme Court primarily focused on the broad nature of its power while giving only limited consideration to the restrictive language of KRS 337.385(2) as shown above. Specifically, the court reached the following conclusions:

- Civil Rule 1 of the Kentucky Rules of Civil Procedure provides that “[t]hese Rules govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings. . . .” This power stems from Section 116 of the Kentucky Constitution.
- As such, the Supreme Court retains the ultimate authority to determine the procedures used within Kentucky courts.
- Because CR 1 creates a very limited exception for “special statutory proceedings,” the court found it appropriate to determine whether KRS 337.385 constitutes a special statutory proceeding.
- A “special statutory proceeding” is one that is “complete within itself having each procedure detail prescribed.” The court then reviewed several examples of “special

statutory proceedings,” such as the Kentucky’s Uniform Juvenile Code, and noted such proceedings may be characterized by initial adjudication within an agency or a commission with an appeal to a court.

- The court rejected the argument that KRS 337.385 constitutes a “special statutory proceeding” because the statute “fails to create the comprehensive, wholly self-contained procedural process necessary to constitute a recognized special statutory proceeding.”
- The court also noted Sullivan argued that “even absent a special statutory proceeding, CR 23 does not apply because KRS 337.385 omits language specifically authorizing class actions.” CR 23 is the civil rule allowing for class actions, and Sullivan argued it must give way to the more specific statute. The court, however, found that the actual words used in the statute do not explicitly permit or prohibit the class action device.

WHAT DOES THIS MEAN FOR KENTUCKY EMPLOYERS?

This decision is highly significant for employers with operations in Kentucky because the Act provides a much stronger remedy to address wage and hour violations as compared to the federal FLSA. There are two crucial differences between the Act and the FLSA. First, employees wishing to participate in a representative action under the FLSA, in what is commonly known as a collective action, must affirmatively “opt in” to the litigation by signing a written consent form. Typically, only a small percentage (10 to 20%) of employees do so.

Second, while the Act has a five-year statute of limitations for any violations, the FLSA’s limitations period is for only two years, and three years in case of a willful violation. Both of these differences have the effect of significantly reducing potential damages in cases brought under the federal law.

In light of this decision, we anticipate plaintiffs will seek to bring cases under Kentucky law or will bring hybrid cases under both Kentucky law and the FLSA. Fisher Phillips has been at the forefront of this issue and will continue to help clients navigate these uncharted waters going forward. If you have any questions about this decision or how it may impact your business, please contact any attorney in the [Louisville office](#) of Fisher Phillips at 502.561.3990.

This Legal Alert provides an overview of a specific court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.