

Coverage for California Wage and Hour Class Actions Under an EPL Policy

By Len Surdyk

In today's litigious business climate, many employers are painfully aware of the dramatic increase in the number of class action wage and hour lawsuits filed in California in recent years. Such class action lawsuits can be filed for a wide range of actual or alleged violations of wage and hour laws governing payment of overtime, vacation policies, meal and rest periods, and a host of other issues, such as timing of pay periods. Because such wage and hour laws are highly technical and complex, lawsuits based on violation of such laws are both expensive to defend and costly to settle.

Wage and Hour Law Exclusions

The insurance industry has long recognized that class action wage and hour suits are expensive, and since the inception of standalone EPL policies in the 1990s, insurers have included standard exclusions in EPL policies for claims based on or arising out of violations of wage and hour laws. One such exclusion, known as the FLSA exclusion, eliminates coverage for claims under the Federal Labor Standards Act and a variety of other federal statutes. While such exclusions may also purport to exclude similar state laws, insurers have nearly universally taken the position that California wage and hour laws are similar to the FLSA and that the exclusion therefore applies to California claims alleging violation of wage and hour laws.

At least one California Court has disagreed with the insurance industry and held that the California wage and hour laws were not excluded by the FLSA exclusion.¹ Despite this case, when an insured notifies its insurer of a class action wage and hour claim, the typical response by the insurer is to send a letter denying all coverage and refusing to defend or indemnify. Moreover, the typical position of insurance companies and many insurance brokers is that such insurance simply is not available, even with payment of an additional premium.²

Historically, most insureds have not challenged the insurer's denial of coverage for wage and hour class action lawsuits because it is not widely recognized that there potentially is coverage for such lawsuits, at least in California. The result is that in most instances of wage and hour lawsuits, an employer will end up paying all defense expenses and any settlement or judgment out of its own pocket.

Wage and Hour Law Coverage and Business Code Section 17200

When it comes to wage and hour law class actions, California is different than any other state. This is because in addition to the wage and hour laws, the California legislature has enacted other laws that apply to workplace wage and hour practices. One such law is Section 17200 of the Business Code. Section 17200 is an extremely broad statute that applies to a great multitude of unfair business practices. In virtually every wage and hour class action in California, plaintiff's lawyers allege violation of one or more of California's wage and hour laws and Section 17200. Insurers either gloss over the Section 17200 claim and do not treat it differently than the wage and hour violation or argue that the Section 17200 claim is similar to the FLSA.

The end result is that most insurers deny coverage for the Section 17200 claim in addition to the wage and hour law claim.

What most insurance professionals do not realize is that Section 17200 is not the same as -- or even similar to -- California wage and hour laws. For example, Section 17200 would apply to a company charging illegal interest rates or engaging in false advertising. In fact, any business practice that gives a company an unfair advantage over its competition or is unfair to customers is prohibited by Section 17200.

It is obvious that the FLSA does not purport to regulate such activities. The FLSA is limited exclusively to the terms and conditions of the employer/employee relationship. Section 17200 is far broader than FLSA and deals with a multitude of business activities that have nothing to do with the FLSA. Accordingly, the FLSA exclusion should not apply to any Section 17200 claim.

Rules of Insurance Policy Construction

The inapplicability of the FLSA exclusion to Section 17200 is even more apparent given the rules of construction for insurance policies. Under California law, exclusionary clauses, like the FLSA exclusion, are to be constructed narrowly and not expansively. Only the most expansive construction of the FLSA exclusion could render it similar to Section 17200. A neutral construction would result in a finding of dissimilarity, and under a narrow construction it is not even close.

Of course, there are always other issues to consider. Insurers will argue that wage and hour claims and Section 17200 claims are uninsurable as a matter of law or that even if the claims are insurable, the insurers are entitled to an allocation between the uncovered wage and hour claims and the covered Section 17200 claims. Finally, an insurer may argue that the 17200 claim does not fall within the insuring agreement. All of these arguments can be defeated, however, depending on the facts of the case.

What is important to remember is that California insureds can seek to enforce their rights for coverage for class action wage and hour claims under their EPL policies. The statute of limitations in California for an action against an insurer is four years. Accordingly, insurers can face coverage lawsuits under old EPL policies issued during the past four years. Going forward, insurers may address these problems by adding an unfair business practices act exclusion to their California-based EPL policies if they do not wish to face the risk of insureds arguing for coverage for wage and hour law class action claims. Some insurers have already done just that and others are likely to follow suit.

Conclusion

Unless an EPL policy contains an unfair business practices act exclusion, and most do not, there is a very real chance that coverage exists for an insured under their EPL policy for class action wage and hour law claims filed in California. For policies outside of California where no Section 17200 claim is pled, there may be other arguments for coverage. For example, some FLSA exclusions exclude claims for violation of the FLSA as opposed to excluding claims for actual or alleged violations of the FLSA. If a class action wage and hour law claim is settled and there was no actual violation of the FLSA, coverage may be available.

Accordingly, even in a state that does not have a statutory equivalent to Section 17200, coverage may be available for a class action wage and hour claim because the insurance policy exclusion for wage and hour law claims may be defective. 🚩

Notes

¹ The California case is styled *SWH Corp. v. Select Ins. Co.*, 2006 Cal. App. Unpub. Lexis 8694 (Cal. App. Sept. 28, 2006) and held that the language extending the exclusion to similar state laws did not apply to the FLSA. The FLSA was only one of a number of federal statutes listed on the exclusion and the Court held that the similar state law language only applied to the last federal statute in the list.

² There is at least one insurer who offers very limited coverage for wage and hour law lawsuits.

ABOUT THE AUTHOR

Len Surdyk has over 20 years' experience in representing clients in complex insurance coverage disputes. He has extensive insurance coverage and coverage litigation experience in directors and officers, employment practices liability, and insurance companies professional liability insurance matters as well as other professional liability and general liability matters. Mr. Surdyk has authored several text books on insurance coverage topics and is a popular guest speaker at conferences and seminars