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Multiple Venues Key To Workers' New Litigation Plan

By Erin Coe

Law360, New York (January 10, 2011) -- While employees typically focus on bringing claims over unfair workplace practices in one venue, a new wave of workers is now opting to raise claims in several venues or before various agencies at once in a move that can put companies at a major disadvantage, according to employment lawyers.

The layoffs and terminations amid the economic downturn and the existing challenges of finding work have prompted more individuals to take a multipronged approach against their former employers, such as by filing a discrimination claim before the U.S. Equal Employment Opportunity Commission while simultaneously lodging a wage claim with the Department of Labor and alleging unsafe working conditions before the Occupational Safety and Health Administration, according to Helen A. Rella, counsel at Wilk Auslander LLP who defends employers.

"Employees are filing in multiple venues in order to maximize the chances for settlement," she said. "The more places employers are forced to appear to defend themselves, the more it will cost them."

More plaintiffs these days are alleging companies are misclassifying them as independent contractors before the state unemployment agency and in court as part of an individual or proposed class, according to Mark W. Batten, co-head of Proskauer Rose LLP's class and collective action group.

Publishers Circulation Fulfillment Inc. battled a proposed class action in the U.S. District Court for the Southern District of New York brought by newspaper delivery drivers alleging they were employees instead of independent contractors, while several members of the proposed class were pursuing similar claims before an unemployment agency, according to Batten, who represented Publishers. The company defeated the bid for class certification in June, and the plaintiffs entered into a stipulation to dismiss the action in July.

But the appeal of filing claims on multiple fronts is unlikely to wane, since it allows employees to pursue every type of relief available, according to Shannon Liss-Riordan, a plaintiffs attorney at Lichten & Liss-Riordan PC.

"The main advantage is being able to maximize the potential recovery by seeking recovery in all possible avenues, and it also can put pressure on an employer," she said.

In November, a federal judge serving as an arbitrator and overseeing several claims from an ongoing proposed class action against Coverall found that the cleaning franchise company's misclassification of franchisees as independent contractors was willful because it disregarded a prior ruling by the Massachusetts Supreme Judicial Court, which affirmed

an unemployment agency's determination that a Coverall franchisee was an employee, according to Liss-Riordan.

The federal court presiding over the action has since asked the Massachusetts Supreme Judicial Court to review what the damages should be for misclassifying workers as independent contractors.

"As long as employers continue to misclassify workers, they are going to see these types of claims," she said.

As state agencies show a greater interest in questions related to whether an individual is an independent contractor or an employee, these two-pronged attacks are likely to skyrocket, Batten said.

"Whenever the state takes an interest, then the plaintiffs bar wakes up," he said. "This is the beginning of an explosion in this type of litigation."

Companies have not paid close attention to reviewing independent contractor status, and because contractors do not receive benefits and can be less expensive than hiring employees, the classification process has led to abuses, according to Batten.

"There are a lot of targets out there, and they are ripe for this kind of attack," he said.

One mistake too many employers make is not taking unemployment claims seriously enough in the beginning, Batten said. If the plaintiff wins at the unemployment agency, which tends to be relatively low exposure for the employer, that finding could be used as a weapon against the employer to advance the claims of many employees in a related class action, he said.

The problem for employers is that there is not a whole lot they can do once they've been hit by claims in many venues, according to Stephen D. Erf, a partner of McDermott Will & Emery LLP.

"An employer and employee can agree to go to arbitration or mediation to handle wage payment, discrimination and other complaints," he said. "That would be the only real way to funnel all of the complaints to one tribunal."

While independent contractor claims in multiple venues may not slow down anytime soon, much of the spike in workplace complaints across many venues could start to drop off once the labor market improves.

"If it's easier to get another job, there will be a decrease in the number of these claims filed," Rella said. "When employees are laid off and are able to get another position, that limits or reduces the amount of damages or settlement money they are able to get."

But as these claims in multiple venues continue to pose a threat, companies can take steps to try to mitigate their risks.

If an employer ends up facing similar claims by a worker on multiple fronts, the employer can argue for one case to proceed at a venue that may look more favorably at its defense and push for a stay at the other forums, according to Vincent A. Cino, Jackson Lewis LLP's national director of litigation.

"It's possible that a federal case and a state case can go forward with the same allegations, but allowing that to happen could get two different results, and that's what you want to avoid," he said. "It usually works out that a court will say the other actions should be stayed while it decides the issue because it doesn't want to undermine judicial

economy.”

If the employer gains a favorable ruling at one venue, it can then assert the principles of collateral estoppel to toss similar pending actions.

Businesses that are looking to resolve employee claims should address all allegations at once in a global settlement, according to Erf.

“Employers should try to avoid piecemeal settlements,” he said. “If an employer settles a wage claim, that money could be used to fund another fight against the employer in a state agency or federal court.”

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