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SPECIAL EMPLOYMENT LAW ISSUE

The Status of Remote Work as a Reasonable Accommodation in Wisconsin After the COVID-19 Pandemic
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The Rise of Hybrid Actions: How a Lawful Termination Can Morph into a Multi-Million Dollar Liability

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Imagine a scenario where an employer lawfully terminates an employee of three months for blatant and repeated violations of the company's attendance policy. The disgruntled (now former) employee discusses the circumstances surrounding his termination with a lawyer. Finding nothing unlawful about the termination, the lawyer asks the former employee about payroll practices, timekeeping, and bonuses at his old job. With some promising anecdotes, the lawyer then turns to the employee's wage statements and uncovers what appears to be a technical violation of federal and state wage and hour laws. If the technical violation seemingly results from a common policy or practice, the former employee can then file a complaint on behalf of all affected current and former employees, alleging violations of federal and state wage and hour laws on a collective and class action basis.

When collective and class action claims are brought in the same lawsuit, the case is commonly referred to as a "hybrid" action. Hybrid actions allow employees to pool their claims for prosecution and oftentimes result in a larger individual recovery for the former employee (who receives a service award on top of wage damages) and a significant fee award (frequently 1/3 of the total recovery) for the employee's lawyer. Consequently, hybrid actions are one of the most expensive lawsuits an employer can face. And, given the "gotcha" nature of many wage and hour laws, hybrid actions can come with little-to-no warning.

The number of new hybrid actions filed each year has steadily been on the rise, however, last year proved to be a bit of an anomaly. Although fewer hybrid actions were filed in 2020, a higher percentage of collective action claims achieved conditional certification and plaintiffs on the whole obtained larger recoveries. As the country emerges from the COVID-19 pandemic, there is reason to believe the number of hybrid actions will continue to increase and remain a source of significant financial exposure to employers of all sizes. By all accounts, hybrid actions are here to stay, making a basic comprehension of the procedural and substantive anatomy of hybrid actions necessary to help employers limit exposure and mitigate risk.

I. When Federal and State Wage and Hour Law Claims Collide

Eligible employees are afforded wage and hour protections under both federal and state law. The Fair Labor Standards Act of 1938 (FLSA), a federal labor law, establishes minimum wage, overtime pay, child labor, and record-keeping requirements affecting full- and part-time employees in the private sector and in federal, state, and local, governments.[1] State and local laws can vary by jurisdiction but often add another layer of complexity when they provide different or additional protections to employees that extend beyond the FLSA. Employers must be cognizant of these variations because they are required to comply with the laws providing the greatest protection to employees.

Despite the potential variation between federal and state requirements, the factual underpinnings of alleged wage and hour violations are often the same. This common fact pattern allows plaintiffs to assert, on a representative basis, both federal and state law claims in a single hybrid action. Plaintiff's lawyers are apt to contend that hybrid actions are superior for efficiency's sake. Not surprisingly, defendants and their counsel often hold a differing view—that hybrid actions simply serve to leverage larger settlements for a limited number of employees and a substantial fee award for their counsel.

Regardless of perspective, hybrid actions do allow for the simultaneous pursuit of federal and state law wage and hour claims in the same action. But the differing legal and procedural requirements of collective and class actions adds a level of complexity that can be confusing even for lawyers.

II. Collective and Class Actions are Subject to Distinct Legal and Procedural Requirements

The procedure for bringing a FLSA collective action is governed by 29 U.S.C. § 216(b), whereas the procedure for bringing a class action is governed by Rule 23 of the Federal Rules of Civil Procedure. A plaintiff must independently satisfy the legal and procedural requirements of both frameworks to successfully pursue a hybrid action on a representative basis.

The most significant difference between a class and collective action is the certification process and, more specifically, how individuals become bound by the outcome of the lawsuit. The FLSA requires individuals to affirmatively "opt-in" to a collective action by signing and filing a written consent to join with the presiding court. Conversely, Rule 23 class actions are subject to an "opt-out" procedure, where unwilling plaintiffs must provide written confirmation of their desire to not be included in the lawsuit. These decision points—whether to opt-in to a collective action or opt-out of a class action—arise at different times in a hybrid action and are dependent on the court granting conditional certification in a FLSA collective action and certification in a Rule 23 class action.

The majority of district courts evaluate the viability of a collective action using a two-step certification process. To implement the FLSA opt-in procedure, the named plaintiff must first move for conditional certification, which requires the plaintiff to demonstrate a "reasonable basis" for the court to conclude he or she is similarly situated to the other potential opt-in plaintiffs.[2] The burden is low because the plaintiff need only make "a modest factual showing" through declarations, deposition testimony, or other documents, that there is some "factual nexus between the plaintiff and the proposed class or a common policy that affects all the collective members."[3] Although the "modest factual showing" standard is lenient, it is not a "mere formality," because once the class is conditionally certified, notice is sent to other potential collective members, advising them of the lawsuit and providing them the opportunity to "opt-in" and become a party plaintiff. [4] Upon receiving notice of a collective action, an individual can either "opt-in" to be a member of the FLSA collective, or do nothing, in which case the individual will not be bound by any judicial determination affecting the collective.

Because conditional certification is granted without examining the actual merits of the collective action allegations, district courts have established a second step in the certification process, which provides the employer the opportunity to move to decertify the collective action and force the court to determine whether the plaintiffs who have opted in are, in fact, similarly situated.[5] In this phase, the court assesses whether continuing as a collective action provides efficient resolution in one proceeding of common issues of law and fact.[6] The downside for employers is that this second stage follows discovery, which is time-consuming and expensive. The upside is that a successful motion for decertification sounds the death knell for the collective action by prohibiting the plaintiff from pursuing FLSA wage and hour claims on a representative basis. Employers are more likely to defeat a collective action at the

decertification stage when discovery reveals that individualized issues predominate.

In comparison, Rule 23 class actions have a one-step certification process typically occurring after extensive discovery is completed. Class certification requires a judicial finding that (1) the putative class is "so numerous that joinder of all members is impracticable," (2) the class claims share common questions of law or fact, (3) "the claims or defenses of the representative parties are typical of the claims of defenses of the class," and (4) "the representative parties will fairly and adequately protect the interests of the class" members.[7] If each of these four elements are satisfied, certification will be granted so long as the putative class also meets one of the requirements of Rule 23(b). In hybrid actions, this is usually the predominance and superiority prong, which requires the court to find that common questions of law and fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[8] If, and only if, certification is granted, putative class members receive notice of the lawsuit and the opportunity to "opt-out" of the class action. Under the Rule 23 framework, putative class members are automatically included in the lawsuit with respect to the state law wage and hour claims. Upon receiving notice of the class action, an individual can do nothing and stay in the case or affirmatively opt-out and not be bound by the ultimate resolution of the state law claims.

Although hybrid actions combine the procedural framework for collective and class actions in one lawsuit, the Seventh Circuit recently issued a decision suggesting that the availability of the collective action mechanism may, in certain instances, preclude class certification.[9] In *Anderson v. Weinert Enterprises, Inc.*, a seasonal employee of a roofing company brought a hybrid action against his employer alleging violations of the FLSA and Wisconsin labor laws. His collective action failed to garner sufficient support, with only three other employees (only one of which was timely) filing the "opt-in" consent to join forms with the court.[10] He amended his complaint to convert the FLSA collective action into an individual claim (which later settled) and put his energy into his Wisconsin law class action claim.[11] The Eastern District of Wisconsin denied his motion for class certification on numerosity grounds, finding that the joinder of 37 employees in a single lawsuit would not be impracticable.[12] On appeal, the Seventh Circuit found no abuse of discretion and affirmed the district court's denial of class certification. While this ruling does not obliterate hybrid actions, it arguably opens the door for courts to deny class certification when a collective action is available.

III. Common Allegations in Hybrid Actions

Most hybrid actions involve misclassification or compensable time claims because the FLSA requires employers to pay non-exempt employees at least the minimum wage for all hours worked and overtime pay for all hours worked over 40 in a workweek. Worker misclassification claims focus on whether an employee is exempt from overtime wages or improperly classified as an independent contractor or volunteer. Common compensable time claims include allegations of unpaid wages, improper regular rate calculations, time-shaving, off-the-clock work, tip credit violations, and expense under-reimbursement. Regardless of the specific claims at issue, the following exemplars show how hybrid actions can turn low-dollar individual claims into substantial employer liability.

> ***Scenario 1: Making a Mountain Out of a Molehill.*** A brewery employs over 400 non-exempt hourly employees over three shifts and uses a time clock to track hours worked. The company follows the 7-minute rule, rounding its employees' clock in-and-out times to the nearest quarter hour. Although this practice follows Department of Labor guidance, the company gets hit with a hybrid action initiated by a former employee who worked for the company for just four months,

alleging time-shaving claims under the FLSA and Wisconsin law. The company's 7-minute rounding rule is neutral on its face, but the former employee alleges that the practice almost always inures to the benefit of the employer and does not fully compensate employees for actual time worked. As an individual claim, the former employee's recovery would be *de minimis*, but aggregated across 400 employees over a 3-year statute of limitations with a liquidated damages multiplier, the employer's potential liability skyrockets.

Scenario 2: No Good Deed Goes Unpunished. A national retailer employs thousands of in-store customer service representatives, many of whom become hesitant to work during a global pandemic. To incentivize attendance, the retailer decides to pay employees an additional dollar per hour for all hours worked during the height of the pandemic. Many of these employees work overtime but the additional dollar per hour is not included in their regular rate calculation. As a result, employees are being shorted pennies on the dollar for all overtime hours worked. What can amount to pennies on one paycheck, however, can easily turn into big money on a class and collective basis. Employers often get tripped up by not including non-discretionary bonuses in their regular rate calculations for purposes of determining overtime pay.

Scenario 3: This Car Pays for Itself. A restaurant employs drivers to deliver food and beverage orders to customers within a defined geographic area. The drivers are non-exempt hourly employees and must use their own vehicles to make deliveries. In exchange, the restaurant reimburses the drivers 32 cents-per-mile as tracked by GPS on a restaurant-owned mapping device. A disgruntled delivery driver files a class and collective action against the restaurant claiming that the 32 cents-per-mile reimbursement fails to reasonably approximate drivers' vehicle expenses—expenses he has not tracked. The representative plaintiff seeks reimbursement at the IRS standard business mileage rate, contending that anything less amounts to an unlawful kickback from the drivers' wages. Even though the restaurant engaged a leading workforce management company to calculate a reasonable approximation of each drivers' per-mile vehicle expenses, taking into account the make, model, and year of each driver's vehicle, the restaurant ends up negotiating a settlement because the cost of defending the action will equal, if not surpass, the class's likely recovery.

These three scenarios, and countless others like them, make it easy to see the motivation for plaintiffs' lawyers to identify potential hybrid actions and to understand why they are here to stay.

IV. Hybrid Actions in a Post-COVID World

As if COVID-19 did not present enough unprecedented challenges to employers over the last year and a half, the emergence of employees from furloughs and remote work environments is all but certain to spawn a spike in hybrid actions. This is to be expected given the seemingly overnight closure of the country and transition to telework environments in industries that never contemplated the possibility. Remote work environments naturally give rise to additional "off-

the-clock" claims by nonexempt employees. Most employers with a predominantly onsite workforce pre-pandemic lacked the necessary infrastructure to track compensable time when employees began working from home. In addition, the act of setting up a remote work environment naturally lends itself to an increase in expense reimbursement claims.

The anticipated rise in hybrid actions will extend beyond the remote work environment, too. Throughout the pandemic, non-exempt essential healthcare employees were required to work extended shifts, potentially subjecting employers to additional unpaid overtime and off-the-clock claims. Likewise, employers in the retail and restaurant industries are susceptible to compensable time claims relating to time spent by employees waiting in line for temperature checks or misclassification claims by managers performing increased non-exempt work as a cost-saving measure to control payroll expenses. But even a return to some sense of normalcy will likely be met with additional hybrid actions challenging everything from employer decisions about who to bring back from furlough to facemask policies and vaccine mandates.

V. Should I Stay (and Litigate) or Should I Go (and Settle)?

Hybrid actions can range from small nuisance-value claims to "bet-the-company" litigation. This wide variance in potential liability underscores the importance of conducting an early evaluation of claims, including a thorough review of the employer's overall payroll structure to determine whether there are other potential problems that could affect the value of the case and overall risk assessment. Early assessment of the employer's potential liability in concert with its overall risk tolerance will steer the hybrid action toward putting up a defense or settlement.

When a case is headed toward settlement, consideration should be given to whether settlement on an individual basis is a possibility. Defense counsel should be sure to explore and obtain representations from plaintiff's counsel that they do not represent or know of any other potential class or collective members who could step in the place of the settling plaintiff. On the other hand, if settling on an individual basis is not feasible or there is uncertainty over employee interest in a hybrid action, defense counsel should discuss negotiating a "blow up" provision in the settlement agreement that allows the defendant the option of backing out of the deal or "blowing it up" if a negotiated percentage or number of class members opt out of the settlement.

For risk adverse employers, class action waivers in arbitration agreements may be a viable option for keeping hybrid actions at bay. Though preventing hybrid actions altogether may seem desirable, the potential disadvantages are exposed when multiple employees simultaneously pursue individual claims in separate arbitrations. When this happens, employers end up facing a series of identical arbitration claims and, despite fee-splitting agreements, also end up funding most, if not all, of the administrative and arbitrator fees associated with each action. An employer who receives 100 individual arbitration demands can end up paying $265,000 in filing and case management fees even if the claims are completely without merit.

VI. Conclusion

If you take nothing else from this article, remember this: It is a mistake to be dismissive of apparently small dollar claims based on a single named plaintiff's tenure and individual experience at the defendant company. That plaintiff is the proverbial camel's nose, sniffing and peeking into the tent. Triage the claims pled—and look for claims that are not pled and may be found along the way—to make an early evaluation for your client and set strategy accordingly.

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Josh Johanningmeier is a shareholder in Godfrey & Kahn's Products Liability & Torts Practice Group and a member of the firm's Labor & Employment Litigation and Insurance Practice Groups. Josh represents employers in federal and state courts, as well as

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Maggie Cook is a shareholder on Godfrey & Kahn's litigation team and member of the Labor & Employment Litigation, Non-Competition and Trade Secret, and Financial Services Litigation practice groups. She litigates a variety of complex commercial disputes that arise in the business context, including breach of contract actions, business torts, employment litigation, consumer protection laws, and real estate and construction litigation. Maggie has achieved successful outcomes litigating in state and federal courts and before various administrative agencies. Maggie maintains an active labor and employment litigation practice. She represents employers in wage and hour class and collective actions, defends individual discrimination, harassment, and retaliation claims, and regularly litigates restrictive covenant agreements, trade secret theft, wage claims, and termination disputes. Maggie's financial services litigation experience includes defending companies facing consumer protection claims under state and federal law, including alleged violations of the Fair Credit Reporting Act, Fair Debt Collection Practices Act, Telephone Consumer Protection Act, and Wisconsin Consumer Act. Maggie graduated cum laude from the University of Wisconsin Law School. While in law school, Maggie served as a student attorney in the Criminal Appeals Clinic gaining hands-on experience arguing post-conviction motions and writing appellate briefs. Prior to law school, Maggie worked for one year at a law firm in Illinois where she handled various condominium and homeowner association matters. She also worked for two and a half years at Godfrey & Kahn as a litigation paralegal.

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3 *Ehmann*, 2016 WL 5957275, at *2 (quoting *Nehmelman v. Penn Nat'l Gaming, Inc.*, 822 F. Supp. 2d 745, 750 (N.D. Ill. 2011)).

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7 Fed. R. Civ. P. 23(a).

8 Fed. R. Civ. P. 23(b)(3).

9 *Anderson v. Weinert Enter., Inc*., 986 F.3d 773 (7th Cir. 2021).

10 *Id.* at 775.

11 *Id.* at 775-76.

12 *Id.* at 776.