Class Certification Looms In Wage Suppression Case Law

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On Oct. 24, 2013, Judge Lucy Koh of the U.S. District Court for the Northern District of California certified a class of employees in a wage suppression "no employee solicitation" antitrust case in In Re: High-Tech Employee Antitrust Litigation (N.D. Cal. Oct. 24, 2013) ("High-Tech"). In an area in which plaintiffs have previously struggled, this is the second federal court decision, separated by just over a month, granting certification of a class of employees claiming wage suppression in violation of federal antitrust laws. See Cason-Merenda v. Detroit Medical Center, Case No. 06-15601, 2013 U.S. Dist. LEXIS 131006 (E.D. Mich. Sept. 6, 2013) (certifying class of over 20,000 nurses in a wage suppression case involving the exchange of wage information). These types of claims merit employers' attention as the potential liability can be substantial if a class is certified.

Background

On behalf of themselves and a class of employees, plaintiffs alleged that seven high profile, high-tech employers reached agreements among themselves not to solicit each other's employees and that the effect of these agreements was to suppress their wages. On April 4, 2013, the U.S. District Court for the Northern District of California denied plaintiffs' initial motion for class certification, but in doing so, acknowledged that plaintiffs had just received a large amount of documentary evidence and access to witnesses after the class certification hearing. It therefore invited plaintiffs to amend their motion. Id., at *19. Plaintiffs did so in May, and in an 86 page decision, Judge Koh issued an order granting Plaintiffs' Supplemental Motion for Class Certification.

The Class Certification Decision

In their supplemental motion plaintiffs sought to certify a nationwide class of salaried technical, creative and research and development employees who worked for any defendant while that defendant participated in at least one anti-solicitation agreement with another defendant. Id., at *23. Plaintiffs estimated that the class exceeded 50,000 employees. Id., at *25.

The requirements of Rule 23(a) were not contested, and the U.S. District Court for the Northern District of California found that plaintiffs' satisfied them. Id., at *31-39. The real battleground was predominance under Rule 23(b)(3). The question was whether plaintiffs could show with proof common to the class: (1) that all or nearly all members of the class suffered injury as a result of the alleged antitrust violation ("antitrust impact"); and (2) the amount of damages suffered by class members. Id., at *39-40.

The court concluded that plaintiffs' satisfied their burden regarding antitrust impact. In the court's view the record supported the plaintiffs' contention that the absence of employee solicitation could suppress the wages not only of the employees who would have been solicited, but also all other employees in the purported class. According to the court, the evidence showed that each defendant used formal administrative compensation structures that divided jobs into pay bands, zones, grades and ranges by which they evaluated and paid employees in groups in relationship to other groups. Id., at *86-87.

It also found that in reaching compensation decisions it was important to each defendant to maintain internal equity — "the idea that employees doing the same work would generally be

paid similarly — in both hiring and promotions." Id., at *93. Thus, if a defendant is forced to raise an employee's salary either in anticipation, or as the result, of solicitation by another employer, the defendant would increase the pay of other employees to maintain internal equity. Id., at *86-101. The court found that these conclusions were supported by substantial documentary evidence and the testimony of plaintiffs' experts.

The defendants argued that managers exercised broad discretion when setting and adjusting salaries and that in making compensation decisions, they valued performance over internal equity. As a result, they contended that compensation decisions were highly individualized and would require a case-by-case determination. The court rejected these arguments finding that they were supported principally by declarations drafted for purposes of litigation and were inconsistent with contemporaneously created documents. The court also found the criticisms lodged by defendants' experts against the testimony of plaintiffs' experts unpersuasive because, among other things, they were "conclusory and contrary to the overwhelming evidence in the record." Id., at *150-151.

Finally, with respect to damages the court concluded that the formulaic model for calculating damages created by plaintiffs' expert satisfied the requirements of Rule 23(b)(3). Id., at *167 177.

Implications for Employers

As noted above, roughly six weeks before the court's certification decision High-Tech, the Eastern District of Michigan certified a class of over 20,000 nurses in a wage suppression case involving the exchange of wage information. Cason-Meranda, 2013 U.S. Dist. LEXIS 131006, at *22. But prior to these two decisions, plaintiffs had struggled to obtain class certification in wage suppression cases because of the inability to show antitrust impact and damages on classwide basis.

See Weisfeld v. Sun Chemical Corp., 84 Fed. Appx. 257 (3rd Cir. 2004) (upholding denial of class certification in a "no hire" wage suppression case); Reed v. Advocate Health Care, 268 F.R.D. 573, 596 (N.D. Ill. 2009) (denying class certification in a wage suppression wage exchange case); Fleischman v. Albany Medical Center, No. 06-cv-765, 2008 U.S. Dist. LEXIS 57188, at *22 23 (N.D.N.Y. Jul. 28, 2008) (denying certification on the issues of impact and damages in a wage suppression wage exchange case); In re Compensation of Managerial, Professional & Technical Employees Antitrust Litigation, MDL No. 1471, 2003 U.S. Dist. LEXIS 22836, at *15 (D.N.J. May 22, 2003) (denying class certification in a wage suppression wage exchange case). But see Johnson v. Arizona Hospital and Healthcare Association, No. CV 07-1292-PAX-SRB, 2009 U.S. Dist. LEXIS 122807, at *39 (D. Ariz. Jul. 14, 2009) (denying certification of a class of traveling nurses but granting certification of a class of per diem nurses in a wage fixing wage suppression case). But the court in High-Tech distinguished each of these cases on the grounds that they lacked "the comprehensive documentary record present in the instant case." See High-Tech, 2013 U.S. Dist. LEXIS 153752, at *42-43, n.7. And the court in Cason-Merenda distinguished each of the wage exchange cases on various grounds. Cason-Merenda, 2013 U.S. Dist. LEXIS 131006, at *33 45.

It is too early to tell whether these decisions are anomalies or whether plaintiffs' certification theories will prove applicable to other wage suppression cases. See Fleischman v. Albany Medical Center, 06-CV-0765, 2010 U.S. Dist. LEXIS 23727, at *18-21 (W.D.N.Y. 2010) (finding that a similar benchmark opinion proffered by the same expert that was used by plaintiffs in Cason-Merenda failed to demonstrate that classwide antitrust impact can be shown with

common proof). But certainly the ability to certify a large class of employees greatly raises the stakes in wage suppression cases. Counsel for plaintiffs in High-Tech was reported as stating that damages in that case are estimated to be in the hundreds of millions of dollars, and in Cason-Merenda the plaintiffs seek damages of $1.79 billion. Detroit Medical Center's Petition for Permission to Appeal From Class Certification Order at 18, Cason-Merenda v. VHS of Michigan Inc., Case 13-113 (6th Cir.) (Document 006111833963, 9/27/2013).

As in any large class action, certification applies significant pressure on defendants to settle regardless of the merits. And, as noted in Cason-Merenda, under the antitrust laws there is joint and several liability among the conspiring defendants for the losses of all employees in the relevant market, with no right of contribution from other defendants. Cason-Merenda, 2013 U.S. Dist. LEXIS 131006, at *71 72. Thus, there is additional pressure to settle early so that you are not stuck "holding the bag."

The solution should be easy, right? Employers should simply refrain from agreeing not to hire or solicit one another's employees and from exchanging wage information in ways that do not conform to statement six of the Statements of Antitrust Enforcement Policy in Health Care promulgated by the U.S. Department of Justice and the Federal Trade Commission. Statement Six provides guidelines by which employers may participate in wage surveys; if the conditions of Statement Six are satisfied, then absent extraordinary circumstances, the DOJ and FTC will not bring enforcement proceedings.

Unfortunately, that is more difficult than it sounds. A large number of managers and executives, and, indeed, many non-antitrust lawyers, are not aware that the antitrust laws apply to the employment marketplace. They think of the antitrust laws as regulating commercial competition, not employment. Covenants not to compete are commonplace and rarely raise antitrust concern, so what is the problem with agreeing with another employer not to hire each other's employees? There are many surveys in the marketplace which disclose salaries and wages, so why is there a problem with conducting a wage survey directly with human resource representatives of competing employers? Similarly, antitrust compliance policies almost invariably prohibit discussing prices with competitors. But few emphasize the risks inherent in exchanging wage or benefit information or in agreeing with a competitor not to hire or solicit one another's employees.

But if plaintiffs are able to apply the decisions in High-Tech and Cason-Merenda in other wage suppression cases, then the risks for employers greatly increase. Thus, employers should make sure that their managers and executives are aware of the risks associated with no-hire and nonsolicitation agreements and of exchanging wage and benefit information in ways that do not comply with DOJ and FTC policy statements. This is probably best accomplished by ensuring that these employment issues are explicitly addressed in the employer's antitrust compliance policies. Special emphasis should be directed at human resources and compensation personnel to ensure that they understand the issues and can comply.

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