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Lawyers Weigh In On Supreme Court's FLSA Ruling

Law360, New York (April 16, 2013, 9:28 PM ET) -- The U.S. Supreme Court found Tuesday that a nurse's putative Fair Labor Standards Act collective action against Genesis Healthcare Corp. cannot proceed because the employer's offer of full relief for her individual claims rendered the case moot. Here, employment attorneys tell Law360 why the 5-4 ruling in Genesis HealthCare Corp. et al. v. Laura Symczyk is significant.

Richard Alfred, Seyfarth Shaw LLP
"Genesis is most important because of the distinction the Supreme Court has now expressly recognized between FLSA collective and Rule 23 class actions. Unlike a Rule 23 certified class, a conditionally certified collective has no independent legal status and exists only as a procedure to allow the sending of court-approved notices to “similarly situated” employees. While in the context of a Rule 68 offer, Genesis should broadly impact the way FLSA collective actions are litigated, not as true representative class actions, but as the joinder of parties plaintiff, allowing discovery and trial of individual rather than representative claims."

Alexandra Bak-Boychuk, Ballard Spahr LLP
"When it comes to Rule 68 offers of judgment in FLSA cases, the significance of Genesis ... may be largely academic. On paper, the decision reaffirms the conceptual differences between Rule 23 actions and FLSA collective actions, and how those differences impact traditional notions of mootness. But the Supreme Court did not decide, for once and for all, whether an unaccepted Rule 68 offer moots an individual plaintiff's claims. Practically speaking, it remains an open question for judges to decide whether their jurisdictions recognize that a plaintiff's claim may be satisfied without that plaintiff's consent."

Bill Berger, Brownstein Hyatt Farber Schreck LLP
"This case raised an important issue — whether employers who face extremely costly class action litigation, including in this case a collective action under the Fair Labor Standards Act, can moot the lawsuit by "picking off" the named plaintiff and offering to pay them everything to which they are entitled. The Supreme Court had a chance to address the issue. It could have told us if this "pick off" tactic is permitted. Unfortunately, the court did not. It held, basically, that the individual hadn't preserved their arguments adequately, sidestepping the issue. As Justice [Elena] Kagan points out in the dissent, this decision "aids no one, now or ever." On the other hand, the Supreme Court is generally wise to rule only when the facts and law, as preserved on appeal, require its oversight. This sends the issue back to percolate in the lower courts."

Allan Bloom, Paul Hastings LLP
"Aside from the strict application, the decision is significant as it advances the argument that there is no fundamental, inalienable right to bring a collective action under the FLSA. Many putative wage and hour class actions are filed with one or only a few named plaintiffs, by counsel seeking to publicize the lawsuit through the notice process and generate additional plaintiffs. Genesis HealthCare confirms that the constitutional requirement of having a live controversy also applies in the FLSA context. Employers should have all manner of tools available to avoid protracted litigation and its attendant costs and burdens, including the ability to pursue an early resolution."

Thomas R. Bundy III, Sutherland Asbill & Brennan LLP
"Although the court's holding appears to add another arrow to the defendant's quiver of strategies in FLSA cases, its practical impact in other cases may be limited. As emphasized in the dissent, the court expressly declined to address an underlying circuit split over the effect of unaccepted offers of judgment. As a result, a defendant's ability to rely on the strategy used in Symczyk will likely still depend on jurisdictional variations in the law."

Catherine M. Foti, Morvillo Abramowitz Grand Iason & Anello PC
"Although today's Supreme Court decision is limited by the assumption that the plaintiff's claim was moot, the majority's decision strongly suggests that a sufficient Rule 68 offer of settlement will extinguish a representative plaintiff's claim, thereby giving employers a mechanism by which they can cut the legs out from FLSA collective actions."

Fred Gants, Quarles & Brady LLP
"The decision has significance in that employers may be able to effectively stop a class action by paying an individual's legitimate wage claim. The Supreme Court, in a series of decisions in recent years, has been striking down class and collective action claims. As a practical matter, the court's decision to dismiss the lawsuit based on lack of subject matter jurisdiction is another strike against collective actions in FLSA cases."

Patrick F. Hulla, Ogletree Deakins Nash Smoak & Stewart PC
"There are several trends that will likely emerge from this decision. First, for collective actions in their infancy, we should expect more plaintiffs to move for conditional collective action certification to be filed shortly after complaints are filed. To avoid the court's ruling, more and more of these cases are likely to be pled as hybrid class and collective actions. Likewise, to avoid the Rule 68 bar, plaintiffs will likely begin filing more cases in state court under state law. Now, it would be ideal if the Supreme Court would consider the incompatibility of hybrid cases, which may be more attractive if substantially more wage and hour claims that are filed in federal court include an analogue state law claim. Perhaps the court was hinting at this eventuality by stating 'Rule 23 actions are fundamentally different from collective actions under the FLSA.'"

Amy Jensen, Hinshaw & Culbertson LLP
"This is a good decision for employers, particularly those facing class or collective actions. An ... interesting situation arises when the representative employee-plaintiff's claim is resolved through a 'pick off' settlement and the action becomes 'headless.' What does that mean for the remaining class or collective action claimants, particularly where they exist in theory only? That's what the Supreme Court considered in Genesis, and they ultimately concluded that, depending upon the circumstances and the stage of the case, if the representative employee-plaintiff's claim is rendered moot, she has no personal interest in representing the putative claimants, and therefore, the case was subject to dismissal. The court was quick to point out, however, that the rules applicable in a typical class action are not necessarily similarly applicable in a collective action. Employers facing similar class or collective claims should work closely with counsel to ensure that they comply with all applicable state and federal laws in resolving such actions in order to ensure that they receive the anticipated benefit of the chosen method of resolution."

Tom Kaufman, Sheppard Mullin Richter & Hampton LLP
"An area where this case might have some impact is on the question of whether FLSA collective claims are subject to mandatory individual arbitration. This case seems pretty clearly to say that there is no important interest in representing other employees under the FLSA. That runs counter to the notion that compelling individual arbitration of an FLSA claim somehow does violence to Congress' intent in setting up the collective action process. The majority here is the same majority in all the pro-arbitration decisions."

Wendy Lazerson, Sidley Austin LLP
"The decision is less significant as a statement of new law than a reflection of a continuing trend to greet with skepticism the collective class process. At the core of the case was a plaintiff who could have had everything she could possibly ask for, yet she (or her attorneys) did not accept the proffered relief she demanded. The majority decision demonstrates an impatience with the potential misuse of the collective action process. Equally striking is the adamant tone of the dissent which highlights the court's choice to pursue its desired result when the court could have easily chosen to address the waiver issue."

Tim Long, Orrick Herrington & Sutcliffe LLP
"There are two take-aways from Symczyk in favor of the defense. First, there is nothing wrong with trying to 'pick off' plaintiffs who file collective actions. And in those circuits that hold (for now) that a Rule 68 offer that fully satisfies a plaintiff's claims is sufficient by itself to moot an action, making such an offer a powerful weapon to potentially shut down a putative collective action. Second, noting that conditional certification does not produce a class with an independent legal status and that conditional certification is 'not tantamount to class certification under Rule 23' a defendant could make Rule 68 offers even after a court grants conditional certification."

J. Timothy McDonald, Thompson Hine LLP
"The court's language in its decision will add fuel to a boiling dispute in wage-and-hour collective actions under the FLSA: How much do the principles applicable to class actions under Federal Rule of Civil Procedure 23 apply to FLSA collective actions after the court's historic decision almost two years ago in Wal-Mart Stores Inc. v Dukes? Since Dukes, courts are widely split on that issue. In today's decision, the majority — which is constituted by justices in the majority in Dukes — notes that there are "significant differences" between the two, but stops far short of saying that Rule 23 cases like Dukes have no applicability to FLSA collective actions. The real impact of this decision may ultimately be felt more on this broader issue."

W. Daniel "Dee" Miles III, Beasley Allen Crow Methvin Portis & Miles PC
"This 5-4 decision is best described by Justice Kagan in her dissenting opinion as 'wrong, wrong and wrong again.' A case where a plaintiff never accepted an employer-defendant's offer of judgment and the majority concludes not only is her claim 'moot,' but anyone who may be similarly situated with a FLSA claim is also 'moot?' Furthermore, as Justice Kagan correctly stated, 'the majority's decision — founded as it is on an unfounded assumption — would have no real-world meaning or application. The decision would turn out to be the most one-off of one-offs….That is the case here.' Justice Kagan (joined by Justices [Ruth Bader] Ginsburg, [Stephen] Breyer and [Sonia] Sotomayor) correctly conclude that today's opinion in Genesis has virtually no practical application to the practice of law in the FLSA arena."

Kevin Ranlett, Mayer Brown LLP
"Genesis ... is of enormous importance. Under the FLSA, an employee can bring a collective action for damages for violations of the act not only for himself or herself, but also for other "similarly situated" employees, who have the right to 'opt in' to the lawsuit. In this case, the court held that when an employee's individual claims under the FLSA have been mooted by the defendant's offer of judgment for full relief, if no other employees have yet opted into the lawsuit, the lawsuit should be dismissed as moot. The dissenting justices argued that the court's holding is limited to this case only. But the logic of the majority's decision applies to all FLSA collective actions — and potentially to class actions in general — and thus promises to give businesses a powerful method of settling named plaintiffs' claims in the context of meritless collective and class actions. If a business is willing to pay the named plaintiff's demand in full at the very outset of the case, the Supreme Court's decision suggests that a plaintiff may be barred from pursuing a collective or class action and subjecting the business to the enormous costs of classwide discovery in an effort to coerce a blackmail settlement."

Manesh Rath, Keller and Heckman LLP
"The Supreme Court arrived at the logical conclusion that a plaintiff who has been made whole should not be permitted to proceed with her action merely to enrich her counsel and other members of a yet uncertified class. This decision does not permit employers to 'pick off' lead plaintiffs; rather, it rightly permits employers to step forward and fully settle a plaintiff's complaint quickly and efficiently."

Adam Saravay, McCarter & English LLP
"I expect to see more offers of judgment at the very early stages of FLSA collective actions, with a lot of litigation over whether an unaccepted offer of judgment moots a plaintiff's claim. The Supreme Court assumed without deciding that such a claim would be moot, but it noted that the courts of appeals have split on the issue. Plaintiffs' lawyers will be more likely to file collective action cases with multiple plaintiffs, or with additional plaintiffs filing opt-in consent forms as soon as the complaint is filed. Lawyers for both employees and employers had hoped that the court would clarify the similarities and differences between Rule 23 class actions and FLSA collective actions. The majority opinion states very clearly that the two are different, and it says that "conditional certification" of an FLSA collective action does not produce a class, but it does not provide much guidance on the standards for certification of a collective action, so we'll have to wait for another case to resolve those issues."

John A. Zaloom and Karin M. McGinnis, Moore & Van Allen PLLC
"Genesis ... changes the playing field in FLSA collective actions. FLSA plaintiffs (and their attorneys) for years have been able to use the FLSA collective action as a way to obtain settlement of perhaps questionable claims by inducing fear on the part of the employer of huge and expensive class litigation. One strategy employers have used is to try to settle with the class — which is an 'opt-in' class — before it grows. The Supreme Court's decision today shows that employers may be able to cut a collective action short by making a Rule 68 offer of judgment that covers all of the initial plaintiff's (or plaintiffs') damages and attorneys' fees. In Symczyk, the court held that the employer's offer of judgment to the plaintiff deprived the plaintiff of any personal interest in representing others in the litigation where nobody had opted in to the class at the time of the offer. Therefore, because there was no plaintiff or class member in the case with an interest in its outcome, the case was properly dismissed."

--Editing by John Quinn.