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U.S. Supreme Court Upholds Use of Representative Statistical Evidence to Establish Class-wide Liability in *Tyson Foods* Overtime Class Action

By John Scalia, Rebecca Carr Rizzo and Andrew J. Lauria*

In a much-anticipated decision, the U.S. Supreme Court recently affirmed a $2.9 million judgment in a class action for unpaid overtime wages against Tyson Foods Inc. (Tyson) in which employee class members relied on representative and statistical evidence to establish class-wide liability. The Court held that the class-member employees could establish class-wide liability through the use of representative and statistical evidence because the class members could have relied on such evidence to establish liability in individual actions. The Court explained that its decision was in line with its earlier class action decision in Wal-Mart v. Dukes, *because the employees in* Wal-Mart, *unlike those in the present case, were not similarly situated and therefore could not have prevailed in individual suits by relying on aggregate proof. The Court repeatedly emphasized, however, that it was not adopting "broad or categorical rules regarding the use of representative and statistical evidence in class actions." As a result of this decision, employers and their defense counsel no longer can argue that representative and statistical evidence is never permitted to establish class-wide liability.*

Background

The plaintiffs in the *Tyson* case are employees who work in the company's pork processing plant in Iowa. Their work requires them to wear protective gear, the exact composition of which depends on the specific tasks performed. Tyson compensated some, but not all, employees for the donning and doffing of their protective gear and, importantly, did not record the time that each employee spent on such donning and doffing. The federal Fair Labor Standards Act (FLSA) requires that employers compensate employees for the work activities they perform that are an integral part of, and indispensable to, their principal work activities. The plaintiffs filed suit alleging that Tyson unlawfully denied them overtime compensation under the FLSA, as well as Iowa's wage law, by failing to pay them for their time spent donning and doffing, which they asserted was integral and indispensable to their work. The plaintiffs sought certification of their state claims as a class action under Federal Rule of Civil Procedure (FRCP) 23 and certification of their FLSA claims as a collective action. To certify a class under FRCP 23, a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members."

To recover for their overtime claims, the plaintiffs were required to show that they each worked more than 40 hours a week, inclusive of the time spent donning and doffing their protective gear. Because Tyson had failed to keep records of the time spent by employees donning and doffing, the plaintiffs relied on expert evidence regarding the average time employees spent donning and doffing their protective gear. Notably, Tyson did not challenge the admissibility of this expert evidence before trial.

After the jury returned its $2.9 million judgment for the plaintiffs in unpaid overtime, Tyson moved to set aside the verdict, arguing, in part, that the fact that each employee has different donning and doffing times depending on their protective gear should have defeated predominance and precluded class certification. The plaintiffs argued that it could be assumed that each employee donned and doffed for the average times proffered by their expert. The United States District Court for the Northern District of Iowa denied Tyson's motion, and the United States Court of Appeals for the Eighth Circuit affirmed the judgment and the award.

Tyson presented two issues to the Supreme Court. First, it challenged the class certification of the state law and FLSA claims. Second, it argued that the employee plaintiffs must be required to demonstrate a method to ensure that uninjured class members do not recover any damages from the award.

The Supreme Court's Decision

As noted above, the Court affirmed the certification of the class based on the plaintiffs' expert statistical evidence regarding the average time employees spent donning and doffing their protective gear. Reasoning that representative evidence cannot be improper merely because the claim is brought on behalf of a class, the Court explained that "[o]ne way for [plaintiffs] to show, then, that the sample relied upon here is a permissible method of proving class liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action."

Of particular importance to the Court was the fact that the plaintiffs in this case were relying on a representative sample to fill in an evidentiary gap created by Tyson's own failure to keep adequate records. Relying on its earlier decision in *Anderson v. Mt. Clemens*, the Court affirmed the employment litigation principle that employees cannot be denied recovery on the grounds that they are unable to prove

the precise amount of time worked when the employer has failed to comply with its statutory duty to maintain proper records.

Addressing Tyson's reliance on the Court's earlier *Wal-Mart* decision, the Court explained that "*Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability." In *Wal-Mart*, the Court was faced with the more basic question of whether the class members shared a common question of fact or law—not the "predominance prong" at issue in *Tyson*. The plaintiffs in *Wal-Mart* had not provided significant proof that they each were subjected to a common policy of discrimination, and they attempted to overcome that absence of a common policy by relying on representative evidence. The Court found such usage of representative evidence impermissible given the fact that the plaintiffs were not similarly situated. Unlike the plaintiffs in *Tyson*, the *Wal-Mart* plaintiffs could not have prevailed in an individual action using such representative evidence.

While the Court affirmed the use of representative evidence to certify the class in the instant case, it made clear that such evidence will not always be permissible or persuasive. For example, the Court asserted that "[r]epresentative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate assumption of the uncompensated hours an employee has worked." But here, Tyson did not raise any challenge to the substance of the expert evidence.

The Court also made clear throughout its opinion that it was not establishing any general or broad rules regarding the use of statistical evidence in class actions—whether to include or exclude such evidence. Rather, "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action.... The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases."

The Court declined to address the second question presented by Tyson—whether the employees must demonstrate a method to ensure that uninjured class members of the class do not recover any damages from the award. According to the Court, although the question is "one of great importance[,]" it was not properly before the Court because the damages award had not yet been disbursed and the record did not indicate how the damages were to be disbursed.

Lessons for Employers

The *Tyson* decision was based on narrow reasoning and the specific facts and circumstances of the case. Nonetheless, there are still lessons employers can learn from this decision:

- To mitigate the risk of individual or collective FLSA actions, employers should ensure that their employees are receiving credit for *all* compensable time worked—including time spent on activities that are not work in and of themselves but that are an integral part of, and indispensable to, employees' principal work activities.

- To maximize their ability to successfully defend against such claims, employers should ensure that they maintain accurate time records reflecting all compensable time. (Had Tyson done so, it might well have avoided class certification based on representative evidence.)

- Take note that some states have a more expansive definition of compensable time worked than others. In California, for example, employees are to be compensated for all hours they are subject to the control of the employer, regardless of whether preparatory work is an integral part of their principal work

activities. Employers should ensure that their employees are being compensated for and recording all time worked, as defined by applicable state law as well as federal law.

- When defending employment litigation in which plaintiffs are relying on statistical sampling, employers should consider challenging the admissibility of such evidence before trial.

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If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

John Scalia (bio)
Washington, DC
+1.202.663.8174
john.scalia@pillsburylaw.com

Rebecca Carr Rizzo (bio)
Washington, DC
+1.202.663.9143
rebecca.rizzo@pillsburylaw.com

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