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U.S. Supreme Court Permits Use of Representative Statistical Evidence to Support Class Certification in FLSA Unpaid Overtime Case

Earlier this week, in *Tyson Foods, Inc. v. Bouaphakeo*, the United States Supreme Court issued a decision that makes it easier for groups of employees to maintain wage-hour claims against their employer in a collective action by permitting the use of representative statistical evidence to support class certification.

In *Bouaphakeo*, a class of Tyson Foods employees alleged that the company failed to pay them for time spent donning and doffing personal protective equipment (PPE) before and after their shifts. Because neither Tyson nor the employees kept records of how much time the employees actually spent donning and doffing the PPE, the employee class sought to establish the amount of time that those tasks took through time study estimates conducted by experts hired by the class, known as “representative evidence,” and the trial court approved this approach. The case was presented to a jury, and the jury concluded that the class members should have been paid for their donning and doffing activities. Using the information presented by the experts’ time study, the jury awarded \$2.9 million in damages to the class.

On appeal, Tyson argued that the trial court should not have permitted the case to go forward as a class or collective action, because the statistical method used assumed that each member of the class spent the same amount of time donning and doffing. Tyson argued that this question should have been addressed based on individual inquiries of each class member, and because of that, the case should not have been permitted to go forward as a class or collective action. The Supreme Court rejected Tyson’s argument, holding that in the circumstances of this case, it was appropriate to use the representative evidence, since the lack of time records for the donning and doffing time meant that each class member would have had to rely on the same time study evidence to establish his

or her claims.

While the *Bouaphakeo* case presents a relatively fact-specific issue, it highlights the high stakes that employers can face if a pay practice that is applied to a group of employees is deemed to be improper. Even though the donning and doffing time for one employee was only a few minutes each day, when that time is spread over hundreds of employees and two or three years, the potential liability can add up quickly.

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