Tolling in collective actions under the Fair Labor Standards Act

An important difference between class actions and collective actions: Equitable tolling

By Brian J. Malloy

Class actions under the Fair Labor Standards Act ("FLSA") proceed under the collective action procedures of 29 U.S.C. § 216(b). (See generally *Hoffmann-LaRoche, Inc. v. Sperling* (1989) 493 U.S. 165.) Class actions under the Age Discrimination in Employment Act ("ADEA") borrow the procedure set forth in 29 U.S.C. § 216(b). (See 29 U.S.C. § 626(b).)

There are a number of differences between class and collective actions. In a collective action, unlike a class action which requires a party to opt-out or the party will be bound to the settlement or judgment, the party must join the case or will not benefit from any settlement or judgment in the collective's favor. There are also different standards for certifying a collective action, involving a two-stage process, where in the first stage the plaintiff moves for conditional certification in order to have the court certify the collective for purpose of authorizing notice to the employees, allowing them an opportunity to join the case. (See generally *Campbell v. City of Los Angeles* (9th Cir. 2018) 903 F.3d 1090.)

This article will deal with another important difference between class actions and collective actions: equitable tolling of the statute of limitations. The filing of a class action tolls the limitations period for all other putative class members. Significantly, that is different than a collective action: The limitations period continues to run for all putative collective action members until either the employee joins the case or the court issues an order tolling the limitations period. (See 29

U.S.C. § 256.) This article will highlight when a request for equitable tolling should be made and the grounds to make a successful request.

Timing of tolling

The statute of limitations for a violation of the overtime provisions of the FLSA is two years, which is extended to three years if the violation is willful. (29 U.S.C. § 255(a); *Flores v. City of San Gabriel* (9th Cir. 2016. 824 F.3d 890, 906.) In other words, an employee who files a consent to join may assert overtime violations occurring up to two years back (or three if a willful violation). Because this limitations period continues to run until the putative collective action member joins the case or the court issues a tolling order, it is important to raise this issue early in the case. A factor in whether to toll is whether the plaintiff acted reasonably, so you need to move quickly.

One way of seeking tolling is to ask for a stipulation of tolling so the parties do not have to engage in motion practice over the issue. This may not be futile, since it may allow time to explore an early resolution. If that does not work, then you will need the court's intervention. You can file a separate motion for tolling early on in the case, even before the initial case management conference. This will show the court that you are serious about having this issue addressed upfront.

Another option is to ask for tolling at the initial case management conference. Typically, anywhere from 90 to 120 days after a complaint is filed, the federal district court will hold this initial conference. A detailed case management statement is typically filed beforehand, and you should raise the tolling issue here.

Finally, a third and common option is to request tolling when you move for first-stage conditional collective action certification, either in the motion itself or in a separate motion specifically addressing tolling.

Grounds for tolling

Whether to toll the limitations period is entirely up to the district court's discretion. There are several grounds to urge for tolling. The overriding equitable considerations are whether circumstances exist that prevented the plaintiff from asserting a claim due to wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control make it impossible to file a timely claim. (See *Stoll v. Runyon* (9th Cir. 1999) 165 F.3d 1238, 1242 ; *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1113.)

Court-ordered stays preventing motions for certification

Case law from across the country, including in the Northern District of California, uniformly holds that where there is a court-imposed stay the FLSA limitations period should be tolled during the pendency of the stay. (See *Hughes v. S.A.W. Entertainment, LTD*, 2017 WL 6450485, at *3 (N.D. Cal. Dec. 18, 2017) (Beeler, M.J.); *McElrath v. Uber Techs., Inc.*, 2017 WL 1175591, at *5-7 (N.D. Cal. Mar. 30, 2017) (Corley, M.J.); *Coppernoll v. Hamcor, Inc.*, 2017 WL 1508853, at *2-4 (N.D. Cal. Apr. 27, 2017) (Alsup, J.); *Cilluffo v. Cent. Refrigerated Servs., Inc.*, 2012 WL 8523474, at *3 (C.D. Cal. Nov. 8, 2012); *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 199 (S.D.N.Y. 2006) ["Where parties are ordered or agree by stipulation to suspend proceedings during the pendency of legal proceedings, the time during which a party is prevented from obtaining legal relief is not counted for purposes of statutes of limitations."]; see also *Castle v. Wells Fargo Fin., Inc.*, 2007 WL 1105118, at *1 (N.D. Cal. Apr. 10, 2007) (Illston, J.).)

If the defendant is asking for a stay for some reason, and the court ends up granting the stay, equitable principles favor tolling the limitations period. (*Koval v. Pacific Bell Tel. Co.*, 2012 WL 3283428, at *7-8 (N.D. Cal. Aug. 10, 2012) (Wilken, J.) ["Because the Court chooses to use its discretion to stay the federal case at [the defendant's] request, it also equitably tolls the statute of limitations for the putative collective action members from the date of the filing of the instant federal action through the date on which the stay is lifted . . ."].)

A court-imposed stay is a matter beyond the plaintiff's control, which also makes it effectively impossible for a plaintiff to move for conditional certification.

Other court-related issues that prevent the filing of a conditional certification motion

A similar ground for seeking tolling is where the court has imposed some delay in the proceedings impacting the ability to file a certification motion, even without a formal stay order.

For example, tolling was found appropriate where the court ordered the parties to a settlement conference. (See *Helton v. Factor 5, Inc.*, 2011 WL 5925078, at *2 (N.D. Cal. Nov. 28, 2011) (Armstrong, J.).) Tolling was also found appropriate where the court delayed ruling on the conditional collective action certification motion pending a ruling on the defendant's motion to dismiss. (See *Stickle v. SCIWestern Market Support Center, L.P.*, 2008 WL 4446539, at *21-22 (D.Ariz. Sep.30, 2008).) Where the hearing on a motion or a delay in issuing a ruling occurs, tolling should be ordered. (See, e.g., *Syed v. M-I, LLC*, 2014 WL 6685966, at *10 (E.D. Cal. Nov. 26, 2014); *Warren v. Twin Islands, LLC*, 2012 WL 346681, at *3-4 (D. Idaho Feb. 2, 2012).)

These are just some examples of issues that arise in litigation that, while not reaching the state of a formal stay order, nevertheless delayed the plaintiff's attempt to get notice of the case with an opportunity to join to the affected employees through a conditional certification motion.

Defendant's conduct, particularly in discovery, prevented a more timely conditional certification motion

Another ground for seeking tolling is where the conduct of the defendant has prevented a conditional certification motion from being timely filed. Equitable tolling is particularly appropriate when motion practice and discovery disputes

prevent a certification motion from being more timely filed. (See *Adams v. Inter-Con Sec. Systems, Inc.*, 242 F.R.D. 530, 542-543 (N.D. Cal. 2007) [tolling warranted where defendant delayed producing information]; *Barghout v. Bayer Healthcare Pharm.*, 2013 WL 12322094, at *3 (D. N.J. May 31, 2013) [tolling limitations period where "the hotly contested discovery disputes and procedural delays prolonged discovery notwithstanding Plaintiffs' diligence in pursuing their claims and moving the matter forward"]; *Bolletino v. Cellular Sales of Knoxville, Inc.*, 2012 WL 3263941, at *4 (E.D. Tenn. Aug. 9, 2012) [tolling limitations period when "the delay became exceptional when the Defendants moved to stay the discovery in this matter"].)

Case-specific or other circumstances that make it equitable to toll

The decision to toll is one based on equitable factors. So, there may be issues in your case that do not meet any of the above criteria but are nevertheless grounds for tolling. (See *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2007 WL 707475, at *8 (N.D. Cal. Mar. 6, 2007) (Conti, J.); *Antonio-Morales v. Bimbo's Best Produce, Inc.*, 2009 WL 1591172, at *1 (E.D. La. Apr. 20, 2009) ["Courts routinely grant equitable tolling in the FLSA collective action context to avoid prejudice to actual or potential opt-in plaintiffs that can arise from the unique procedural posture of collective actions under 29 U.S.C. § 216(b)."].)

For instance, some courts are open to tolling as they recognize the unique nature of opt-in collective actions. (See, e.g., *Struck v. PNC Bank N.A.*, 2013 WL 1142708, at *6 (S.D.Ohio Mar.19, 2013) [equitably tolling FLSA statute of limitations from date plaintiffs sought to notify putative class members of pending action]; *Stransky v. HealthONE of Denver, Inc.*, 2012 WL 2190843 (D.Colo. June 14, 2012).)

As an example of a case-specific circumstance, an employer is required to post a notice informing employees of their rights under the FLSA. (29 C.F.R. § 516.4; *Summa v. Hofstra University*, 715 F.Supp.2d 378, 387 (E.D.N.Y. 2010) ["the FLSA requires that employers post a notice explaining the Act's requirements 'in conspicuous places . . . where such employees are employed so as to permit them to observe readily a copy.'" (quoting 29 C.F.R. § 516.4)].) Courts have held that "the failure to post such notices advising employees of the right to earn minimum wage and overtime compensation equitably tolls the statute of limitations until an employee has actual notice of his or her rights under the FLSA." (*Ibid.* (citations omitted); see also *Cisneros v. Jinny Beauty Supply Co., Inc.*, 2004 WL 524482, at *1 (N.D.Ill. Feb. 6, 2004) ["We agree with our colleague in this district that an employer's failure to post the notice required by 29 C.F.R. § 516.4 tolls the FLSA statute of limitations until an employee acquires a general awareness of his rights under the FLSA."]; *Henchy v. City of Absecon*, 148 F.Supp.2d 435, 439 (D.N.J. 2001); *Kamens v. Summit Stainless, Inc.*, 586 F.Supp. 324, 328 (E.D.Pa.1984) ["(a)n employer's failure to post a statutorily required notice of this type tolls the running of any period of limitations."] (citing *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1977).) Thus, if the employer has not posted this notice, this could be fertile ground for a tolling argument.

Conclusion

When filing a collective action under the FLSA, it is important to tackle the statute of limitations of putative collective action members right from the start. This article highlights some arguments to do so, but the overriding guideline in any case is whether "something" has occurred making it inequitable not to toll.


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