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## Despite Backlash, Florida To Remain FLSA Hotbed

By **Leigh Kamping-Carder**

*Law360, New York (November 18, 2009)* -- A concentration of low-wage workers, midsize businesses and vigorous plaintiffs firms has made Florida a favorite spot for Fair Labor Standards Act litigation, and despite a judicial backlash — one judge called the situation “out of hand” — the FLSA hot spot shows no signs of cooling down, according to lawyers.

In recent years, FLSA litigation has soared across the U.S., egged on by U.S. Department of Labor regulations that expanded overtime eligibility in 2004 and a perception that wage-and-hour suits are a relatively easy — and lucrative — form of employment litigation, lawyers said.

But no other jurisdiction has seen more FLSA activity than the U.S. District Court for the Southern District of Florida, with 1,609 suits filed in 2008, followed closely by the Middle District of Florida, with 1,419 new cases, according to the Administrative Office of the U.S. Courts.

The Southern District, which includes Miami, accounts for more than 28 percent of FLSA suits across the U.S., according to one judge.

Unlike other FLSA-heavy jurisdictions such as New York, Los Angeles and Chicago, Florida is not the home of corporate headquarters or large corporations. Nor does Florida law favor workers like California state courts, another hot spot of employment class actions, said Gerald L. Maatman Jr., co-chair of the class action defense group at Seyfarth Shaw LLP.

“I know I've scratched my head, and a lot of people have said, 'What is it about Florida that there's just this high level of filing?’” said Maatman, also is editor of the firm's annual workplace class action report.

For one thing, Florida has a high concentration of low-wage industries — hospitality, retail, construction, agriculture and childcare — that often breed employment violations, according to lawyers.

The state also attracts large populations of immigrant, nonlegal or non-English speaking workers, who tend to be less aware of their rights or less vocal about enforcing them directly with the boss, lawyers said.

While some employers may take advantage, others simply may not understand their compliance obligations, they said. Florida is dominated by small and midsize businesses, creating a “relatively unsophisticated employer community,” said Miami labor attorney Mark Neuberger, of counsel at Foley & Lardner LLP.

With a quieter union presence compared with other parts of the U.S., the state's labor disputes are less often resolved through collective bargaining or directly with employers, Maatman said.

These claims often end up in court, and a well-organized plaintiffs bar, armed with late-night advertising campaigns, has stepped up to handle them.

Perhaps the most prolific plaintiffs firm is Shavitz Law Group PA, which filed nearly a quarter of the FLSA suits in the Southern District in 2008. Meanwhile, Morgan & Morgan PA and the Pantas Law Firm PA handle the bulk of the cases in the Middle District, according to one judge.

“This is no longer the time where you can simply open up a business, bury your head in the sand and not take a look at your obligations under the law,” said Richard Celler, managing partner of the national employment law division at Morgan & Morgan, which claims to have 1,000 active clients in Florida.

It's no surprise that attorneys moved to wage-and-hour suits, looking for a way to “retire into the sunset with a new practice area,” especially after the state's workers' compensation law was “gutted” in 2003 and attorneys' fees were set on a contingency basis, Celler said.

Lawyers have found it easier to certify classes based on more technical wage-and-hour claims than on cloudier accusations of discrimination, they said. Frequently, finding evidence of alleged violations is simply a matter of searching employers' records.

Defendants routinely are liable for attorneys' fees, which often surpass the value of any recovery, lawyers note.

According to Celler, every suit Morgan & Morgan accepts has merit, and the firm often will take on a case regardless of financial gain.

“In a volume practice, we don’t need to squeeze every penny out of employers in attorneys’ fees,” he said.

Nevertheless, “there are certain firms that have essentially destroyed the good will created by other firms in trying to secure or maintain this area of practice for Floridians,” Celler added.

It's not difficult to see why judges, who repeatedly see the same names on case filings, might be getting fed up.

At least one of them, Judge Kenneth L. Ryskamp of the Southern District of Florida, has blamed Shavitz for the jurisdiction's lead in FLSA suits, adding that the surge is a “lawyer’s retirement bill” that has “gotten quite out of hand.”

Shavitz has filed more than 1,300 FLSA suits since 2000, with most of them resolved within three months and only one going to trial, Judge Ryskamp has noted. He has advocated requiring plaintiffs to send demand letters before filing suit against employers.

“What is very clear to me is that most defendants are saying, 'How much is it going to cost me to defend this case, and what is the claim?' and the claim is so small it would cost most to have the lawyers defend it, so they are basically nuisance-type claims that get bought off,” the judge said at a hearing related to one such case.

Judge Ryskamp has since recused himself from another overtime suit Shavitz filed on behalf of a sales associate at Abercrombie & Fitch Stores Inc.

Gregg I. Shavitz, the firm's founder, was not available for an interview.

However, the glut is not confined to Southern Florida. In the Middle District, FLSA litigation accounts for roughly 20 percent of all pending cases, according to one judge. Celler said he had suits in unassigned dockets “treading water in cyberspace” because there are no judges to rule on pending motions.

In an effort to move these cases quickly to settlement, the Orlando, Fla., bench imposed a courtwide scheduling order requiring plaintiffs to document the main points of their claims. Other courts have adopted the practice, as well.

Although Celler said he thought the idea worked in theory, he was wary of workers' rights becoming collateral damage in an attorney's pursuit of profits and a judge's need to mark his or her territory.

“Judges are supposed to be referees, and attorneys are mouthpieces,” he said. “We’re not supposed to be participants in the practice.”

While the bench grapples with clogged dockets, defense attorneys are working out their own strategies for dealing with the bombardment of FLSA suits, lawyers said.

The attorneys' fee provision of the law requires defense lawyers to litigate surgically, deciding immediately whether an employer should settle, Maatman said.

"Every case needs to have an exit strategy," he said. "That exit strategy needs to be put together very quickly. And that exit strategy is as important as the defense strategy."

Hiring experts and analyzing damages happens at the start of the case, rather than the end, and suits are generally concluding more quickly, with parties turning to a possible resolution much sooner than before, according to Maatman.

But the first wave of litigation is cresting, and plaintiffs' attorneys are becoming more creative, bringing "more sophisticated, second-generation" cases, he said.

"Every year when you think it can't get more, more gets filed, and you wonder when it's going to end," Maatman said, adding that it will likely take another few years before the number of FLSA suits filed in Florida begins to drop.

According to Celler, however, a decade or 15 years could pass before the courts see a decline in new filings.

With the economy in a landslide, employers are cutting corners, asking employees to work off the clock and laying the foundation for a fresh round of FLSA litigation, Celler said. Laid-off workers have little reason to remain loyal to former employers, he added.

Judge Ryskamp has advocated congressional review, but attorneys scoff at the idea that legislation changes could happen anytime soon.

Congress revisited overtime regulations in 2004, and with a prolabor administration in the White House, the likelihood of another overhaul is slim, Neuberger said.

At Morgan & Morgan, the number of potential intakes of wage-and-hour cases has tripled, according to Celler. The firm is adding new locations across the U.S., hiring additional lawyers at its Florida offices and promising to meet any fresh onslaught of FLSA clients with a smile, he added.

"We're not going anywhere," Celler said.