

HOT TOPICS AND TRENDS IN FLSA COLLECTIVE ACTIONS

J. Derek Braziel
Lee & Braziel, LLP
Dallas, TX
214-749-1400

jdbraziel@l-b-law.com
www.OvertimeLawyer.com

Kevin J. White
Hunton & Williams LLP
Houston, TX
713-229-5708

kwhite@hunton.com
www.hunton.com

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TOPICS

- *Bouaphakeo* and representative evidence
- Recent decisions regarding arbitration
- DOL administrative interpretation regarding joint employment
- *Oregon Restaurant and Lodging Association* and tip pooling

*Bouaphakeo**

- Key question Can a class/collective action be certified where liability and damages will be determined using statistical techniques (“representative evidence”)?
- Plaintiff brought a class action under Iowa law and a collective action under the FLSA for overtime related to donning and doffing gear.

**Tyson Foods , Inc. v. Bouaphakeo, 577 U.S. __ (2016)*

Bouaphakeo

Plaintiff’s expert performed a time and motion study on a sample of class members, determining the average time employees spent donning and doffing in two departments. The expert added the average time to the employee’s time worked and subtracted the donning and doffing time for which the employee had been paid to calculate any unpaid overtime.

Bouaphakeo

- District court certified the Rule 23 class and FLSA collective action. Jury found for the plaintiff. The 8th Circuit affirmed.
 - \$5.8M plus \$3M in Fees to 2015
- The Supreme Court, in a 6-2 decision, affirmed the judgment. Kennedy wrote the opinion. Roberts joined the majority but wrote a separate opinion.

Bouaphakeo

- Key to the opinion is the premise that, given the absence of employer records, any individual in the class could have properly used the study in an individual case to raise a reasonable inference of the amount of time spent donning and doffing. Thus, aggregating the claims in a class was also permissible.
- The Court distinguished *Dukes* because the study in that case could not be used by individuals to establish individual liability.

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