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Labor and Employment Alert: New York's Highest Court Rules that Pre-Certification Settlements Require Class Notice

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The New York Court of Appeals (the state's highest court) recently issued a potentially game-changing decision on pre-certification settlements in class actions. In *Desrosiers v. Perry Ellis Menswear*, the Court ruled that an individual settlement in a purported class action requires notice be sent to all putative class members – even though no class had been certified.

Desrosiers involved two wage-hour cases, initially filed as class actions. In both cases, the plaintiffs accepted pre-certification, individual settlements and the defendants moved to dismiss their complaints accordingly. The plaintiffs did not oppose the dismissals (having already released their claims in their settlement). Instead, the plaintiffs requested that the courts allow them to provide notice of the proposed dismissal to putative class members. The defendants objected because either the time for moving for class certification had expired or because no class had been certified. The lower courts rejected the defense arguments.

At issue on appeal was the interpretation of New York's Civil Practice Law and Rules (CPLR) §908, which provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The Court of Appeals (in a 4-3 decision) found that the text of CPLR 908 is ambiguous with respect to whether pre-certification notice is required.

The Court rejected the defendants' argument that the reference to "class action" necessarily meant a "certified" class action. The Court explained that a New York appellate decision in 1982 holding that notices must be sent to putative class members when there was a pre-certification individual settlement had never been overruled, nor had the New York Legislature acted on the issue. Given this, the Court determined that CPLR 908 applies to class actions that are settled or dismissed **even before the class has been certified**. "As a result, notice to putative class members of a proposed dismissal, discontinuance, or

compromise must be given.” The majority dismissed concerns that its ruling will likely create problems for class action defendants: “Any practical difficulties and policy concerns that may arise ... are best addressed by the legislature.”

This decision raises several practical considerations that employers must weigh when determining whether to settle a case pre-certification that is pending in state court. Who is a member of the class entitled to notice? And won't providing notice potentially stir up more litigants? As the dissent pointed out, because no class had been certified “it is unclear to whom notice was purportedly required. Not only would this uncertainty create administrative difficulties that would entail the expenditure of time and resources, the ultimate purpose of the notice appears, at most, to be to allow plaintiffs' counsel to identify more clients at the expense of the court and defendants.” The Court's ruling may thus discourage early settlement because notice and class data are now required when an individual settlement occurs in a case that includes class allegations. Contact your Vorys lawyer if you have questions about this decision or about other wage-hour matters.