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# Court Holds FLSA Exclusion In E&O Policy Inapplicable to Au Pair Class Action

BY:

In its recent decision in *Cultural Care, Inc. v. AXA Ins. Co.*, 2018 U.S. Dist. LEXIS 100679 (D. Col. June 15, 2018), the United States District Court for the District of Colorado, applying Massachusetts law, had occasion to consider the scope of a policy exclusion in a professional liability policy applicable to claims brought under the Fair Labor Standards Act and related wage laws.

AXA's insured, CCI, is a U.S. State Department designated sponsor of *au pairs* brought in from foreign countries. It was named as a defendant in a class action lawsuit alleging that it conspired to set the weekly pay rates for the *au pairs* below market rate in violation of state and federal law, including the FLSA. The suit set forth several causes of action, including ones based on RICO, restraint of trade, constructive fraud and negligent misrepresentation.

AXA denied coverage under the professional liability policy it issued to CCI primarily on the basis of an exclusion applicable to any "claim or Suit based upon or arising out of any violation of the Fair Labor Standards Act or any similar federal, state or local law pertaining to working conditions, hours, employee benefits or wages." AXA argued that the gravamen of the underlying suit was alleged violations of the FLSA and comparable state laws, and that the cause of action for negligent misrepresentation flowed from these violations.

In considering the exclusion, the court rejected AXA's argument that Massachusetts law permits an insurer to look at the "gravamen" or the "essence" of a complaint. Rather, the court observed that Massachusetts law requires examination of each of the causes of action independently. The court further reasoned that the exclusion did not apply to claims or suits that merely include a cause of action based on a violation of the FLSA or comparable laws, but rather that the exclusion applies only when a claim or suit arises exclusively or entirely from a violation of the FLSA or similar laws. In other words, as long as one cause of action potentially escapes the exclusion, AXA is required to provide a defense, regardless of whether the suit can be characterized primarily as an FLSA claim.

Based on this reasoning, the court concluded that the claim in the underlying suit for negligent misrepresentation potentially escaped the exclusion because it could be pled independently of the wage-related claims given the specific allegations in the complaint. As such, the court held that AXA breached its defense obligation by denying coverage for the suit.