

GONZALEZ
SABGIO
HARLAN

The GSH

60-Second Memo

November 9, 2011

Sponsored by the GSH Employment Group



**Gregory B. Gilmore,
Esq.**

www.gshllp.com

(973) 256-9000

Want more
information on this
topic?

[CLICK HERE!](#)

[Join Our Mailing List!](#)

Federal Litigation of Employment Claims: The Importance of Knowing When the Clock Begins to Run

By Gregory B. Gilmore, Esq.

There are a host of means by which employees (prospective, current, and past) can voice claims of discrimination, and employers must be prepared to respond to each method appropriately. Further, no matter how proactive an employer is in implementing new procedures and policies, how thorough its investigative process, and how responsive it is to claims, an employer may find itself named as a defendant in a lawsuit. Litigation of employment-related claims presents new challenges and involves unique considerations and decisions. For instance, employers defending a lawsuit filed in state court may, under certain circumstances, remove the case to federal court. There can be various tactical reasons for doing so, including different jury pools and judges, different procedures applied to the discovery process, and even the tactic of taking a plaintiff's counsel out of his or her chosen venue (and perhaps comfort zone). However, while all federal district courts apply the same statutory removal provisions - 28 U.S.C. §§ 1441 and 1446 - federal courts interpret and apply these procedures differently. Thus, it is very important for employers - or at least their legal counsel - to understand these differences so as to not make a mistake and be stuck in the court you do not want to be in. A very recent federal court decision hit home this very point.

In an employment discrimination case where the employer is the sole defendant, there is no dispute about the time period in which the defendant employer must seek to remove the case to federal court. Pursuant to 28 U.S.C. § 1446(b), the defendant employer must file a notice of removal "within thirty days after its

receipt, through service or otherwise, of a copy of the initial pleading" if it wishes to remove the case from state court to federal court. However, in cases involving multiple defendants - such as employment discrimination cases in which a plaintiff has sued his or her employer, as well as a co-employee - the federal circuits differ on the issue of when the time to remove the case from state court to federal court begins to run with respect to the defendants who were not the first defendant to be served with the complaint. On October 12, 2011, in [*Delalla v. Hanover Insurance*](#), No. 10-3933, 2011 WL 4823483 (3rd Cir. October 12, 2011), the United States Court of Appeals for the Third Circuit (covering Delaware, New Jersey, and Pennsylvania) weighed in on the issue and held that, at least in that circuit, each defendant has its own 30-day deadline to remove the lawsuit.

The *Delalla* court rejected the minority view adopted by the Fourth and Fifth Circuits, which holds that the 30-day "removal clock" starts to run for all defendants on the date that the first defendant receives a copy of the complaint (the "first-served rule"). Instead, the *Delalla* court chose to adopt the majority view - followed by the Sixth, Eighth, Ninth, and Eleventh Circuits - which holds that the 30-day "removal clock" starts to run separately for each defendant upon that defendant's receipt of the complaint (the "later-served rule"). The difference between the rules has major implications for defendants in multiple-defendant lawsuits who were not the first defendant to be served. For example, under the first-served rule, unless you were the first defendant to receive a copy of the complaint, you will have less than 30 days to file a notice of removal. In theory, under the first-served rule, a defendant's time to file a notice of removal could expire even before that defendant receives a copy of the complaint. Under the later-served rule, however, a defendant will always have 30 days from its receipt of the complaint to file a notice of removal, regardless of whether the defendant was the first or last defendant to receive a copy of the complaint.

In rejecting the first-served rule and adopting the later-served rule, the court in *Della*, in noticing the inequities of the first-served rule, stated that:

The first-served rule not only unfairly prejudices later-served defendants, but it creates a perverse incentive system that encourages further inequity. Under the first-served rule, a plaintiff who wishes to remain in state court benefits by serving a defendant who is indifferent to removal, and then waiting to serve other defendants who are more likely to wish to remove. The rule thus incentivizes plaintiffs to take advantage of the inequities inherent under the first-served rule. By protecting each defendant's right to removal without regard to whether other defendants were served earlier, the later served rule thus removes the incentive for "unfair manipulation by delaying service on defendants most likely to remove."

Plaintiffs that bring multi-defendant actions in state courts

**GONZALEZ
SAGGIO
HARLAN**

Office Locations:

Arizona
California
Connecticut
Florida
Georgia
Illinois
Indiana
Iowa
Massachusetts
New Jersey
New York
Ohio
Tennessee
Washington D.C.
Wisconsin

www.gshllp.com

within the Third Circuit, as well as the other circuits that follow the later-served rule (i.e., the Sixth, Eighth, Ninth, and Eleventh Circuits), will not be able to shorten a later-served defendant's 30-day time period to file a notice of removal by delaying service on that defendant until after the plaintiff has served another defendant in the action.

However, for cases filed in state court within federal districts that have not adopted the later-served rule, plaintiffs can employ this tactic. As such, it is vital that a defendant employer served with a state court complaint in a multi-defendant employment discrimination case immediately forward the complaint to its legal department or outside counsel to determine whether the action is removable and, if so, when the defendant must file its notice of removal. In state court actions within those circuits, even the slightest delay in doing so could foreclose a defendant's ability to remove the case from state court to federal court. Thus, while the mechanisms of removal may not be an everyday concern for most employers, not knowing where your particular circuit falls on the issue could prove costly.

*The 60-Second Memo is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.
Copyright 2011 Gonzalez Saggio & Harlan LLP. All rights reserved.*