Settling Wage/Hour Claims: Weighing Settlement Options, Negotiating Damages, and Ensuring Court Approval

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Today’s faculty features:

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Settling Wage & Hour Claims

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Section I: Evaluating When To Consider Settlement
When Should You Consider Settlement

- DOL Investigation
- Attorney Demand Letter
- Internal Audit
- During litigation
When Should You Consider Settlement

DOL Investigation

- Two years of back pay
- Usually no liquidated damages
- Current and former employees addressed
- Usually no civil penalties
- Can leverage prior success
- Avoids a public judgment
- Cooperation = more favorable results
When Should You Consider Settlement

**Attorney Demand Letter**

- Sophisticated/experienced plaintiff’s counsel
- Single employee versus group of similar-situated employees
- Disclosure issues
- Attorney’s fees impact on exposure
- May be able to leverage prior success
- Private settlement issues
When Should You Consider Settlement

**Internal Audit**

- Former employee problem
- Being proactive has benefits
- May not be able to satisfy the “bona fide” dispute requirement
- Private settlement issues, but can still seek DOL supervision or Court approval
When Should You Consider Settlement

During litigation

• Before or after discovery
• Collective or class certification
• Dispositive motion
When Should You Consider Settlement

Overall

Consider pre-litigation settlement under DOL supervision

Consider private pre-litigation settlements
Court Supervised Settlements
Obtaining Enforceable Settlement

- DOL Supervised Settlement
- Court Approved Settlement
- Private Settlement
Obtaining Enforceable Settlement

Court Approval

• Bona Fide Dispute

• Fair and Reasonable – Collective v. Class Action
Obtaining Enforceable Settlement

Court Approved Settlement

- Fraud
- Complexity
- Stage of case
- Probability of success
- Opinions of class counsel
- Liability, damages, and disposition risks
- Settlement fund
- Stipulation
Obtaining Enforceable Settlement

Court Approved Settlement

- Incentive Payments, generally ok
- Reversionary settlements, generally ok
- Settlement May Not Always Be Confidential
Obtaining Enforceable Settlement

Private Settlements

- Not all courts agree - recent trend
- bona fide dispute as to hours worked and amount owed
Section II: Assessing Risk of Exposure and Calculating Potential Damages

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Initial Assessment: Evaluating the Complaint

- **Basics** – Jurisdiction, Judge, & Plaintiff’s Counsel
- **Plaintiff** – What do you know about him / her?
- **The Law** – FLSA Claim / State Law Claim / Hybrid
- **Factual Grounds** – Are the stated facts sufficient to support the merits claims?
- **Collective / Class Action Allegations** – Too vague to survive? Too broad? Can it be limited to a facility, a state, or a region? Or is it national in scope?
Preliminary Exposure Analysis

- Rough analysis. Not intended to be perfect and detailed
- Key Factors
  - Statutes of limitations
  - Misclassification or “off-the-clock” case
  - Number of workweeks / people at issue
  - Number of hours at issue
  - Rate(s) of pay
Preliminary Exposure Analysis: Statute of Limitations

• Rule 23 – Applicable statute of limitations tolls as of complaint date
• FLSA – Class members’ opt-in dates
  • Plaintiff’s request for tolling
Preliminary Exposure Analysis: Type of Case

• FLSA Misclassification
  • Half-time, using fluctuating hours to determine regular rate (majority of courts use this method)
  • Time and a half for hours over 40, using 40 as the divisor to determine regular rate (minority view)
• Off-the-clock: Time and a half for hours over 40
• Other: Sometimes the time of time and a half has already been paid
Preliminary Exposure Analysis: Number of Workweeks / People at Issue

• Number of workweeks at issue provides the more accurate estimate of exposure.
• Number of people provides a less accurate estimate, but can be discounted based on tenure averages.
• Each will over-estimate unless discounted for weeks when no overtime would be worked.
• USDOL, Wage and Hour Division, uses 40 weeks out of a 52-week year (or approximately 77%).
• In FLSA cases, opt-in participation rates vary.
Preliminary Exposure Analysis: Number of Overtime Hours at Issue and Employee Rates of Pay

• Number of Hours at Issue
  • Early Stage: Use 2.5, 5, 10, 15 overtime hours, unless more exact estimate is available
  • Later Stages: Determine more accurate estimates derived from data points and discovery

• Employees Rates of Pay
  • Averages are okay
  • Actual is better
Preliminary Exposure Analysis: Example

- Weekly Salary = $800 Average Weekly Hours = 45
- Misclassification Case Using Half-Time:
  - $800/45 = Regular Rate of $17.78
  - $17.78 x .5 = Overtime Rate of $8.90
  - 5 x $8.90 = Weekly Overtime Pay of $44.50
- Misclassification Case Using Time and a Half:
  - $800/40 = Regular Rate of $20
  - $20 x 1.5 = Overtime Rate of $30
  - 5 x $30 = Weekly Overtime Pay of $150
- Half-Time = Less than a third
Exposure Analysis

- As case progresses, exposure analysis can be refined based on actual numbers
  - Opt-ins
  - Rates of pay
  - Workweeks
- During settlement discussions, calculators can be used to implement different variables to address disagreements among the parties.
Section III(B): Obtaining Enforceable Settlement Agreements from DOL
• Section 216(c): DOL supervised settlement constitutes a waiver of rights under 216(b)

• DOL can settle with employees over objections of plaintiff suing on behalf of employee

• WH-56/WH-58 Process vs. Settlement Agreement