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

THURSDAY, SEPTEMBER 14, 2017
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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SETTLING WAGE & HOUR CLAIMS
Weighing Settlement Options, Negotiating Damages, and Ensuring Court Approval

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Presentation Overview

01 FLSA: Background on the Act
02 Evaluating When to Consider Settlement
03 Settling FLSA & Hybrid Litigation
04 Quantifying Exposure
The Fair Labor Standards Act: Background
Early Supreme Court rulings made FLSA settlements difficult to achieve short of full-blown litigation.

• The Supreme Court issued several rulings within decade of FLSA’s passage emphasizing its important **private/public character** and, therefore, establishing different lens for viewing resolutions of disputes under the Act.

• One **cannot consent to work for less than what is prescribed by FLSA**. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942).

• In *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 704 (1945), Court held that absent **genuine dispute** over amount of compensation owed, employee could not **validly waive** full compensation, including **liquidated damages**. In essence: public policy concerns trump private contracting.

• A year later, in *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114 (1946), Court clarified that even when there is a **bona fide dispute** as to whether employer is **covered** by the Act, a release for liquidated damages is **not enforceable**.

• In *Gangi* (as in *O’Neil*), Court **left open** whether compromises of other types of bona fide disputes, “**such as a dispute over the number of hours worked or the regular rate of employment**,” could be permissible.
Congress responded in 1949 by amending FLSA to also allow settlements with supervision by DOL.

- Decisions in *O’Neil* and *Gangi* were criticized by business community for discouraging employers from voluntarily paying back wages.

- Around same time, the Court decided multiple other cases interpreting FLSA favorably for employees. These cases, most notably *Anderson v. Mt. Clemens Pottery Co.*, were catalysts for passage of Portal-to-Portal Act of 1947. Part of that legislation allowed private resolution of bona fide disputes as to compensation owed, but only with respect to cases pending at that time.

- Two years later, in 1949, Congress amended the Act to allow employees to settle FLSA claims, including claims for liquidated damages, under supervision of the Secretary of Labor.

- Amendments were designed to encourage employers to agree to voluntary settlements with the DOL’s Wage & Hour Division.
What is the role of Court and DOL in supervising FLSA settlements?

• **Majority View:**
  – FLSA claims are non-waivable and can only be settled with supervision of the DOL or a court. See *Lynn’s Food Stores v. DOL*, 679 F.2d 1350, 1355 (11th Cir. 1982) (pre-suit waiver not valid where back wages paid were well below amounts previously calculated by DOL and employees were not made aware of prior DOL calculations).

• **Minority View:**
  – In the Fifth Circuit, unsupervised settlements that resolve a bona fide dispute over hours worked or compensation owed under the FLSA are enforceable. See *Martin v. Spring Break ‘83 Prods., LLC*, 688 F.3d 247 (2012) (pre-suit agreement was binding and precluded FLSA claims, where plaintiffs were guided by labor union reps in settling).
    - But see *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159 (5th Cir. 2015) (no settlement of bona fide dispute if no factual development about hours worked and compensation owed, and FLSA claims were not actually bargained for)
Paths to settlement under procedural rules

• **Rule 41:**
    - Why is this important? If a plaintiff signs general release and stipulated dismissal and later learns about FLSA violations not part of earlier case, there is an argument that she may file or opt in to FLSA case and employer will not be permitted to use general release and stipulated dismissal to bar her from pursuing the later claims.

• **Rule 68**
  - District courts split regarding whether Rule 68 judgments of FLSA claims must undergo judicial scrutiny.
When to Consider Settlement
When to Consider Settlement

- **Timing**
  - What discovery is necessary? Before or after plaintiff’s deposition?
  - Before or after collective or class certification
  - Dispositive motion?
  - Easiest opportunities to raise discussion are when required by court:
    - At pre-discovery settlement conferences required by court
    - At court-mandated mediation

- **Merits**
  - Basics (jurisdiction, judge, opposing counsel and party)
  - The law (FLSA claim, state law claims) → does the complaint state a claim?
  - Collective/class allegations (employer questions: is it too vague, too broad?)

- **Principle**
  - Employee in particular:
    - What does employee hope to gain?
  - Employer in particular—cost, employee relations, media coverage, “me too” risk, closure:
    - Does the challenged practice go to our business model?
    - Do we foresee similar challenges to this aspect of the model?
    - Do we plan to keep the practice the same?
    - Is this an optimal time and place to defend the practice?
Some employers learn of wage-hour issues through proactive audits or one-off complaints.

• Reasons not to settle:
  – Private settlement issues (but can still seek DOL supervision or court approval)
  – May not be able to satisfy “bona fide” dispute requirement
  – Former employee problem
  – Being proactive has risks

• Reasons to consider settling:
  – Do the right thing
  – Do we need a release?
  – Offset always on table
  – Being proactive has benefits
Pre-Litigation: Attorney Demand Letter

**In some cases, litigation is preceded by an attorney demand letter.**

- Plaintiff’s perspective: when to send letter vs. file litigation?
  - Class v. individual claims
  - Additional data needed from employer?
  - Benefit to employer in cooperation/pre-litigation settlement/avoiding publicity?

- Employer’s perspective: how to assess demand letter?
  - Sophisticated/experienced counsel
  - Single employee versus group of “similarly situated” employees
  - Disclosure issues
  - Attorney’s fees impact on exposure
  - May be able to leverage prior success
  - Private settlement issues
Certainly a DOL-supervised settlement has benefits that private settlements may lack.

- 216(c) → DOL supervised settlement constitutes waiver of rights under 216(b)
  - To constitute valid 216(c) waiver, employee must “agree to accept the payment which the Secretary determines to be due by the Secretary, and there must be payment in full.” *Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977)
  - Must be signed release, but need not be WH-58 (and, in some cases, signed check is enough)

- DOL can settle with employees over objection of plaintiff suing on behalf of employee

- WH-56/WH-58 process vs. settlement agreement

- Other advantages
  - Two years of back pay
  - Usually no liquidated damages or CMPs
  - Current and former employees addressed
  - Can leverage prior success
  - Avoids a public judgment
  - Cooperation goes a long way
Settling FLSA and Hybrid Litigation
Settling FLSA and Hybrid Litigation

• When to settle
  – Pre- vs. post-conditional certification
  – Mediation considerations

• Seeking court approval of settlement terms
  – Standard for approval
  – Pre- vs. post-conditional certification
  – Settlement terms
When to Settle:
Settling Pre-Conditional Certification

• Ultimately, a strategic decision on both sides whether to enter settlement negotiations before collective action motion or decision.

• One option is to send notice to putative collective action members with option to opt into settlement—i.e., a claims-made settlement.
  – Pro: Possibility of finality with respect to more individuals.
  – Con: Possibility of copycat lawsuits from individuals who otherwise may not have pursued claims.

• Rule 68 offer (or tender of full payment to moot live controversy)?
  – Generally, must be comfortable with full compensation, entry of judgment, and potential use of judgment in other cases.
  – If accepted (or paid?), valid way to moot individual named plaintiff’s claim, even if case styled as collective action. See Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013); Campbell-Ewald Co. v. Gomez, 577 U.S. ___ (2016).
  – Unaccepted offer cannot moot named plaintiff’s individual claims or claims of putative class. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016).
When to Settle: Settling Post-Conditional Certification

- Major question is whether to give additional opportunity to opt into collective action to expand collective bound by settlement or to limit settlement only to those who opted in.

- How to ensure that those who opt in are bound by settlement?
  - Have each sign settlement agreement (if feasible).
  - Send notice to each that, if no rescission of consent, they will be bound by settlement.
  - Have each sign document that attorney has right to act on his/her behalf (will not be sufficient in states like CA where attorney’s signature is insufficient to bind client to settlement).

  - At notice stage, consider whether such a provision should be included on consent form.
When to Settle: Leveraging Mediation

• Who is the right mediator?
• Day-of techniques
  – Sharing mediation briefs
  – Sharing calculators
  – Joint sessions
  – Astronomical demands and lowball offers
• Breaking the impasse
  – Bracketing
  – The Mediator’s Proposal
  – How to close the deal
  – Next stop: court approval
Seeking Judicial Approval:
Standard for Approval of FLSA Settlements

- Must be fair and reasonable resolution of a **bona fide dispute**
- Relevant factors vary by jurisdiction, but generally include:
  - Complexity, expense, and likely duration of the litigation
  - Stage of proceedings and amount of discovery completed
  - Whether there is fraud or collusion behind the settlement
  - Probability of plaintiffs’ success on the merits
  - Range of possible recovery
  - Opinions and experience of counsel (and sometimes mediator or M.J.)
- Attorneys’ fees must be reasonable, but not all courts require determination that agreed amount of fees is fair
  - Percentage-of-recovery, percentage-of-fund, and/or lodestar methods
Seeking Judicial Approval: Lower Standard for Approval of FLSA Settlements?


- “Evaluation of an FLSA settlement is less rigorous than the court’s evaluation of a class action settlement because, under the FLSA, parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date.” Romero v. La Revise Assocs., LLC, 58 F. Supp. 3d 411, 421 (S.D.N.Y. 2014);

Seeking Judicial Approval: Settlement Terms

• Broad, general releases disfavored
  – May be approved if agreement includes consideration additional to FLSA consideration
  – Court may also consider whether release is mutual

• May include release of claims not presented if factual predicate is same as that of claims presented in active complaint
  – Can typically include state-law wage hour claims based on same facts
  – Cannot include claims of collective members while in a position not identified in active complaint
Seeking Judicial Approval: Spotlight on Confidentiality

- More and more courts finding that confidentiality provisions render FLSA settlement agreement unreasonable
  - See Armenta v. Dirty Bird Grp., LLC, 2014 WL 3344287, at *2 (S.D.N.Y. June 27, 2014) (“The overwhelming majority of courts reject the proposition that FLSA settlement agreements can be confidential.”).

- Confidentiality alternatives?
  - Some courts will allow parties to file under seal, submit for in camera review, or to read agreement into record
    - 4th Circuit: Court must give public notice and opportunity to challenge decision to keep agreement from public record
      - Terms requiring parties to keep terms of settlement agreement confidential would still be enforceable
    - Courts more likely to allow if follow 5th Circuit in holding no court approval required, but not all district courts in 5th Circuit allow parties to keep agreement off public record
  - Agreement not to publicize
  - Important to speak to the uncertainty in agreements
- **Incentive payments** → Courts generally approve up to $10,000—higher amounts would likely need extraordinary circumstances.

- **Reversions** → Generally okay for unclaimed portions of FLSA settlement to revert to defendants (*see Thio v. Genji, LLC*, 14 F. Supp. 3d 1324 (N.D. Cal. 2014))
  - Contrast with trend away from reversions in Rule 23 settlements.

- **Separate and additional consideration for FLSA claims may be required in hybrid cases** (i.e., two funds or assigned value to FLSA claims)
  - “[H]aving a single settlement fund from which both the FLSA and Rule 23 claims are satisfied is problematic.” *Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 602 (E.D. Cal. 2015).
## Settlement Participation: Rule 23 vs. FLSA

<table>
<thead>
<tr>
<th></th>
<th>Rule 23 Class Action</th>
<th>FLSA Collective Action</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Binding Effect, Participation</strong></td>
<td>Unless class has been certified, settlement requires opt-out form—but also opportunity to object</td>
<td>Unless conditional certification has been granted, settlement often requires opt-in form</td>
</tr>
<tr>
<td><strong>Payment</strong></td>
<td>Checks mailed to anyone who did not opt out</td>
<td>Depositing or cashing of check</td>
</tr>
<tr>
<td><strong>Reversion</strong></td>
<td>Disfavored by some courts (but consider cy pres)</td>
<td>Generally accepted</td>
</tr>
</tbody>
</table>
Settlement Participation: Hybrid Actions

• Generally must **submit claim form or sign check to release FLSA claims.** But see *Richardson v. Wells Fargo*, 839 F.3d 442 (5th Cir. 2016) (finding that absent class members who did not submit claim form in hybrid action released FLSA claims).

• If using checks to opt in, consider using two checks—one for Rule 23 claims, one for FLSA:
  – Opt-in language only on FLSA check.
  – Allows tender of one or both checks so class members have choice to participate in collective action. *Sharobiem v. CVS*, 2015 WL 10791914, at *3 (C.D. Cal. 2015).
  – Alleviates concern about needing extra consideration to support release of FLSA claims.


• Risky to have claims-made settlement where class member must submit claim to receive Rule 23 settlement but has no option but to join collective. *Sharobiem v. CVS Pharmacy, Inc.*, 2015 WL 10791914, at *4 (C.D. Cal. Sep. 2, 2015).

• If utilizing claim form for class action settlement, consider separate language on same claim form indicating consent to join collective action.
  
  □ By checking the box, you are also agreeing to “opt in” to a collective action under the Fair Labor Standards Act (“FLSA”) 29 U.S.C. § 216(b), and you are eligible to receive a settlement payment for claims brought under the FLSA.
Settlement Approval

<table>
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<tr>
<th>FLSA Collective Action</th>
<th>Rule 23 Class Action</th>
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<tbody>
<tr>
<td>Process varies by jurisdiction</td>
<td>Two-stage settlement process</td>
</tr>
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</table>

- In hybrid action, single settlement agreement usually covers both FLSA and Rule 23 settlement, so **FLSA settlement may go through two-stage** settlement process.

- If settlement is reached before conditional certification, may combine preliminary approval (class notice process) with opt-in process.
Quantifying Exposure
• Exposure analysis should be **living document**
  - As you move from early stages through discovery, analysis should be **updated/refined** based on more detailed data and findings
  - Also, **conditional probabilities** should also be accounted for
    ▪ 75% chance of surviving motion to dismiss, 50% chance of surviving summary judgment, 30% chance of winning at trial \( \rightarrow 11.25\% \) chance
    ▪ Once Plaintiff survives motion to dismiss, conditional probability rises \( \rightarrow 15\% \)
  - Build the analysis to revise and **account for different variables**, e.g., hours, liquidated damages, SOL, and other key variables
  - During settlement discussions, calculators can be helpful for **addressing disagreements**
    ▪ Presentable to team, client, neutral, opt-ins, and even opponent
• Several key factors to consider in building an exposure analysis (ex. misclassification or “off-the-clock” case)
  – Statute of limitations
  – Number of workweeks / people at issue
  – Number of hours at issue
  – Rate(s) of pay
Deeper dive on key factors

- Statutes of limitations
  - 2- vs. 3-year, or states with longer periods
  - Rule 23 (tolling as of Complaint) vs. FLSA (tolling as of opt-in date)
- Misclassification or “off-the-clock” case
  - Half-time where the “time” of time and a half has already been paid
  - Half-time in misclassification cases—majority of courts and DOL
- Number of workweeks / people at issue
  - Weeks provides more accurate estimate of exposure
  - Either will over-estimate unless discounted for weeks with no OT
  - WHD uses 40 weeks out of a 52-week year (or approximately 77%)
  - In FLSA cases, opt-in rates vary
Deeper dive on key factors

• Number of hours at issue
  – Early: Use 2.5, 5, 10, 15 OT hours, unless more exact estimate is available
  – Later: Determine more accurate estimates derived from data points and discovery

• Employees’ rates of pay
  – Averages can be okay, but at least consider moving averages by year, area, or other criteria
  – Actual figures will ultimately be better
Example

- Weekly salary of $800, working 45 hours per week

- Misclassification using **half-time**:  
  - $800 ÷ 45 hours = $17.78 regular rate  
  - $17.78 x 0.5 = $8.90 half-time owed  
  - $8.90 x 5 OT hours/week = $44.50 weekly OT pay owed

- Misclassification using **time and a half**:  
  - $800 ÷ 45 hours = $17.78 regular rate  
  - $17.78 x 1.5 = $26.67 OT rate  
  - $26.67 x 5 OT hours = $133.35 weekly OT pay owed
Thank You.