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Wage & Hour Collective and Class Actions: Asserting and Challenging Affirmative Defenses

Leveraging Good Faith, Doctrine of Avoidable Consequences, and Other Defenses

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Wage & Hour Collective and Class Actions: Asserting and Challenging Affirmative Defenses

Leveraging Good Faith, Doctrine of Avoidable Consequences and Other Defenses

Agenda

We will discuss:

1. **FLSA's good faith defenses**
2. **Similar state law defenses**
3. **Other defenses commonly invoked with respect to claims regarding hours worked.**

We will not discuss:

- All of the wage-hour defenses under the sun, including the exemptions and exclusions set forth in 29 U.S.C. §§ 203, 207 and 213. Many of the exemptions are affirmative defenses. *But see Walton v. United Consumers Club*, 786 F.2d 303 (7th Cir. 1986) (payment 29 U.S.C. § 207(i) is a "method of complying with the Act").

Affirmative Defenses: FLSA Defenses

#1: The FLSA's Good Faith Defenses

FLSA Good Faith: Two Defenses

"Good faith" defense can be an absolute defense (29 USC § 259) and a defense to liquidated damages (29 USC § 260).

Complete Defense (§ 259)

- No liability for failure to pay minimum wages or overtime compensation if proven that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the DOL.

Congressional Purpose of Defense

- FLSA not intended to provide "windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay."

Affirmative Defenses: FLSA Defenses

Requirements for Complete Defense:

(1) action taken in reliance on written admin. reg., order, ruling, approval, or interpretation by U.S. DOL, or any admin. practice or enforcement policy;

(2) in conformity with that ruling; and

(3) in good faith.

Objective test of employer's good faith is whether employer acted as "reasonably prudent man would have acted under similar circumstances."

Subjective test is whether employer "had honesty of intention and no knowledge of circumstances which ought to put him upon inquiry."

29 C.F.R. § 790.15.

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Complete Defense (Section 259) – Narrowly Construed (Identical Facts)

- Facts must be close to identical between your case and the scenario that led to the order/ruling/interpretation that is relied upon.

Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 927 (11th Cir. Ala. 1987)

- "None of the examples are closely analogous to the situation of the employees working on the eviscerating line at Farm Fresh. Thus while the Bulletin itself provides some examples pertinent to particular situations, no specific guidance is provided for the situation at bar, and the Bulletin itself clearly recognizes that the provisions therein provide only general guidelines to be applied in light of all the particular circumstances of each case. Thus the Bulletin itself does not claim to establish a particular rule upon which an employer may rely in order to determine what length and type of waiting period is compensable time worked under the particular facts of this case. Thus it was in fact simply impossible for Farm Fresh to rely on it."

Complete Defense (Section 259) – Narrowly Construed (Identical Facts)

Swigart v. Fifth Third Bank, 870 F. Supp. 2d 500, 511 (S.D. Ohio 2012)

- Reliance on opinion letter regarding employees who had the same job title did not suffice, where employer did not conduct a sufficient investigation to determine whether actual job duties were "the same job duties as the mortgage loan officers described in the 2006 Opinion Letter."

Complete Defense (Section 259) – Narrowly Construed (Source of Ruling)

- Ruling relied upon must be in writing and issued by the *Administrator* of the Wage and Hour Division of the Department of Labor. Reliance on rulings from lower level officer or employee of the agency (e.g. Regional Directors) likely will not satisfy the employer's burden. *See Hodgson v. Square D Co.*, 459 F.2d 805, 810 (6th Cir. Ky. 1972).

  – "§ 259(a) requires that the writing must be 'of the agency of the United States specified in subsection (b) of this section,' and § 259(b) specifically provides, inter alia, that the agency referred to in subsection (a) shall be 'the Administrator of the Wage and Hour Division of the Department of Labor.' The Company argues that 'Administrator' means the organization rather than the individual, but unfortunately the regulations and the case law do not support the Company's position."

Complete Defense (Section 259) – Narrowly Construed ("in actual conformity with")

Employer must confirm that "its actions actually conformed with the letter" and that the "circumstances described in the opinion letter" match the employer's own "actual circumstances."

Lewis v. Huntington Nat'l Bank, 838 F. Supp. 2d 703, 717–18 (S.D. Ohio 2012)

Employer's investigation did not include:

(1) Any interviews with people in the job title; or

(2) Any observational studies.

Affirmative Defenses: FLSA Defenses

Defense to Liquidated Damages (Section 260):

(1)Subjective good faith, defined as honesty of intention and no actual or constructive notice of an FLSA violation; and

(2)Employer's reasonable grounds to believe that its conduct complies with the Act.

Defense to Liquidated Damages (Section 260)

- "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages . . . ." 29 U.S.C. § 260.

  - Employer must show that it acted in subjective good faith with objectively reasonable grounds for believing that its acts or omissions did not violate the FLSA. *Barfield v. New York City Heath & Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008).

  - Not enough to show the absence of bad faith. To prevail, the employer must show that it took "active steps to ascertain the dictates of the FLSA and then act[ed] to comply with them." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999); *Clark v. Saporito*, No. 3:18-cv-00660, 2020 U.S. Dist. LEXIS 54608 (M.D. Pa. Mar. 30, 2020)(to rely on previously-provided USDOL opinion letter, needed to relate to policy at issue).

Defense to Liquidated Damages (Section 260): Who decides?

– Generally a determination for judge, not jury.

- Jury's finding of willfulness constrains the court's discretion to find good faith. *Black v. SettlePou, P.C.*, 732 F.3d 492, 501 (5th Cir. 2013).

- But, a jury finding of no willfulness does not preclude a finding that the employer did not act in good faith

Defense to Liquidated Damages (Section 260): What Constitutes Good Faith?

Some examples include (non-exhaustive):

- Reliance on advice of counsel. *See e.g., Perez v. Mountaire Farms*, 650 F.3d 350, 375-76 (4th Cir. 2011).

- Thorough review of pay records and practices. *See e.g., Barfield v. New York City Heath & Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008).

- Reliance on advice of internal personnel experts (even if that advice proves incorrect). *See e.g., Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912 (8th Cir. 1991).

- Contacting DOL and/or relying on guidance from DOL.

Defense to Liquidated Damages (Section 260): What Might Not Suffice to Show Good Faith?

Some examples include (non-exhaustive):

Scalia v. Employer Solution Staffing Group, LLC, 951 F.3d 1097 (9th Cir. 2020)

- Reliance on instructions from another entity (co-joint employer)
- Lack of manager-level employee knowledge of the issue

Martin v. Indiana Mich. Power Co., 381 F.3d 574, 584–85 (6th Cir. 2004)

- Failure to investigate actual duties
- Constructive knowledge of non-exempt duties (in the job description)
- Employee complained about the violation

Blotzer v. L-3 Commc'ns Corp., No. 11 Civ. 274, 2012 WL 6086931, at *15 (D. Ariz. Dec. 6, 2012)

- Reliance on industrywide practice

Defense to Liquidated Damages (Section 260)
Reliance on Advice of Counsel – Potential for Privilege Waiver

- When a defendant asserts the good faith defense, he "consequently cannot 'fairly both assert testimony that implicitly communicate[s] his version of the legal advice he received and simultaneously withhold disclosure of the legal advice actually received.'" *Enea v. Bloomberg L.P.*, 2015 U.S. Dist. LEXIS 111901, *12 (S.D.N.Y. Aug. 20, 2015) (citing *John Doe Co. v. United States*, 350 F.3d 299, 304 (2d Cir. 2003)).

- The concept is that the attorney-client privilege cannot be used simultaneously as a sword and a shield.

Defense to Liquidated Damages (Section 260): Scope of Privilege Waiver – Developing Area of the Law

- *Foster v. City of New York*, 2016 U.S. Dist. LEXIS 14594 (S.D.N.Y. Feb. 5, 2016):
  - Communications between counsel working on behalf of the City and any non-attorney employee of the agencies or the City are discoverable, as long as they are relevant to advice provided to the agencies or the City regarding the agencies' FLSA compliance.
  - However, internal communications between attorneys are not subject to discovery because the City's "state of mind" could not have been influenced by information of which it was unaware.
  - The Court rejected plaintiffs' argument that all relevant communications related to FLSA compliance were subject to the privilege waiver (plaintiffs argued that the "implied waiver either applies or it does not"). In denying this expansive waiver, the Court reasoned that "implied waivers are not such blunt instruments. Rather, they must be formulated with caution."

Defense to Liquidated Damages (Section 260): Scope of Privilege Waiver – Developing Area of the Law

Maar v. Beall's, Inc., 237 F. Supp. 3d 1336, 1339-40 (S.D. Fla. 2017)

- An employer's affirmative pleading of good faith suffices to constitute a waiver of attorney-client privilege.

Defense to Liquidated Damages (Section 260): Other Privilege Issues – Non-Attorneys

Not protected by attorney-client privilege: report of an HR consultant who studies job duties.

- *Scott v. Chipotle Mexican Grill, Inc.*, 103 F. Supp. 3d 542, 547 (S.D.N.Y. 2015)
- *Scott v. Chipotle Mexican Grill, Inc.*, 94 F. Supp. 3d 585, 590 (S.D.N.Y. 2015)

Affirmative Defenses: FLSA Defenses

Considerations:

- Difficult to establish defense, especially the complete defense under § 10
- Courts reluctant to find "good faith" defense if issues of fact exist as to reasonableness of inquiry;
- DOL Rule/Regulation/Opinion Letter needs to "clearly" establish no liability;
- Reliance on outcome of involuntary governmental audits not guaranteed to support defense, even where no liability found;
- Subjective belief insufficient;
- Be prepared to waive the attorney-client privilege;
- State law requires separate analysis.

Affirmative Defenses: State Law

#2: Statutory State Law Defenses

Affirmative Defenses: State Law

State Law Defenses that Mirror or Mimic FLSA. E.g.,

- N.Y. Labor Law § 198(1-a) (good faith defense to liquidated damages)
- Conn. Gen. Stat. § 31-68 (same)
- Consider: whether damages can be "stacked" where purpose of liquidated damages under state law varies (compensatory v. punitive)

State Law Defenses to Unique State Law Claims:

- N.Y. Labor Law § 198(1-b) and (1-d). Provides two separate statutory defenses to penalty provisions of notice and wage statement requirements of Wage Theft Prevention Act (WTPA) based on "complete and timely payment of all wages due" or where employer "reasonably believed in good faith that it was not required" to provide notice or statement). *See e.g. Belvin v. Electchester Mgmt. LLC*, No. 15-cv-04924(KAM)(PK), 2020 U.S. Dist. LEXIS 15914 (E.D.N.Y. Jan. 30, 2020) (complete and timely payment; *Liu v. Elegance Rest. Furniture Corp.*, No. 15-CV-5787, 2017 U.S. Dist. LEXIS 160110 (E.D.N.Y. Sep. 25, 2017)(good faith belief).

"Avoidable Consequences" Doctrine

Not really an affirmative defense in and of itself but a way of talking about a number of ways to defend against off-the-clock allegations

- Unclean hands / equitable estoppel
- Employees' inability to show actual/constructive knowledge

Courts have said the employer cannot sit back on its hands and allow improper timekeeping

- *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1319 (11th Cir. 2007) ("When an employer's actions squelch truthful reports of overtime worked, or where the employer encourages artificially low reporting, it cannot disclaim knowledge.")
- *Bailey v. TitleMax of Ga, Inc.*, 776 F.3d 797, 805 (11th Cir. 2015) ("Where, as here, an employer knew or had reason to know that its employee underreported his hours, it cannot invoke equitable defenses based on that underreporting to bar the employee's FLSA claim.")

But where the employer enforces its timekeeping requirements, employees cannot simply disregard those requirements by consciously omitting overtime hours and still prevail on a claim for unpaid time.

- *Wood v. Mid-America Management Corp.,* 192 F. App'x 378, 380-81 (6th Cir. 2006) ("[T]he employee bears some responsibility for the proper implementation of the FLSA's overtime provisions. An employer cannot satisfy an obligation that it has no reason to think exists. And an employee cannot undermine his employer's efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid.")

Employer Practices

#3: Practices Related to Asserting These and Other Compliance-Based Defenses

Employer Practices

Documents Relating to Wage Policy and Compliance:

- Personnel files (including files showing leaves of absence)
- Resumes, interview notes
- Employee complaints
- Exit interview notes
- Employee surveys or job studies
- Payroll files/records
- Handbooks
- Training manuals
- Orientation materials
- Training manuals
- Operational manuals
- Communications between supervisors and subordinates
- Job descriptions
- Emails (yes, emails!)

Employer Practices

Identifying Compensable Working Time (For Hourly Employees)

- Time spent in primary work activities;
- Time spent by an employee outside normal hours "required, suffered or permitted to work."
- All such work time must be recorded!
- For time not spent in primary work activities, query whether the time is "integral and indispensable" to a primary duty under the Portal-to-Portal Act. *See Integrity Staffing Solutions, Inc.* v. *Busk*, 574 U. S. ___, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014).
- On call time, travel time, remote work, and other potential traps.

Employer Practices

Question: For exempt employees, how do you incorporate these considerations into litigation defense, or best practices outside litigation?

Legal Answer: Even if an employee is misclassified, she or he retains "burden of proving that he performed work for which he was not properly compensated." *Holaway v. Stratasys, Inc.*, 771 F.3d 1057 (8th Cir. 2014) (*quoting Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946)); *Viet v. Le*, No. 18-6191, 2020 U.S. App. LEXIS 7430 (6th Cir. Mar. 10, 2020)(affirming grant of summary judgment where employee failed to "fill in his general 60-hour estimate with specific facts about his daily schedule")

In *Holaway*, the Court ruled that Plaintiff's testimony regarding his hours worked (his only evidence on the issue) was so "vague" and "inconsistent" it could not support a finding of overtime work – even on summary judgment!

However, not all employers will be so lucky: Plaintiff's burden is relaxed to a "just and reasonable inference" standard. *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 363 (2d Cir. 2011).

Employer Practices

Question: For exempt employees, how do you incorporate these considerations into litigation defense, or best practices outside litigation?

Practical Answer: Consider how you will respond to a misclassification plaintiff's allegations regarding his or her "hours of work." What will the data trail show? What records exist (e.g. sales reports)? How will you confront the potential for allegations of substantial hours worked (leaving aside issue of whether they are believed)?

Employer Practices

Calculation of Overtime: Fluctuating Workweek and Misclassification Damages are <u>not</u> the same thing

- Most circuit courts hold FWW compliance not necessary or applicable in misclassification cases. *See, e.g. Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665 (7th Cir. Ill. 2010) (discussing *Half-Time or Time and a Half? Calculating Overtime in Misclassification Cases* by Paul DeCamp). *Clements v. Serco*, Inc., 530 F.3d 1224 (10th Cir. 2008).
- Some district courts have required variation on FWW: "rebuttable presumption" that salary does not cover all hours.
- Key inquiry is what hours salary "intended to compensate."

Employer Practices

A growing number of district courts in other circuits have held that FWW is categorically inapplicable in a misclassification case:

- *Costello v. Home Depot USA, Inc.*, 944 F. Supp. 2d 199, 204 (D. Conn. 2013) (collecting cases)
- *Snodgrass v. Bob Evans Farms, LLC*, No. 12 Civ. 768, 2015 WL 1246640, at *7 (S.D. Ohio Mar. 18, 2015) (collecting cases)

Or assume that the salary is intended to compensate for just 40 hours unless the employer can rebut that presumption:

- *Ransom v. M. Patel Enters., Inc.*, 825 F. Supp. 2d 799, 809-10 (W.D. Tex. 2011) ("the correct approach when there is no persuasive evidence, direct or circumstantial, of a contrary agreement, is to presume that a weekly salary paid to a non-e employee compensated them for 40 hours o

Employer Practices

Intended to compensate evidence:

- HR materials
  - Job descriptions;
  - Offer letters;
  - Trainings;
  - Mandatory forms;
- Benefits materials
  - How is PTO tracked/accrued?

Questions?

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