Strategies for Mediating Your Wage & Hour Action

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This paper will discuss suggestions for effectively mediating Fair Labor Standards Act ("FLSA") collective actions.[1] Issues discussed include, when should you mediate, what information should be shared prior to mediation, what should you do to prepare for mediation, what should be covered in a mediation brief, how can you effectively present your case to the opposing party at mediation, and how should you conclude a mediation after settlement is reached or impasse is declared.

I. When You Should Mediate A FLSA Collective Action

Virtually all FLSA collective actions filed in federal court are sent to mandatory mediation prior to trial. Therefore, the question is not whether mediation should occur, but when it should occur.

A. Should You Mediate Before or After Collective Action Certification?

The first timing issue in collective actions is whether to mediate before or after conditional certification is briefed and/or a ruling has been made by the district court.

1. Pre-Class Certification Mediation

Like employment discrimination class actions, the certification of a wage and hour collective action results in a significant shift in leverage to the plaintiffs. Pre-

[1] State law wage and hour class actions involve similar mediation issues but may be negotiated as opt out class actions instead of opt in collective actions and will require a notice and fairness hearing to class members bound by any settlement reached.

certification mediation typically makes sense regardless of whether the employer believes that the plaintiffs' are likely to achieve class certification. Prior to agreeing to pre-certification mediation of an FLSA collective action, most competent plaintiffs' attorneys will insist on an agreement tolling the running of the statute of limitations for the FLSA claims of the potential opt-in plaintiffs because the statute of limitations under the FLSA is not tolled for any individual class member until that individual has filed a written consent to join form with the court, *see e.g.*, 29 C.F.R. §790.21(b)(2); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1105-06 (11th Cir. 1996), *cert. denied*, 519 U.S. 982 (1996). In addition, the parties should address the employer's duty to preserve evidence and put in place a litigation hold on the destruction of evidence during the pendency of the mediation. *See e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Mediating a FLSA collective action prior to conditional certification requires the parties to negotiate without knowing the full extent of the case because notice will not have been provided prior to the mediation. This does not generally present an insurmountable problem.

First, the parties may negotiate a lump sum settlement that would be paid if all potential opt-in plaintiffs join the action. Second, the parties may negotiate a settlement that resolves the claims of the named plaintiffs and all potential opt-in plaintiffs on a formula basis. Finally, the employer may choose to provide full relief to all potential opt-in plaintiffs.

a. Class Certification Unlikely

If the plaintiffs are highly unlikely to achieve class certification, but will likely attempt to certify the class, mediation may be attempted to convince the plaintiffs that the effort spent on certification will not be fruitful or that the scope of the class should be narrowed. In this scenario, pre-certification mediation may save the employer the expenses of litigating the class certification issues and end the litigation without risking that the plaintiffs will be successful in certifying the class. Even if the case does not settle, pre-certification mediation will give the parties an opportunity to learn about the merits of the claims and the defenses.

b. Class Certification Likely

If the plaintiffs are likely to achieve class certification, pre-certification mediation may be preferred because the plaintiffs are likely to give the employer a discount for early settlement (aka the "pilgrim discount for early settling") and provide a discount for the chance that certification will not be achieved. Conducting negotiations prior to certification may be advantageous to the employer because the parties may agree to limit contacts with potential opt-in plaintiffs during the mediation. In addition, the parties may agree to limit contacts with the media. Finally, prior to certification, the parties may agree to produce documents only for mediation purposes limiting their usefulness to the plaintiffs in expanding the size of the case.

2. Post Class Certification Mediation

Some employers prefer to delay mediation of FLSA collective actions until after the court has ruled on the motion for certification, and, if granted, the time period for potential opt-in plaintiffs to file consents to join the case has expired enabling the employer to determine the exact number of opt-in plaintiffs. Mediating after all opt-in plaintiffs have joined the case allows the parties to negotiate over claims of known plaintiffs. However, this decision is not always wise because the plaintiffs may expand the case by filing state law class actions if a broad notice is approved by the court and individuals opt in from additional states not represented by the initial plaintiffs. In addition, the plaintiffs may serve broad discovery prior to mediation in a certified collective action.

B. Should You Mediate An FLSA Collective Action Before Discovery Is Conducted?

The second major decision regarding the timing of mediation is whether to mediate prior to conducting discovery or after conducting minimal discovery. Waiting to mediate a collective action until substantial discovery has been conducted has the advantage of crystallizing many of the issues in the case and allows the parties to mediate the case using a fully-developed record evidence. However, because discovery is costly and neither party has control over whether the discovery will favor their case, it may make sense to attempt mediation without conducting substantial discovery. Conducting

discovery of a sample of plaintiffs using statistical methods may provide a sufficient basis for analyzing the claims of a larger sample and may save significant resources that may be allocated to the settlement of the case. Discovery is probably more critical in cases where liability will rise or fall on the job duties performed by the plaintiffs or where there are no objective criteria to determine the hours worked by the plaintiffs than in cases where there is some objective data upon which the parties can agree that will assist them in reaching a compromise regarding the hours worked by the plaintiffs.

II. Information That Should Be Shared Prior to Mediation

For any mediation to be successful, both parties must have a comfort level that sufficient information is known about the case in order to evaluate alternative settlement proposals. In an FLSA collective action, this definitely means each party should obtain sufficient payroll and other data to model the damages at issue. Plaintiffs should exchange their estimates of the hours worked for mediation to be successful; however, because employers typically have a negative visceral response to the plaintiffs estimates of hours worked, the parties should explore whether there is any objective data that can be obtained that will help recreate the hours worked by the plaintiffs. Objective data may include computer log in or log off data, telephone logs, cell phone logs, times of sending or receiving emails, security code data, computer-hard drive recovery data, or third-party data showing the times employees were working. This data should be exchanged and utilized in the modeling process if the employer contests the hours estimates of the plaintiffs. Both sides to the mediation should construct their own damage model or become familiar with the other sides' damage model prior to mediation. Constructing a damage model that is fully explained and analyzed prior to mediation that the parties may use to negotiate a settlement is critical in wage and hour cases because settlement is highly unlikely if either party does not understand or trust the data contained in the damage model or models.

In addition to information that goes to damages, each party should disclose information with the opposing side in advance of mediation that will assist the opposing side in moderating their settlement position. For example, if a party has factual information that would need to be investigated, sharing this information at mediation is

likely to derail the mediation because the surprised party has not had time to investigate whether the information is accurate.

If the case has not progressed through litigation to the point that depositions have been taken, the parties may wish to conduct informal interviews of a sample of plaintiffs and key management witnesses. These interviews allow the parties to obtain information regarding the opposing parties' strengths and weaknesses without incurring the expense of depositions. They also assist the parties in analyzing the damages at issue by allowing the parties to extensively evaluate a small sample of plaintiffs and then use the results of this sample for the larger class of plaintiffs. Interviews of management witnesses may provide plaintiffs' counsel with sufficient information to properly advise their clients regarding settlement alternatives. This includes determining whether the employer has had prior notice of the violations and/or taken affirmative steps to comply with the FLSA, including obtaining an opinion from the DOL or an attorney regarding the alleged violations at issue. Finally, if the case settles at mediation, the parties will be in a stronger position to inform the court of the fairness of the settlement.

III. What Should You Do To Prepare for Mediation

Each party to the mediation of an FLSA collective action should prepare for mediation by conducting a sufficient factual investigation of the case by interviewing individuals in the same job as the plaintiffs, the managers overseeing the plaintiffs' employment, and third-party witnesses. In addition, there is no substitute for conducting significant legal research prior to mediation. Finally, picking an appropriate representative for your side and finding out who will attend mediation for the other side is critical to achieving settlement at mediation.

A. The Factual Investigation

Both parties need to be fully apprised of the factual basis for the dispute. In all FLSA collective actions, the number of hours worked by the plaintiffs is a critical factor in negotiating a settlement. Therefore, each party should conduct sufficient interviews of the plaintiffs, other individuals who worked in the same job category, and co-workers and supervisors who observed the plaintiffs at work. In addition, any objective data providing an estimate of the hours worked should be obtained and analyzed.

If the case involves whether or not a group of employees were misclassified as exempt, then the parties will need to obtain any documents that discuss the job duties performed by the employees, especially documents that discuss the primary or most important duty performed by the employees (job vacancy announcements, job descriptions, evaluations, or job analyses). In addition, interviews of individuals who work or worked in the position at issue should be conducted along with interviews of management to determine the employees' freedom from supervision, the amount of discretion exercised by the employees, and the number of other employees, if any, supervised by the plaintiffs (executive exemption) or whether the work performed by the employees at issue was directly related to the employer's general business operations and required the exercise of discretion and independent judgment (administrative exemption).

If an issue in the case is whether the plaintiffs performed work without pay, a significant number of interviews may be needed to determine whether management instructed employees not to properly record their hours worked and/or whether the employer was aware that this work was being performed. Such a finding would assist the claims of the employees at issue because under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), if employees work for an employer which has failed to keep accurate or adequate time records, and the employees provide some credible evidence that they worked overtime hours without pay, the employees can recover all the hours claimed without providing specific evidence of the exact number of hours worked. *See also, Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 471 (11th Cir. 1982). The plaintiffs need only submit sufficient evidence to support a "just and reasonable inference" that they worked unpaid overtime hours to the extent claimed. *Mt. Clemens*, 328 U.S. at 687. This generous standard means that plaintiffs can rely on inexact and circumstantial evidence to establish both liability and damages for the total number of overtime hours claimed. *Id.* at 687-88; *Shelton v. M.P. Ervin*, 646 F.Supp. 1011, 1020 (M.D. Ga. 1986), *aff'd*, 858 F.2d 931 (11th Cir. 1988). In contrast, the employer which has failed to maintain records can only rebut liability or reduce the damages awarded if it comes forward with "evidence of the *precise* amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687-688 (emphasis added). "If the employer fails to produce

such evidence, the court may then award damages to the employee, *even though the result be only approximate*." *Id.* (emphasis added).

Both parties should also conduct factual research regarding whether the company has been subjected to any prior complaints, lawsuits or DOL investigations regarding the failure to pay overtime which may affect whether a two or three-year statute of limitations. In addition, the company will be called upon to explain their good faith defense (subjective and objective) to liquidated damages.

B. Conducting Legal Research Prior to Mediation

Conducting legal research regarding the plaintiffs' theory of liability, any defenses to liability, and the appropriate calculation of damages is critical in an FLSA collective action. Many times even large well-respected law firms fail to sufficiently analyze the legal issues involved and instead use logic or intuition regarding how damages are calculated. This is a mistake in FLSA cases because many times the Department of Labor's regulations or case law provides detailed analysis of the proper way to calculate damages. For example, a credit or set off for certain types of premium pay (double time payments for Sunday work or daily overtime for example) may be deducted from overtime compensation owed whereas non-discretionary bonus payments may be included in the calculation of the regular rate increasing the overtime compensation due.

Finally, even experienced FLSA attorneys need to update their legal research prior to mediation. In the last four years, the number of FLSA cases filed in federal court has increased from approximately 2,898 cases in 2003 to approximately 6,735 cases in 2006.[2] The significant number of cases being litigated results in numerous new FLSA opinions being reported each month.

C. Decide Who Should Attend Mediation For Your Side

Both parties should take care in choosing who should attend the mediation for their side. If there is a strong personality type who will possibly foment discontent regarding any settlement, then this person should be included on the mediation team. Keeping this person away from mediation would seem logical because he or she may be

[2]Legal and Business Publishing Group The Bureau of National Affairs, Inc. conducted a search via the U.S. Case Party Index - (PACER indexes) which classifies Fair Labor Standards cases as item 710. The trend has been steady from 2003 through 2006: 2,898 in 2003; 3,593 in 2004; 4,079 in 2005; and 6,735 in 2006.

difficult to convince, but it is almost always better to include this person in the decision making so that he or she will support the outcome. Each party should also make sure to include someone on the mediation team who will provide a positive influence on the mediation. Finally, each party needs to bring individuals to the mediation who have actual authority to resolve the case. If possible, the mediation should be scheduled so that important decision makers are accessible in person during mediation.

D. Find Out Who Will Attend Mediation For The Opposing Party

If possible, you should find out who will attend the mediation for the opposing party. You may seek assistance from the mediator or opposing counsel if you find out that the person attending mediation for the other side is the individual who made the employment decision at issue in the mediation, is difficult to work with, or lacks authority to settle the dispute or persuade plaintiffs or officers of the company to accept the settlement of the dispute. Opposing counsel may be able to use your request to convince their clients to bring additional representatives that will facilitate settlement.

IV. What Should be Covered In A Mediation Brief For An FLSA Collective Action

A mediation brief is written for two audiences, the mediator and the opposing party. The mediator needs to be brought up to speed regarding the history of the case and its strengths and weaknesses and the opposing party needs to be convinced that you will prevail at litigation if mediation is not successful. Two briefs may be useful for this purpose if there are issues that you believe the mediator needs to hear on a confidential basis. In general, mediation briefs should be provided to the mediator and to the opposing party so that the opposing party understands your position regarding liability and is not taken by surprise at mediation so that they are unprepared to resolve the case. Withholding information during mediation is counter productive and does not help persuade the other side to moderate their mediation positions. However, you may want to provide a separate confidential brief to the mediator if you wish to discuss issues that would be sensitive to the other side, but necessary for the mediator to be apprised of prior to mediation. For example, if you believe that personality issues related to the opposing party or their counsel will potentially affect the mediation, you may want to divulge this information in a confidential statement to the mediator.

A strong mediation brief will describe the legal basis for liability or a defense to liability and the factual basis for this legal position. In addition, the mediation brief should describe the factors that support settling the case at the upcoming mediation and should discuss perceived obstacles to settlement. If the mediator is convinced that your side will prevail in litigation, he or she will help you resolve the case on more favorable terms. In addition, mediators sometimes make mediation proposals that are influenced by your written and oral presentations. Finally, if possible, the plaintiffs should make an offer of settlement in their mediation brief. This offer of settlement should be accompanied by a damage model that explains the basis for the offer. Plaintiffs' counsel should be willing to explain the damage model to the mediator and the employer's counsel prior to mediation so that the parties are negotiating from a position of understanding if not agreement regarding the potential damages at issue.

The settlement offer should be made in the form of a settlement agreement that addresses who will be covered by the settlement, how much each plaintiff will receive and when, whether liquidated damages will be included in the settlement, the temporal scope of the settlement, the scope of the release, any conditions that may occur that will invalidate the settlement, the payment of the employer's share of any taxes, the timing and payment of attorneys' fees and costs, and any court involvement in the settlement.

V. How Can You Effectively Present Your Side At Mediation

During a mediation of an FLSA collective action, counsel should make a strong concise presentation of the merits of their side of the dispute and should focus the presentation on ways to resolve the dispute. Emphasis should be placed on the benefits of reaching a settlement. Special attention should be paid to addressing concerns that have been raised by the mediator or the other side prior to mediation. Mediation presentations require a conciliatory tone. Counsel need to present areas of common agreement if possible. Areas that are extremely sensitive that would need to be addressed during litigation may be omitted entirely if not germane to settlement. For example, the plaintiffs may have filed suit against the employer and its CEO or other officers. It may be unnecessary to discuss the standard for liability of the individual defendant or the factual basis for this liability if it is clear that the settlement payments will be made from the corporate employer.

It may also facilitate settlement to allow the parties to participate in the mediation presentation. Such presentations may help to dispel negative information provided to the representatives of the parties prior to mediation and allow the opposing party an opportunity to observe whether the party will be an effective witness at trial. If the parties are going to speak at mediation they should be prepared to keep their presentations brief and as non-confrontational as possible.

It is also important to present realistic expectations to the opposing side if settlement is to be possible. Counsel should also identify issues that are going to be problematic. For example, if the employer desires to reach a confidential settlement or will need to make payments over time, these issues should be disclosed early in the process so that they can be addressed by the parties.

Another important issue for the parties to address is whether any changes will need to be made to the employer's business practices. Generally, private plaintiffs cannot obtain injunctive relief through the litigation of a minimum wage or overtime compensation FLSA action; however, the parties may want to address what changes may be necessary to the employer's business practices if the employer has continued the questionable practices that are the subject of the lawsuit.

VI. How Do You End The Mediation

Mediations generally end in one of three ways: settlement, continuation, or impasse. If a continuation is agreed to, the parties should address what information will assist in preparing for the next mediation and whether any court-ordered deadlines will need to be addressed by the continuation of the mediation.

If the mediation ends in impasse, it may assist the parties to exchange correspondence detailing the final positions taken by each party. This assures that the mediator properly conveyed each side's last offer, provides the parties with a starting point for future mediations, and documents the positions taken by the parties which may become relevant in the event the plaintiffs prevail at trial and are entitled to prevailing party attorneys' fees and costs.

If a settlement is reached, the parties should sign an enforceable agreement that identifies who will be covered by the settlement, how much each plaintiff will receive and when, whether liquidated damages will be included in the settlement, the payment of

the employer's share of any taxes, the temporal scope of the settlement, the scope of the release, any conditions that may occur that will invalidate the settlement, the timing and payment of attorneys' fees and costs, the tax documents to be provided to the plaintiffs, the length of time that the checks to the plaintiffs will be valid, a procedure for replacing lost checks, and whether the settlement is conditioned on court approval of the settlement (generally, a compromise of FLSA claims is only enforceable upon court approval of the settlement). If possible, a complete final settlement agreement should be signed at the mediation. If this is not possible, then an agreement describing all of the issues to be contained in the final settlement agreement should be drafted and signed before leaving the mediation.

VII. Conclusion

Mediation presents the parties to an FLSA collective action with a cost effective alternative to resolve the dispute without continuing costly litigation. Such mediations may occur prior to collective action certification and notice if an employer is willing to toll the statute of limitations and negotiate without knowing the exact number of opt-in plaintiffs who will join the case. If such a mediation is successful, the parties will save the resources that would be spend on the class certification issues.