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Effective Preparation for FLSA Mediations: Top Tips for Corporate Counsel

By Gary Fowler
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Effective mediations require advanced preparation. This is especially true in Fair Labor Standards Act (FLSA) cases. This article will provide steps for corporate counsel to promote an effective mediation leading to a resolution that avoids further litigation costs and resolves risks inherent in FLSA lawsuits.

Preparation for an Effective FLSA Mediation

It is always important to have a mediator knowledgeable about the area and experienced with resolving the case. This is even more important with FLSA cases, though. FLSA cases often allege minimum wage, overtime or wage and hour computation issues (e.g., tip credits, travel time or working time) affecting many employees. Corporate counsel should look for mediators who know the law and, more importantly, are experienced in how these types of cases are resolved.

Before the mediation, corporate counsel should ensure that the facts are adequately developed. This includes developing spreadsheets that, in a case alleging misclassification of employees as exempt, for example, show the regular rate of pay, hours worked and potential overtime owed. If not already subject to discovery, it may be necessary to share basic information about regular rates and hours with opposing counsel to ensure an effective mediation.

Good mediators schedule separate calls with each side prior to the mediation. This not only allows the mediator to understand the issues prior to mediation, but it can also eliminate surprises that could otherwise derail the mediation — for example, counsel may differ as to how the regular rate should be computed or how overtime should be calculated. Even if not resolved, it is good to identify these issues prior to the mediation so that neither side feels ambushed at the mediation. Corporate counsel should notify their outside counsel that they wish to participate in these calls, as mediators may initially have only the names of outside counsel.

Confidentiality Clauses

Clients do not like surprises during mediation or, worse when a number has been reached and the parties are working out the "details" of the deal. With careful preparation, these FLSA surprises may be avoided.

For example, clients generally expect a confidentiality clause. But FLSA cases generally require approval of the settlement by the Department of Labor or a federal court; most opt for a court. But courts have a strong presumption in favor of open records, and court approval generally requires filing the settlement agreement.

So, how to achieve client expectations of confidentiality? Courts in the Fifth Circuit have held that unsupervised, private FLSA settlements are effective when they are reached over a bona fide dispute regarding the amount of hours worked or compensation due. But that holding has not been accepted widely outside the Fifth Circuit, and even in the Fifth Circuit, it is subject to exceptions. So, court approval is often the more prudent course.

Courts generally presume that public access, not a settlement filed under seal, is required in FLSA cases and, to overcome that presumption, a substantial showing of need that the terms of the settlement should not be filed publicly. (*Peralta v. Soundview at Glen Cove, Inc.*, 2-13 WL 2147792 (E.D.N.Y. 2013).) Other courts allow filing under seal or a memorandum from counsel as to why the settlement is a fair resolution of the case. (*Herrera v. Schlumberger Tech. Corp.*, 2018 WL 8546114 (W.D. Tex. 2018); *Kaesemeyer v. Legend Mining USA, Inc.* 2019 WL 4316859 (W.D. La. 2019).) Still, others compromise and allow the amount of the settlement to be redacted from the public filing. (*Athan v. U.S. Steel Corp.*, 523 F.Supp.3d 960 (E.D. Mich. 2021).)

How confidentiality of a settlement may be treated lies within the discretion of the particular court and judge. Before mediation, counsel should review how the court in a pending case has responded to requests for confidentiality. For presuit mediations, counsel should review the same for courts to which the settlement may be submitted for approval.

What Will Be Settled

Before mediation, corporate counsel should consider what will be settled and with whom.

The FLSA is, again, unique. It allows similarly situated employees to proceed collectively, but unlike traditional class actions maintainable pursuant to Rule 23 of the Federal Rules of Civil Procedure, employees in FLSA representative actions must affirmatively opt-in to be part of the class and be bound by the judgment. Courts generally have adopted procedures for determining whether employees are similarly situated, with a notice than being issued to those employees to join the litigation.

A key issue at any presuit mediation is whether notice will be sent to similarly situated employees if, for example, opposing counsel insists or the client wishes to resolve as many cases as possible to avoid other lawsuits. In presuit mediations, the parties may agree upon the group of employees to whom notice may be sent and how. But only those employees who opt-in will be bound by the settlement. Any employees who do not are free to bring their own claims. (As noted above, court approval, even for presuit matters, is generally required to ensure that the settlement is effective.)

Another key variable is state law. State law actions may proceed under a Rule 23 class, along with federal claims, to create a hybrid Rule 23/FLSA claim. In such cases, corporate counsel should explore with counsel how to settle such claims effectively and avoid paying money to employees who might otherwise preserve their federal claims. An example of how one case handled the issue is *Jean-Pierre v. J&L Cable TV Services, Inc.*, 538 F. Supp. 3d 208, 217 (D. Mass. 2021).

Clients generally expect that, when they pay money to an employee, the employee provides a general release of all claims. Courts, though, often will not approve and enforce a release that extends beyond wage and hour claims, because doing so "allows the employer to extract from the plaintiff a benefit beyond what he is compensated for in exchange for payment of the fair wages he is owed." (*Solkoff v. Pennsylvania State University,* 435 F.Supp.3d 646, 660 (E.D. Pa. 2020).)

Other Issues

Plaintiffs' counsel may seek a service award for their clients bringing the action that is beyond the amount paid for settlement of the wage and hour claims. Courts have approved payments that are relatively low and proportional to the total recovery (e.g., $5,000 to $10,000 for a mid-to-high-six-figure settlement).

Corporate counsel should also keep in mind that amounts allocated in settlement to disputed wages are likely to be considered subject to Social Security and Medicare taxes; again, to avoid post-settlement surprises, this amount should be calculated, considered, and provided to client representatives to make sure they know what they are agreeing to pay.

The good news is that courts generally approve a settlement and recognize that they are not in as good of a position as the parties to determine the reasonableness of an FLSA settlement. With preparation, corporate counsel can promote an effective mediation that eliminates unpleasant surprises, avoids further litigation costs, and reduces legal risks.

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