UPPER MIDWEST EMPLOYMENT LAW INSTITUTE
ADVANCED TRIAL PRACTICE:

PLAINTIFFS' PANEL FOR WINNING FLSA CASES
(Plaintiffs' Perspective)
(No. 707)

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I. INTRODUCTION

This is a companion paper to the paper provided for Panel No. 607 (which is addressed to a mixed audience of employee and management counsel). This paper is intended to provide additional tips addressed solely to plaintiffs' counsel to assist them in bringing successful FLSA lawsuits on behalf of employees.

II. EARLY NOTICE

In addition to the suggestions in the companion paper, I cannot stress enough the importance of bringing your Section 216(b) notice motion as early as possible. This is important for at least two very sound reasons (if not more). First, the filing of the collective action complaint does not affect any class tolling (absent some grounds for equitable tolling). The rather short FLSA statute of limitations is only tolled as to each individual in the "FLSA class" as he or she files a signed consent to join form or opt-in notice with the court. Therefore, each day you delay in filing your notice motion means that claims are losing value if not being extinguished. Second, it is generally acknowledged that courts will apply the ad hoc two step approach to evaluating collective action status, with the first step coming at the pleading stage. Courts generally apply the "lenient" test at this first step. If you delay bringing your notice motion and engage in significant discovery, defendants will argue that the court should apply the more rigorous second step test or some more stringent intermediate test. Also, with the passage of time, if you haven't filed more consents, defendants will argue that there are no other similarly situated employees interested in joining your lawsuit and therefore that notice should be denied. So, the early bird gets the worm and you should bring the notice motion right after filing your complaint or within a couple of weeks thereafter.

III. STATE CLASS ACTIONS

While this panel addresses FLSA cases, counsel must consider whether there are parallel state wage/hour claims that can be brought in conjunction with the FLSA claims alleged in the complaint. The BNA publishes a treatise that surveys (state by state) applicable state wage/hour laws. Often these state laws may provide longer statutes of limitations, more generous remedies, or more liberal substantive requirements than the FLSA. Also, many states will permit you to bring an opt out (Rule 23(b)(3)) class action as to state law wage claims. This will permit many more workers to vindicate their rights than if the case were to be limited to FLSA opt in claims.

IV. REPRESENTATIVE EVIDENCE

Employer's counsel will often insist that they are entitled to individual discovery as to each and every opt in plaintiff. This cannot work where you have hundreds or thousands of opt in class members. Therefore, you will want to meet/confer and if necessary to move for discovery to be conducted on the basis of some sort of representative sample.

V. WHAT CLAIMS TO BRING OR NOT TO BRING

This section will introduce some of the kinds of wage/hour claims in which employees are prevailing in recent months, and also suggests perils apparent as to some of the claims that are being litigated:

a. Tip Pooling

The FLSA permits mandatory sharing of tips among tip eligible employees. However, generally management personnel and non-customer contact personnel are barred from participation in tip pools. I have a fuller discussion of tip pools available on my website at www.gdblegal.com on the RESOURCES link (see Articles and Wage/Hour). Our recent tip pooling case under California state law received ample press coverage after the judge ruled that Starbucks owed our barista class over $105 million in misdirected tips. Several plaintiff firms have filed "copycat cases" under state laws in Minnesota, New York, and Massachusetts.

b. Compensable Time

It has been reported recently that employers are cutting back on overtime due to the recession. The recession has not, however, led employers to cut back on creative compensation plans and practices that deprive workers of wages for all periods of time that they have been suffered or permitted to work. The recent Alvarez v. IBP case in the U.S. Supreme Court has reconfirmed the continuous work day rule that workers must be paid for all time after their first principal activity, be it donning the company's protective gear or for required waiting time before starting productive activity. There have been lots of class actions against Wal-Mart and other firms for various "off the clock" work programs and some of these have even been successful. The recent trend of requiring workers to take their company vehicles home with them and to log on to company computers to access work assignments in the morning before reporting to distant customer jobsites has spawned many successful wage/hour cases, as have the time keeping programs at customer call centers around the country. However, recent cases make it clear that mere security screening time (as at airports by TSA or at nuclear power facilities) may not start the clock on compensable time claims.

c. SAFETEA-LU

Up until recently the Motor Carrier Act (aka "MCA exemption" or "smell the gasoline exemption") prevented many workers from claiming overtime pay if they drove any sort of motor vehicle in their work and transported anything (checks, insurance applications) that arguably had any connection to interstate commerce – even when the driving in question was entirely within a single state. However, since August 10, 2005, when the Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, or the "SAFETEA-LU", drivers of vehicles which weigh less than 10,000 pounds (most cars, light pickup trucks, panel vans) will be eligible for overtime compensation. Many successful cases have been brought for travel time on behalf of employees who had previously been exempt under the MCA. See O'Neal v. Kilborne Medical Labs, Inc., 2007 WL 956428 (E.D. Ky. Mar. 28, 2007).

d. Retail and Service Employees

Many recent successful cases have been brought on behalf of commission sales employees who, we argued, were not exempt because the employer's business was not a retail or service establishment. These cases included the many successful class actions brought on behalf of mortgage loan officers and insurance sales agents. However, defense counsel continue to challenge the "7i" regulations as outdated and inapplicable. See English v. Ecolab, Inc., 2008 WL 878456 (S.D.N.Y. Mar. 31, 2008).

e. Administrative Exemption

The last 12-18 months saw an explosion of litigation brought on behalf if so called "pharmbots" or pharmacy sales representatives who brought drug samples to doctors' offices in order to increase sales of drugs marketed by big pharmacy companies. Plaintiffs' counsel argued in these cases that such employees were not exempt as administrative employees because they were not engaged in selling (but only in providing samples and literature/information about the drugs). Courts have generally not been hospitable toward these claims.

f. Executive Exemption

The "new regs" may have made it tougher for employers to prove up their entitlement to the executive exemption. The regulations now require that exempt executives not only supervise two or more employees, but that they hire or fire such employees or that their recommendations as to such discipline is given "particular weight". Recent cases suggest that courts may be more receptive to our executive exemption cases than in the past. See Mullins v. City of New York, 523 F.Supp.2d 339 (S.D.N.Y. 2007); Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259 (11th Cir. Mar. 6, 2008).

VI. CONCLUSION

Wage and hour litigation is here to stay and plaintiffs' counsel continue to do the hard work of enforcing the nation's wage/hour laws. There is no substitute for the careful working up of the law and facts of each case. The DOL cannot possibly handle all the potential claims that arise from employers' continued neglect, benign or otherwise, of the FLSA and state wage/hour laws. It is as true today as in 1937, when President Franklin D. Roosevelt, in his message urging passage of the FLSA wrote:

> "A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours." Quoted in Kearns, The Fair Labor Standards Act (BNA 1999), pp. 12-13.