Mediation of Class Actions On Wage-and-Hour Matters

By **Ruth D. Raisfeld**

Class actions against employers alleging illegal pay practices under the federal Fair Labor Standards Act (FLSA) and under state labor laws have been increasing in both federal and state courts throughout the country and particularly in the New York metropolitan area. As a federal district judge recently observed: "Recent years have witnessed an explosion in FLSA litigation." In 2014, FLSA cases constituted "nearly 9 percent of the civil cases filed in the Southern District of New York. And this district is no outlier. Nationwide, annual FLSA filings are up over 400 percent from 2001."[1]

Large multistate companies like Wal-Mart, Starbucks, and JP Morgan, but also smaller local businesses like restaurants, stock brokers, construction companies, mortgage brokers, car washes, and insurance companies have been sued in collective or class actions by present and former employees who alleged that they have not been paid all wages due or that they have been misclassified as employees exempt from overtime.

Amendments to the New York Labor Law as well as New York Department of Labor regulations have only contributed more uncertainty to the application of these rules to the workplace, many of which originated during the New Deal and since then have not been amended.

High Stakes

The many legal issues raised in these disputes have generated lower court and U.S. Supreme Court decisions that alter the workplace status quo on almost a daily basis. A panoply of remedies afforded to employees awaits the employer who is found to have engaged in wage-and-hour violations including back pay, liquidated damages, prejudgment interest, shifting attorney fees, and other potential penalties and damages under both federal and state labor law (which in New York carries a six-year statute of limitations), making the defense of these claims an expensive and possibly perilous proposition.

The discovery process for these cases also imposes significant burdens on plaintiffs' firms as well as on the employers. Witnesses may be hard to find and are afraid to risk retaliation by coming forward to join the suit or testify. In addition, the procedural steps of maintaining class and collective actions are daunting: conditional class certification, distribution of notice to the class, document production, depositions, motions, etc. contribute expenses and delay for both sides.

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Further, when the plaintiffs do settle the case, they must seek approval of a class settlement and demonstrate to the trial court that the proposed settlement "is procedurally and substantively fair, reasonable and adequate."[2] Reviewing courts must determine whether the proposed settlement is the result of "vigorous, arm's-length negotiations…untainted by collusion…." Where "the settlement is a by-product of a mediation before an experienced employment law mediator, there is a presumption of fairness and arm's-length negotiations."[3]

Thus, given the high stakes of class wage-and-hour disputes, the complexity of the litigation, and the criteria for court approval of wage-and-hour class settlements, many of these claims are submitted to mediation as a way to facilitate complicated negotiations and help to insure the fairness of the negotiations.

Counsel on both sides of these disputes support the utility of mediation to resolve class disputes. According to plaintiffs'-side lawyer Brian Schaffer of Fitapelli & Schaffer, "early settlement discussions benefit both sides and should take place in virtually every wage-and-hour case. A mediator can be effective in facilitating that process."[4] Carolyn Richmond of Fox Rothschild, a defense lawyer active in the hospitality industry, states: "Attorneys' fees and other statutory penalties can be so crippling, that it behooves an employer to 'reality test' any factual disputes in mediation before running up substantial fees and expenses that will impede settlement negotiations later on."[5]

Guiding Principles

Considering the vote of confidence that both sides give to mediation for resolution of class disputes, counsel who will participate in mediation of such cases, should consider the following principles to guide their preparation and strategic calculus.

First, the mediation must be scheduled with sufficient time for the parties to exchange pertinent information in advance: Who are the workers? What were they paid? Are there records? What do the records show? While full-blown discovery is not always necessary, sophisticated counsel in wage-and-hour lawsuits, either with or without court order, provide a sample of payroll records, job descriptions, employee handbooks, time records and other documentary evidence of the way in which employees were paid and their time was recorded or calculated. If the parties stumble in providing such documentation, the mediator is available to help facilitate what will be produced and how much time will be needed to review it prior to the mediation.

Second, once the foregoing exchange has taken place, both sides should prepare damages calculations. Generally, » Page 7

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Mediation

« Continued from page 4

plaintiffs' counsel interviews putative class members, analyzes the available data and calculates damages based on whatever potential statutory and regulatory violations they discover for which they project back pay, liquidated damages, interest, applicable penalties and potential attorney fees. Defendants are also well advised to do their own analysis of best case and worst case scenarios sufficiently in advance of the mediation—so that both sides (and the mediator) are prepared to make a realistic assessment of the value of the case and the potential settlement zone.

Mediations may fail where the parties had neglected the damages calculation step altogether, or undertook the analysis too close to the mediation, and consequently had significantly conflicting assessments of the potential damages and settlement values. Particularly for the employer, failure to prepare for this "reality testing" may result in "sticker shock," and an inability to determine how to finance the settlement. Inadequate preparation may doom the mediation and result in unnecessary litigation and expense, only to settle later on.

Third, the right representatives should be at the table. For the employer, the representative attending the mediation must be someone with knowledge of the facts and authority to settle. Along with the principal decision makers in the business, an accountant or bookkeeper is helpful. Where there are others with a significant financial interest in the business, it is helpful either to have them at the mediation or available by phone. As is the case in mediation generally, when the people with the real settlement authority are not in attendance, it may be difficult to bring them up to speed on the ups and downs of the negotiation and thus, the greater the possibility that a mediation will fail.

On the employees' side, whether the class representatives attend the mediation, depends on their availability, their willingness to sit opposite the employer, any language barriers, and their knowledge of the facts and understanding of the issues. However, it is imperative for plaintiffs' counsel to consider having class representatives or opt-ins attend the mediation so that they understand the settlement process and can help advocate in favor of the fairness of the settlement which will be submitted for court approval.

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Fourth, the negotiators of a class settlement must have adequate technical support at the mediation to be able to calculate offers and counter-offers during the give-and-take over factual and legal arguments. A lawyer, legal assistant, bookkeeper or accountant with math and Excel skills is critical. Attorneys should not attend a class action mediation without bringing a laptop loaded with the payroll data and damage calculations: Communicating with someone back at the employer's premises or at the attorneys' offices is cumbersome and inefficient. Projecting damage calculation Excel spreadsheets on large screens in the conference room where the mediation is taking place also helps both sides focus on potential damages and settlement possibilities.

Fifth, consider the negotiators' mind-set. Very often both sides to a wage-and-hour dispute cast their adversaries as ideological villains. The employees may feel that the employer is benefitting from the sweat of their brows, the employers may feel that the employees are ungrateful and that the class action will put the employers out of business and eliminate jobs. Defense counsel may object to plaintiffs' attorney fee demands while plaintiffs' counsel claim that defense counsel are dragging their feet to generate more fees. Regardless of the real or imagined bones of contention, it is not helpful for the negotiators to demonize the other side or their negotiating partners. It is in everyone's interest to settle and to realize that these ideological battles cannot be won.

Finally, the negotiators must be patient, persistent, and determined. Even after the difficult task of agreeing to a settlement fund, the negotiators must still hammer out a variety of procedural aspects including the schedule for funding the settlement, the content of the notice to the class, the administration of the settlement, the scope of the release, reversions, tax issues, and attorney fees, to cite a few of the moving parts to a class settlement. These technical issues must be worked out for a settlement to be accepted by the class and approved by a court. Sufficient time must be allotted at the mediation for the negotiators to reduce the agreed-upon issues to a terms sheet, followed up in short order by a fully integrated agreement.

Conclusion

Class actions can and should be resolved to avoid uncertain and expensive litigation—but in order to have a productive and successful mediation, preparation, in advance, is essential.

1. *Sakiko Fujiwara v. Sushi Yasuda*, 12 Civ. 8742, NYLJ 1202676425103 (S.D.N.Y. Nov. 12, 2014, Pauley, J.)
2. *Flores v. One Hanover*, 2014 WL 2567912 (S.D.N.Y. 2014).
3. Id. See also *Capsolas v. Pasta Resources*, 2012 WL 4760910 (SDNY March 5, 2012).
4. Brian Schaffer, e-mail communication, Feb. 9, 2015.
5. Carolyn Richmond, e-mail communication, Feb. 9, 2015.