Mediation of Class and Multi-Party Wage & Hour/Overtime Claims

By Deborah Rothman*

California employers have been deluged recently with high-stakes overtime premium claims. Some have been asserted in the form of multiparty claims, many in the form of class actions, some under the Fair Labor Standards Act of 1938, 29 U. S. C. §201 et seq. ("FLSA"), most under state law—either the Labor Code or California's Unfair Competition Law, Business and Professions Code §17200 et seq. ("UCL"). Regardless of the forum, it is in both plaintiffs' and employers' best interests to settle these claims at the earliest possible stage. This article provides an overview of the nature of these claims, and suggests methods for resolving them in the mediation context.

Wage and hour claims currently hold a lot of attraction for plaintiffs' counsel, and pose a great deal of risk to employers who had previously assumed that compliance with federal overtime standards would immunize them from state liability. These claims are frequently not much more difficult to prove on a representative or a class-wide basis than on an individual basis. Under state law staggering damages can be, and recently have been, awarded to misclassified employees. Raising the stakes further is the fact that under both the FLSA and Labor Code §1194, employers are liable for successful plaintiffs' attorneys' fees. Unsuccessful plaintiffs, on the other hand, are not responsible for defense costs.

Plaintiffs, as a rule, prefer not to file under the FLSA. Claims brought under the FLSA are subject to an opt-in requirement (29 U. S. C. §216[b]), less generous damage formulas, a more liberal definition of exempt employees, and a shorter statute of limitations. 29 U. S. C. §255(a). Plaintiffs are likely to resist employers' attempts to remove state claims to federal court on diversity grounds, as well, since attorneys' fees are more limited and federal verdicts require a unanimous jury.

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California law, on the other hand, is more favorable to plaintiffs asserting class or representative wage and hour claims. It contains more restrictive definitions of the categories of workers that qualify as exempt from overtime pay requirements, see, Ramirez v. Yosemite Water Co., 20 Cal. 4th 785 (1999), and permits greater recovery and fewer obstacles to class certification. Courts can impose the remedy of disgorgement of profits into a fluid recovery fund for Labor Code violations established in a class action; in UCL claims the damages are limited to restitution to each individual proving the elements of the claim. See, Kraus v. Trinity Management Services, Inc., 23 Cal. 4th 116 (2000). The statute of limitations under the FLSA is two years, three if willful conduct is found; in contrast, overtime claims brought under the Labor Code enjoy a three-year statute of limitations, and representative UCL actions have a four year statute of limitations.

The big question, of course, is whether a putative class will be certified. Frequently, especially in misclassification claims, there are common questions concerning class members' job responsibilities and ratio of exempt/non-exempt job duties; the damage suffered by each individual member of the putative class is relatively small and easily calculable; the number of current and former employees affected generally exceeds even the most stringent class action minima; and the company's payroll practices are ordinarily consistent. All of these factors would support class certification. If, on the other hand, different members of the class perform different tasks, so that a case-by-case determination of the ratio of exempt and non-exempt duties would have to be made, class certification might be denied because of the absence of judicial economy. Oftentimes there are variations among class members in type of work done from person to person.

Similarly, changes in job descriptions, staffing levels, management or pay practices during the class period could require individual prove-ups and potentially defeat certification. See, e.g., Osborne v. Subaru of America, 198 Cal. App. 3d 646, 657 (1988). Where supervisors or managers at different locations have the discretion to perform different tasks, stop-watch clocking of each employee to determine his/her individual exempt/non-exempt ratio may be the only alternative if the case goes to trial. Banana Republic successfully defeated class certification of a wage and hour overtime claim on just this basis.

The determination of whether the job requirements of any given class of workers qualifies as exempt duties was previously assumed to require a fact-based analysis which would protect employers from losing on summary judgment. But in Bell v. Farmers Insurance Exchange, 87 Cal. App. 4th 805 (2001), the 1st District Court of Appeal upheld the trial court's grant of summary judgment in favor of plaintiff-insurance adjusters on the employer's exemption argument. This case can be expected to embolden plaintiffs' attorneys and put greater pressure on employers to settle these cases at an early stage.

The absence of class certification is not a death knell for the law suit. Even if a class cannot be certified, successful rep-

resentative claims brought under the Business and Professions Code can inure to the benefit of nonparty plaintiffs. Cortez v. Purolator Air filtration Products Co., 23 Cal. 4th 163, 177 (2000). Plaintiff's counsel still has the option of filing a representative UCL action and trying each case separately, but this scenario results in a less favorable settlement for plaintiffs than a class action. Similarly, standing to maintain a collective claim under the FLSA requires only that the employees be "similarly situated." 29 U. S. C. §216(b). Thus, these claims pose a tremendous threat to employers, even if a class is not certified.

The Role of the Mediator

In the mediation of wage and hour class or representative actions, in contrast to traditional employment mediations where individuals seek both legal and emotional vindication, the class representatives typically take a backseat in the negotiations, and the settlement package is not comprised of non-monetary items. Because the judge overseeing the action will eventually be called upon to pass upon the fairness of the settlement negotiated by class counsel and the employer, the court should be thought of as an invisible "client-equivalent". In traditional mediations the mediator functions only as an agent of reality, persuading each side to soften its negotiating position, in private caucuses. In wage and hour class action mediations, even after the parties have reached a resolution, the mediator again serves as an agent of reality, providing feedback as to the likelihood of court approval of the parties' negotiated agreement.

In terms of timing, mediation appears to be most effective when undertaken before class certification has occurred, and thus before any formal discovery on the issue of liability has taken place. If plaintiffs' counsel has nonetheless assembled sufficient information regarding class members' overtime hours, salary, job duties, period of employment and other employment data, a resolution could theoretically be reached in one marathon session. If not, the first mediation session can be used to streamline the production by the employer of data necessary for class counsel to evaluate its case and participate meaningfully in a subsequent mediation session. The mediator can help the parties tailor a process that balances the employer's need to maintain the confidentiality of individual employees' work records, and class counsel's need to ascertain the accuracy and reliability of aggregate data offered by defense counsel. In one recent mediation, for example, it was agreed that the mediator would serve as a sort of robot, sampling raw data that plaintiff's counsel could identify but not view, and reporting the findings to class counsel.

A major focus of wage and hour class action mediations is whether the class will be certified, and which employees will comprise the class. Neither side relishes the prospect of individual mini-trials for every member of the putative class. Settlement with a small group of employee representatives who ultimately fail to obtain class certification is of little value to a large company. The defense wants the class of employees who are ultimately barred by the doctrine of res judicata from raising similar claims, to be as large as possible. Similarly, the company wants to avoid settling a putative class action with its managers, only to find itself the target of another class action brought by its assistant managers the next month, or a second action filed three years later on behalf of managers hired subsequent to the class period. The employer must balance the risk of an enormous judgment and the attendant negative publicity against the likelihood of prevailing on the merits, or even just on the class certification issue. California courts have recently certified a healthy number of classes in wage and hour cases, but there is no way to predict with certainty what any given judge will do.

The actual settlement is somewhat formulaic. Each class member could be paid a negotiated overtime factor, which would be a percentage of his or her earnings for each week of active employment during the negotiated class period, or a flat sum regardless of hours. There might be a fixed fund to satisfy class members' claims as well as class counsel's fees and costs, or the parties could theoretically agree to evaluate each claim independently, regardless of the total amount ultimately owed. Employers tend to prefer settlements that require individual plaintiffs to participate in a claim procedure, since inevitably some class members fail to respond to technical notices of claim procedure. Class counsel may also be more comfortable with a settlement structured around a claims procedure rather than with a fixed sum of money for which all class members must compete.

The Important Details in the Negotiations

There is an enormous amount of wrangling over details that goes into negotiating the overtime factor ultimately applied, as well as the other deal points. Aside from assessing the likelihood that a class will be certified and that the employer will be found liable for overtime pay violations, some bases for compromise include the following:

(1) While the applicable statute of limitations is four years for individual UCL claims, the defense could assert the equitable defense of laches, see, Cortez v. Purolator, supra, to shorten the class period. (Equitable defenses do not apply to Labor Code claims, which are actions at law.) The theory is that the employer could have adjusted its salary structure, and perhaps also its bonus configuration, had an employee representative sooner brought its claim to the employer's attention. This is a hard defense to make, since most employees are unaware of their rights.

(2) Did class members have the right to assign overtime? An employer might argue the equitable defense of unclean hands to a UCL claim on the theory that some salaried managers may have failed to assign available overtime to non-exempt workers in order to enhance their own performance evaluations. Plaintiffs' counsel would undoubtedly argue that the company, in an effort to boost their profits at the expense of its salaried workers, refused to authorize overtime for non-exempt employees.

(3) Can the calculation of pre-2000 "straight time" be based

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Ask the Arbitrator

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familiar with the process and with the inner workings of the organizations. There is no reason that these individuals cannot gather facts and information just as well as attorneys. The entire system is based on the theory that an employment dispute is one that needs to be resolved. It is not based on the theory that an arbitration must be won or lost. It assumes that it is not appropriate for advocates to notch their respective pistols indicating the number of victories in arbitration. Employment disputes are problems in the workplace that usually need a resolution which does not clearly demarcate a winner and a loser. Rather than victors and losers, they need cooperative problem solvers.

It appears from this on-going experiment that this quick, efficient, effective problem-solving dispute resolution procedure may be far better than our current form of arbitration for everyone involved, including Kaiser, Local 250, the worker, and perhaps most importantly, the Kaiser patient.

ENDNOTES

1. 29 U.S.C. Section 151 et seq.
2. 29 U.S.C. Section 141 et seq.
3. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593.

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on the more employer-friendly federal methodology outlined in Tidewater Marine Western, Inc. v. Bradshaw, 32 Cal App. 4th 968 (1996)? Class counsel will argue for the application of the more stringent state rule enunciated in Skyline Homes, Inc. v. Dep't of Industrial Relations, 165 Cal. App. 3d 239 (1985) and enacted into law starting in June, 2000 (AB 60, as implemented Wage Order 4-2001). That methodology determines a salaried worker's "regular rate" by dividing the employee's weekly salary by forty hours, regardless of the number of hours the employee actually worked, and applying a 150% overtime multiplier to hours worked beyond forty per week. Employers will want the weekly salary to be determined by dividing the salary by the number of hours the employee actually worked (a number which will be higher than forty), and multiplying by only 50% solely those overtime hours which exceed forty per week. This latter calculation, following the federal standard, assumes that the employee's weekly salary contemplated an over-forty-hour workweek.

(4) There may be some flexibility in calculating the number of weeks of "active employment" for which overtime premiums are due. For claims covering 1998 and 1999, when overtime was not available on a daily basis if the work week did not exceed forty hours, overtime is not required for weeks in which the employee took one or more days of vacation time, sick pay, disability, FMLA leave and/or personal time, or weeks in which the business was closed for one or more days.

(5) Under certain circumstances, the employer can claim an offset for bonuses paid to class members, on the theory that the employer intended the bonuses to compensate exempt employees for their long hours. Class counsel will argue that bonuses increase class members' base pay, since non-discretionary bonuses, at least, must be added to employees' salaries for purposes of calculating "straight time". Ultimately, the effect of bonuses turns on whether they were tied to hours worked—in which case they would offset the employer's liability for overtime—or to productivity, sales, profits or safety, in which case they would not.

(6) Former employees are entitled to waiting time penalties of up to 30 days' pay for late payment of final wages where the failure to pay was willful. See, Labor Code §§201-203. However, the defense can attempt to negotiate for a reduction or elimination of waiting time penalties on the grounds that the employees' entitlement was so unclear at the time as to vitiate the corporate willfulness necessary to obtain such penalties.

(7) Some misclassification cases involve salaried employees whose work schedules are fixed and known. Employees whose work hours were not clocked or are otherwise not necessarily ascertainable are permitted to estimate

unrecorded overtime hours. Hernandez v. Mendoza, 199 Cal.App.3d 721, 727 (1988). The less the parties know about class members' actual work hours, the better the prospect for compromise on this issue.

(8) While Bell reaffirmed class members' entitlement to attorney's fees in an overtime action, the court reversed an interim award of such fees in the amount of $1.2 million, holding that the trial court could not grant attorney's fees until the conclusion of the litigation. A present value discount of attorney's fees, pre-judgment interest and waiting time penalties might be negotiated at the mediation, as well as the applicable interest rate, if any.

Other deal points that are typically negotiated in the settlement of putative wage and hour class actions include:

(1) The size of the fund, if there is to be a limited pool.
(2) How to assure that the company will not, by settling the overtime claims of a class of current employees, establish itself as a target for subsequent claims.
(3) The employer may insist upon an option to "kill" the deal based on the opt-outs from the settlement. The defense usually wants to reserve the right to rescind the deal if the number of opt-outs is large, the potential claims of the opt-outs are costly, and/or a high percentage of the opt-outs are likely to file individual actions.
(4) What percentage of the fund is to be allocated to attorneys' fees?
(5) Whether the fund will cover expenses incidental to the settlement, such as FICA and Social Security.
(6) The amount of enhancement, or premium, to be paid to named class representatives for their participation on behalf of the class from the inception of the claim.

There may even be an opportunity for employers to settle the claim of one or more class representatives before class members have been notified, or before a class has been certified. In fact, employers may be willing to pay a premium prior to certification to settle with key plaintiffs whose absence from the litigation would diminish the prospects for class certification. Though arguably permissible, such settlements would nonetheless be subjected to judicial scrutiny. See, e.g., Weight Watchers, Inc. v. Weight Watchers, Int'l, 455 F. 2d 770 (1972) and In Re: General Motors Engine Interchange Litigation, 594 F. 2d 1106 (7th Cir. 1979), cert denied, 444 U. S. 870 (1979).

Mechanics Of The Settlement Process

The mechanics of the settlement process might be as follows: the employer sends each putative class member a notice stating whether it believes the individual is a member of the class, the individual's negotiated overtime rate, the period of time to which the employer believes the individual is entitled to overtime restitution, and the calculation of that individual's settlement amount. Rather than engage in an elaborate, expensive, time-consuming process of individual discovery and verification, a non-profit neutral provider of mass claims resolution services, such as the American Arbitration Association, the Duke University Private Adjudication Center or Northwestern School of Law's Dispute Resolution Center, can be enlisted to administer the settlement, or to oversee the resolution of claims disputes. One fairly straightforward, time- and cost-efficient method to resolve disputes over the employer's determination is via neutral evaluation, based solely on documents. More cumbersome variations include telephonic or in-person dispute resolution processes.

California is an especially employee-friendly state when it comes to wage and hour regulation, and plaintiffs' attorneys' have recently been extremely aggressive and successful in asserting employees' overtime claims. The possibility of obtaining class certification or representative status for these claims in state court, the fact that the employer has the burden of establishing exemptions from the overtime law, the likelihood of imposition of hefty class counsel attorney's fees, pre-judgment interest and waiting time penalties, as well as the possibility of an early disposition favorable to plaintiffs on summary adjudication, combine to pose a powerful threat to employers. As a matter of pure risk control, attempts to resolve these claims through mediation at the earliest possible stage should be and often is a top priority for employers. Employees also benefit from avoiding the fact-intensive case-by-case prove up that would otherwise be necessary to resolve these claims.

Cases Pending Before the Supreme Court

There are now at least six recent labor and employment law decisions pending before the California Supreme Court. Among them are:

- *Advanced Bionics Corp v. Medtronic Inc.* (Mar. 22, 2001) (concerning enforcement of California law prohibiting the imposition of non-competition agreements as a condition of employment, and a conflict with Minnesota law on the same subject).
- *Lolley v. Campbell* – 84 Cal. App. 4th 683 (Availability of attorneys' fees in Superior Court trials de novo of wage claims).
- *County of Riverside v. Superior Court,* 8 Cal.App.4th 211 (Public Safety Officers Bill of Rights and inspection of a background investigation file after termination).
- *Katzberg v. U. C. Regents,* 105 Cal. Rptr. 2d 586 (March 30, 2001) (availability of monetary remedy for violation of a permanent public employee's "liberty interest")
- *Valdez v. Clayton Industries*, 88 Cal. App.4th 1162 (2001)(several issues concerning sexual harassment cases, including the application of the continuing violation doctrine).
- *Clayton-Brame v. Superior Court of Los Angeles County* (May 10, 2000)(Concerning the factual showing that a plaintiff must make in pursuing a claim for a discriminatory refusal to promote)