

Reining In Attorneys' Fees In FLSA Collective Actions: Factors Emphasized By Courts In Scrutinizing Fee Applications

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Much publicity has been generated by the proliferation of wage and hour collective actions under the Fair Labor Standards Act (FLSA), which in recent years have come to represent a rapidly increasing proportion of all class actions filed in the federal courts. A typical FLSA collective action begins as a suit filed by counsel for one or more plaintiffs alleging wage and hour violations against their current or former employer. After the court determines that the case should be conditionally certified as a collective action, other individuals who are similarly situated will be given the opportunity to opt-in as class members. Depending on how many individuals ultimately decide to join the action, an employer's potential exposure to damages may rapidly escalate.

One of the reasons that plaintiffs' attorneys have been particularly motivated to file countless lawsuits all over the country is the FLSA's mandatory attorneys' fee provision and the substantial fees that can be recovered. Under the FLSA, if the plaintiff is the prevailing party in a case, the court is required to award reasonable attorneys' fees and costs. The fees and costs are paid by the defendant in addition to any damages that are owed, such as back pay for unpaid wages and liquidated damages. In some cases, attorneys' fees will substantially exceed the amount of damages that a plaintiff will receive in a judgment or settlement.

As a result, even plaintiffs asserting breach of contract, fraudulent inducement, or other common law claims arising from employment or independent contractor agreements will often dress up their complaints with FLSA claims solely to obtain the benefit of the statute's fee-shifting provision. Attorneys' fees have thus unfortunately become the tail wagging the dog in lawsuits involving unpaid wage allegations.

Despite the mandatory nature of attorneys' fees under the FLSA, courts have discretion to determine the amount of fees to award to plaintiffs' attorneys. In addition, judges throughout the country have demonstrated a willingness to carefully scrutinize attorneys' fee requests and have reduced fees for reasons ranging from counsel's failure to provide the court with adequate documentation and poor exercise of billing judgment, to the limited success achieved by the plaintiffs in the lawsuit.

This article will review the factors that courts have emphasized in evaluating attorneys' fees applications and suggest strategies for reducing exposure to fees. Given the prominent role of attorneys' fees in FLSA suits, it is more important than ever for corporate counsel and experienced outside counsel to focus on this issue at the early stages of a case, especially a case brought as a collective action with the potential for significant liability.

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The Lodestar

The "lodestar" method is the generally recognized method used by courts to determine reasonable attorneys' fees in cases brought under fee-shifting statutes such as the FLSA. Under the lodestar method, the court multiplies the number of hours reasonably expended in the litigation by a reasonable hourly rate. The attorneys for the plaintiffs must document the number of hours spent on the case, provide a description of the work performed, and establish that the number of hours expended were reasonable. Plaintiffs' attorneys are also required to establish the reasonableness of their claimed hourly rate. In determining a reasonable hourly rate, the court relies on the prevailing market rate for attorneys who provide similar legal services in the community where the case is pending.

As part of the attorneys' fees assessment, the court also carefully evaluates the results obtained in the case, and may reduce attorneys' fees based on the degree of success achieved by plaintiffs at trial or in a settlement. A reduction in fees may be accomplished by the elimination of certain hours spent litigating unsuccessful claims, or simply a downward adjustment of the total fee requested by a certain percentage.

Factors Driving Fee Reductions

In recent FLSA collective actions and purported collective actions throughout the country, courts have emphasized several reasons for curtailing attorneys' fees, including limited success achieved by the plaintiffs, counsel's conduct in the case, and deficient fee applications. Such factors have led to significant reductions in the attorneys' fees that are ultimately awarded, with several courts reducing fee awards by 50 percent or more.

Plaintiffs' limited success in the litigation. The level of success achieved by the prevailing plaintiffs in a FLSA action is a critical factor in the court's determination of the amount of attorneys' fees to award. The court will not reduce attorneys' fees solely because plaintiffs obtain a small damages award. However, if the ultimate recovery is small relative to the original amount sought by the plaintiffs in a particular case, the court will account for this disparity by reducing attorneys' fees to reflect the plaintiffs' limited success. Indeed, plaintiffs who overreach with an excessive damages demand and later end up with a small fraction of their initial demand may run the risk of causing the court to summarily reject their attorneys' fees application in its entirety.¹

In the context of FLSA collective actions, courts have routinely reduced fees to account for unsuccessful efforts to achieve collective action certification. Many cases that begin as purported collective actions will not ultimately be certified. To determine if certification is appropriate, courts evaluate whether there are other proposed class members who are similarly situated to the plaintiffs. The court will

analyze the commonalities between plaintiffs and other proposed class members, including their job descriptions, geographical location, and whether their work may have been influenced by similar policies and practices.

The court also assesses whether there are other proposed class members in addition to the named plaintiffs who wish to opt-in to the action. If the court ultimately determines that a case should not be certified as a collective action, the named plaintiffs may still proceed with the litigation. Under these circumstances, fees would still be awarded for hours expended on behalf of the plaintiffs who remained in the case and prevailed on their claims. However, the court will explicitly disallow fees for time spent by plaintiffs' counsel on collective action certification, especially if the court determines that the case never should have been brought as a collective action in the first place.²

Unnecessary multiplication of proceedings. Not surprisingly, judges are sensitive to the degree that judicial time and resources are spent in any particular case. Conduct by plaintiffs' counsel that improperly prolongs the litigation and wastes the court's time will result in significant penalties in the form of reduced fee awards. Courts are quick to highlight strategic mistakes by counsel in FLSA actions, including damages assessments that are unrealistic and the pursuit of damages theories and calculations that lack evidentiary and legal support.³ Courts also frown upon abusive motion practice, including the filing of unnecessary and frivolous motions on issues that may have been resolved in prior cases or that could have been addressed without the expenditure of substantial judicial resources.⁴

Clerical and administrative work. In evaluating the billing records that are submitted in support of fee applications, courts will discount attorneys' fees for time spent on work that appears to be of a clerical or administrative nature. If billing entries suggest that certain tasks performed in the case were largely clerical, even if performed by attorneys, the court may decline to award fees for hours expended on such work.⁵ Similarly, hours may be disallowed for work that was performed by attorneys, but that should have been performed by paralegals at lower hourly rates. Attorneys' fees have also been reduced due to excessive time spent by attorneys on the drafting of boilerplate documents that require little or no legal analysis.

Deficient time records. Courts often criticize time records that contain vague time entries. If descriptions of the work performed are not sufficiently specific, the court will not be able to determine if hours are properly compensable. Counsel's exercise of billing judgment has also been a target for scrutiny, as courts have noted when fee records include excessive time for unnecessary, minor or redundant tasks. Courts will also criticize time records that contain instances of "block billing," which is the inclusion of multiple tasks under a single time entry. Block billing obscures the amount of time dedicated to each task and hampers the court's ability to determine if the number of hours expended by counsel on certain activities were reasonable.

Inadequate proof of hourly rates. In determining a reasonable hourly rate, courts rely upon the prevailing rate for

legal services provided by attorneys of comparable skill, reputation and experience. Judges may rely on survey data from the local legal community to help assess the benchmark for billing rates. If the hourly rates claimed in the fee application are higher than the benchmark, the court will award fees based on lower rates.⁶ Additional evidence of market rates may be submitted through declarations of other attorneys in the legal community.⁷

Strategies For Employers

The United States Supreme Court has long cautioned that a request for attorneys' fees in a case brought pursuant to a fee-shifting statute should not result in a second major litigation.⁸ With this principle in mind, several options may be considered by employers in determining how to effectively litigate a FLSA case while at the same time limiting their exposure to attorneys' fees.

If potential liability is clear, it may be prudent to negotiate a settlement early in the litigation and before counsel for the plaintiffs have expended significant time and resources on the case. Another strategy that may facilitate early resolution of a case is an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure. A plaintiff who rejects an offer of judgment may subsequently end up with a judgment or settlement for an amount below the offer of judgment. In this scenario, a court is likely to reduce attorneys' fees to account for the limited results obtained by the plaintiff.⁹ Similarly, plaintiffs who reject an early settlement offer may end up receiving much less later on in the case, and their attorneys run the risk of a greatly reduced fee award.¹⁰

If a settlement is being negotiated, employers may also consider settling the substantive FLSA claims and allowing plaintiffs' counsel to petition the court for an award of reasonable attorneys' fees and costs. By structuring the settlement in this manner, employers have preserved the opportunity to challenge the application for attorneys' fees.¹¹ Alternatively, if the parties wish to avoid motion practice over the attorneys' fees issue, it may be worthwhile to request documentation of fees from plaintiffs' counsel, such as actual time records, and then arrive at a reasonable fee in the course of settlement.

Given the substantial liability that employers may face in FLSA collective actions and even individual cases, keeping a close watch over attorneys' fees and thinking about how to reduce fees at the outset of a case is a direct way to control exposure.

¹ See *Coan v. Nightingale Home Healthcare*, 2006 U.S. Dist. LEXIS 78672, at *2-3 (S.D. Ind. Oct. 27, 2006).

² See *Barfield v. New York City Health & Hosps. Corp.*, 2006 U.S. Dist. LEXIS 56711, at *7-8 (S.D.N.Y. Aug. 11, 2006); *West v. Border Foods, Inc.*, 2007 U.S. Dist. LEXIS 43423, at *8-9 (D. Minn. June 8, 2007).

³ See *Powell v. Carey Int'l, Inc.*, 547 F. Supp. 2d 1281, 1286-90 (S.D. Fla. 2008) (plaintiffs' appeal and defendants' cross-appeal pending).

⁴ See *id.* at 1290-92.

⁵ See *McElmurry v. U.S. Bank N.A.*, 2008 U.S. Dist. LEXIS 35905, at *10 (D. Or. Apr. 30, 2008).

⁶ See *id.* at *7-10.

⁷ See *Stevens v. Safeway, Inc.*, 2008 U.S. Dist. LEXIS 17119, at *44-48 (C.D. Cal. Feb. 25, 2008).

⁸ See *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

⁹ See *Shea v. Galaxie Lumber & Constr. Co.*, 2000 U.S. App. LEXIS 15471, at *3-6 (7th Cir. June 28, 2000).

¹⁰ See *Powell*, 547 F. Supp. 2d at 1297.

¹¹ See *West*, 2007 U.S. Dist. LEXIS 43423, at *5.

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