

**UPPER MIDWEST EMPLOYMENT LAW INSTITUTE
ADVANCED TRIAL PRACTICE:**

**HOW TO BRING THE FLSA CASE
(Plaintiffs' Perspective)
(No. 607)**

By David Borgen

GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN

300 Lakeside Drive, Suite 1000

Oakland, CA 94612

(510) 763-9800

(510) 835-1417

[*borgen@gdblegal.com*](mailto:borgen@gdblegal.com)

[*www.gdblegal.com*](http://www.gdblegal.com)

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I. STUDIOUSLY STAY CURRENT

In the fast developing wage/hour sector of employment law, there is no substitute for scrupulously staying on top of all new legal developments (both state and federal). Too many lawyers, not only labor and employment lawyers but personal injury, securities, and even defense attorneys, are rushing into plaintiffs' wage/hour cases, often without much background in the law. BNA has an excellent treatise (Kearns, The Fair Labor Standards Act) for which there is an annual cumulative supplement. BNA also provides daily and weekly reports on wage/hour developments. The U.S. Department of Labor website has all its opinion letters posted in chronological order so that it is easy to check for new material. Keeping up to date will assist the employees' counsel in identifying potential cases and in avoiding potentially losing cases.

II. ASK EVERYONE

Defense counsel always want to know how we find these cases. In truth, it is not very common for workers to come into lawyers' offices with a clear idea of how their rights have been violated under the state or federal wage/hour laws and regulations. It is probably true that most good wage/hour cases are discovered when clients present other legal problems, like perceived discrimination or wrongful termination issues. Usually, potential clients will have to be carefully interviewed about compensation practices to determine exactly what wage/hour claims may be asserted on their behalf.

III. CUSTOM TAILORING

Once it has been ascertained that a potential client has one or more wage/hour claims, a complaint must be prepared that is carefully tailored to create the best chances for overall success. In our experience, it is rare that in a given workplace only a single worker has been subject to unlawful compensation practices. In today's workplace, usually an entire work group has been subjected to unlawful compensation practices. This is why wage/hour cases are usually brought as class or collective actions. [Another reason is that a single plaintiff FLSA case is not likely to be economically viable.] Even after a decision has been made to bring a class or collective action, the complaint must be carefully tailored to fit the clients who are available to bring the claims. Counsel should avoid over-pleading the case in terms of the number of claims to be included, the number of job titles to be included, and the number of facilities to be included.

IV. FORUM SELECTION

While forum shopping may be improper, it is the duty of plaintiffs' counsel to carefully evaluate where to bring the case. Initially, a choice must be made between state and federal court. Often, venue may be proper in any number of jurisdictions based on where the employer does business or where the plaintiffs worked. A proper selection at the outset may dictate the future of the case. Plaintiffs' counsel should be concerned about what motions the defense may raise as to forum selection, including how to respond to potential motions to remove the case pursuant to the Class Action Fairness Act (CAFA) or motions to transfer (forum non conveniens).

V. CASE MANAGEMENT

Once the decision has been made to file a class or collective action wage/hour case, the next challenge is to make sure that there are adequate resources to see the case through to conclusion. It is not unusual for these cases to present millions of dollars of potential exposure to the employer and employers faced with such cases often choose to engage in scorched earth litigation tactics. Even in the face of a more benign response, the sheer size of some of these cases will require substantial resources in terms of expertise, staff, financing, and computer capacity. A successful large scale wage/hour case requires the assembly of an adequate team. Often, if the case is large enough, several plaintiffs' firms will have to band together in order to bring enough resources to bear on the case. If the case has numerous class members and/or optin plaintiffs scattered around the country, counsel must plan for numerous depositions and travel time, as well as responding to multiple sets of interrogatories and document requests. A large scale database must be available to keep track of class members and their documents. Often considerable expenses will be incurred in sending out class notice and in engaging expert witnesses.

VI. THE DOOR IS ALWAYS OPEN

It is our practice to always be ready and available to talk about settlement of a case. This is not a sign of weakness or excessive tractability. It is a good policy. It is in everyone's interest to try to resolve these cases as early as possible, if at all possible. Fortunately, most court rules require counsel and the parties to address alternative dispute resolution (ADR) techniques early in the case. This should not be treated pro forma. In our experience, serious settlement discussions may proceed concurrently with discovery and litigation so long as counsel are experienced and open to working on two tracks at the same time. Often, however, private mediation before a mediator experienced with wage/hour class/collective actions is the most effective road to a global solution. Counsel are encouraged to be creative and to consider using innovative approaches including informal interviews and information exchanges.

VII. WITNESS SELECTION

In most courts, counsel are required to disclose their trial witnesses in advance of the trial. The deadline for filing these witnesses lists is far too late to start considering who will testify at your trial. Start as early as possible to assemble your list of trial witnesses. For plaintiffs' counsel this may mean employees other than the named plaintiff, as later discovered witnesses may be far more effective than the initial worker who came to your office and signed onto your complaint. Of course, trial witnesses have to be thoroughly vetted, including reviewing any relevant employment documents and collateral litigation they may have been involved with. It may be worthwhile to have a trial consultant or jury selection expert assist you in preparing and/or evaluating trial witnesses. Witnesses not only need to be credible, but they need to have good stories and be personable and sympathetic. During the same time period, you will want to consider whether to engage expert witnesses. In fact, expert witnesses may be useful not only at trial but for obtaining Section 216(b) collective action notice, FRCP Rule 23 class certification, or for defeating summary judgment. Often, experts can be of tremendous assistance in mediation (see #6 above). The selection of expert witnesses (and Daubert motions) is outside the scope of this panel.

VIII. CAN YOU CARRY A TUNE?

Did you ever notice how many movies and commercials feature background music by Puccini? That's because he wrote the world's most beautiful melodies. Similarly, every winning case needs a good theme or motif that is memorable, catchy, and appealing. Even in the often dry and sometimes hypertechnical field of wage/hour class/collective action litigation, counsel need to develop and hammer home a theme of the case. In our recent Starbucks tip pooling case, it could have been: they're taking money from consumers and low wage baristas to pay their supervisors' wages. Every good plaintiffs' case needs a "justice angle." This theme should be developed early on and refined as the case proceeds.

IX. PRE-TRIAL MOTIONS

Be prepared to survive the avalanche of activity that threatens, pre-trial, to bury you alive. Just before trial, when you are trying to prepare your witnesses, write out your opening statement and trial brief, and assemble your exhibits, you will be hit with decertification motions, summary judgment motions, and motions in limine seemingly without number, maybe also a Daubert motion or two to exclude your experts. Any one of these can sink your case entirely or drastically reduce its value. This is one of the reasons why you assembled a big team of attorneys and paralegals adequate to survive the onslaught (see #5 above). You will have assigned one or more attorneys who are skilled at quickly producing winning briefs to handle this while you work on your theme and other trial preparations. These attorneys may even have time to write some pro-active motions to put the other side on the defensive.

X. TRIAL

Not so long ago, it was conventional wisdom that these cases couldn't be tried or if they could be tried no one in their right mind would want to try them. Now, we are seeing more and more of these cases going to trial. In the past year, my small firm has tried two massive class actions, one against Longs Drug Stores (about 80,000 class members) and one against Starbucks (bench trial resulting in \$105 million verdict on behalf of 120,000 barista class members). Other wage/hour class/collective cases have been tried to verdict in the recent past against Family Dollar, Farmers Insurance, Wal-Mart, U.S. Bank, Tyson, and other large employers, just to name a few. The one lesson learned in this (given that plaintiffs and defendants both have claimed victories) is that these cases are triable and that trials can be completed within reasonable time periods. Counsel should consider early on just how such a trial can be tailored for the facts and claims in each case. Trial plans may include bifurcation or the use of representative evidence or survey evidence. In some instances, a test case or two may be appropriate. Careful planning with opposing counsel and the court will be required in order to devise an effective plan for trying these cases. Just don't assume the case can't or won't be tried.