Pay Up -- What Do FLSA Violations Really Cost
Fourth Annual Section of Labor and Employment Law Conference
Chicago, Illinois
November 5, 2010

ATTORNEY'S FEES: ETHICAL ISSUES, WHEN AND HOW TO NEGOTIATE, AND FEE PETITIONS[1]

Aashish Y. Desai
Mower, Carreon & Desai, LLP
8001 Irvine Center Drive, Suite 1450
Irvine, CA 92618
desai@mocalaw.com

I. THERE ARE MANY WAYS THAT ATTORNEY'S FEES CAN BE AWARDED IN FLSA ACTIONS.

The FLSA provides that the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow reasonable attorney's fees to be paid by the defendant, and the cost of the action." 29 U.S.C. § 216(b). Since most of these cases are brought as class hybrid actions, attorney's fees may also be available under general theories related to class actions. Settlement negotiations for the class may overlap with discuss of class counsel's attorney's fees. While such situations may raise difficult ethical issues for plaintiff's attorneys, the U.S. Supreme Court has declined to inhibit the practice of overlapping fee discussions with damages because "a defendant may have good reason to demand to know his total liability." MANUAL FOR COMPLEX LITIGATION (4th) § 10.14 (Fed. Jud. Ctr. 2004). Other times, a lump sum is negotiated and attorney's fees are awarded from that sum.

This paper will discuss practical theories surrounding fee applications and some of the common conflict scenarios that can arrive in negotiating attorney's fees in a class environment. In particular, the attorney's loyalty to the client may be compromised by the attorney's desire to secure compensation for services. This, naturally, gives rise to a potential conflict in the class action context. But as will be shown, the conflict is more theoretical than practical.

---

[1] *Ethics rules vary by jurisdiction and are often difficult to apply in the context of class action lawsuits. There are very few Black Letter rules. Each situation is unique and will require specific, fact, intensive analysis. The views expressed are merely scholarly commentary and are not meant to reflect the proper outcome in any particular case. This is not legal advice.*

II.
Fee Petitions

In contrast to fee shifting statutes in which attorney's fees are discretionary, an award of attorney's fees to a prevailing plaintiff is mandatory under the FLSA. *Alaska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Shelton v. Irwin*, 830 F.2d 182, 184 (11th Cir. 1987), *aff'd*, 853 F2d 931 (11th Cir. 1988) (holding that attorney's fees are mandatory and integral to FLSA; determination of amount of fees must be made before appeal). Congress's mandate to the courts to award attorney's fees only to plaintiffs was intentional and specifically designed to encourage private litigants to act as "Private Attorneys General" to vindicate FLSA rights. *See Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).

Defendants are not entitled to their fees under the FLSA. *Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1993). However, a defendant may be entitled to attorney's fees for bad faith, vexatious, or oppressive litigation. *EEOC v. Hendrix Coll.*, 53 F.3d 209, 211 (8th Cir. 1995).

Five Basic Steps for Prevailing Plaintiff Fee Application

1. Entitlement: Under what circumstances and statues are you entitled to attorney's fees?

2. How many hours were reasonably spent on the matter (the lodestar)?

3. What hourly rate should be applied?

4. Are there any issues with apportionment -- i.e., prevailing and nonprevailing claims? and

5. Are you entitled to a multiplier?

1. Entitlement

A prevailing plaintiff is entitled to attorney's fees by statute under the FLSA as described above. 29 U.S.C. § 216(B).

2. Legal Standing for Lodestar

The link determining whether fees were reasonably incurred focuses on the attorney's decision to perform work at the time it was performed and in light of the overall result. Attorney's fees are not a gift. They are just compensation for expenses actually incurred in vindicating a public right.

The starting point for determining the amount of fees is the number of hours reasonably expended on the litigation multiplied by a reasonably hourly rate. *Hensley v.*

Eckerhart, 461 U.S. 424, 433 (1983). This lodestar calculation provides an objective basis upon which to make an initial estimate of the lawyer's services. *Hensely*, 461 U.S. at 433. The court may reduce the lodestar by deducting hours which were not "reasonably expended." *Id.* at 434. The number of hours that is "reasonable" must be determined according to the facts of each case. *Id.* at 429.

- **Use reasonable billing judgment**

A billing partner usually reviews draft invoices before they are finalized into the invoice and ultimately sent to the client for payment. Consequently, prevailing parties are obligated to exercise "billing judgment" to exclude from the fee request hours that are excessive, redundant or otherwise unnecessary. *Carson v. Billings Police Department*, 470 F.3d 889. 893 (9th Cir. 2006) (holding that a district court may not uncritically accept the number of hours claimed by the prevailing party, but find that the time actually spent was reasonably necessary).[2]

- **Court has broad discretion**

The trial court has wide discretion in awarding fees. Because the court has such wide latitude an applicant can increase her chances of success by making every effort to be reasonable. Of course, the court has discretion to deny its fees altogether if the request is "inflated and outrageously unreasonable." *Serrano v. Unruh*, 32 Cal.3d 621, 635 (1982).

- **Reasonableness factors**

The following are some considerations used by courts to determine whether the fees requested are reasonable.

a. Multiple attendance.

Courts examine with skepticism claims several lawyers were needed to perform a task and often deny compensation for needless duplication when many lawyers appear for hearing when one would do. *See Democratic Party of Washington State v. Reed,* 388 F.3d 1281, 1286 (9th Cir. 2004).

b. Documentation activities

Time spent on clerical activities should not be billed at an attorney or paralegal rate. *Missouri v. Jenkins*, 4 91 U.S. 274, 288 n.10 (1989) ("holding that it is appropriate

---

[2] Everyone believes their hours are reasonable. However, consider using billing discretion to reduce the hours being requested from the actual hours billed to bolster your application. This will help counter an argument made by the opposition that you were unreasonable -- i.e., by reminding the court that you have "already reduced the hours claimed by five or ten percent."

to distinguish between legal work and investigation and clerical work). Clerical activities may including updating correspondence and pleadings, file maintenance activities, sending exhibits to expert witnesses, making copies and pulling travel materials.

- **Vague entries**

Time entries should be detailed and comprehensible. Vague billing descriptions are universally prohibited because of the commonly held perception that a timekeeper can consciously or unconsciously disguise and inflate their billable hours. *In re Donovan*, 877 F.2d 982, 995 (D.C. Cir. 1989).

- **Duplication of efforts and overstaffing**

Overstaffing can generate excessive fees. It can also result in a duplication of efforts. While courts are reluctant to lay down strict guidelines, they are critical of law firms who overstaff a matter. *Covel v. PaineWebber*, 128 F.R.D. 654 (N.D. Ill. 1989). (Cases should be staffed at appropriate levels according to expertise and billing rates).

- **Blocked billing**

Time spent on each task should be separately recorded. "Blocked billing" is a practice of lumping two or more tasks into a single entry. Due to the uncertainty that blocked billing creates, it has often been found by courts to warrant a percentage reduction. *See, e.g., In re The Leonard Jed Co.*, 103 B.R. 706, 713 (Bankr. M.D. 1989).

- **Quarterly hourly increments**

The State Bar Advisory cites the use of "high minimum increments" as an example of padding:

> The standard minimum is $1/10^{th}$ of an hour or 6 minutes. If the higher minimum is used such as .25 or .5, this probably increases the time by 15 to 25%. Some courts have criticized the use of .25 or 1/4 hour minimum as being too high.

- **Excessive conferences**

Internal conferences is an important tool and is certainly valuable to the client. A classic example are conferences with junior level associates to work more efficiently and the supervision of the senior attorney who can direct the legal research needed on a case or narrow the investigation. *Common Cause v. Jones*, 235 F.Supp.2d 1076, 1080 (C.D. Cal. 2002). Of course, conferencing can also be subject to abuse. Courts often deny fees for time spent in excessive meetings involving more than two attorneys. While some amount of discussion is useful, excessive time billed for attorneys "discussing" a case maybe questioned. *Guckenbberger v. Boston University*, 8 F.Supp.2d 91, 101 (1998)

(holding "excessive telephone calls and conferences represent a duplication of effort for which less than full fare should logically be charged for all participants.").

3. Hourly Rates

Once the reasonable number of hours are determined, those hours should then be multiplied by an hourly rate. Market value is determined by the rates charged in the relevant community by attorneys of comparable knowledge, skill, experience and reputation. *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 1095-96 (2000). One of the best ways to establish market value is by submitting declarations from practitioners in community. This can help establish current rates for associate attorneys and paralegals as well. Another consideration is to use surveys conducted of attorney hourly rates, including those conducted by RSM McGladrey and Ultman Weil, Inc. *See* 2006 Law Firm Financial Benchmarking Survey, RSM McGladrey, National Edition.

4. Apportionment Issues

A party opposing the fee application will likely claim that fees should be apportioned between successful and unsuccessful claims. This issue turns on whether the claims are "inextricably intertwined" such that no apportionment is either necessary or appropriate. In *Hensley*, 461 U.S. at 434, the U.S. Supreme Court held that where a lawsuit consists of related claims, a plaintiff was one substantial relief should not have his attorney's fees reduced "simply because the district court did not adopt each contention raised."

5. The right to a multiplier

In cases of contingent risk, plaintiff's counsel may ask for a multiplier of their lodestar -- most seek fees in the range of two to three times their lodestars. Under California law, lodestars may be adjusted upwards to compensate for the nature of the case. *Crommie v. State of California*, 840 F.Supp. 719, 726 (N.D. Cal. 1994) (awarding 2.0 multiplier); *Serrano v. Priest*, 20 Cal.3d 25, 48-50 (1977) (1.4 multiplier upheld under Private Attorney General theory).

The relevant factors that a court may consider in awarding an enhancement include: (i) the contingent nature of the fee award; (ii) the novelty and complexity of the litigation; (iii) counsel's skill; (iv) extent to which litigation precluded other employment; (v) results obtained; (vi) delay in payment.

Contingency risk multipliers in federal fee shifting cases are no longer allowed in the aftermath of *City of Burlingame v. Dague*, 505 U.S. 557 (1992). However, some states, such as California, has expressly declined to follow *Dague* and has specifically recognized that a lodestar should be enhanced to compensate attorneys for the risk of loss in contingent cases. *Ketchum v. Moses*, 24 Cal.4th 1122, 1133 (2001). Thus, plaintiffs should ask for multipliers under state and federal law, i.e., under California's C.C.P. § 1021.5 for enhancement of companion unfair competition law claims. *Chabner v. United*

of Omaha Life Ins. Co., 1999 WL 33227443 at *7 (N.D. Cal. October 12, 1999); *Parks v. Eastwood Ins.*, 2005 WL 6007833 (C.D. Cal. June 28, 2005) (awarding fees and multiplier on FLSA and UCL class action).

III.
ETHICAL ISSUES FOR WHEN AND HOW TO NEGOTIATE FEES

The problem with simultaneous negotiation of a settlement and attorney's fees has been recognized by many commentators. The absence of a "real client" impairs the incentive of a lawyer for the class to press the suit to a successful conclusion because his earnings from the suit are determined by the legal fee he receives rather than the size of the judgment. This creates at least a temptation to settlement with the defendant for a small judgment and large legal fee and, such an offer will naturally be attractive to the defendant, provide the sum of the two figures is less than the defendant's net expected loss from going to trial. *See, e.g.*, Richard A. Posner, Economic Analysis of Law, 570 (4th ed. 1992) (discussing the conflicts that may arise between attorneys and clients in class actions).

While this problem is easily recognized, there are no clear-cut solutions. One solution is to flatly prohibit a settlement under certain circumstances. However, courts have rejected that position. The Ninth Circuit posited that an outright prohibition of simultaneous negotiation of settlement and attorney's fees would not be prudent. *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980). The Ninth Circuit reasoned that settlement negotiations are a "give and take process" in which all elements should be considered, including attorney's fees.

Another solution that commentators have discussed is to abstain from the discussion of attorney's fees until an agreement is reached on the relief itself or negotiate lump sum settlement and allow the court to allocate the fund between counsel and client. *See Cisek v. National Surface Cleaning, Inc.*, 954 F.Supp. 110, 111 (S.D.N.Y. 1997). The most serious disadvantage to this theory, however, is that it would result in more responsibility on judges who already have a tremendous amount of work. To adequately determine attorney's fees out of a lump sum apportionment would take extra time and tremendous discretion. This may actually exacerbate the problem and turn the attorney fee application into satellite litigation.

In the end, the potential or real conflict of interest inherent in simultaneous negotiation is complex and difficult to control. Most defendants simply want to buy peace. At mediation or at a settlement conference, defendants usually ask whether the settlement numbers include attorney's fees on a forward-going basis so that they know they are negotiating for the final disposition of the case, all in. While not perfect, this approach has the most potential to deal with the conflicts so that it is minimized in the

class action context. There will no doubt be consequences that have yet to be discovered, however, this method seems best suited to address the potential pitfalls.[3]

[3] Sometimes defendants create other ethical problems by demanding an agreement for class counsel to refrain from representing future claimants against their company. Model Rule of Professional Responsibility 5.6 specifically prohibits lawyers from entering into "an agreement in which a reservation on the lawyer's right to practice is part of the settlement of a client's controversy." Similarly, defense counsel may ask class counsel to settlement claims that are not contained in the complaint. Courts are not authorized to approve class action settlements with overbroad releases going beyond the facts of the operative complaint. *See, e.g., National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (9th Cir. 1981); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F.Supp.2d 561, 577-78 (E.D. Pa. 2001).