**Collective Actions**

Collective actions and other large Rule 23 and mass messes. It would appear that my current forte may be mediating large collective actions and/or Rule 23 class actions under the Fair Labor Standards Act ("FLSA"), on a regional or national basis. This may be because I have practiced in this area for 40+ years, both on the employee and the defense side, or it may be because my father was Area Director of the Wage and Hour Division of the U.S. Department of Labor for 30+ years. I do know the statute and how it works.

In the past several years, parties in my mediations have successfully concluded several hundred FLSA mediations involving in excess of 41,000 employees and generating in excess of $400 million in wage payment settlements under both the FLSA and applicable state law – in resolution of perhaps several billions of dollars of exposure. If you know the terms *all-in, opt-in, opt-out, employer-side taxes, TPA, QSF and reversionary funds,* you know what I am talking about. It you don't, you might need to retain special FLSA counsel.

Many of these matters involved oil and gas or energy-related organizations, and classifications such as security guards, pump technicians, directional drillers and measure-while-drilling technicians, drilling supervisors, field service specialists and supervisors, mud engineers, fluid technicians/operators, waste technicians/operators, wireline operators, frac-techs and solids control personnel. Often, potential liability parallel to or greater than the FLSA may exist under the state laws of California, North Dakota, Pennsylvania, Wyoming, Alaska, New Mexico and Ohio, just to name a few. Violations sometime involve simple misclassification or exemption issues, but also failure to meet the fluctuating workweek or salary basis test, or payment of straight salary without compounding into the overtime rate any number of completion bonuses, day rates or per diem payments. The FLSA/Rule 23 mediations have taken me to Houston, Dallas, Denver, Midland, New York City, Oklahoma City, Philadelphia, Phoenix, Pittsburg, Charlotte, St. Louis, Baton Rouge and New Orleans, among other places. I was recently admitted to the ADR Panel for the Western District of Pennsylvania at the request of one of the judges there.

In addition to these energy-related FLSA disputes, I am knowledgeable in other areas of the FLSA such as tip pools, packing plants and security/loss prevention personnel. Among these mediations were:

- A dispute involving "doffing and donning" at a meat packing plant in the central U.S., with a class of over 300 employees who were members of the Teamsters Union;
- A dispute involving overtime claims by some 300 or so San Antonio Police Officers;
- Several disputes under the FLSA and state law, involving four thousand or so directional drillers and mud engineers, each of whom were bound to mandatory arbitration of individual claims;
- A dispute over royalty and development rights in a subdivision involving some 340 lot owners, 30 or so reserved royalty owners and forty-two lawyers; and
- Numerous disputes over how much expense reimbursement pizza delivery drivers should receive

The key to being of value in these cases is to make certain that the parties, and the Mediator, have sufficient information to make a decision.

> *To successfully mediate, both parties must have a comfort level that sufficient information is known about the case in order to evaluate alternative settlement proposals. In an FLSA collective action, this definitely means each party should obtain sufficient payroll and other data to model the damages at issue. Plaintiffs should exchange their estimates of the hours worked for mediation to be successful; however, because employers typically have a negative visceral response to the plaintiffs' estimates of hours worked, the parties should explore whether there is any objective data that can be obtained that will help recreate the hours worked by the plaintiffs. Objective data may include computer long in or log off data, telephone logs, cell phone logs, times of sending or receiving emails, security code data, computer-hard drive recovery data or third-party data showing the time employees were working. Both sides to the mediation should construct their own damage model or become familiar with the other sides' damage model prior to mediation.*[1]

**Predictions of Exposure/Recovery:** It is very helpful to me to learn what the parties anticipate the damage model (or exposure) to be. When I go to the employer's room, sometimes I am told that these employees never worked an hour of overtime in their careers. I am told in the Plaintiffs' room that each of the class members always, without fail every week, worked 30 hours of overtime, mostly off the clock. I know this is not what happens in real life, so the more accurately we can get our minds around what really happens, the more realistically we can try to find a solution. These estimates were most often based upon data provided by the Employer as to hours and days and pay rates and number of workweeks. When both sides share accurate information, they often are able to achieve a better and faster result in mediation. In fact, the estimates by both sides in a dispute often does not differ in material respects for either two years or three years of exposure. Ultimately, what I am trying to do is find a range of exposure say at the two year, not doubled level, and at the three year not doubled level.

**Minimum payroll data necessary:** For the classifications that are involved in our mediation, it is crucial that the Employer furnish to me and the other side certain information for at least the last two years:

Number in each classification for each week.
Total workweeks (with overtime) globally for all classifications for this period.
Average of hours worked each workweek and average pay levels.
Total employee census by classification and state.

**Unfortunately, I cannot guarantee that we can resolve these disputes even with the free and open exchange of information. But I can guarantee that if we do not openly share census, wage and workweek data, this case <u>will not settle</u>.**

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[1] *Strategies for Mediating Your Wage & Hour Class Action,* Burr & Smith, LLP, American Conference Institute, New York, New York, April 25-27, 2007.