



OAJ Destination CLE: Wage & Hour Seminar

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Considerations when settling Class and Collective Cases

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Considerations When Settling Class and Collective Cases

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I. SETTLEMENT CASE STUDIES

Case 1: Conditionally Certified FLSA Collective, Class Certified Rule 23 State Law Class

*Issues: Should the named plaintiffs attend the mediation?
How to counter slow defense lawyers?
How to explain and fairly devise a complicated allocation?
How to determine whether the data produced by the defendant is accurate?*

Case 2: Conditionally Certified FLSA Collective, Uncertified State Law Classes

*Issues: Is it appropriate to weigh the allocations so that FLSA opt-in plaintiffs receive more than Rule 23 class members?
If the court awards less than the agreed upon attorneys' fees and costs, what happens to the amounts not awarded?
When is it appropriate to contact the court regarding delays by the defendant?*

Case 3: Conditionally Certified FLSA Collective, Uncertified State Law Classes

*Issues: Is it appropriate to weigh the allocations so that different claims are worth more than other claims? For example, misclassification claims and off-the-clock claims?
Should you settle claims at mediation that are not yet plead in your complaint?
Should you carve out unrelated claims subject to pending litigation from the settlement release?*

Case 4: Conditionally Certified FLSA Collective, Uncertified State Law Classes, Two Separate Cases Brought By Separate Plaintiffs' Counsel

*Issues: How can you resolve the conflict between plaintiffs' counsel?
When the defendant is paying for the administrator, exactly what type of notice are they paying for?
Can the administrator accept unencrypted claim forms by email?*

II. SETTLEMENT CHECKLIST

There are many terms and conditions of settlement that counsel should consider when resolving wage and hour cases. You should maintain a running list of the issues described below and any others unique to your case, and review and contemplate them prior to mediation and settlement. Many of these issues are significant and can derail a settlement if the parties do not discuss and resolve them prior to, or at mediation.

- What is the amount of the settlement? Why is it reasonable? How will you explain it to your clients and the court?
- What happens to unclaimed funds? Do they revert to the defendant, are they reallocated to participating plaintiffs, or are they donated to charity?
- Is the defendant responsible for its share of payroll taxes in addition to the settlement amount, or are those amounts included?
- Are you using a settlement administrator? Who is selecting the administrator? What are the anticipated costs? Is the defendant paying separately, or are the costs deducted from the settlement?
- Is there a “set aside fund” (also referred to as a “contingency fund” or “reserve fund”) to handle mistakes in the allocation or issues with the defendant’s data? If so, what happens if there are funds remaining after settlement?
- Which party calculates the settlement allocations?
- Are the plaintiffs seeking an incentive or service payment for named plaintiffs? What about plaintiffs who were deposed? If so, how much? How will it be treated for tax purposes?
- What are the plaintiffs’ attorneys’ fees and costs? Is there a maximum amount/percentage that the plaintiffs’ attorneys can seek?
- What happens if the Court awards a smaller incentive payment, or less attorneys’ fees? Do those funds revert to the defendant or are they reallocated to the participating plaintiffs?
- What is the allocation formula? Is there a minimum or maximum gross settlement amount?
- How will the settlement amounts be treated for tax purposes? (Wage and hour settlement is often classified as half 1099 as liquidated damages, and half W-2 as wages).

- What do eligible employees (FLSA opt-ins or class members) required to do in order to accept the settlement? Claim form? Endorse a check?
- What happens to unresponsive FLSA opt-ins? Are they dismissed with or without prejudice? If without prejudice, are their claims tolled for any period of time?
- What happens to FLSA opt-ins who object to, or reject the settlement? Will the plaintiffs' attorneys continue to represent them? Will their claims be dismissed without prejudice and tolled to allow them to re-file?
- What is the procedure for class members to object to settlement?
- What is the topical scope of the named plaintiffs release? What is the temporal scope? FLSA opt-ins? Rule 23 class members?
- Is the settlement confidential? Can plaintiffs' counsel speak with the press or issue a press release? Do the parties anticipate filing under seal?
- Did you sign a term sheet at the end of the mediation?