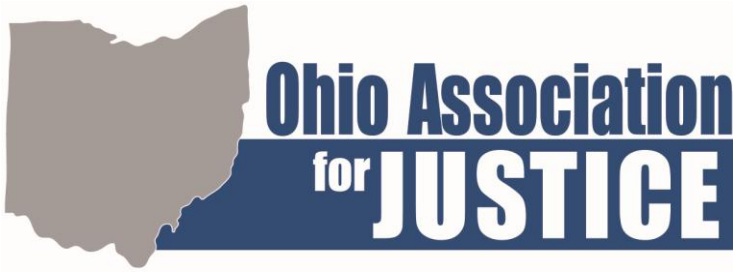

OAJ Destination CLE: Wage & Hour Seminar

March 24-26, 2014 – Park City, UT

How to Prove an "Off-the-Clock" Case Without Documentary Evidence.

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Proving an "Off the Clock" Case

WITHOUT DOCUMENTARY EVIDENCE

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Typical "Off the Clock" Cases

- Pre- and post-shift work
- On-call work
- Interrupted meal breaks
- Travel time
- Rounding time

Documents Used to Prove FLSA Violations

- Paystubs
- Timesheets or punch detail reports
- Tax documentation
- Employee handbooks
- Company policies related to overtime, compensatory time, timekeeping, etc.
- Written job descriptions
- E-mails or other correspondence

Recordkeeping Requirements

- Employers have a duty to keep all payroll documents.

29 U.S.C. § 211(c) Records

- Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

Federal Regulations

- **29 C.F.R. § 516.2**
- Every employer shall maintain and preserve payroll or other records containing, without limitation, the total hours worked by each employee each workday and total hours worked by each employee each workweek.

Non-Delegable Duty

- *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352, 363 (2nd Cir. 2011)
- Employer instructed employee to **not** record more than 40 hours per week on his timesheets.
- District court granted employer summary judgment because plaintiff was responsible for filling out his own timesheets and had admittedly falsified them, such that any inaccuracies were "self-created."
- District court held plaintiff was required to "prove the amount of time he worked off-the-clock with specificity."

Kuebel v. Black & Decker (cont'd)

- The Second Circuit **vacated** the decision and held that an employer's duty to maintain records is non-delegable.
- Where an employee's falsifications were carried out at the instruction of the employer, the employer cannot be exonerated by the fact that the employee erroneously recorded his time worked.

Burden of Proof – General Rule

- An employee who brings suit for unpaid overtime compensation bears the burden of proving, **with definite and certain evidence**, that he performed work for which he was not properly compensated.
- *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Reeves v. Int'l Tel. & Tel. Corp.*, 616 F.2d 1342, 1351 (5th Cir. 1980).

No Documents?

- How does a plaintiff meet the burden to prove he or she worked without pay with specificity?
- The FLSA contains no provisions specifying the method by which an employee can prove the number of hours of uncompensated work.

Relaxed Burden of Proof

- There is no private cause of action for violations of Section 211(c)
- Remedy: Plaintiffs have a relaxed burden of proof when an employer violates the recordkeeping requirements.

Burden Shifting: *Anderson v. Mt. Clemens*

- *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)
- When an employer fails to keep accurate records of the hours worked by its employees, the relaxed burden applies.
- ...where the employer's records are inaccurate or inadequate ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient **evidence to show the amount and extent of that work as a matter of just and reasonable inference**. **The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference** to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson v Mt. Clemens (cont'd)

- The Supreme Court set forth this test to avoid placing a premium on an employer's failure to keep proper records in conformity with its statutory duty, thereby allowing the employer to reap the benefits of the employees' labors without proper compensation as required by the FLSA.
- Where damages are awarded pursuant to this test, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with ... the Act." *Id.*

Anderson Burden Shifting: Recap

1. Employee must prove Employer violated its FLSA recordkeeping duties;
2. Employee must prove he or she performed the uncompensated work by "a just and reasonable inference"; and
3. Employer must:
    1. Come forward with evidence of the precise amount of work performed; or
    2. Come forward with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence

Make Employer Admit Recordkeeping Violation

- Interrogs
    - Make employer explain any inaccurate or inadequate data
    - Make employer explain its recordkeeping processes
- RTP
    - Recordkeeping retention policies
    - Recordkeeping software
    - Time records
    - Paystubs
- Requests to Admit
- Take a 30(b)(6) deposition
- Motions to Compel
    - Example

Create a Just and Reasonable Inference

- Client credibility is key. Does the story make sense?
- Prior convictions for fraud or perjury?
- Make sure the client can articulate reasonably *specific* and consistent facts of an "off the clock" claim.
- Use corroborating evidence wherever possible.
- Be creative: use formulas, averages, representative data, or expert witnesses

Use Representative Testimony

- There are three situations in which representative testimony is typically accepted:
  - Where substantial other evidence supports the inference drawn from the representative testimony
  - Where an employer systematically causes records to be falsified that would otherwise be properly maintained
  - Where there is a common theory of liability related to work methods, conditions, and hours encompassing a class of employees

See McLaughlin v. DialAmerica Marketing, Inc., 716 F.Supp 812 (D. N.J. 1989)

Representative Testimony (cont'd)

- Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees. *See e.g., Donovan v. Bel-Loc Diner, Inc.*, 780 f.2d 1113 (4th Cir. 1985).
- The requirement is only that the testimony be fairly representational. *Donovan v. Burger King Corp.*, 672 F.2d 221, 224 (1st Cir. 1982).

Representative Testimony (cont'd)

- The weight to be accorded representative testimony is a function of quality, not quantity.
- *See Secretary of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991)(" 'the adequacy of representative testimony will be determined in light of the nature of the work involved, the working conditions and relationships, and the detail and credibility of the testimony' ")

Representative Testimony (cont'd)

- Depending on the nature of the facts to be proved, a very small sample of representational evidence can suffice.
- *Mt. Clemens*, 328 U.S. at 690-91 (testimony of 8 of approximately 300 employees, or 2.7% of the group was sufficient to establish entitlement to recovery under the FLSA)

Examples

CASES WHERE PLAINTIFF FAILED TO ESTABLISH A JUST AND REASONABLE INFERENCE

Exaggeration/Credibility

- *Rosales v. Lore*, 149 Fed. Appx. 245 (5th Cir. 2005)
- Employee failed to establish hours worked by just and reasonable inference because his claim of working 12 hours per day, seven days per week, for several months strained credibility.

Vague Estimates

- *Harris v. Healthcare Servs. Group*, 2008 U.S. Dist. LEXIS 55077, 13-14 (E.D. Pa. July 18, 2008)
- SJ granted where Plaintiffs failed to provide an reasonable estimate of unpaid overtime hours worked.
- Defendant's interrogatories: "[state t]he amount of damages you contend you are entitled to" and "the method by which such damages were calculated."
- Plaintiffs' responses: "Answering plaintiff seeks reimbursement for overtime payment and any and all other damages and money allowed by law."
- Plaintiffs' SJ response also failed to provide any estimate of unpaid overtime.

Examples

CASES WHERE PLAINTIFF ESTABLISHED A JUST AND REASONABLE INFERENCE

Representative Testimony

- *Reich v. Southern New England Tele. Corporation*, 121 F.3d 58, 69-70 (2nd Cir. 1997)
- Plaintiff created a just and reasonable inference by presenting testimony of thirty-nine (39) employees, accounting for all five job categories in question.
- While these witnesses only accounted for 4 of the 5 job categories, they had first hand knowledge of the fifth.

Other Types of Representative Evidence

- *Donovan v. Town Pump*, 25 WH Cases 343 (D. Mont. 1981)
- Basing decision on acceptance of total number of hours stations open in a week.

- *Bueno v. Mattner*, 633 F. Supp. 1446 (W.D. Mich. 1986), *aff'd* 829 F.2d 1380 (6th Cir. 1987)
- Basing judgment on maximum number of hours any one plaintiff could have worked in a particular pay period.

Representative Evidence (cont'd)

- *Davis ex rel. v. U-Haul Co.*, 2006 U.S. Dist. LEXIS 53838, 10 (S.D. Miss. July 12, 2006)
- Although they had no documentary evidence of the alleged overtime hours worked, Plaintiffs provided inferential evidence of their work hours.
- Plaintiffs were the only managers of the Gibraltar Drive U-Haul facility. As such, they had to be at the facility during all store hours. The store hours were from 7:00 a.m. to 6:00 p.m. This equated to an eleven hour work day, a fifty-five hour work week and fifteen overtime hours per week.
- Plaintiffs also contended that they rode to work together and left together, because one plaintiff could not drive the manual-shift vehicle. This evidence satisfied the first *Anderson* factor for summary judgment purposes.

Corroborating Evidence - Witnesses

- *Templet v. Hard Rock Constr. Co.*, 2003 U.S. Dist. LEXIS 1023, 19 (E.D. La. Jan. 27, 2003)
- Plaintiff proved she worked through her lunches with corroborating deposition testimony of other employees with whom she spent her lunch breaks.

Corroborating Evidence: Weather Almanac

- *Gonzalez v. Tanimura & Antle, Inc.*, 2008 U.S. Dist. LEXIS 83326, 39-40 (D. Ariz. Sept. 29, 2008)
- Plaintiffs met their burden by providing their testimony, as well as the Defendant's representatives' testimony, showing that ice formed in the fields when the temperatures fell below 38 degrees.
- The number of days with temperatures below 38 degrees can be determined by referring to a weather almanac. Nearly all Plaintiffs deposed testified that they have had to wait for ice to melt before commencing work in the field.

Recollection of Hours Worked

- *Reeves Int'l Tel. & Tel. Corp.*, 616 F.2d 1342 (5th Cir. 1980)
- Employee kept "running total" of approximately 3,100 uncompensated hours (average of 74.5 per week) corresponding to "rough computations of his subconscious mind"
- Court awarded 60 hours per week

Recollection (cont'd)

- *Monroe v. FTS USA, LLC*, 763 F. Supp. 2d 979 (W.D. Tenn. 2011)
- Plaintiffs established a just and reasonable inference based on testimony of 49 plaintiffs on their recollection of hours worked.

Methods

- *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352, 363 (2nd Cir. 2011)
- Plaintiff estimated that he averaged one to five hours of uncompensated overtime each week, and specifically described his method of shaving Friday hours so his weekly total did not exceed forty hours.

Formulas

- *McLaughlin v. DialAmerica Mktg.*, 716 F. Supp. 812 (D. N.J. 1989)
- Calculating hours worked by dividing total number of pieces produced per hour.
- *Martin v. Selker Bros., Inc.*, 949 F.2d 1286 (3d Cir. 1991)
- Using gas station employees' commissions to determine hours worked and damages.

Formulas (cont'd)

- *Donovan v. Doyon Drywall*, 25 WH Cases 765 (M.D. Fla. 1982)
- Approving method of attempting to estimate overtime by establishing equivalent hourly rate of pay based on "perceived productivity" of that employee.

Average Hours Per Week

- *Donovan v. Hamm's Drive Inn*, 661 F.2d 316 (5th Cir. 1981)
- Finding that certain groups of employees averaged certain numbers of hours per week and awarded back pay based on those "admittedly approximate" calculations

Expert Witnesses

- *Perez v Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. 2011)
- Court's concluded a reasonable time estimate of 10.204 minutes for donning and doffing based upon expert witness time studies.

Examples

CASES WHERE DEFENDANT NEGATED THE JUST AND REASONABLE INFERENCE

Failure to Rebut Defendant's Evidence

- *Deloatch v. Harris Teeter, Inc.*, 797 F. Supp. 2d 48, 57 (D.D.C. 2011)
- Plaintiff proffered a log of hours which was not based on his own personal knowledge, but rather, was compiled based on his attorney's estimates.
- The defendant provided the plaintiff's time cards from the days in question, revealing that he was paid for at least one of the alleged days and indicating that the plaintiff did not punch his time card at all on the remaining four days.
- Plaintiff failed to dispute any of the defendant's evidence, relying solely on his own conclusory statements which were void of any factual detail.

Failure to Rebut (cont'd)

- *Ebbs v. Orleans Parish Sch. Bd.*, 2012 U.S. Dist. LEXIS 120461, 13-14 (E.D. La. Aug. 24, 2012)
- Defendant provided specific, persuasive evidence showing that the opposed Plaintiffs did receive some compensation for overtime work.
- In opposition, Plaintiffs provide vague, self-serving statements, which they have declined to support with the timesheets that Defendant has made available to them.
- "Given the specific, reliable evidence provided by Defendant, Plaintiffs' statements are not enough to get past a motion for summary judgment."

Examples

DEFENDANT FAILED TO NEGATE A JUST AND REASONABLE INFERENCE

Under-inclusive Data

- *Reich v. Southern New England Tele. Corporation*, 121 F.3d 58, 69-70 (2nd Cir. 1997)
- Employer's rebuttal evidence, comprised of a lengthy spreadsheet, purportedly broke the employees' job classifications down into specific job functions. However, because the spreadsheet failed to account for *some* of the compensable job functions, the evidence was deemed under-inclusive.

Random Data Sampling

- *O'Brien v. Town of Agawam*, 482 F. Supp. 2d 115, 119 (D. Mass. 2007)
- Patrolmen plaintiffs created a just a reasonable inference by submitting affidavits averring the hours they actually worked.
- In an attempt to negate the inference, the Town offered "a random sampling" of records indicating that "from December 2003 to April 2005, the plaintiffs spent, on average 1.75 hours in attendance at court on days for which they were paid 4 hours of court time."

Unsupported Assumptions

- *Hodgson v. Rancourt*, 336 F. Supp. 1119, 1123-1124 (D. R.I. 1972)
- Typists paid $7.00 to $8.00 for every one-thousand labels produced
- Employer's method of determining the piece rate paid to employees was predicated on the assumption that each employee could type 50 words per minute (although employer never observed them typing). Employer also erroneously assumed that each of the labels required only 10 words to be typed thereon.

Insufficient Witness Testimony

- *Solis v. SCA Rest. Corp.*, 938 F. Supp. 2d 380, 395 (E.D.N.Y. 2013)
- "Defendants only presented one witness regarding the hours of the employees, and that witness admitted that he not only could not see the back door that employees frequently used, but that he was not present at the restaurant for the vast majority of the time period covered by this suit. In short, defendants' evidence does not, in any way, undermine the credible testimony of the Secretary's witnesses and the exhibits offered into evidence."

Averaging Shift Hours

- *Berrios v. Nicholas Zito Racing Stable, Inc.*, 849 F. Supp. 2d 372, 383 (E.D.N.Y. 2012)
- "[Employer] does not provide a single example, from his own personal observations, of the actual hours he saw Plaintiffs — or any groom for that matter — coming to or leaving from work. Such generalizations lacks the specificity necessary to negate the inference Plaintiffs retain due to Defendants' lack of adequate record-keeping. "

Personal Matters During Work Hours

- *Mohammadi v. Nwabuisi*, 2014 U.S. Dist. LEXIS 64, 48 (W.D. Tex. Jan. 2, 2014)
- "To the extent that Defendants tried to argue that Plaintiff was simply surfing the internet or dealing with other personal matters during the extra hours captured on her time sheet, the Court does not find this explanation compelling: A bad employee could surf the internet during work hours; she would not come into the office an hour early or stay an hour late to do so. Thus, Defendants did not negative the reasonableness of the inference to be drawn from these time cards—namely, that Plaintiff was actually working during the times they capture."

Absence of Evidence

- *Braun v. Wal-Mart, Inc.*, 2008 Minn. Dist. LEXIS 109, 171-173 (Minn. Dist. Ct. 2008)
- Plaintiffs are entitled to rely on the absence of a break punch as an inference to assist in proving "the nonoccurrence or nonexistence" a break or meal.
- Wal-Mart argued that its time records do not mean what the Plaintiffs claimed they meant. However, Wal-Mart failed to come forward with sufficient class-wide evidence of its own to completely "negative the reasonableness of the inference" to be drawn from its time clock records.

"Off the Clock" Case to Watch

- *LaFleur v. Dollar Tree Stores, Inc.*, 2014 U.S. Dist LEXIS 30682 (E.D. Va. Mar. 7, 2014)
- Plaintiffs claim they were not paid for:
  - Making bank deposits
  - Interrupted meal breaks
  - Unloading trucks
  - Stocking inventory and aisles
  - Retrieving carts and boxes
  - Cleaning
  - Wait time

The End