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PERSPECTIVE

Tips for mediating your next wage and hour case

By Michael A. Strauss

While wage and hour law technically falls under the umbrella of employment law in general, a wage and hour mediation is fundamentally different from other types of employment law mediations. Wage and hour mediations involve a lot of math, lack excitement and emotion, and, if the parties' damages calculations are off, can start the day off with an impasse. As you head into your next wage and hour mediation, whether in a class or individual case, the following strategies should prepare you for a successful outcome..

1. Pick a mediator who actually likes wage and hour law.

Not all employment mediators know wage and hour law. Even fewer employment mediators actually like doing wage and hour mediations. If you do not choose a mediator who likes wage and hour law, there is a good chance that your mediator's eyes will gloss over when you start discussing concepts like how to calculate the regular rate or what constitutes a call back for the purposes of reporting time pay.

How do you know your mediator knows and likes wage and hour law? You can always put a call into the mediator you are considering to see if they are enthusiastic about your case. Also, look for mediators who as lawyers tried wage and hour cases or argued wage and hour cases before courts of appeal. Such attorneys likely have a depth of knowledge and underlying love of wage and hour law that compelled them to show off their abilities at the highest levels. Finally, ask other wage and hour lawyers if they ever used your potential mediator.

However you go about choosing a wage and hour mediator, getting

one who likes wage and hour law is a critical first step in ensuring that your wage and hour mediation will get off to a good start.

2. Please, please, please prepare a good spreadsheet!

Since you've chosen a mediator who actually likes wage and hour law, your mediator will expect that you come to the mediation with a good damages spreadsheet. At a minimum, your spreadsheet will segregate the damage amounts for each of the claims at issue in the case. Even better would be a pay-period-by-pay-period analysis of the wages or penalties owed for each type of claim. A detailed damages spreadsheet will signal to your mediator that you know what you are doing.

Creating a good damages spreadsheet is just as important for the defense as it is for the plaintiff. A defendant-employer must know its exposure in a wage and hour case. By crafting a detailed damages spreadsheet, the employer's attorney will give her client insight as to the potential liabilities of the case. A thorough spreadsheet will also allow the attorney to spot mathematical mistakes in her opponent's calculations.

3. Seriously consider sharing your brief and damages calculations before the mediation.

While many attorneys are reluctant to share mediation briefs in employment cases, they should reconsider that approach in a wage and hour case. Too much time is wasted in many wage and hour mediations when the parties have divergent views on how to calculate damages. For example, if the plaintiff's damages calculations show potential exposure of \$1,000,000, but the defendant's spreadsheet shows maximum liability of \$500,000, any move that the plaintiff makes above \$500,000 will be viewed by the defendant

as unrealistic. Until the plaintiff moves under the defendant's perceived maximum liability \$500,000, the defendant will not put real money on the table. From the get go, the parties will be at an impasse, and they can eat up valuable hours of the mediation trying to justify their legal positions and mathematical calculations.

By exchanging briefs and damages calculations well in advance of the mediation, the parties can largely avoid this problem. Lawyers generally are not mathematicians; mistakes in their calculations are common. Rather than point out your opponent's mistakes at the mediation, which can embarrass him before his client and the mediator and put a halt to actual negotiations, the better practice is to reach for the phone and discuss any incorrect calculations you might have found in your opponent's spreadsheet. Maybe it was you who made the miscalculation, and your opponent will justify her calculations in your phone call. Either way, it is much better to hash out these types of disputes before the mediation begins, which will enable the parties to focus on negotiations instead of fuzzy math.

4. Set realistic expectations with your client.

Unlike a FEHA or whistleblower case, where there may be an award of emotional distress or punitive damages that is impossible to predict, the potential damages in a wage and hour case are finite. There is no reason, therefore, for the parties to have unrealistic expectations of what could happen at mediation or, if the mediation is unsuccessful, at trial.

If the plaintiff's attorney has done her job correctly, she will have prepared a solid damages spreadsheet and shared it with her opposing

counsel in advance. If the defendant's attorney has done her job correctly, she will have prepared and shared her own spreadsheet as well. The attorneys and their clients should know the extent of the potential damages in the case.

Do not be afraid to show all the calculations – both yours and your opponent's – to your client. Make sure your client understands how you and your opponent are calculating the damages and what factual assumptions both sides are making to build their damages model. Your client should be able to see that the value of the case can be more or less than they thought.

In summary, wage and hour mediations are unlike other employment mediations. But if you pick a mediator who actually likes wage and hour law, create a solid damages spreadsheet, share your brief and damages calculations with your opponent, and set reasonable expectations with your client, you can maximize your chances of obtaining a favorable settlement for your client.

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