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Lawyer Insights

Tips For Defeating Claims Of Willful FLSA Violations

By Michael Mueller and Evangeline Paschal
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The Fair Labor Standards Act allows plaintiffs to seek back wages for a two-year limitations period for a violation of the act. However, if the plaintiffs allege that the employer violated the statute willfully, they can seek an additional third year of recovery.[1]

In addition to increasing the potential exposure your client faces, a willfulness claim also creates additional issues for trial because it puts the employer's state of mind at issue. If plaintiffs can prove that your client knowingly violated the FLSA, or acted in reckless disregard of its legal obligations, they can unlock an additional year of back wage recovery and potentially open additional avenues of recovery.[2]

In light of the U.S. Department of Labor's increasing pursuit of FLSA enforcement actions as well as private plaintiffs' use of collective actions, we have developed some tips for how to use the discovery period effectively to build a defense to a willfulness claim, as well as some trial strategies that can help persuade the trier of fact that plaintiffs cannot prove your client acted willfully.

Together, these tips and strategies are designed to highlight how the employer had systems in place to achieve legal compliance, as well as a culture of acting as a reasonably prudent employer.

How a Willfulness Claim Can Increase Your Client's Exposure

A willfulness claim can significantly expand your client's exposure in several ways. In multiplaintiff litigation, the additional year of potential recovery afforded by Section 255(a) can increase an employer's exposure significantly. The outcome of a willfulness claim can also influence whether a plaintiff can recover liquidated damages after a successful back wage recovery.

Section 16(b) of the FLSA, Title 29 of the U.S. Code, Section 216(b), allows the trial court to impose liquidated damages in double the amount of wages recovered as a form of additional employee compensation. However, Section 11 of the act provides an affirmative defense against double damages if the employer proves that it acted in good faith.[3]

In addition, when the secretary of labor brings an FLSA enforcement action, they can use a willfulness finding to seek additional civil monetary penalties through an administrative proceeding.[4] Such penalties would be assessed in addition to any back wages recovered on behalf of employees.

While the standards and burdens of proof are different for a willfulness claim and the good faith defense to liquidated damages, a finding of willfulness makes it difficult, or even impossible, to convince the trial court to recognize the good faith defense to liquidated damages.[5]

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Conversely, a finding of no willfulness can bolster an employer's argument that it acted with objective reasonableness and an honest attempt to follow the law, which is the test for proving the good faith defense.[6] A finding of no willfulness also puts to bed any agency claim for civil monetary penalties on collateral estoppel grounds.

Developing Your Case Pretrial to Defeat Willfulness

In addition to responding to discovery propounded on your client, it is important to pursue a thorough investigation of your client's policies and practices to learn how they were developed. Such an investigation should, at a minimum, include the following topics.

Determine if your client can assert reliance on advice of counsel.

One of the strongest arguments against a willfulness claim is that the employer relied on advice of counsel in adopting or continuing the challenged pay practices.[7]

In some instances, it may be clear from the start that the employer can avail itself of this argument because it has written proof of outside counsel's recommendation or approval of the challenged practice. But other times it may not be so clear.

For instance, when a challenged practice has been in place for many years, it may not be immediately clear if attorney advice was sought when the practice was first implemented. This means that it is important to probe your client's institutional knowledge and records early on to help you develop your themes on willfulness and overall compliance.

While a legal memorandum or other written analysis is the best way to prove reliance on counsel, even less robust proof can bolster your defense. Emails or other written record of counsel approval, whether in-house or from outside counsel, can serve as evidence of attorney input, as can developing a clear explanation of any processes used when adopting or revising policies to ensure attorney approval.

Asserting reliance on advice of counsel is a powerful way to disprove that your client acted with bad intent or reckless disregard of the law. Indeed, seeking advice of counsel is fundamentally incompatible with a reckless attitude toward compliance.

Of course, to assert reliance, your client must be prepared to waive the attorney-client privilege if it is to disclose any written form of the advice or approval and provide deposition testimony about any conversations with counsel with respect to such advice or approval.

While this is normally not a favored course of action, the benefits to your defense may outweigh the risks. This is especially so if you make clear in waiving the privilege that the waiver is limited to advice regarding the pay practice at issue.

In discovery, asserting advice of counsel and waiving the privilege may require testimony as to the nature and circumstances of the advice. Do not be afraid of this possibility.

Remember, asserting advice of counsel does not turn your defense into a referendum on the accuracy of counsel's advice or approval. The trier of fact only reaches the question of willfulness once there has been a finding of liability, meaning that your defense will always be predicated on the possible

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determination that your client "got it wrong."

What matters is that you develop proof to persuade the trier of fact that your client did not adopt the challenged pay practice either with an intent to violate the FLSA or reckless disregard for whether it violated the FLSA.

Understand and document the systems in place to ensure compliance with labor laws.

Even if your client cannot point to specific advice of counsel regarding the challenged pay practice, you can build the case that your client was diligent in trying to ascertain and comply with FLSA requirements. By thoroughly interviewing key management, you can pinpoint steps taken to learn about FLSA compliance and review relevant pay policies to see if they measure up.

Helpful actions taken by management could include (1) attending workshops or conferences on FLSA topics; (2) membership and participation in trade organizations or other professional groups; (3) formal inclusion of outside or in-house counsel in policy adoption and revision decisions; and (4) periodic policy reviews or audits of pay practices.

Aggregating these various facts can help you paint a picture of your client as a employer that takes legal compliance seriously, which is the antithesis of a reckless or bad actor.[8]

Probe any interactions with the DOL regarding FLSA compliance.

Under Section 10 of the FLSA[9] an employer who has received a written interpretation from the DOL can raise its reliance on that interpretation as an affirmative defense to liability.[10]

Many employers are unlikely to be able to meet the high bar for this defense. However, it is a mistake to not probe your client's interactions with the DOL in developing a defense to a willfulness claim.

While not sufficient to be a defense to liability, oral conversations or other interactions with DOL officials can still be a useful part of a defense to a willfulness claim by explaining why the employer believed it was in compliance. So, too, can the fact that the Wage and Hour Division investigated the employer and either did not find FLSA violations or concluded that any violation found was resolved.[11]

You can even develop evidence of wage and hour investigations on issues beyond the ambit of the FLSA if investigators conducted on-site visits, interviews of employees regarding how they were paid, or review of pay and timekeeping records or job descriptions. Such evidence can be developed to argue that the DOL was on notice of your client's pay practices and did not inform it that there was a compliance issue, which you can argue is inconsistent with a reckless disregard of what the law requires.

Defeating Willfulness at Trial

Trial is the opportunity for your client to tell its story to the trier of fact. When willfulness is at issue, that story should illustrate how your client had a system in place to try to comply with the law, as well as a culture of taking its responsibilities seriously. Below are some examples of what that story may include.

Detail your client's efforts to comply with the FLSA.

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Simply presenting testimony that your client did not mean to violate the law and did not understand that it was not in compliance is unlikely to persuade the trier of fact that your client was not willful. Rather, you must be prepared to show that your client took compliance seriously and took affirmative steps to comply with the FLSA instead of leaving it to chance.

Working with the appropriate management witness, such as the head of human resources, to develop trial testimony that explains the various steps taken to ensure compliance will help persuade the trier of fact that your client did not view its legal obligations recklessly.

But in addition to working with your witnesses to provide this narrative on direct examination, you should also prepare them to bring out some of these testimonial points on cross-examination. You can anticipate that the plaintiff's counsel will use their examination of your management witnesses to highlight the various actions that your client failed to take to ensure FLSA compliance. Prepare your witnesses to respond on whether they understood such steps to be necessary from both a legal and practical point of view.

For example, the plaintiff may probe why your client did not retain a third party to audit its job descriptions or conduct a time study of pre- and post-shift activities. With effective preparation, your witness may be able to explain why such undertakings would not have provided information that your client was not already aware of as a practical matter, and explain your client's understanding on whether such an audit was even required.

In doing so in response to questions by the plaintiff's counsel, management witnesses can also explain the basis for their understanding of what the law requires, which in turn provides an opportunity to talk about the employer's approach to compliance. By advancing some of your narrative during the other side's examination, you can telegraph to the trier of fact during the plaintiff's case-in-chief that the plaintiff cannot meet the burden of proof on willfulness.

If an FLSA investigation was involved, attack the quality of the investigation and bring out agency findings that favored your client.

One key distinction between a DOL enforcement action and an FLSA lawsuit brought by a private plaintiff is the potential for the trier of fact to assume that your client must have violated the FLSA if the secretary of labor has chosen to sue. The secretary will likely try to capitalize on this assumption in explaining at trial how a wage and hour investigation of the employer led to the lawsuit being filed.

To rebut this inference, be prepared to point out any deficiencies in the investigation. This can include instances where the wage and hour investigators did not follow the DOL's own guidance documents in conducting the investigation, such as the DOL's Field Operations Handbook. Also look for evidence showing investigators' statements that the employer was cooperative and forthcoming during the investigation.

If the investigation included written employee interview statements, you should be able to obtain those from the DOL in discovery. You may be able to mine such documents for helpful statements about the employer or the challenged pay practice.

For example, an interviewed employee may have stated that any off-the-clock activity at issue only took a few seconds or minutes, which would be consistent with a determination by the employer that such time

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was de minimis and thus did not have to be recorded. You can point to such statements as demonstrating how the DOL ignored unhelpful facts in deciding whether to pursue a willfulness claim.

To develop this testimony, be prepared to call as witnesses the wage and hour investigators who conducted the investigation, as well as, potentially, the managers who oversaw the conclusion of the investigation. It is possible that the labor secretary will call some such witnesses in the plaintiff's case-in-chief, in which case you will have the opportunity to establish these points through cross-examination.

However, it is unlikely that the secretary will call all relevant personnel involved in the investigation, so you should consider including on your witness list those personnel involved in those parts of the investigation that you want to challenge, such as employee interviews, records review, or the preparation of the FLSA narrative and other final conference documents.

The goal of examining DOL officials on these documents should be to attack the basis of the secretary's decision to pursue a claim for willfulness, showing that it is unsupported by the facts developed during the investigation and that your client acted as a conscientious employer, not a reckless or bad actor.[12]

Consider using an expert witness.

Using an expert witness in defending against a willfulness claim may seem like a novel idea, but it can provide the jury context for assessing an employer's reasonableness in trying to comply with the law.

For example, engaging a former wage and hour investigator and manager as an expert witness could prove an effective way to enlighten jurors on what it means for an employer to act reasonably when trying to comply with FLSA requirements.

Such a witness would have strong credentials to defeat a Daubert challenge seeking to exclude such testimony, given that the former official would likely qualify as an expert witness whose testifying could be helpful to the jury as it assesses what a reasonably prudent employer looks like.[13]

At trial, the expert can explain to the jury the types of actions — and inactions — that are consistent with the concept of an objectively reasonable employer, informed by his experience with wage and hour investigators.

Given that the jury lacks experience with what the Wage and Hour Division's expectations for employers are, this testimony signals that the employer's actions were not unreasonable when faced with uncertainty in the law, rebutting the secretary's arguments that the employer should have performed a laundry list of actions to assess compliance, none of which are found in any of the DOL's internal guidance documents.

The expert testimony gives the jury a frame of reference that no management witness would ever be able to provide. It also undermines the assumption, inherent in FLSA enforcement actions, that the secretary must have had good grounds for bringing a willfulness claim against the employer.

Conclusion

Given the various avenues of exposure that a willfulness claim opens up, it is important to begin thinking about your trial strategy for defeating the claim early in the life cycle of the litigation, including before discovery commences and throughout the discovery period.

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Even if your case does not go all the way to trial, such strategizing will help you craft a discovery plan that can equip you to achieve a desirable pretrial result. If you do go to trial, you will have laid the appropriate groundwork to demonstrate to the trier of fact why the plaintiff cannot carry the burden of proof on the willfulness claim.

Notes

1. See 29 U.S.C. § 255(a).
2. See generally McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988).
3. 29 U.S.C. § 260.
4. See 29 C.F.R. § 578.3(a) (Wage and hour administrator may pursue civil monetary penalties for "willful" violations of FLSA overtime and minimum wage requirements).
5. See Alvarez-Perez v. Sanford-Orlando Kennel Club Inc., 515 F.3d 1150, 1166 (11th Cir. 2008) (reversing district court's denial of liquidated damages where jury had found employer had acted willfully, and noting that many circuits treat willfulness finding as requiring imposition of liquidated damages).
6. See Su v. East Penn Mfg. Co., Civ. No. 18-1194, 2023 WL 6849033, at *5 (E.D. Pa. Oct. 17, 2023) ("the jury's rejection of the DOL's willfulness claim does militate against an award of liquidated damages") (citing cases).
7. See, e.g., Trans World Airlines Inc. v. Thurston, 469 U.S. 111, 130 (1985) (under analogous Age Discrimination in Employment Act willfulness standard, employer not willful in adopting a new transfer policy after consulting with legal counsel, even though the policy violated the ADEA); Pignataro v. Port Authority of New York and New Jersey, 593 F.3d 265, 273 (3d Cir. 2010) (employer not willful in misclassifying helicopter pilots as exempt where it relied on discussions with and research by employer's law department); Perez v. Mountaire Farms Inc., 650 F.3d 350 (4th Cir. 2011) (employer acted in good faith where it believed time at issue was de minimis, despite court finding time was not de minimis, where evidence showed employer relied on advice of counsel and took action based on counsel's advice).
8. See Rhea Lana Inc. v. Department of Labor, 824 F.3d 1023, 1031 (D.C. Cir. 2016) (noting that the DOL conceded that there is a "totality-of-circumstances inquiry regarding willfulness"); Reich v. Gateway Press Inc., 13 F.3d 685, 703 (3d Cir. 1994) ("The district court concluded that under all the circumstances, Gateway's actions were not willful. We are not inclined to disturb this conclusion.").
9. 29 U.S.C. § 259.
10. See Guyton v. Tyson Foods Inc., 767 F.3d 754, 762 (8th Cir. 2014) (affirming jury's verdict that the employer acted in good faith reliance on the DOL's written interpretation of law, including evidence and jury instructions of case law relevant to the claims in the case).

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11. See Lugo v. Farmer's Pride Inc., 802 F. Supp.2d 598, 618 (E.D. Pa. 2011) (employer not willful where after DOL investigation, defendant conducted an internal study and implemented a new compensation schedule that received DOL approval, made revisions to the schedule over time, and communicated with DOL through its representatives and attorneys).

12. See Su v. East Penn Mfg. Co., 555 F. Supp. 3d 89 (E.D. Pa. 2021) (in denying summary judgment on willfulness and liquidated damages issues, court engaged in extensive discussion of DOL's investigations of employer and held that jury may take those facts into account).

13. See Su v. East Penn Mfg. Co., No. 18-1194, 2020 WL 5409164, at *14 (E.D. Pa. Sept. 9, 2020) (permitting former wage and hour investigator and supervisor to testify as expert witness to help the jury weigh the objective reasonableness of the employer's viewpoint).

Michael Mueller *is a partner in the firm's Commercial Litigation group in the firm's Washington D.C. office. Mike has 36 years of experience with class actions and other complex cases, including wage-hour class actions, consumer products class actions, racketeering (RICO), and labor disputes with unions and employee groups. He can be reached at +1 (305) 810-2524 or mmueller@HuntonAK.com.*

Evangeline Paschal *is a counsel in the firm's Commercial Litigation group in the firm's Washington D.C. office. Evangeline's practice focuses on class action and other large-case litigation involving subjects as diverse as the Fair Labor Standards Act, False Claims Act, and securities fraud. She can be reached at +1 (202) 419-2174 or epaschal@HuntonAK.com.*

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