New York Law Journal



# Wage and Hour Mediations and the Small Employer

A wage and hour mediation, which produces compromise and limits costly attorney fees, is a potential lifeline for a small employer provided there is clear-eyed engagement in the process.

By **James A. Brown** | December 14, 2018


As wage and hour claims explode over the legal landscape, some federal court judges are automatically referring such cases to court-annexed mediation. Often, the defendants are small employers with few assets who are overwhelmed by the costly demands for back wages, liquidated damages, statutory penalties and attorney fees. Not surprisingly, defending a wage and hour lawsuit can produce an existential crisis that sharply impedes settlement discussions at mediation.

Some small employers, in order to navigate their harsh new reality and reduce their potential liability, embrace suspect defenses. An evaluative mediator must address those mistaken defenses if only to redirect the employer to a more useful cost-benefit analysis and discussion of self-interest. Indeed, a mediator should present the following hard truths, which can be confirmed or challenged by counsel, as a predicate to a successful wage and hour mediation.

## Absence of Payroll and Time Records

The first hard truth is that an employer's failure to maintain adequate payroll and time records allows for speculative damages. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946), the Supreme Court addressed this truth by making clear that an employer may not benefit from its poor record-keeping. As stated by the court, it "'would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.'" Noting that employees "seldom keep such records themselves," the court described how plaintiffs may estimate their damages, in the absence of payroll and time records, by "reasonable inference" and "approximation":

> [A]n 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 ... . [T]he court may then award damages to the employee, even though the result be only approximate.

Moreover, a plaintiff's burden of proving his or her minimum wage and overtime damages is "not onerous," and may be established by a plaintiff's recollection alone. See *Kuebel v. Black & Decker*, 643 F.3d 352, 364 (2011); *Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 335 (S.D.N.Y. 2005) and *Rivera v. Ndola Pharmacy*, 497 F. Supp. 2d 381, 388 (E.D.N.Y. 2007). Also, an employer's rebuttal, as to damages, cannot rely on general denials but must instead include "evidence of the precise amount of work performed or ... evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Anderson*, 328 U.S. at 687-88.

Finally, an employer's failure to maintain payroll and time records entitles a plaintiff to approximate damages with some latitude, subject to the employer's rebuttal. In fact, the Second Circuit found no error in an award of damages which "might have been somewhat generous" because of the "difficulty of precisely determining damages when the employer has failed to keep adequate records." *Reich v. Southern New England Telecom. Corp.*, 121 F.3d 58, 70, n.3 (2d Cir. 1997).

## Tips Are Not an Offset

Some employers also mistakenly assume that employee tips can be used to offset the minimum wage and overtime damages they allegedly owe. An employer typically seeks this reduction while arguing that its business enabled the employee to receive the tips.

While there does exist a "tip credit" that lowers the minimum wage (based on a formula and the amount of tips received by an employee), tips confer no other benefits on an employer. See 29 U.S.C. §203(m). This is because federal and state laws expressly entitle employees to retain their tips (unless there exists a valid tip pool or tip sharing arrangement). See 29 U.S.C. §203(m); 29 CFR §531.52; New York Labor Law §196-d; 12 NYCRR §§146-2.15 and 146-2.16. Simply stated, an employee's tips cannot reduce the amount of damages because tips do not belong to an employer.

## Tip Credit Not Automatic

Employers will also claim an automatic tip credit whenever they have tipped employees on payroll. Yet a tip credit applies only if the employer provides notice of the tip credit, including its amount, to its tipped employees. See 12 NYCRR §§146-1.3 and 146-2.2. Under New York law, said notice must be in writing and appear in English, as well as the employee's "primary language," as a part of the Wage Notice mandated by New York's Wage Theft Prevention Act. See New York Labor Law §§195(1)(a), 195(2) and 12 NYCRR §146-2.2

In addition, New York law prohibits restaurants and hotels from taking the tip credit for any day during which the tipped employee works in a non-tipped occupation for more than 20 percent of that workday or two hours (whichever is less). See 12 NYCRR §146-2.9. For example, the tip credit will not apply to an

employee who generally serves customers during her seven-hour shift but also spends 90 minutes—more that 20 percent of that shift—preparing food.

## Determining Regular Rate of Pay

There are different methods to calculate the regular rate of pay, upon which overtime is based, when an employee who is entitled to overtime receives a weekly salary rather than an hourly rate. Employers will argue that the weekly salary should be divided by the total number of hours worked and not the first 40 hours. This calculation, which uses a larger denominator, effectively lowers the hourly rate of pay. Employers will further argue that half-time, rather than time-and-one-half, should be paid for any overtime because the weekly salary included straight time wages for all hours worked.

Generally speaking, this employer-preferred, lower regular rate of pay can only be used if the employer and employee had a "clear mutual understanding" that the weekly salary covered all hours worked. See 29 CFR §778.114; *Ramos v. Telgian*, 176 F. Supp. 3d 181, 194 (E.D.N.Y. 2016)(setting forth test for allowing regular hourly rate to be determined by dividing by total hours worked). Moreover, employers are mistaken if they believe their preferred method, which lowers the hourly rate and permits half-time overtime pay, can be used in the restaurant and hotel industries. According to the New York Hospitality Industry Wage Order, the hourly rate for overtime "shall be calculated by dividing the employee's total weekly earnings ... by the lesser of 40 hours or the actual number of hours worked by that employee." See 12 NYCRR §§146-3.5 and 146-1.4.

## Conclusion

A wage and hour mediation, which produces compromise and limits costly attorney fees, is a potential lifeline for a small employer provided there is clear-eyed engagement in the process. Mediators must correct an employer's mistaken assumptions by offering hard truths that can be tempered by talk of reasonable payment schedules and ways to bolster any "inability to pay" defense (i.e., by disclosing business and tax records). While it takes the good faith participation of both sides to produce a successful wage and hour mediation, the small employer, overwhelmed by circumstance, typically requires more coaxing to take advantage of the opportunity offered by mediation.

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