

The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 19, No. 10

© 2011 The Metropolitan Corporate Counsel, Inc.

October 2011

Winning In Wage And Hour Litigation: Compliance, Experts And The Certification Process

**William C. Martucci and
Kristen A. Page**

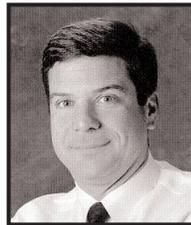
SHOOK, HARDY & BACON, L.L.P.

The wage and hour litigation wave continues, and the essential areas of focus for corporate employers in successfully defending these actions is increasingly centering on a “back to basics” approach. Certainly, defense efforts in wage and hour litigation are sophisticated and nuanced, but the fundamental success elements are, at their core, built on familiar concepts – compliance, experts and the certification process. In this article, we will provide an overview of the wage and hour litigation framework, explore the critical success elements and put those elements in play in a case-study illustration from a recent New York federal district court decision in *Zivali v. AT&T Mobility, LLC*.

Overview Of The Wage And Hour Litigation Framework

The Fair Labor Standards Act (FLSA) is the statute upon which the explosion of wage and hour multi-plaintiff litigation developed.¹ Congress passed the FLSA during America’s Great Depression in 1938. It has been amended several times through the years, but it remains, at its

William C. Martucci and Kristen A. Page are partners in the National Employment Litigation and Policy Group at Shook, Hardy & Bacon, L.L.P. in Washington, D.C. and Kansas City, Missouri. They represent corporate employers exclusively and regularly defend FLSA and state wage and hour claims throughout the country.



**William C.
Martucci**



**Kristen A.
Page**

core, the same law that existed in 1938 – prescribing minimum wages that employers must pay and maximum hours that employers may require before paying overtime. Against this federal overlay, many U.S. states have their own wage and hour laws, which sometimes mirror the federal law and which sometimes provide greater protections for employees. Although the FLSA has been on the books for more than seventy years, the significant wage and hour litigation boom has only come during the last decade.

Wage and hour suits are most often filed as multi-plaintiff group actions because individual wage claims typically involve relatively nominal damages – the cases are more valuable and attractive as group actions. Under the FLSA, group actions are maintained as “collective actions,” meaning that class members may participate only by affirmatively opting in to the lawsuit. Multi-plaintiff actions may also be brought under state wage and hour laws, making them opt-out actions subject to FRCP 23 or its state counterpart. The most critical moments in multi-plaintiff wage and hour litigation revolve around certification questions. Very few wage and hour cases are tried in the courtroom; therefore, the discovery strategy approach leading to certification and decertification decisions is of central importance.

The Triangle Of Defense Success Elements – Compliance, Experts And The Certification Process

The successful defense of most wage and hour litigation is built on a foundation of strong compliance programs and effective use of expert witnesses. These two elements come together to permit corporate defendants to wage a strong fight against attempts at certification of massive class actions (and to seek decertification as well). This triangle of success elements – strong compliance programs, expert storytellers and winning the certification/decertification battle – represents the essentials of the approach to successfully defending wage and hour litigation.

The starting place is compliance. This term can mean many things – strong policies, effective training, an accurate time-keeping system, a solid approach to classification, active monitoring and outreach – and the varying elements play different roles in different cases. Although the fullness of a *Faragher-Ellerth* type defense is not available to corporate defendants in wage and hour litigation, the chances of successfully fighting off certification increase dramatically if the compliance foundation is set and outreach efforts are strong. Without question, courts evaluating the propriety of certification are focused on the “commonality” and “similarly situated” concepts, but being able to present a strong compliance program to the court will more than likely positively affect the lens of the review.

With a solid compliance foundation in place, the stage can be set for effective use of expert witnesses as storytellers to assist a court in understanding why a given case would not be appropriate for class action treatment. Wage and hour cases, particularly those involving “off the clock” alle-

Please email the authors at wmartucci@shb.com or kpage@shb.com with questions about this article.

gations, are often document-intensive and lend themselves very well to use of experts to help bring complex, voluminous records to life. Expert witnesses can assist a court in better understanding the differences that matter in the certification context, as well as highlight the impact of strong compliance efforts.

A Case Study Illustration In The Certification Context: *Zivali v. AT&T Mobility, LLC*

The triangle of defense success elements is well illustrated by a recent decision from the U.S. District Court for the Southern District of New York in an “off the clock” wage and hour case styled *Zivali v. AT&T Mobility, LLC*.² In the May 12, 2011, decision, the court granted the employer’s motion for decertification after a full analysis of documentary evidence, testimony and expert witness findings. The case is a promising illustration of the FLSA approach to certification working in a comprehensive fashion – an initial grant of conditional certification based on the lenient early standard, an opt-in process where more than 4,100 individuals joined the action and a decertification decision following an extensive discovery period.

The case was initiated in November 2008 by plaintiff Gamze Zivali on behalf of herself and others similarly situated. She alleged that her employer, AT&T Mobility, LLC, failed to pay wages and overtime compensation in violation of the FLSA and the New York Labor Law. She represented “non-exempt” company employees who worked as retail sales consultants and assistant store managers. Specifically, she claimed that the company’s timekeeping system failed to capture all hours worked in light of off-site work activities and other store opening and closing tasks. The action was conditionally certified in July 2009, and the company moved to decertify the collective action in November 2010.

The court framed its review of the certification question by first looking to the company’s compliance efforts. It highlighted the company’s official policies that prohibited overtime work without pre-approval, but that also mandated that all overtime, even if not authorized in advance, be paid. Plaintiffs testified that these principles were reinforced through recurring training for managers and non-managers. The court further noted that employees had a variety of avenues to seek redress if violations occurred. As to the company’s timekeeping system,

MyTime, the court found that it was capable of capturing all time worked while employees were in the store and also when they were working off site because it allowed employees to obtain time adjustments.

Against this background, the court concluded, “it is clear that both the MyTime system itself and Mobility’s related policies are lawful.” This powerful finding at the beginning of the court’s analysis framed the remainder of its review. The impact of this early perspective cannot be overstated. From there, the court addressed the plaintiff’s argument that facially appropriate systems and policies “do not protect employers when established practices are to the contrary.”

This is where relevant testimony and expert analysis entered the court’s review. They were there to bolster the compliance foundation established at the outset. For example, opt-in plaintiff testimony concerning alleged off-duty email usage, text messaging and telephone calls demonstrated a host of varying experiences and was bolstered by expert analysis suggesting that the frequency and length of such communications varied widely. Similarly, with respect to use of the timekeeping system’s adjustment feature, the testimony again demonstrated variety, and the expert analysis was there to back it up. The court noted: “Expert analysis of MyTime data demonstrates a wide range in the frequency of adjustments: in some stores

none of the plaintiffs’ time records was edited, while in other stores greater than 50 percent of the employees/days contained edits to what might otherwise have appeared as a complete series of punches.”

In the end, the court held that the relevant factors favored decertification: “Unlike cases in which courts have permitted plaintiffs to proceed as a class, the record shows that there is simply no uniform policy or practice at Mobility that would result in systematic FLSA violations across the potential 4,000-plus plaintiff class.” This victory for the employer at the decertification stage was the result of a meaningful intersection of compliance efforts and expert witness analysis.

Concluding Thoughts

Expansive wage and hour litigation will no doubt continue for many years to come as old and new laws are applied to the modern workplace. Companies that re-focus on fundamental compliance steps and give high emphasis to wage and hour principles will be in an increasingly better position to address litigation when it comes. Such compliance efforts, combined with and bolstered by expert witness analysis in the litigation setting, are the keys to winning in wage and hour litigation.

¹ 29 U.S.C. § 201, et seq.

² ___ F. Supp. 2d ___, 2011 WL 1815391, No. 08 Civ. 10310 JSR (S.D.N.Y. May 12, 2011).

