



You May Not Have to Pay Attorney's Fees in Some FLSA Cases

Insights

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If you have ever had to defend against a lawsuit under the FLSA, you probably know that attorney's fees awards often far exceed the value of your employee's claims. This is especially true in collective action cases, which often involve extensive litigation resulting in a higher fee award. Unlike the general presumption in the United States that each party to a lawsuit pays its own attorney's fees, the FLSA provides for a mandatory award of attorney's fees to an employee who prevails on his or her claim. This mandatory fee-shifting provision sometimes results in employers deciding to settle a case early in the litigation to avoid increased fees in the event of a judgment in favor of the employee.

Avoiding Attorney's Fees Awards

However, in *Fast v. Cash Depot Ltd.*, a federal court in Wisconsin recently denied a plaintiff's request for attorney's fees and costs because it found that the plaintiff was not a "prevailing party." In this collective action lawsuit, the employee sued his employer for allegedly failing to pay him and similarly situated Field Service Technicians the correct rate of overtime pay for all overtime hours worked. The employer quickly hired an accounting firm to investigate its pay practices. Based on the accounting firm's finding that the employer did not pay the correct amount of overtime owed to its employees, the employer sent checks to its current and former employees for the unpaid overtime pay, and also mailed a check for the lead plaintiff's underpaid overtime pay, liquidated (double) damages, and attorney's fees accrued through that point in the litigation (based on the amount claimed by plaintiff's counsel in discovery). The lead plaintiff did not cash the check and his attorneys ultimately requested a significantly higher attorney's fee award after briefing on the employer's motion to dismiss.

Relying on the 2001 United States Supreme Court decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the court held that because the employer paid the employee the full amount owed under the FLSA, the employee was not a "prevailing party" entitled to attorney's fees under the FLSA. The court noted that Section 216(b) of the FLSA "plainly requires that the plaintiff receive a judgment in his favor to be entitled to attorney's fees and costs." Essentially, the court held that in order for an employee to be considered a "prevailing party" under the FLSA, the court must award a judgment to the employee or approve a consent decree or settlement agreement. Because the employer in this case paid all of the overtime pay owed to the lead plaintiff and its current and former employees, and the parties did not seek court approval of a settlement agreement, the lead plaintiff was not entitled to attorney's fees.

Preparing Your Defense

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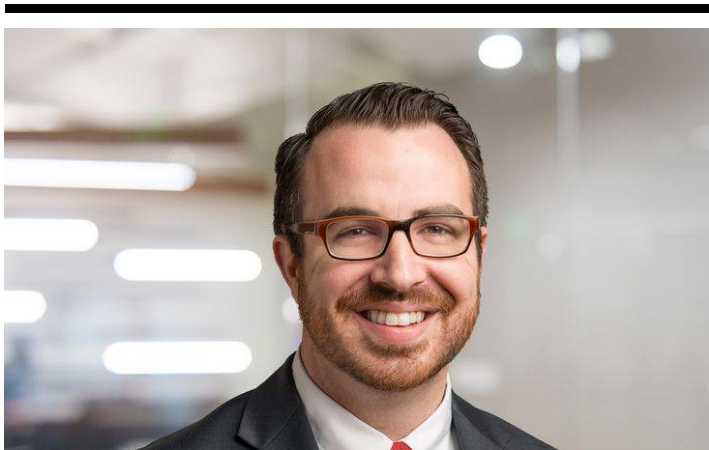
Of course, as with any court decision, there are some aspects to this case that are unique and may not be applicable in your case. If you are faced with a collective action lawsuit under the FLSA, you should consider the following:

- Review payroll data and evaluate the strength of your defenses early in the litigation to determine the best litigation strategy.
- If your review reveals an underpayment of wages, consider whether paying the full amount of underpaid or unpaid wages to your current and former employees is practicable and the best course of action, taking into account:
 - Your ability to accurately calculate the amount of wages owed;
 - The likelihood of the plaintiff obtaining class or collective action certification;
 - The anticipated number of employees who will join the lawsuit if certified;
 - The complexity of the litigation and resulting attorney's fees (on both sides); and
 - The likelihood of the plaintiff ultimately prevailing in the litigation.
- Review the current law regarding attorney's fees under the FLSA in your jurisdiction, which may be different than the case described above.
- Determine whether there are any potential state law wage payment claims that may affect your strategy.

The Bottom Line

Litigating a collective action lawsuit can be complicated and requires a number of strategy decisions that depend on the specific facts of your case. The case described above is one example of a strategy that was effective in reducing the amount of attorney's fees potentially owed to an employee. However, this strategy is not always feasible depending on the nature of the violations and the available payroll records. If you are dealing with an FLSA collective action lawsuit, you should consult your employment attorney for advice regarding the best approach in your case.

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