Denver Law Review

Volume 28 | Issue 2 Article 8

January 1951

A Guide to the Trial of an Employee Suit Under the Wage and Hour Law

Edward H. Sherman

A Guide to the Trial of an Employee Suit Under the Wage and Hour Law

Brotherhood v. *Publix Cab Co.*[34] presents a set of kaleidoscopic facets that, it is to be hoped, will not soon recur.[35] After a caution as to limited applicability of its decision to other situations,[36] the court concluded with reference to only a few of the conflicts and ambiguities as follows:[37]

> Where, as in this case, the record shows the absence of any negotiations having taken place, or a dispute having occurred, or a statement of grievances having been submitted by the individuals striking and picketing to the individuals against whom the strike has been called and against whom the pickets are presumably picketing, we say that it is against the public interest to allow such picketing because a bona fide dispute has not been shown to exist.

The quest for certainty in this field is rewarding in neither state nor national jurisdiction. Could it be that the legal problem has a political aspect and thus will be solved more easily after a few more Supreme Court vacancies are filled, or, perhaps, after November 4, 1952?

A GUIDE TO THE TRIAL OF AN EMPLOYEE SUIT UNDER THE WAGE AND HOUR LAW

EDWARD H. SHERMAN
of the Denver Bar

This article has been prepared primarily to aid the general practitioner who is called upon either to sue or defend a claim arising out of the Fair Labor Standards Act. The busy practitioner faced with an employee suit for these claims is bewildered by the maze of statutory, judicial, and administrative rulings. He has not had many occasions to delve into a new field of law which in a short time has developed into a complexity of rules and decisions which compare to that developed in other fields in over a hundred years. This article does not presume to be a treatise on the law. It does not claim to be exhaustive. It will deal with substantive law only incidentally. The object is to point out certain common problems of procedure and practice which you will probably face when you sue for an employee or defend his employer.

Let us assume that you represent the employee. He seeks to recover minimum wages or overtime pay which his employer

---

[34] 119 Colo. 208,, 202 P. 2d 154 (1949).

[35] Two attempts at strike votes were "unsuccessful"; union collective bargaining authorizations and revocations circulated like counterfeit bills; an unheralded strike was called; the union officials said the strike was against the owner-drivers, but all the strikers except one said it was against Publix Cab Co.; no attempt had been made by the union to negotiate with the owner-drivers against whom the officials said the strike was called and whom the union at the same time purported to represent. Controversy raged as to who represented whom, who was employed by whom and for what purpose, and which statute if any was applicable.

[36] In which the writer respectfully joins.

[37] *Supra,* n. 34 at 217.

denied him and which he claims to be entitled to under the Act. You have carefully examined the facts, and now you must decide whether he is entitled to the minimum wage or overtime pay benefits which the law provides. You carefully examine the substantive provisions of the FLSA, as amended,[1] and as affected by the Portal-to-Portal Act.[2] You now know generally that the client is entitled to minimum wages and overtime pay as prescribed by the law if he was engaged in interstate commerce, in production for commerce, or in an occupation closely related and needed for this production. You have learned that the present minimum rate for employees within the scope of the Act is 75 cents an hour and that the employer must pay for time worked in excess of 40 hours weekly at a rate of 1½ times the regular rate. You realize that the first and basic problem is whether the client is covered by the Act. The particular activities of the client is the decisive ultimate test. Here you cannot stop with the statute. You must consider thousands of definitions and rulings which try to determine coverage in various cases. You have further carefully examined the exemptions from the Act which, under the amendments of 1949, have been redefined and greatly expanded. You will search the administrative rulings on which many exemptions are based. Let us now assume that you have determined that your employee is covered by the Act and that his activities or those of his employer are not exempt. The next problem is to determine what relief is available to the employee.

Employee Has Choice of Remedies

Your employee will have a choice between three types of suits, but he must choose between them. You may advise him that he could waive his right to bring suit and make an agreement to accept from the employer payments of the amount which is due him under the supervision of the administrator of the Wage and Hour Division. Under Section 16(c) of the amended Act, he may consent to suit brought by the administrator on his behalf, but if he does this he cannot bring a suit on the same claim, either individually or collectively. His other choices are an individual suit in his own name or a collective suit brought by a fellow employee for his benefit and other employees similarly situated. A final judgment in any of these types of suits will obviously be a bar to bringing another type of suit on the same cause of action, and if the employee consents to suit by the administrator, he gives up his right to liquidated damages and attorney's fees which he would otherwise have in the other types of suits. The employee would be wiser to sue in his own right under Section 16(b) or to join

[1] Fair Labor Standards Act of 1938 and Fair Labor Standards Amendments of 1949, 29 U.S.C. 201-219, as amended.
[2] Portal-to-Portal Act of 1947, 29 U.S.C. 251-263.

with others in a collective action brought for the benefit of themselves and other employees similarly situated. The mere threat of liquidated damages and attorney fees imposed, is alone a powerful weapon for an adjustment. Let us assume, therefore, that you have decided to proceed by an individual suit or a collective one for the employee. In the process of litigation you will surely face many of the problems which are set out below.

PROPER PARTIES TO THE ACTION

Your employee is the real party in interest, and the action should be maintained by him for and in behalf of himself or other employees similarly situated and by other employees who have joined him in a group action. The Portal-to-Portal Act, which became effective May 14, 1947, prohibits an action by a non-employee representative. You can no longer designate a union or other representative to maintain the action for the employee. The Portal-to-Portal Act also prohibits assignment of "portal" wage claims not compensable by contract, custom or practice which arose prior to May 14, 1947. If it were not for this, it would seem that an assignee would be a proper party[3]. A person who is not an employee cannot file a suit under Section 16(b) as a representative or agent of an employee or on behalf of all employees similarly situated; however, other employees may join your client in bringing a collective suit. In order to become a party plaintiff to a suit, the employee must give his consent in writing which must be filed in the court where the action is brought. No time limit is set forth within which the employee must file his written consent (Sec. 7, Portal-to-Portal Act). The problem is somewhat analagous to interventions in which employees similarly situated were allowed to intervene where they desire to become parties to the action. It is interesting to note that one court construed Section 16(b) of the Act as providing a permissive joinder device whereby employees with individual claims could present them simultaneously to avoid much litigation, a procedure which was not "a true class suit."[4] Employees similarly situated, who are not joined as parties nor represented by employees who are parties to the suit, have been held not to be bound by the judgments. Thus, you may bring an action for your employee and all other employees similarly situated and may join other employees whose claims may be separate and distinct if they otherwise consent to become parties to the action. The words "similarly situated" do not mean identically situated nor do they limit the participants to the action to those employees who are of the same class or department as the plaintiff.[5] It is important that in collective suits the employee

[3] Frisch v. Zelart Drug Co., 46 N.Y.S. 2d 44 (1943).
[4] Pentland v. Dravo Corp., 152 Fed. 2d 851 (3rd Cir. 1945).
[5] Shain v. Armour & Co., 40 F. Supp. 488 (D.C. Ky. 1941); McNichols v. Lenno Furnace Co., 7 F.R.D. 40 (D.C. N.Y., 1947); Wright v. U.S. Rubber Co., 69 F. Supp. 621 (D.C. Iowa 1946).

should give his consent in writing to become a party plaintiff and file this consent in court.

THE PROPER FORUM FOR THE ACTION

Section 16(b) of the FLSA provides that an employee may sue in any court of competent jurisdiction. This will permit you to proceed in either a federal or a state court. Your choice of courts will be based largely on matters of expediency or strategy. Under the Act, the federal court will take jurisdiction regardless of whether there is diversity of citizenship or whether the amount exceeds $3000.[6] You should note, however, that the jurisdiction of the federal court may, in addition, be based upon other grounds. Federal jurisdiction may thus exist because the cause is one which exceeds $3,000 and is between citizens of different states, because there is involved the enforcement of a penalty under the federal laws, or because the law involved regulates interstate commerce. You will understand the federal decisions better if you consider the source of jurisdiction.[7] So, for example, if the suit is for something other than minimum wages and overtime compensation and not within the Act, a federal court may deny jurisdiction unless it is shown that there is diversity of citizenship and the controversy exceeds $3,000.[8]

There is no reason why our county court could not assume jurisdiction if the amount does not exceed $2,000, but in estimating the amount involved the court will include liquidated damages and attorney's fees which are not considered costs, but are, in fact, part of the allowable recovery. If the amount sought should be beyond the court's jurisdiction, this would not oust the court but would probably nullify the amount claimed beyond the jurisdictional limit.[9] Your most perplexing problems will concern the removal of an action to the federal court after you have started it in the county court. The decisions cannot be reconciled. It would seem that since Congress provided that the action may be maintained in any court of competent jurisdiction, it should be prosecuted to final judgment in that court and not removed.[10]

You will, of course, conduct the suit in accordance with the rules of practice and procedure which are in effect in the court where your action is brought. Where the procedural question is not covered by the Act, you will follow the rules of the court. This will be true on questions involving the capacity to sue, process,

[6] Maloy v. Friedman, 80 F. Supp. 290 (D.C. Ohio 1948); Robertson v. Argus Hosiery Mills, Inc., 121 Fed. 2d 285 (6th cir. 1941).

[7] Federal jurisdiction may be based upon the amount of the controversy and diversity of citizenship, 28 U.S.C. Sec. 41 (1); because you seek to enforce a penalty under federal laws, 28 U.S.C. Sec. 371; or under 28 U.S.C. Sec. 41 (8) because the suit arises under a law regulating commerce.

[8] See, for example: Schempf v. Armour & Co., 5 F.R.D. 294 (D.C. Minn. 1946); Kantor v. Garchell, 150 Fed. 2d 47 (8th Cir. 1945).

[9] Caperna v. Williams-Bauer Corp., 9 Labor Cases, Sec. 62,607 (N.Y. 1945).

[10] Johnson v. Butler Bros., 162 F 2d 87 (C.C.A. Minn. 1947); Harris v. Reno Oil Co., 48 F. Supp. 908 (D.C. Tex. 1943).

venue, joinder of parties and causes of action, etc. Under the Act, a union or one of its agents can no longer bring an action on behalf of the employee. A minor will sue by his next friend. The question of venue in the state court will be determined by our Rule 98. You may have to determine whether the action is for recovery of a penalty or on a contract, and the courts have differed as to this matter. In the federal court the question would probably be determined by the rules and Section 51 of the Judicial Code (28 USC Section 112). Our rules of procedure as to joinder of parties and actions would seem to apply. Nevertheless, it should be noted that under Section 16(b) of the Act, the joinder of parties and claims seems to be specifically provided for on the basis that the employees are all similarly situated and the causes arise out of the same set of circumstances. The federal courts have indicated a very liberal attitude in permitting joinder of parties and causes of action in one suit, pursuant to Rule 23 of the Federal Rules of Civil Procedure and Section 16 of the Act.[11]

PLEADING REQUIRES JURISDICTIONAL ALLEGATIONS

How shall you draft your complaint in this type of action? For the most part, the sufficiency of the complaint will be determined by the appropriate Rules of Civil Procedure as in other cases, but there are certain jurisdictional allegations which must be set forth in the complaint. Your complaint should contain an allegation not only of the interstate nature of the employer's business but also of the facts which establish that the employee is directly engaged in interstate commerce or in the production of goods for such commerce. It may be deemed insufficient to allege merely "that defendant was engaged in interstate commerce" or that the employee "worked directly in the production of goods for commerce." Many of the courts have held that you must allege more than mere conclusions to establish jurisdiction.[12] The federal courts have differed as to how much should be set out in the employee's complaint. Generally, however, they will try to determine from the evidence on the trial the jurisdictional facts and from a technical construction of the pleadings. As one court stated, "Unless it appears with certainty from the complaint that such employees would be entitled to no relief under the facts stated, the complaint should not be dismissed,"[13] but there are numerous cases which require specific allegations of the jurisdictional facts in order to determine coverage of the Act. The complaint should also contain a statement of the ultimate facts which show that there existed a contractual relationship be-

[11] For examples of joinder. *see,* Archer v. Musick, 147 Neb. 1018. 25 N.W. 2d 908 (1947); Keele v. Union Pac. R. Co., 78 F. Supp. 679 (D.C. Calif. 1949).

[12] W. S. Dickey Clay Mfg. Co., 78 F. Supp. 616 (D.C. Mo. 1948); Baggett v. Henry Rischer Packing Co., 37 F. Supp. 670 (D.C. Ky. 1941).

[13] Clyde v. Broderick, 144 Fed. 2d 348 (10th Cir. 1944); De Loach v. Crowley's, Inc., 128 Fed. 2d 378 (5th Cir. 1942).

tween your employee and the employer. Should you specify in the complaint the hours of overtime due and the amount of underpayment involved? Some courts have required that you plead the exact months and time worked, holding that a mere allegation that the employee was not paid the overtime provided by the Act was insufficient. On the other hand, many of the federal courts have held that it is not necessary to specifically allege the overtime which may later appear from the evidence.[14] When an employee was employed by a company engaged in interstate and intrastate commerce, the court required the complaint to set forth the amount of time he worked in each classification and, where he worked for two employers, the amount worked for each.[15] If you bring a collective action on behalf of your employee and other employees similarly situated, it would seem advisable to set out the names of these other employees. Your failure to set forth the authority of the agent to bring the action for the others may render the complaint insufficient as to them. You must show on the face of the complaint that the employees are similarly situated. In several cases, however, the suit was held not subject to dismissal on the grounds that the complaint did not name the employees alleged to be similarly situated.[16] In others, the employer was allowed, by appropriate motions, to obtain their names. The judgment will not affect those employees who did not submit to the court's jurisdiction.

No Special Rules of Pleading Required

Apart from the question of jurisdiction there are really no special rules of pleading which are unique in this class of cases. The facts of each case will govern what you will do. The use of motions will follow the general rules of practice and procedure. Motions to dismiss the complaint because of insufficiency have been denied by the federal courts unless it appeared with certainty that the employee was entitled to no relief under any state of facts. It it should appear, however, that there is no possible claim, notwithstanding amendments, the court will dismiss the proceeding rather than indulge in long and expensive litigation. Motions to strike will generally be denied as in other cases, and motions for summary judgment will be denied where the record discloses any issue of fact which must be determined from evidence which would be submitted at the trial. In actions involving Portalto-Portal activities where the complaint must show that the claim should be paid under express provisions of a contract or under a custom or practice in effect when the claim arose, the

[14] *Compare* Hunt v. National Linen Service Corp., 178 Tenn. 262, with Dykema v. Aluminum Co. of America, 11 Labor Cases Sec. 63,414 (D.C. Ill. 1946).
[15] Kidd v. Royal Crown Bottling Co., 6 Labor Cases Sec. 61,385 (Tenn. 1942).
[16] *Compare:* Coleman v. Springsely Realty Corp., 6 Labor Cases, Sec. 61,406 (D.C. N.Y. 1943); Calabrese v. Chiumento, 3 F.R.D. 435 (D.C. N.J. 1944); Dolan v. Day and Zimmerman, Inc., 8 Labor Cases Sec. 62,189 (D.C. Mass. 1943).

failure to allege this will justify a summary judgment or a motion to dismiss.[17] Sometimes an employer will move for security for costs. The federal courts have generally rejected this motion where the employees were residents or were employed within the jurisdiction of the court. In Colorado, the right to such security would be governed by our general statute on costs.

The liberal use of counter claims and setoffs as provided for in Rule 13 of our rules is also available to the employer in these suits. The employer's counter-claim will be allowed even though it does not arise out of the same facts. It is because of this that, in one case, the employer was permitted to offset a debt owing to him but only after liquidated damages for the employee were computed.[18]

USE OF DISCOVERY AND DEPOSITION ESSENTIAL

A most important procedural device for successful litigation is obtaining information before trial. Information regarding hours worked, compensation received, rates of pay, premiums, and other relevant matters may be secured under our rules for discovery or depositions. The federal courts have on several occasions stated that these rules may be employed only after the pleadings have been formulated. A federal court held that one cannot take the deposition of his employer for the purpose of discovering evidence to enable him to frame a complaint.[19] He can do so only after the action has been commenced. An employee will then have the right to examine the books and records of the employer. The examination will be limited to the material records relating to the parties to the action.[20] Motions for inspection and discovery of employer's books and records will be granted but subject to control by the court. You may request admissions of fact from the employer, thereby relieving you from the costs and labor of proving facts which would not be disputed. Interrogatories have been allowed where limited to the plaintiffs of record and to the period covered by the complaint. Often the court will try to avoid the unreasonable burden upon the employer of requiring him to compile a great deal of information which may be of doubtful relevancy. It has been held that discovery must be limited to the period of time which would not be excluded by the statute of limitations.

What are your rights to a bill of particulars? You may ask for a bill as a dilatory tactic, but if you really want it, your motion will be considered in the light of several decisions. It will be denied if you merely seek evidence; it will be denied if the pleadings are definite enough to answer. Some of the courts have allowed it only if necessary to answer but not to prepare for trial. A party will not be entitled to it when he seeks discovery of matters

[17] Hays v. Hercules Powder Co., 13 Labor Cases sec. 64,123 (D.C. Mo. 1947).
[18] Barrineau v. Carolina Milling Co., 52 F. Supp. 197 (D.C. S.C. 1942).
[19] Ferkauf v Leon Decorating Co., Inc., 3 F.R.D. 89 (D.C. N.Y. 1943).
[20] Fishman v. Marcouse, 32 F. Supp. 460 (D.C. Pa. 1940).

which are within his own knowledge. Where employees have filed a collective suit on behalf of themselves and others, the courts have often granted bills of particular in order that the claim of each employee might be definitely set forth, together with the jurisdictional facts involved.[21] Where several plaintiffs are involved, it might facilitate a speedy and inexpensive determination of the individual claims. They have thus required the employee on occasions to furnish a bill which would separate the claims of each, as it were, and furnish the names of the employees, the exact work done, the period of time involved, etc. Where exemption is pleaded by the employer as a separate defense, a bill of particulars has been ordered, and where the employer asserted as a defense that he had relied in good faith on an administrative regulation, the employee was entitled to a bill of particulars setting forth this regulation and the employer's acts in reliance on it.

You will not be allowed to procure information secured by the Wage and Hour Division, for this is privileged. There will be other confidential government records unavailable to you but the discovery procedure available in both the federal and state courts permits application to the court for a subpoena directing the appearance and production of records or evidence when material to the suit. Such subpoena will be enforceable by contempt proceedings where there is a violation.

THE BURDEN OF PROOF AND SUFFICIENCY OF EVIDENCE

The employee has the burden of proving by a preponderance of evidence that he is entitled to recover. He must prove all the essential elements of his claim. He has the burden of showing the existence of the employer-employee relationship; that his activities are within the coverage of the Act; that the employer has violated the provisions of the Act to his damage. If he was engaged in both interstate and intrastate commerce, he has the burden of showing how much time he was employed in interstate commerce. He cannot claim violations of the Act based upon guess work or speculation. His evidence must not be uncertain or conjectural. He cannot indicate in a general way how much overtime work he performed. The court should not place upon an employee a standard of proof which is so great as to be unrealistic. It is held that his claim need not rest upon documentary evidence. In other cases, where the employer has failed to keep records of his employees and their hours and wages which the law requires, the burden of proof will not shift to the employer, but the employee will be allowed to show the amount and extent of his work as a matter of reasonable inference.[22] In many cases the employee

[21] Dolan v. Dan & Zimmerman, 8 Labor Cases, Sec. 62,189 (D.C. Mass. 1943); Lemme v. V. La Rosa & Sons, 7 F.R.D. 485 (D.C. N.Y. 1947); Compare—Dykema v. Aluminum Co. of America, 8 F.R.D. 230 (D.C. Ill. 1947).

[22] Electron Corp. v. Wilkins, 14 Labor Cases, Sec. 64,234 (Colo. 1947); Davies v. Onyx Oils and Resins, Inc., 63 F. Supp. 777 (D.C. N.J. 1946).

tried to prove his case by self-kept records. These were usually held not to sustain his burden of proof especially where they were not kept daily and their accuracy and truthfulness were suspect.

There are no special rules concerning admission of evidence which apply to employee suits. You should remember that the rules applied in Colorado will be followed in the federal court for Colorado. You might consider the decision of a few cases in this field: self-serving declarations of an employee who kept a daily record of his hours worked in order to make a claim against his employer were held inadmissible; an employer cannot vary his written contract by offering parol evidence to prove that lower rates were agreed upon; but admissions against interest have been held admissible. These admissions were interesting—an offer by the employer to pay if the employee would drop his suit and give a written release of all claims under the Act. The courts have applied the best evidence rule where the employer had failed to keep records and the employee presented the best evidence which was available.

You will get a feeling of what degree of proof is sufficient to establish the employee's claim by reading the cases involved. Time-clock records are important where they accurately reflect the period worked, but they are never conclusive. The employer may not establish an exclusive way of determining the hours worked. Where employer kept no records and employee testified positively of hours worked, which were not contradicted, such testimony was held sufficient to entitle him to a judgment.[23] Any records of an employee which appear fabricated or which were entered for the purpose of instituting a claim and were not made currently, will be rejected. In some cases, disinterested witnesses testified to corroborate the plaintiff's testimony, and a sufficient showing was made. Mere general recollection by an employee of this time worked, without more, was held insufficient. It has been held that an employee need not prove with exact precision the amount of overtime hours he worked. Where it was undisputed that other employees were similarly situated with the plaintiff, a recovery was warranted for them, even though they did not all appear personally and testify.[24]

JURY TRIAL, VERDICT AND APPEAL

You will probably want a jury. You will be entitled to a trial by jury whether in federal court or in the state court. Your demand should be in writing and within the period required by our Rules of Civil Procedure. There are no special rules in an

[23] Campbell v. Mandel Auto Parts, 6 Labor Cases Sec. 61,557 (S.Y. 1943); On the question of sufficiency, *see:* Lawley & Sons v. South, 140 Fed. 2d 439 (1st. Cir. 1944); Murdick v. Cities Service Oil Co., 9 Labor Cases Sec. 62,389 (10th Cir. 1949); Richardson v. Duff, 194 S.W. 2d 389 (Ky. 1946).

[24] Baker v. California Shipbuilding Corp., 13 Labor Cases, Sec. 63,855 (D.C. Calif. 1947).

employee suit concerning a jury trial, which differ from other suits. The courts have said that the trial judge may not direct a verdict where reasonable men draw different inferences from the evidence. A jury's verdict supported by substantial evidence will not be set aside. In one case it was set aside when the judgment for the plaintiff was less than was warranted from the undisputed evidence. It will be set aside where it is inconsistent or against the weight of the evidence or based on a compromise or not responsive to any finding of fact. Appeals from judgment in employees' suits do not differ from other cases. A trial court's finding of facts, where sufficient to sustain the judgment, will be binding upon the appellate court unless clearly erroneous.

THE EMPLOYER'S DEFENSES

Now let us consider the employer. How shall he defend the employee suit? He will not be liable if he can show that the employee was not an employee, or that he was not covered by the Act, or that he was not employed at a wage below the legal minimum or in excess of 40 hours a week. You should very carefully consider the 1949 amendments to the Act on the question of coverage or exemption. Many employees are now excluded from the Act as the exemptions have been enlarged to a considerable extent—they will include many retail and service establishments, laundries and dry-cleaners, telephone and telegraph agencies, news boys, employees of local newspapers, or taxicab operators and others. Many of the exemptions will be administrative, and you must search carefully to find them.

Considerable litigation has already indicated what other types of defenses will be sustained or denied. If you justify the employer's conduct by a state law or some other federal law, or if you offer an agreement or contract, all of which is contrary to the Act or prohibited by it, your defense will not be sustained. Therefore, employment contracts which provide that the parties shall arbitrate wage disputes form a valid defense.[25] The employer can not show that he offered a payment to the employee which was accepted where the amount was not in accordance with the Act or where he tendered overtime payment after it was due. In many cases the employer has pleaded estoppel, e.g., that the employee has consistently accepted less wages without protest, that he has failed to make a demand for overtime wages, or that he has submitted false records. None of these defenses are sufficient to avoid liability under the act.[26] If you claim payment as a defense, it must be for the full amount required. A prior judgment or a dismissal with prejudice in a former action involving the same

[25] St. Clair v. Russell and Pugh Lumber Co., 51 F. Supp. 47 (D.C. Idaho 1943).

[26] Block v. Bell, 53 F. Supp. 863 (D.C. Ky. 1945); Lawley & Sons v. South, 140 Fed. 2d 439 (1st Cir. 1944); Travis v. Ray, 41 F. Supp. 6 (D.C. Ky. 1941); Freeman v. Blake Co., 84 F. Supp. 700 (D.C. Mass. 1949).

parties and the same claim will, however, bar recovery in the later suit. If such a prior action is still pending, the later action should be abated.

There are some very significant defenses which you must carefully consider. If you can show that your employer acted in good faith in relying upon an administrative ruling which was in effect and that he conformed to it innocently, this may constitute a bar to an action for violations even though the administrative ruling was later changed or rescinded. The Portal-to-Portal Act, which supplements the FLSA, created this defense in order to protect employers from the retroactive effects of changes brought about by new administrative rulings or court decisions. The Portal-to-Portal Act makes a distinction between the past acts or omissions of the employer resulting from his reliance upon administrative rulings which occurred prior to May 14, 1947 and those which occurred subsequently. If the employer's acts or omissions were prior to that date, the ruling upon which he relied as a defense does not have to be in writing, and it may be any administrative ruling of any federal agency. Those subsequent to May 14, 1947 must, however, be a written ruling or enforcement policy of the Wage and Hour Administrator.

Good Faith Reliance on Rulings

In such a case certain problems obviously arise. Is the ruling or policy in fact that of the Wage and Hour Administration? Is it an official ruling or a policy? If the Administrator fails to reply to the employer to an inquiry, is this an administrative ruling? If he abandons a court action or an appeal, must the Administrator affirmatively act? Is the ruling applicable to the particular business in which the employer is engaged? It has also been held that before the employer's good faith reliance upon an administrative practice is to relieve him from violations, such practice or policy must be based upon the ground that the act did not violate the FLSA and that the practice or policy of the Administrator in not enforcing the Act with respect to the employer's acts or omissions induced him to believe that he was not violating the Act. The employer must actually rely upon the administrative ruling or policy and conform to it. There must be truly good faith. What constitutes good faith on the part of the employer and whether he was justified in believing that he was not violating the Act must be determined by the particular circumstances of each case. [27] You should carefully study the interpretive bulletins and court decisions in considering this defense.

The employer's good faith is also important on the question

[27] For the test of good faith, *see:* Kam Koon Wan v. E. E. Block, Ltd., 14 Labor Cases, Sec. 64,294 (D.C. Hawaii 1948); Anderson v. Arvey Corp., 84 F. Supp. 55 (D.C. Mich. 1949).

of liquidated damages. The Act provides that an employee may recover as liquidated damages an additional amount equal to the unpaid compensation. At first an award of liquidated damages was held mandatory upon the courts. Section II of the Portal-to-Portal Act gave to the courts discretionary power to award or withhold liquidated damages in these cases. This depends upon the employer showing to the satisfaction of the court that he was innocent and that his conduct was in good faith and was based upon reasonable grounds for believing that he did not violate the Act. This is obviously a question of fact which can only be determined upon trial. The employee's claim for liquidated damages cannot be summarily overruled. Good faith should be pleaded by the employer. You should also know that the employee cannot recover interest on an award for liquidated damages.

An additional significant defense should here be mentioned. It involves the statute of limitations. It is sufficient to state now that the federal statute of limitations will govern all causes of actions and supercede our Colorado statute of limitations in these employee suits. There is a two year statute of limitations for suits under the FLSA as amended, and all causes of action arising prior to January 5, 1950, the effective date of the 1949 amendment, would be barred by the end of two years after that date. A cause of action, for unpaid wages, accrues when the wages become due and are not paid: There need be no demand for payment. The employee's action is commenced on the date when the complaint is filed with the court. In the case of a collective action or one brought by an employee to enforce his rights and those of others similarly situated, the action is not considered to begin for these other employees until they have filed a written consent with the court or have otherwise participated actively. This is in accordance with the Portal Act.

Employee Claims Cannot Be Compromised

If the employee has been paid in full under supervision of the Wage and Hour Administration and has accepted such payment, this is a waiver of his rights for the benefits provided by the Act. There is a similar waiver to the employee's right to liquidated damages and attorney fees if he authorizes and consents to an Administrator suit, but you will be confronted with a very significant problem. Can you settle the employee's claim out of court and obtain releases which will be valid? Our supreme court has held that the Wage and Hour law confers statutory rights which are affected with a public interest and, therefore, these rights cannot be waived or released. In a series of decisions the court held that the employee cannot waive or release or compromise his rights to minimum wages or overtime pay or liquidated damages. He cannot accept less than the full amount due him under the Act.

He cannot release his claim for liquidated damages (prior to the amendments of the Act). He cannot relinquish his claim to liquidated damages by accepting full payment for overtime work where the dispute involves coverage under the Act.[28] Lower courts have been in conflict as to the validity of compromised agreements where there is a bona fide dispute as to the number of hours worked by the employee. It is, therefore, very dangerous to compromise a employee's claim under the Act. There is, however, a device which is available and which should accomplish this purpose. Where a compromise agreement which is fair and equitable has been merged in a judgment, when the parties appear before the court and seek a consent decree, such a judgment would then appear to be a bar to a later action.[29] Should it be inequitable or fraudulent, the solution would be a motion to set aside this judgment which otherwise will remain in force.

INTERSTATE BAR COUNCIL MEETS IN DENVER

The Colorado Bar Association will be host this year to the bar representatives of the eleven Western states which make up the Interstate Bar Council. This council has for its purpose the promotion and exchange of ideas on programs relating to the welfare and improvement of the legal profession in this area.

The council will stage its annual meeting at the Brown Palace in Denver on February 28, the day following the close of the mid-winter meeting of the ABA House of Delegates in Chicago. President Edward G. Knowles will welcome the delegates in behalf of the Colorado Bar Association and participate in the panel discussion on bar association matters which will be presided over by Harry J. McClean of the Los Angeles bar, chairman of the council.

President Fritz A. Nagel has arranged to accelerate the regular March meeting of the Denver Bar Association in order that it may coincide with this occasion. A joint luncheon will be held at the University Club in honor of the visitors from Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. This promises to be one of the outstanding programs of the year, and further notice as to the speaker, subject and other arrangements will be given later.

Interested bar association members are also invited to drop into the Tabor-Stratton Room of the Brown Palace at 10:00 a.m. and 2 p.m. on Wednesday, February 28 to hear a lively panel discussion on the following subjects:

---

[28] Observe the decisions of the Supreme Court as they have developed: Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1944); Dize v. Maddrix, 324 U.S. .... (1945); Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).

[29] Bracey v. Luray, 161 Fed. 2d 128 (4th Cir. 1947).