

## **Employer-Side Trial Strategies For Wage And Hour Cases**

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You can greatly improve your chances of winning your trials if you develop a thoughtful trial plan. This article provides guidance on employer-side courtroom strategies for wage and hour trials.

Specifically, it covers:

- Jury selection strategies and voir dire best practices;
- Opening statements;
- Cross-examination of employees;
- Essential evidence to introduce;
- Direct examination of company witnesses; and
- Closing arguments.<sup>i</sup>

### **Jury Selection Strategies and Voir Dire Best Practices**

Jury selection and voir dire is your first opportunity to observe and interact with the triers of fact. In addition to identifying who will and will not serve on the jury, you should use the opportunity to observe interactions between the judge and the jurors, opposing counsel and the jurors, the judge and opposing counsel, and to get comfortable in the courtroom.

#### ***Jury Selection Strategies***

When selecting a jury in a wage and hour case, you should learn about the voir dire process the judge uses before you start, obtain a list of jurors, find out the number of peremptory challenges, and find out how many peremptory challenges you will have in the case.

You should also create a profile for the ideal juror. For example: those who don't think employers are out to cheat employees of wages; those who recognize that compliance with technical payment rules can be complicated, and that any wage-related mistakes are likely inadvertent; and those who will reject discreet wage mistakes as being part of a larger scheme, not to mention those with strong math skills.

Ask jurors about their experiences with payroll issues that they or their family members or colleagues may have experienced, how the issues were resolved, and whether the outcome was satisfactory.

Most importantly, you need to know the facts and themes of your case in advance of jury selection. For example, the following themes are worth considering for wage and hour trials:

- The company is a responsible employer who makes every effort to comply with wage and hour laws.
- The company pays its employees fairly and has many long-service employees who remain because they are paid fairly and in accordance with the law.
- Employees understand how they are paid. No employee has ever complained about the technical issues raised in this case.
- Employees know how and where to raise an issue when they have questions or concerns about their pay.
- Payroll mistakes are corrected.
- Employees are trained on their rights to take meal and rest breaks, and their work is arranged so that everyone can take breaks.

### ***Voir Dire Best Practices***

Depending on your jurisdiction, voir dire may be your first opportunity to tell your story to the jury. If so, take advantage of that opportunity and spend time educating the venire about your case. Sample employment/wage and hour voir dire questions include:

- Have you or anyone close to you ever had an issue with your (their) pay?
- Have you or anyone close to you ever felt that you (they) were being paid unfairly?
- Have you or anyone close to you ever felt confused about your (their) pay stub?
- Have you or anyone close to you ever felt that you (they) were in the wrong job?
- Have you or anyone close to you ever felt like you (they) were doing someone else's job?
- Have you or anyone close to you ever worked in job where you (they) were not allowed to leave the premises?
- Have you or anyone close to you ever worked in a job where you (they) had to work through breaks?
- Have you or anyone close to you had to work overtime? When you (they) worked overtime, were you (they) paid overtime?
- Have you or anyone close to you ever worked off the clock?

## Opening Statements

During the opening statement, you establish your themes, a rational timeline of events, and a road map of the witnesses and evidence the jury will see during the trial. Opening statements are very important because most juries make up their minds about the case after hearing them.

### *What to Cover in Opening Statements in Wage and Hour Trials*

#### *Introductions*

Introduce yourself, your client representative and the others on your team. Have them each stand when their name is mentioned.

#### *Wage and Hour Themes*

Start off with the theme of your case. It should be a declarative sentence that starts off explaining what the case is about. If you can refer to something in common experience, add that. For example:

- This is a case about wage statements that were clear and understandable. The plaintiff in this case is going to argue that there were technical problems with the wage statements. However, as you will see during the trial, the employees who actually received the statements clearly understood what they said when they had a reason to read them.
- This is a case about employees who claimed to work overtime, but failed to follow the company's simple procedures for working overtime. If the employees had recorded the overtime and advised their supervisors regarding the need to work overtime, they would have been paid overtime. As you will see during the trial, the company paid overtime to employees who worked overtime and recorded their hours.
- This is a case about store managers who were hired to oversee the store. They knew their responsibilities, were trained on them, and were expected to maintain proper staffing levels in the store. As managers, there was no one looking over their shoulder and if they chose not to hire a full staff or chose to do work that they should have given to their employees, that doesn't mean they are not managers. Not doing your job correctly does not change you from an exempt to a nonexempt employee.

#### *Background on the Company*

Explain what the company does and use its website and employee handbook to help explain that information. Highlight the company's commitment to fair treatment for all employees, the structure of its payroll department, the use of professional outside agencies to generate wage statements, and the background of the witnesses who will testify.

### *Employees Who Are Named Plaintiffs*

Talk about the employees who are the named plaintiffs in the case — their employment, the fact that they were paid properly and regularly, and that they never complained about any problem with their wage statements.

### *Weaknesses*

Address directly any weaknesses in your case and provide explanations and context for any harmful evidence.

### *Experts*

Spend some time talking about the experts who will testify and what to pay attention to regarding the expert testimony.

### *Conclusion*

Provide a concluding section listing the key themes and key evidence in the case and thank the jurors for their attention and ask them to keep an open mind until you can present your case.

## **Cross-Examination of Employees**

The purpose of cross-examination is not simply to attack an adversary, but rather to strengthen your own case. Indeed, effective cross-examination can help win the case in front of the judge and jury.

For instance, admissions by the plaintiff could help establish a lack of evidence to support a claim, strengthening the chance for a directed or jury verdict. Damaging the plaintiff's credibility will no doubt also be helpful in securing a victory. Counsel should follow these best practices when cross-examining employees:

## ***Be prepared.***

Do your homework before trial. Talk to supervisors and co-workers. Review the payroll records and personnel files. Look for admissions in depositions or in emails.

If you have a misclassification case, look for resumes and job applications for admissions regarding the importance and scope of work and job responsibilities. Also, see if any of the employee witnesses provided declarations or helpful statements to the employer in other class actions and/or participated in other wage and hour settlements.

## ***Use videotaped depositions.***

Use helpful admissions, inconsistent statements, body language and inappropriate conduct during videotaped depositions to undermine witness credibility.

## ***Build on facts that the witness must admit.***

Use cross-examination to obtain admissions flowing from the employee handbook, employment law postings and training concerning payroll practices, how employees can raise concerns, and their ability to get corrections or changes to pay.

## ***Demonstrate that the employee failed to timely complain.***

Show that the employee did not complain promptly/timely or even ask questions about the wage statement about which he or she is now complaining.

## ***Address methods to voice complaints and how the employee failed to use them.***

Identify the various ways employees have to raise issues or concerns and get the employee to admit that he or she failed to take advantage of those platforms and opportunities.

## ***Address the employee's history with the company.***

Consider getting admissions regarding how long the employee has worked at the company and that he or she has remained with the company despite the allegedly unlawful wage statement. It would also be helpful to show that the employee has referred friends, family members or others to work for the company.

Further, if the company paid the employee a discretionary bonus, this fact could be used both to show that the company has treated the employee fairly and potentially that it has made up for any unpaid wages.

### ***Show obvious bias.***

Address issues of bias including, for example, the employee's relationship (e.g., friendship) with corroborating witnesses and possible coordination of testimony; the employee not making claims at the time but making them now because he or she has hired a lawyer and is looking to gain a windfall; and the employee's motive of revenge against the employer — if, for example, the company fired the employee.

### **Essential Evidence to Introduce — Best Techniques**

Counsel should create a chart setting forth: (1) a list of each element of the claims asserted by the plaintiff; (2) the evidence likely to be introduced by the plaintiff; (3) defense objections; (4) counterevidence; (5) the defendant's affirmative defenses from the answer; (6) the elements needed to establish the affirmative defenses; and (7) the evidence to support the affirmative defenses

For each piece of evidence to be introduced, list how it is going to be introduced into evidence.

For example, if it is witness testimony, list the witness with reference to any relevant deposition testimony. If it is a document, list the witness who will introduce the document and the grounds for introduction — e.g., the witness is the author or recipient, used the document to refresh his/her recollection, or prepared the document and it is relevant to establish state of mind.

Be ready to introduce documents as business records with the appropriate custodian of records, if necessary, and to respond to possible hearsay objections. Remember there are exceptions to the hearsay rules for records that are likely relevant to wage and hour cases — e.g., business record, offered to show state of mind, etc.

### ***Essential Evidence in a Wage and Hour Case***

Essential evidence depends on the case, but usually includes the following in a wage and hour case:

- Policies and procedures used by human resources and payroll to correctly pay employees;

- The procedure for challenging or getting clarification about pay, with examples of payroll corrections being made;
- Training provided to employees and supervisors about correctly implementing the company's pay policies and practices;
- Payroll records of the employees at issue;
- Offer letters, employment agreements, and/or other documents (including emails) concerning the employees' pay; and
- Collective bargaining agreements, if applicable.

## **Direct Examination of Company Witnesses**

It is critical to introduce the jury to the individuals who work for and represent the company and who have been attempting to comply with the pay requirements imposed on employers. Do not settle for the individuals who are most available. Find the individuals who will present the company in the best light and who have the intelligence and background to withstand cross-examination.

Follow these best practices for your direct examination of company witnesses.

### ***Humanize the witnesses.***

You should help the jury see a three-dimensional person and not just a job title or supervisor. The individual should explain how they got to where they are in the organization, how they got started, and what they do outside of work.

If the individual is involved in charitable or community work, cover that in the background questions. This should not take long, and it is important that the jury sees the individual as a person and not just management.

### ***Admit mistakes.***

Make sure the witnesses admit mistakes (where made), and what they have done to make corrections.

For instance: Did a supervisor tell employees not to leave the premises during their rest or meal breaks, and then subsequently correct that instruction to advise employees that they could leave the premises? Remember to raise any difficult issues on direct examination and minimize the impact for cross-examination.

## ***Explain knowledge.***

The witness should credibly explain the basis for their knowledge and authenticate records as appropriate. For instance: In a younger company, did the witness draft the meal break or rest break policy him or herself?

## ***Focus the direct examination.***

Always remember to keep the direct examination focused on preserving objections outside the scope of direct examination.

## ***Explain if witnesses have left the company.***

If the individual is no longer with the company, address why and what they are doing now. If the departure raises issues of privacy, you can make a motion in limine to limit the examination on that topic.

## **Closing Argument**

You have presented all your evidence. The witnesses have all testified. You are in possession of the jury instructions the court intends to read to the jury. You are ready for closing arguments.

The purpose of the closing argument is to provide the fact-finders with reasons to find in favor of your client, including specific evidence that establishes your case.

These pointers will help create a solid closing argument:

- Take notes for the closing argument throughout the trial.
- Use demonstratives to establish key points.
- Consider creating visuals that remind the jury of the testimony and how it fits into your case.
- Go over jury instructions and the verdict form and explain the lack of evidence as to each cause of action.
- Echo the themes from the opening statement.
- Show the jury how all the evidence fits together and results in a defense verdict.
- Remind them of the credibility instruction, if appropriate.
- When you talk about the evidence, point to exhibit numbers and page numbers to allow the jurors to easily find the evidence when they get to the jury room.
- Highlight witnesses' key admissions during the trial — show transcript pages, if appropriate.

- Explain that the company is not in the business of underpaying its employees and that the company would not have intentionally done so as it would have been a foolish business strategy.
  - Explain the competitive market for talent in the industry and the efforts that the company has made to be compliant.
  - Remind the jurors of the availability of avenues to get explanations and clarification — including payroll, human resources, employee relations and the union.
  - Explain that employers invest significant resources in training and developing talent and treating them poorly resulting in them leaving is not a sensible business practice.

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<sup>i</sup> The full practice note, titled "[Trial Strategies in the Courtroom for Wage and Hour Cases](#)," contains the following additional topics:

- Cross-examination of other witnesses;
- Cross-examination of employee's experts;
- Common objections to plaintiff's attorney's questions and proffered evidence;
- Motions during trial — motion for directed verdict (state court) and motion for judgment as a matter of law (federal court);
- Essential evidence to introduce;
- Direct examination of other witnesses;
- Direct examination of the employer's expert; and
- Post-trial motions — motion for judgment notwithstanding the verdict (state court) and motion for judgment as a matter of law (federal court).