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NY County Lawyers Association

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Wage and Hour Mediations: What to Know in an Expanding Area of Law

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I. The Substantive Law

A. Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq.

29 U.S.C. § 207 (Maximum Hours)

(a)(1). [N]o employer shall employ any of his employees... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

1. "Actual or Constructive Knowledge" of Overtime Worked Standard.

"To establish liability under the FLSA on a claim for unpaid overtime, a plaintiff must prove that he or she performed work for which she was not properly compensated, and that the employer had actual or constructive knowledge of that work." *Kuebel v. Black & Decker, Inc.,* 643 F.3d 352, 361 (2d Cir. 2011).

See also Chao v. Gotham Registry, Inc., 514 F.3d 280, 290 (2d Cir. 2008 ("once it is established that an employer has knowledge of a worker's overtime activities and that those activities constitute work under the Act, liability does not turn on whether the employee agreed to work overtime voluntarily or under duress").

2. The Statute of Limitations.

29 U.S.C. § 255 (Statute of Limitations)

(a) [A FLSA claim must] be commenced within two years after the cause of action accrued, . . . except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

See Cohen v. Gerson Leman Grp., Inc., 686 F. Supp. 2d 317, 331 (S.D.N.Y. 2010) ("The FLSA has a two-year statute of limitations except in the case of willful violations, for which the statute of limitations is three years.").

A violation of the FLSA is considered "willful" if "the employer 'either knew or showed a reckless disregard for the matter or whether its conduct was prohibited by the [FLSA]." *Quiroz v. Luigi's Doleria, Inc.,* 2016 WL 2869780, at *3 (E.D.N.Y. May 17, 2016), *quoting Young v. Cooper Cameron Corp.,* 586 F.3d 201, 207 (2d Cir. 2009).

See also Eschmann v. White Plains Crane Serv., Inc., 2014 WL 1224247, at *5 (E.D.N.Y. Mar. 24, 2014) *quoting Donovan v. Kaszycki & Sons Contractors, Inc.,* 599 F. Supp. 860, 870 (S.D.N.Y. 1984) ("[t]he plaintiff bears the burden of proving willfulness, and '[a]ll that is required is that the employer knew or had reason to know that it was or might have been subject to the FLSA.'").

3. Employer's Duty to Create and Preserve Time and Payroll Records.

29 U.S.C. § 211 (Collection of Data)

(c) Records
Every employer... shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

See Harold Levinson Assocs., Inc. v. Chao, 37 F. App'x. 19, 20-21 (2d Cir. 2002) ("burden is on an employer properly to record hours"); *Doo Nam Yang v. ACBL Corp.*, 427 F.Supp.2d 327, 331 (S.D.N.Y. 2005) ("It is the employer's responsibility to 'make, keep, and preserve' records of employee wages and conditions of employment.")

29 CFR § 516.2 (Records to be Kept by Employers; Employees Subject to Minimum Wage and Overtime Provisions)

(a) Items required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

* * *

(6) (i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of 7 consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

4. Calculating the Regular Rate of Pay.

29 CFR § 778.113 (Salaried Employees – General)

(a) Weekly salary. If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate.

Where an employer pays an employee a salary, as here, the regular hourly rate "must be computed on the basis of the hourly rate derived therefrom... determined by dividing [the employee's] total remuneration... in any workweek by the total number of hours actually worked... for which such compensation was paid."

See Adams v. Dep't of Juvenile Justice of City of N.Y., 143 F.3d 61, 66 (2d Cir. 1998). Once the employee's salary is "reduced to its workweek equivalent," 29 C.F.R. § 778.113(b), "the regular rate is computed by dividing the salary by the number of hours which the salary is intended to compensate. *See also Moon v. Kwon*, 248 F.Supp.2d 201, 230 (S.D.N.Y. 2002).

District courts in this Circuit have recognized a rebuttable presumption that fixed weekly salaries are intended only to compensate employees for their first forty hours of work. *See Perez v. Merrill Deli & Grocery, Inc*., 2015 WL 4104790, at *2 (E.D.N.Y. July 8, 2015), *quoting Benitez v. Demo of Riverdale, LLC,* 2015 WL 803069, at *2 (S.D.N.Y. Feb. 19, 2015) ("There is a rebuttable presumption that an employer's payment of [a] weekly salary represents compensation for [only] the first 40 hours of an employee's work week."); and *Giles v. City of New York*, 41 F.Supp.2d 308, 317 (S.D.N.Y. 1999) ("There is a rebuttable presumption that a weekly salary covers 40 hours; the employer can rebut the presumption by showing an employer-employee agreement that the salary cover a different number of hours.").

See also Rosendo v. Everbrighten, Inc., 2015 WL 16057, at *3 (S.D.N.Y. Apr. 7, 2015), report and recommendation adopted, 2015 WL 4557147 (S.D.N.Y. July 28, 2015); and *Berrios v. Nicholas Zito Racing Stable, Inc.*, 849 F.Supp.2d 372, 385 (E.D.N.Y. 2012).

When a weekly salary is paid, it does not include the overtime premium in the absence of evidence that the parties intended and understood their weekly salaries to include overtime premium. *See Berrios v. Nicholas Zito Racing Stable, Inc.*, 849 F.Supp.2d 372, 385 (E.D.N.Y. 2012); and *Amaya v. Superior Tile and Granite Corp*., 2012 WL 130425, at *6-9 (S.D.N.Y. Jan. 17, 2012).

5. Establishing Hours Worked (in the Absence of Time Records).

"Unless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employee's evidence...." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 693 (1946).

"Consistent with [Mt. Clemens], an employee's burden in this regard is not high.... It is well settled among the district courts of this Circuit, and we agree, that it is possible for a plaintiff to meet this burden through estimates based on his own recollection.... [O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation simply because the employee failed to properly record or claim his overtime hours." *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352, 362 (2d Cir. 2011).

In the absence of employer records, an employee may carry its burden by submitting "sufficient evidence from which violations of the [FLSA] and the amount of an award may be reasonably inferred." *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997), *quoting Martin v. Selker Bros.*, 949 F.2d 1286, 1296-97 (3d Cir. 1991).

"If an employer keeps inaccurate or inadequate records, the plaintiff need only offer a reasonable estimate of his [hours]." *McGlone v. Contract Callers, Inc.*, 49 F.Supp.3d 364, 371 (S.D.N.Y. 2014). *See also Sanntillan v. Henao*, 822 F.Supp.2d 284, 294 (E.D.N.Y. 2011), quoting *Doo Nam Yang v. ACBL Corp.*, 427 F.Supp.2d 327, 335 (S.D.N.Y. 2005) ("a plaintiff can meet this burden 'by relying on recollection alone'").

The burden then shifts to the employer to come forward with any evidence to either show "the precise amount of work performed" or to "negative the reasonableness of the inference to be drawn from the employee's evidence." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946).

6. Waiver.

Genesis Healthcare Corp., v. Symczyk, 569 U.S. 66, 69 (2013)("The FLSA establishes minimum wage, maximum-hour, and overtime guarantees that cannot be modified by contract.")

"An employee cannot waive his right to the minimum wage and overtime pay because waiver 'would nullify the purposes of the [FLSA] and thwart the legislative policies it was designed to effectuate.'" *Glatt v. Fox Searchlight Pictures Inc.*, 811 F.3d 528, 534 (2d Cir. 2016), *quoting Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981).

7. The "Tip Credit."

An employer may be eligible to invoke the tip credit, which reduces the minimum wage that must be paid, provided the employee's wages and tips, together satisfy the minimum wage. *See* 29 U.S.C. § 203(m)(2).

In order to take advantage of the tip credit, an employer must first place the employee on notice of the legal provisions governing the tip credit and also explain that that the employee must retain all tips received. See 29 U.S.C. § 203(m)(2).

This notice requirement is "strictly construed." *Chung v. New Silver Palace Rest., Inc.*, 246 F.Supp.2d 220, 229 (S.D.N.Y. 2002). *See also Inclan v. N.Y. Hosp. Grop., Inc.,* 95 F.Supp.3d 490, 497 (S.D.N.Y. 2015) (employer's burden is to demonstrate that the tip credit notice requirement has been satisfied).

8. Liquidated Damages.

29 U.S.C. § 216 (Penalties)

(b) Damages; right of action; attorney's fees and costs; termination of right of action.

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Liquidated damages are the norm and not the exception*. See Barfield v. N.Y.C. Health & Hosp. Corp.,* 537 F.3d 132, 150-151 (2d Cir 2008). *See also Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997), *quoting Brock v. Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987) ("Double damages are the norm, single damages the exception.").

9. Employer's Defense to Liquidated Damages.

Courts have "discretion to deny liquidated damages where [an] employer shows that, despite its failure to pay appropriate wages, it acted in subjective 'good faith' with objectively 'reasonable grounds' for believing that its acts or omissions did not violate the FLSA." However, the employer's burden to satisfy this standard is a "difficult one." *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 150 (2d Cir. 2008)

See also Hernandez v. Jrpac Inc., 2016 U.S. Dist. LEXIS 75430, at *107-108 (S.D.N.Y. June 9, 2016) (an employer can avoid the payment of liquidated damages if it can demonstrate that it acted in "good faith" by "plain and substantial evidence."); and *McLean v Garage Management Corp.*, 2012 U.S. Dist. LEXIS 55425, at *21 (S.D.N.Y. Apr. 9, 2012).

NOTE: Double recovery of liquidated damages under FLSA and NYLL is not permitted. *See Chowdhury v. Hamza Food Corp.*, 666 F.App'x 59, 60-61 (2d Cir. 2016).

10. Personal Liability.

29 U.S.C. § 203(d) (Definition of "Employer")
An employer is "any person acting directly or indirectly in the interest of an employer in relation to an employee."

See Kalloo v. Unlimited Mech. Co. of NY, Inc., 977 F. Supp. 2d 187, 201 (E.D.N.Y. 2013), *citing Irizarry v. Catsimatidis,* 722 F.3d 99, 104-11 (2d Cir. 2013) ("an employer may include an individual owner who exercises a sufficient level of operational control in the company's employment of employees").

In determining whether an individual is an employer, courts consider "whether the individual: '(1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" *Gillian v. Starjam Rest. Corp.,* 2011 WL 4639842, at *4 (S.D.N.Y. Oct. 4, 2011). *See also Elerberth v. Choice § Co.,* 91 F. Supp.3d 339, 353 (E.D.N.Y. 2015) (holding that an individual was an employer pursuant to the FLSA where he "exercised sufficient operational control over [the organization's] employees during [the plaintiff's] employment").

11. Attorneys' Fees.

Both the FLSA and NYLL allow for an award of "reasonable" attorney's fees to a prevailing party. *See* 29 U.S.C. § 216(b); N.Y. Lab. Law § 663(1); *see also Zhen Ming Chen v. New Fresco Tortillas Taco*

LLC, 2015 WL 5710320, at *10 (S.D.N.Y. Sept. 25, 2015) ("Under the FLSA and NYLL, a prevailing plaintiff is entitled to reasonable attorneys' fees and costs.").

12. Cheeks Review.

Settlements that include the dismissal of FLSA claims require the approval of the district court or the Department of Labor.

Cheeks v. Freeport Int'l Pancake House, 796 F.3d 199, 207 (2d Cir. 2015) ("the FLSA is a uniquely protective statute… the FLSA's primary remedial purpose [is] to prevent abuses by unscrupulous employers, and remedy the disparate bargaining power between employers and employees.")

a. *Confidentiality and Non-Disclosure Clauses Are Disfavored.*

   See Gonzales v. Lovin Oven Catering of Suffolk, Inc., 2015 WL 6550560, at *3 (E.D.N.Y. October 28, 2015); *Hall v. ProSource Techs., LLC*, 2016 WL 1555128, at *9 (E.D.N.Y. Apr. 11, 2016).

b. *Broad Non-Disparagement Provisions Will Likely be Rejected.*

   See Yan v. Matsuya Quality Japanese, Inc., 2017 WL 456464 (E.D.N.Y. Feb. 2, 2017); *but see Panganiban v. Medex Diagnostic & Treatment Center, LLC,* 2016 WL 927183, at *2 (E.D.N.Y. Mar. 7, 2016) (non-disparagement clause permitted where there exists "carve-out for truthful statement about plaintiffs' experiences litigating their case.")

c. *Broad Release Language that Includes Claims not Made in Litigation Will Be Rejected.*

   See Castagna v. Hampton Creek, Inc., 2016 WL 7165975 (E.D.N.Y. Dec. 6, 2016); and *Gonzales v. Lovin Oven Catering of Suffolk, Inc.*, 2015 WL 6550560, at *3 (E.D.N.Y. Oct. 28, 2015)

B. New York Labor Law (including NYS Wage Orders)

- NY Labor Law § 652(2) (Minimum Wage; Existing Wage Orders).

- 12 NYCRR Part 142, Minimum Wage Order for Miscellaneous Industries and Occupations.

- 12 NYCRR Part 146, NY Hospitality Industry Wage Order.

See Reiseck v. Universal Comm'ns of Miami, Inc., 591 F.3d 101, 105 (2d Cir. 2010) (NYLL mandates overtime pay in same manner as FLSA).

1. Statute of Limitations.

NYLL § 198(3) provides for a six-year statute of limitations.

See Eschmann v. White Plains Crane Serv., Inc., 2014 WL 1224247, at *4 (E.D.N.Y. Mar. 24, 2014) ("A plaintiff seeking damages for an overtime violation under the NYLL has six years from the date of the alleged violation to assert his claim.").

2. Employer's Duty to Create and Preserve Time and Payroll Records.

New York Hospitality Industry Wage Order, 12 NYCRR § 146-2.1 (Employer Records)

> (a)(4) Every employer shall establish, maintain and preserve for at least six years weekly payroll records which shall show for each employee... the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10.

3. Calculating the Regular Rate of Pay.

New York Hospitality Industry Wage Order. 12 NYCRR § 146-3.5 (Regular Rate of Pay).

> The employee's regular hourly rate of pay shall be calculated by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or the actual number of hours worked by that employee during the work week.

4. Spread of Hours Rule.

12 NYCRR § 142-2.4 (Additional Rate for Split Shift and Spread of Hours)

> An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required in this Part for any day in which:
>
> (a) the spread of hours exceeds 10 hours; or
> (b) there is a split shift; or
> (c) both situations occur.

See Man Wei Shiu v. New Peking Taste Inc., 2014 WL 652355, at *10 (E.D.N.Y. Feb.19, 2014) ("An employee is entitled to recover compensation for an extra hour of work at the minimum wage for each day that the employee works in excess of ten hours."); and *Chuchuca v. Creative Customs Cabinets, Inc.*, 2014 WL 6674583, at *10 (E.D.N.Y. Nov. 25, 2014).

5. NYLL Statutory Penalties (Wage Notice and Wage Statement).

NYLL § 195(1)(a) (Wage Notice)

> Every employer shall:
> 1. (a) provide his or her employees, in writing in English and in the language identified by each employee as the primary language of such employee, at the time of hiring, a notice containing the following information: the rate or rates of pay and basis thereof,

whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary…. For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the notice must state the regular hourly rate and overtime rate of pay.

Labor Law § 198 (1-b) (Costs, Remedies – Wage Notice)
Maximum Penalty: Fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars.

NYLL § 195(3) (Wage Statement)

Every employer shall:
3. furnish each employee with a statement with every payment of wages, listing the following: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages. For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the statement shall include the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked....

Labor Law § 198(1-d) (Costs, Remedies, Wage Statement)
Maximum Penalty: two hundred fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars.

6. Waiver.

Padilla v. Manlapaz, 643 F.Supp.2d 302, 311 (E.D.N.Y. 2014) ("it is well settled law that an employee cannot waive the protections of the [New York] Labor Laws").

7. The "Tip Credit."

NY Labor Law § 652(4); 12 NYCRR Part 146 (Hospitality Industry Wage Order)

12 NYCRR 12 §§ 146-2.2 (Written Notice)
Written notice must state (1) the amount of the tip credit to be claimed against the minimum wage and (2) that extra pay is required if the employee's tips are insufficient to bring his or her pay to meet the minimum wage.

12 NYCRR § 146-29 (Working at Tipped and Non-Tipped Occupations on the Same Day.)

Under New York law, the tip credit does not apply for any day when an employee performs non-tipped work (i.e., cleaning, food preparation) for more than two hours that day, or more than 20 percent of his or her shift, whichever is less.

8. Prejudgment Interest.

Plaintiffs are not entitled to prejudgment interest under the FLSA; however, they are entitled to prejudgment interest under the NYLL. *See Reilly v. Natwest Mkts. Grp. Inc.,* 181 F.3d 253, 265 (2d Cir. 1999). *See also Gortat v. Capala Bros.*, 949 F.Supp.2d 374, 382 (E.D.N.Y. 2013) ("plaintiffs can receive both liquidated damages and prejudgment interest under the NYLL, because liquidated damages under the Labor Law and pre-judgment interest serve fundamentally different purposes.")

Prejudgment interest under New York law accrues at a simple rate of 9% per year. NY CPLR §§ 5001, 5004; *See Marfia v. T.C. Ziraat Bankasi,* 147 F.3d 83, 90 (2d Cir. 1998).

Liquidated damages are excluded from prejudgment interest calculations. *See Marfia v. T.C. Ziraat Bankasi,* 147 F.3d 83, 90 (2d Cir. 1998) (prejudgment interest applies only to compensatory damages). *See also Maldonado v. LaNuevaRampa, Inc.,* 2012 WL 1669341, at *11 (S.D.N.Y. May 14, 2012); and *Mejia v. East Manor USA Inc.*, 2013 WL 3023505, at *8, n.11 (E.D.N.Y. Apr. 19, 2013), *report and recommendation adopted*, 2013 WL 2152176 (May 17, 2013) ("[p]rejudgment interest is calculated . . . on the unpaid wages due under the NYLL, not on the liquidated damages awarded under the state law").

9. Personal Liability.

The "statutory standard for employer status under the NYLL is nearly identical to that of the FLSA." *Hernandez v. Jrpac Inc.*, 2016 WL 3248493, at *22 (S.D.N.Y. June 9, 2016); and *Switzoor v. SCI Engineering, P.C.*, 2013 WL 4838826, at *6 (S.D.N.Y. Sept. 11, 2013) (noting that the courts of the SDNY have applied the same employer analysis to the FLSA and NYLL). *See also Khurana v. JMP USA, Inc.,* 2017 WL 1251102, at *9 (E.D.N.Y. Apr. 5, 2017).

II. The Mediation

A. The Value of Mediation in Wage and Hour Cases.

1. From the Employer's Perspective:
   a. Potential cost savings through compromise;
   b. Cessation of lawyers' fees; and
   c. Possibility of a payment schedule.

2. From the Employee's Perspective:
   a. Recovery of damages is quicker at mediation than post-trial;
   b. Avoid continuing pre-trial discovery, including depositions; and
   c. Avoid complications from any potential bankruptcy.

B. Pre-Mediation.

1. Exchange of Information.

   a. Mandatory Disclosure:

      (i) *See* SDNY Mediation Referral Order for Cases that Include Claims under FLSA.
      (ii) *See* SDNY Procedures of the Mediation Program (12/26/18).
      (iii) *See* Local Rules of the United States District Courts, Local Civil Rule 83.8 (Court Annexed Mediation, Eastern District Only).
      (iv) *See* Individual Judge's Rules/Orders.

   b. Voluntary Disclosure by the Employer:

      (i) Time and payroll records;
      (ii) Wage statements and notices;
      (iii) Tax and business records supporting any "inability to pay" defense; and
      (iv) Job Descriptions/Specifications if plaintiffs allege misclassification.

c. Voluntary Disclosure by the Employee:

(i) Documents recording time worked and wages received; and
(ii) Spreadsheet documenting each category of damages.

2. Pre-Mediation Statements Submitted to Mediator.

(i) *See* SDNY Procedures of the Mediation Program (12/26/18); and
(ii) *See* Local Rules of the United States District Courts, Local Civil Rule 83.8 (Court Annexed Mediation, Eastern District Only)

3. Ex Parte Telephone Conversations with Counsel.

The mediation's ground rules are explained. These ground rules include each side having someone with settlement authority present at the mediation. There is also a discussion regarding the "joint session," and whether "openings" are expected from counsel and whether the parties are expected to speak. There is also an exploration of the strengths and weaknesses of the case.

C. The Mediation Session.

1. Introductory discussion regarding the confidentiality of mediation, the need to be patient and to trust the process which includes the mediator shuttling between two rooms in an attempt to achieve a settlement.

2. Joint session is conducted during which all parties are encouraged to speak, and attorneys will present their clients' claims and defenses without escalating conflict.

3. Caucus sessions are conducted during which the separated parties are encouraged to speak freely about both their interests and needs knowing that their statements will not be shared with other side without their permission.

4. Mediator's Litigation Risk Analysis
-- Legal Points Typically Addressed:

   a. How to define "regular rate of pay?"
   (Should compensation be divided by the first forty hours worked or the total number of hours worked each week?)

   b. The legal effect of an employer failing to maintain payroll and time records.

   c. When an employer may take a "tip credit."

   d. Why an employee's receipt of tips does not offset damages.

   e. The importance of payroll stubs ("wage statements") being accurate.

   f. The law favoring liquidated damages and a plaintiff's recovery of attorneys' fees.