**Transfer & Stay Issues that Arise in Wage & Hour Actions**

**From a Plaintiff’s Perspective**

**By Rhonda H. Wills**

1. **Where can a named plaintiff file a class action/collective action wage & hour matter?**

* **Where the plaintiff worked/lives**
	+ - A civil action may be brought in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred”—28 U.S.C. § 1391(b)(2).
		- *See generally Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435 (S.D. Tex. Oct. 2, 2012) (Miller, J.) (denying defendant’s motion to transfer venue in an FLSA collective action filed where the plaintiff and putative collective action members worked).
* **Where the defendant is domiciled/corporate headquarters**
	+ - A civil action may be brought in “a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located”—28 U.S.C. § 1391(b)(1).
		- Venue is proper in any judicial district of a state where personal jurisdiction over the corporate defendant may be obtained (*Kervin v. Supreme Service & Specialty Co., Inc.*, No. 2:15-cv-102, 2015 WL 1540157, at \*3 (S.D. Tex. Apr. 7, 2015)).
			* Personal jurisdiction over a corporate defendant is proper where the corporate defendant is incorporated and where it keeps its principal place of business (*Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435, at \*5–6 (S.D. Tex. Oct. 2, 2012) (Miller, J.)).

2. **When is a transfer appropriate?**

* **Motion to Transfer under 28 U.S.C. § 1404(a)**—“*For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought*.”
	+ Plaintiff’s choice of forum
		- Plaintiff’s choice of forum is entitled to less deference than usual when the suit is brought as an FLSA collective action on behalf of others similarly situated—*Webb v, Settoon Towing, LLC*, No. 3-12-143, 2012 U.S. Dist. LEXIS 168987 (S.D. Tex. Nov. 28, 2012) (Costa, J.).
	+ Convenience of the witnesses
		- Often recognized as the most important factor in the transfer analysis—*Spiegelberg v. Collegiate Licensing Co.*, 402 F. Supp. 2d 786, 790 (S.D. Tex. 2005); *Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435, at \*8 (S.D. Tex. Oct. 2, 2012) (Miller, J.).
		- When key witnesses must travel more than 100 miles, inconvenience to the witnesses increases in direct relationship to the additional distance to be traveled— *Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435, at \*8 (S.D. Tex. Oct. 2, 2012) (Miller, J.).
		- Residency of putative class members is taken into account for FLSA collective actions—*see Webb v, Settoon Towing, LLC*, No. 3-12-143, 2012 U.S. Dist. LEXIS 168987, at \*14–15 (S.D. Tex. Nov. 28, 2012) (Costa, J.) (transferring FLSA collective action to the Eastern District of Louisiana, noting that 50.2% of the putative class members resided in Louisiana).
	+ Location of relevant documents
		- In wage and hour cases, courts appear more likely to emphasize other factors (e.g. location of relevant witnesses) more heavily than the location of documents such as payroll records in a venue transfer analysis.
		- *Taylor v. Texas Credit Corp.*, No. G-10-416, 2011 WL 201467, at \*2 (S.D. Tex. Jan. 20, 2011).
			* Plaintiff worked as an assistant supervisor in defendant’s Lake Jackson office in Brazoria County, and defendant’s corporate office was located in a county in the Eastern District of Texas.
			* Defendant moved to transfer venue to the Eastern District of Texas primarily based on the fact that payroll records and other potentially relevant documents were located at their corporate office in Timpson, Texas.
			* The court denied defendant’s motion to transfer venue, noting that “beyond the business records associated with her employment, it is unlikely that any employee who reports to work in Timpson would have personal knowledge of the plaintiff’s work attendances. Those witnesses would, more likely than not, be located in Lake Jackson where the plaintiff reported to work on a daily basis.”
	+ Convenience of the parties
		- Convenience of the parties often takes into account the travel times for the plaintiff and plaintiff’s witnesses, as well as the defendant and defendant’s witnesses.
		- *Taylor v. Texas Credit Corp.*, No. G-10-416, 2011 WL 201467, at \*3 (S.D. Tex. Jan. 20, 2011)—court denied motion to transfer venue, noting the presence of persons with knowledge of relevant facts in the Southern District of Texas, as well as essentially no differences between plaintiff and defendant (and their witnesses) in terms of convenience of travel.
	+ Locus of operative facts (local interest)
		- Courts are particularly hesitant to transfer a wage and hour case away from a venue where most of the facts occurred, which often translates to where the plaintiff worked.
		- *See Taylor v. Texas Credit Corp.*, No. G-10-416, 2011 WL 201467, at \*2 (S.D. Tex. Jan. 20, 2011) (denying transfer where plaintiff worked in the Southern District, despite corporate headquarters being located in the Eastern District of Texas); *Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435, at \*7–8 (S.D. Tex. Oct. 2, 2012) (Miller, J.) (similar outcome in the context of a collective action where collective action members worked in Houston).
	+ Availability of process to compel witnesses
		- Inability to compel key witnesses in original venue weighs in favor of transfer, but movants for transfer must specifically identify key witnesses and outline the substance of their testimony—*Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435, at \*7–8 (S.D. Tex. Oct. 2, 2012) (Miller, J.).
	+ Relative means of the parties
		- Courts tend to balance the potential costs to parties in terms of discovery, primarily focusing on the locations of witnesses and travel times.
		- When most witnesses reside in or near the original venue, the fact that some witnesses (i.e. corporate representatives) may have to travel further distances to testify tends to weigh in favor of denying transfer, for example (*Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435, at \*8–9 (S.D. Tex. Oct. 2, 2012) (Miller, J.)).
	+ Forums familiarity with governing law
		- If controversy is governed by state law, the court should consider the desirability of having a case decided by a court in a state whose substantive law governs the action; but this factor is neutral when the predominant issues in the case involve federal law— *Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435, at \*10–11 (S.D. Tex. Oct. 2, 2012) (Miller, J.) (finding the factor neutral in case involving FLSA claims).
	+ Trial efficiency and interests of justice
		- Courts often examine typical case disposition times and availability of judges in the venue to which transfer is sought.
		- *Barnes v. Petroleum Coordinators, Inc.*, No. 12-1132, 2012 U.S. Dist. LEXIS 142435, at \*9–10 (S.D. Tex. Oct. 2, 2012) (Miller, J.) (finding the factor neutral in an FLSA collective action where median disposition times were equivalent to the original venue).
		- *Kervin v. Supreme Service & Specialty Co., Inc.*, No. 2:15-cv-102, 2015 WL 1540157, at \*5 (S.D. Tex. Apr. 7, 2015) (finding the factor favored transfer when the venue to which transfer was sought had more active judges who could handle civil cases).
* **First to File Rule**
	+ Rule:
		- Discretionary doctrine that applies when there are related cases pending between two federal courts and the court in the second-filed action determines that the issues raised “substantially overlap”—*McGrew v. Quinn’s Rental Servs. (USA), LLC*, No. H-16-543, 2016 U.S. Dist. LEXIS 96437, at \*3–4 (S.D. Tex. July 25, 2016) (Miller, J.) (citing *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999)).
			* Court’s options—dismiss case, stay the case, or transfer to the first-filed court
		- Complete identity of parties and issues need not be shown—a “substantial overlap” suffices; once a likelihood of substantial overlap is shown, plaintiff must demonstrate compelling circumstances that caution against transfer in order to avoid application of the rule—*Salazar v. Bloomin’ Brands, Inc.*, No. 2:15-cv-105, 2016 WL 1028371, at \*2 (S.D. Tex. Mar. 15, 2016).
	+ Factors:
		- Are the same issues involved?
		- Are the same classes of workers involved?
		- Balance of convenience factors
	+ Case Examples from the Southern District of Texas:
		- *McGrew v. Quinn’s Rental Servs. (USA), LLC*, No. H-16-543, 2016 U.S. Dist. LEXIS 96437 (S.D. Tex. July 25, 2016) (Miller, J.)
			* Gary Self filed FLSA collective action against Quinn in June 2015 alleging misclassification and improper denial of overtime pay; McGrew filed FLSA collective action against Quinn in March 2016 alleging Quinn improperly calculated overtime pay.
			* Court denied motion to transfer because the cases were “fundamentally different” and concerned two different time periods, so no substantial overlap—one dealt with misclassification (with a time period of June 2012 through June 2015) and one dealt with whether the employer properly calculated the amount of overtime paid (with a time period of July 2015 through November 2015).
		- *Hagans v. Integrated Prod. Servs., Inc.*, No. H-14-2965, 2015 WL 236646 (S.D. Tex. Jan. 16, 2015).
			* Hagans filed suit in October 2014 alleging defendants violated the FLSA by misclassifying him as exempt when he worked as a coil tubing operator.
			* In May 2013, other former employees of defendants (including coil tubing operators) brought an FLSA collective action (which was conditionally certified at the time the court heard this motion) against defendants alleging misclassification.
			* The court transferred the case, finding substantial overlap.
		- *Tillery v. Higman Barge Lines, Inc.*, No. 2:14-cv-40, 2014 WL 1689942 (S.D. Tex. Apr. 29, 2014).
			* Barnett filed FLSA collective action in SD Tex (Galveston) in February 2012 alleging defendant misclassified its tankermen as exempt and failed to pay overtime wages in violation of the FLSA.
			* In February 2014, plaintiff Tillery brought this suit against defendant, alleging misclassification and failure to pay overtime, and seeking the same relief (back wages and liquidated damages for a three-year period).
			* Court transferred the case to the SD Tex Galveston case:
				+ “[B]oth lawsuits involve the exact same legal issue; whether Defendant’s classification of its tankermen as seamen is in violation of the FLSA. The Court therefore finds that if these actions are not tried together, this would lead to judicial waste as well as piecemeal resolution of the FLSA issues, risking inconsistent judgments.”

3. **What actions may a court take when there are competing class action/collective action wage and hour cases?**

* **Consolidation**
	+ Courts may consolidate substantially similar wage and hour actions, but the decision of whether to do so is typically left for the first-filed court after another court transfers the case—*Salazar v. Bloomin’ Brands, Inc.*, No. 2:15-cv-105, 2016 WL 1028371, at \*5 (S.D. Tex. Mar. 15, 2016) (citing *Mann Mfg., Inc. v. Hortex*, 439 F.2d 403, 408 (5th Cir. 1971)).
* **MDL (Multidistrict Litigation)**
	+ Pursuant to 28 U.S.C. § 1407, MDL cases occur when “civil actions involving one or more common questions of fact are pending in different districts.” In order to efficiently process cases that could involve hundreds (or thousands) of plaintiffs in dozens of different federal courts that all share common issues, the [Judicial Panel on Multidistrict Litigation](https://en.wikipedia.org/wiki/Judicial_Panel_on_Multidistrict_Litigation) (“JPML”) decides whether cases should be consolidated under MDL, and if so, where the cases should be transferred. Cases subject to MDL are sent from one court, known as the transferor, to another, known as the transferee, for all pretrial proceedings and discovery. If a case is not settled or dismissed in the transferee court, it is remanded to the transferor court for trial.
	+ Most corporate defendants prefer MDL proceedings. Not only can they consolidate all federal cases pending at the time the MDL consolidation request is granted, they can also bring in any subsequent federal cases (and some state cases as well) as so-called "tag-along" cases. Defendants generally find that it is more efficient and less dangerous to have each defense witness cross-examined in a single marathon deposition rather than risk having a witness deposed in dozens of depositions around the country, which raises the risk that the witness may inadvertently give inconsistent testimony. Plaintiffs often do not favor MDL proceedings because it ultimately means that one group of lawyers will control the litigation and be appointed as “lead counsel.”
	+ Example: *In re Wells Fargo Wage & Hour Employment Practices Litigation (No. III)*, MDL Case No. H-11-2266 (S.D. Tex.) (Miller, J.). (FLSA case consolidating 4 FLSA cases brought in Texas, Washington and New Jersey).
* **Stay one action**
	+ A court may stay one action where, for example, a motion to dismiss is pending in a substantially similar case before another court, and issues in the case may ultimately result in the case being heard before the court staying the action—*see DXP Enterprises, Inc. v. Tim Hill*, No. 4:15-cv-3471, 2016 WL 4159756 (S.D. Tex. Aug. 3, 2016).
* **Sever claims**
	+ Courts may also sever the competing claims and transfer those claims to another court.
	+ Example:
		- *Benavides v. Home Depot USA, Inc.*, No. H-06-0029, 2006 U.S. Dist. LEXIS 31661 (S.D. Tex. May 19, 2006).
			* October 2004—two FLSA lawsuits involving Home Depot assistant managers were consolidated in the District of New Jersey (nationwide notice approved in October 2005).
			* January 2006—plaintiffs filed individual and collective action FLSA claims against Home Depot, alleging misclassification claims, and one plaintiff (Taibi) worked as an assistant manager.
			* The court severed plaintiff Taibi’s FLSA collective action claims and transferred them to New Jersey, noting the issues were identical—in both cases, the “primary issue” is whether Home Depot improperly classified its assistant managers as exempt.
			* “The principles underlying the first-to-file rule favor severing Taibi's MASM collective action claims and transferring them to New Jersey. The MASM collective action claims in the two districts are identical. The likelihood of conflicting rulings in separate collective actions can be avoided through severance and transfer. Because the focus of the collective actions is nationwide, this district and the District of New Jersey have an equal interest in the dispute, but the New Jersey court has the advantage that its case has progressed significantly farther than this case.”