When a wage and hour suit is filed against an employer, one of the first questions asked by the defendant-employer is: What’s my exposure?

Generally, in New York state, in wage and hours suits, plaintiffs allege violations of the federal Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). Both statutes permit prevailing plaintiffs to recover compensatory damages (usually back wages), their reasonable attorney fees and costs and liquidated damages. Whether a successful plaintiff can recover liquidated damages simultaneously under the FLSA and NYLL is an open issue in New York.

In 2010, the legislature passed and the governor signed into law, the New York Wage Theft Prevention Act (WTPA). Effective April 9, 2011, the WTPA increased liquidated damages that may be awarded in wage and hour cases for violations of the NYLL from 25 percent of the underlying back wages owed and made liquidated damages virtually automatic unless the defendant could prove that it acted in good faith compliance with the law. In other words, after the enactment of the WTPA, for every dollar in back pay owed to a successful plaintiff for violations of the NYLL, the defendant would also likely have to pay the plaintiff an additional dollar in liquidated damages under New York law.

Under the FLSA, successful plaintiffs can also recover liquidated damages equal to 100 percent of the back pay owed and like the NYLL, the burden is on the defendant to prove that it acted in good faith compliance with the FLSA to avoid liquidated damages. Thus, after the enactment of the WTPA, for the first time, the liquidated damage provision under the NYLL appeared to mirror the liquidated damage provision under the Fair Labor Standards Act.

After the enactment of the Wage Theft Prevention Act, for the first time, the liquidated damage provision under the New York Labor Law appeared to mirror the liquidated damage provision under the Fair Labor Standards Act. As most wage and hour practitioners in New York are acutely aware, the plaintiffs’ bar has naturally championed applying both sets of liquidated damages to violations covered by both statutes. This permits successful plaintiffs to potentially recover treble damages (i.e., up to 200 percent liquidated damages in addition to any underlying wage liability) in wage and hour litigations, thereby multiplying the recovery available for even relatively minor, technical violations of the NYLL and FLSA.

At the time the WTPA was enacted, practitioners and commentators forecasted these arguments, warning potential “double recovery” theories would be advocated by the plaintiffs’ bar in addition to the robust remedies already available, such as attorney fees that may be awarded to a prevailing plaintiff.

There was certainly a reasonable argument for such cumulative liquidated damages, as federal and state court decisions prior to the enactment of the WTPA (when liquidated damages were only 25 percent under the NYLL) often permitted the recovery of liquidated damages under both statutes (i.e., 125 percent liquidated damages). The theory used by such courts was that liquidated damages under the FLSA were “compensatory” in nature (i.e., meant to compensate the employee for the time he or she was without his or her wages) whereas liquidated damages under the NYLL were “punitive” (i.e., meant to punish and deter employers from engaging in future wage violations). After the enactment of the WTPA, it was assumed that these theories concerning the nature of liquidated damages under both statutes would continue and treble damages might be awarded, thus providing a windfall for successful plaintiffs and further promoting the increase in wage and hour litigation that has occurred over the past decade.

Yet, since the enactment of the WTPA, a split of authority has developed in New York federal and state courts concerning the award of liquidated damages under the FLSA and NYLL. Initially, many courts appeared to allow the simultaneous application of both FLSA and NYLL liquidated damages, thus resulting in the application of 200 percent liquidated damages. These courts reasoned that, under existing case law, both statutes still served...
differing purposes, and noted that nothing had fundamentally changed regarding either statute other than simply increasing the liquidated damages recovery available under the NYLL.

However, even in 2011, seeds of dissent were already sprouting given the obvious wildfield this handed to plaintiffs. Some courts aptly noted that since liquidated damages under the NYLL now mirrored the FLSA, both sets of liquidated damages effectively "serve the same purpose and have the same practical effect of deterring wage violations and compensating underpaid workers." This "practical effect" argument lingered as some judges, then in the minority,8 refused to allow double liquidated damages. These judges found that the purported distinction between liquidated damages under the NYLL and FLSA was illusory since both remedies were identical. Despite this split of authority, no appellate court has yet to weigh in and settle whether both forms of liquidated damages may be recovered simultaneously.9 Thus, over the past several years, federal courts have reversed from the initial bevy of federal and state court decisions applying 200 percent liquidated damages. Countless applications seeking 200 percent liquidated damages have since been denied by numerous judges who find such recoveries to be duplicative and unnecessary.10 These courts continue to reason that “[b]oth forms of damages seek to deter wage-and-hour violations in a manner calculated to compensate the [plaintiff].”11 Even judges that still apply both NYLL and FLSA liquidated damages together have noted the recent trend away from granting 200 percent liquidated damages.12

In fact, in some instances judges have begun abrogating their own precedent, and now embrace the view that double liquidated damages under both the NYLL and FLSA are inappropriate given the similarities between both statutes.13 Today, the prevailing view appears to be that applying liquidated damages remedies under both the NYLL and FLSA results in “a windfall that neither the state nor the federal legislature appears explicitly to have intended.”14 Some courts have gone even further and held that applying pre-judgment interest pursuant to N.Y. C.P.L.R. §5004 is inappropriate as well since such interest serves an identical purpose to the FLSA. Therefore, pre-judgment interest cannot be awarded where FLSA liquidated damages are also available.15 It is certainly difficult to speculate as to the impetus for this sudden reversal for the parties. Perhaps the Second Circuit’s recent increased scrutiny of wage and hour cases in the seminal Cheeks v. Freeport Pancake House in 2015 sparked this trend.16 Alternatively, perhaps this trend is a backlash to the record-breaking filings of wage and hour cases in recent years that have clogged federal dockets. Regardless of the reason, there are strong trends within the judiciary to oppose 200 percent liquidated damages for prevailing plaintiffs in FLSA and NYLL litigation.

While much remains to be seen as to how the split among the lower court judges will be resolved over the next few years, and/or if an appellate court will weigh in on the subject, as of now it is clear that a multitude of judges reject treble damages for wage and hour violations in New York. Indeed some plaintiffs’ attorneys have begun forgoing such cumulative claims altogether given this recent trend.17 Now that the initial proliferation of duplicative damages under the NYLL and FLSA has been counterbalanced, practitioners can also expect the defense bar to increasingly reject redundant liquidated damages claims.

Now that the initial proliferation of duplicative damages under the NYLL and FLSA has been counterbalanced, practitioners can also expect the defense bar to increasingly reject redundant liquidated damages claims. This is especially true now that some judges who have previously approved both forms of liquidated damages are more recently rejecting such windfall recoveries.

2. The NYLL provides for a six year statute of limitations, while the FLSA provides for up to a two or three year statute of limitations period depending on whether the violations were willful. See e.g., Soto v. Lab. Law Enforcement Agency, 2015 WL 1045801, at *7 (N.Y.A.D. 1st 2015). Therefore, the double liquidated damages discussed in this article are only applicable for the two or three year period where both statutes of limitations overlap.
5. Cao v. Wu Luang Ye Lexington Rest., No. 08 CV 3725, 2010 WL 4159391, at *5 (“Under the FLSA, liquidated damages are compensatory, rather than punitive… In contrast, liquidated damages under the Labor Law are punitive ‘to deter an employer’s willful withholding of wages due’… Because liquidated damages under the FLSA and the Labor Law serve fundamentally different purposes, a plaintiff may recover liquidated damages under both the FLSA and the Labor Law.”) (citations omitted).