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TAKING EFFECTIVE 30(B)(6) DEPOSITIONS IN WAGE & HOUR CASES

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I. NOTICE OF DEPOSITION

A. One 30(b)(6) Notice is One Deposition

1. No matter how many topics you include, and no matter how many witnesses the defendant ends up designating, a single notice of deposition under Rule 30(b)(6) counts as one deposition. Fed. R. Civ. P. 30(a)(2)(A) advisory committee's note to 1993 amendment.. See also *Quality Aero Tech., Inc., v. Telemetrie Elektronik*, 212 F.R.D. 313, 318 (E.D.N.C. 2002) (noting that Rule 30(b)(6) depositions are counted as a single deposition, regardless of the number of witnesses designated); *Beaulieu v. Bd. of Trs. of the Univ. of W. Fla.*, No. 3:07cv30, 2007 U.S. Dist. LEXIS 92641 (N.D. Fla. Dec. 18, 2007).

2. This feature can be used to significant advantage. For example, in a case involving multiple facilities or divisions, where corporate witnesses try hard to suggest there is some variation in relevant practice by division or geographic area, etc, but then are unable to provide any specific testimony about specific locations, a Rule 30(b)(6) notice can specify not only the topics, but that testimony is needed with respect to listed divisions or locations, to obtain the needed evidence without counting as multiple depositions.

3. Even better, while each notice counts as one deposition, you still receive 7 hours of deposition time under the rules with each witness defendant designates to respond to the 30(b)(6) notice. Fed. R. Civ. P. 30(d)(2) advisory committee's note to 2000 amendment.

B. Issuing a Second Notice of Rule 30(b)(6) Deposition

While a single notice of deposition can contain multiple topics and still count as one deposition, a second notice of 30(b)(6) deposition would count as a second deposition. More significantly, it may be counted as a second deposition of the *same* person (the corporation), and thus subject to Fed. R. Civ. P. 30(a)(2)(A)(ii) which states that:

> (2) A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):
>
> (A) if the parties have not stipulated to the deposition and:
>
> . . .
>
> (ii) the deponent has already been deposed in the case.

Fed. R. Civ. P. 30.

There is a split of authority as to whether a party must obtain leave of court for a second deposition pursuant to Rule 30(b)(6), at least where the topics designated differ from the first notice. Compare *Quality Aero Tech., Inc.*, 212 F.R.D. at 318 (holding that leave of court is not required for a second 30(b)(6) deposition); *Cornell Research Found., Inc. v. Hewlett-Packard Co.*, No. 5:01-cv-1974, 2006 U.S. Dist. LEXIS 97054, at *19 n.6 (N.D.N.Y. Nov. 13, 2006) (same); with *Balivi Chem. Corp. v. JMC Ventilation Refrigeration LLC*, Nos. 7-0354-5-BLW & 7-0353-5-BLW, 2009 U.S. Dist. LEXIS 24009, at *3-5 (D. Idaho Mar. 24, 2009) (noting split of authority, and finding no need to resolve as court held leave should be granted); and with *Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC*, No. 07-2388-DJW, 2008 U.S. Dist. LEXIS 75489, at *7-10, 9-10 n.16, 15-16, 18-19 (D. Kan. Aug. 21, 2008) (holding that leave of court is required before a second 30(b)(6) deposition, and granting leave).

If leave is required, "the court must grant leave to the extent consistent with Rule 26(b)(1) and (2)." Fed. R. Civ. P. 30(a)(2). The standards for obtaining leave under Rule 26(b)(2) are summarized in Moore's Federal Practice:

> The decision to grant or deny leave to re-depose a witness is guided by Rule 26(b)(2)(C), which requires the party opposing the second deposition to demonstrate that (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at state in the litigation, and the importance of the proposed discovery in resolving the issues.

7 James Wm. Moore et al., *Moore's Federal Practice*, ¶ 30.05[1][c] at n.19 (3d ed. 2010); *see also* Fed. R. Civ. P. 26(b)(2)(C).

Where the topics on the second notice of deposition pursuant to Rule 30(b)(6) differ from the earlier notice, and where other witnesses have not been able to provide the information sought, a second deposition should be obtainable.

II. OBJECTIONS TO NOTICE AND OTHER DEFENSE TACTICS BEFORE THE DEPOSITION

A. Company cannot avoid a 30(b)(6) deposition by directing plaintiff to attempt to obtain the information through document requests or interrogatories

Some entities have attempted to require the deposing party to obtain the information through interrogatories first. Courts have rejected such a precondition. *SEC v. Merkin*, 283 F.R.D. 689, 694 (S.D. Fla. 2012) objections overruled, 283 F.R.D. 699 (S.D. Fla. 2012).

Similarly, a party cannot respond to a 30(b)(6) notice by directing plaintiff to documents it has produced or interrogatory responses that address the topics set forth in the notice. Courts have recognized that other forms of discovery do not preclude and are not a satisfactory substitute for live testimony. *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012); *New Jersey v. Sprint Corp.,* No. 03–2071–JWL, 2010 WL 610671, at *2–3 (D. Kan. Feb. 19, 2010) (rejecting the argument that the 30(b)(6) deposition would duplicate discovery already obtained and explaining that the rule is designed to bind the corporation or agency); *Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 74 (D. Conn. 2010) (a party should not be prevented from taking a 30(b)(6) deposition "just because the topics proposed are similar to those contained in documents provided or interrogatory questions answered"); *SEC v. Merkin*, 283 F.R.D. at 697, objections overruled, 283 F.R.D. 699 (S.D. Fla. 2012).

B. Attorney Client and Work-Product Privilege Do Not Provide Special Protection Against a 30(b)(6) Notice

Some defendants have argued that because counsel for the company must prepare the witness to provide information within the possession of the company, that will necessarily violate attorney-client privilege or work product, and thus the deposition testimony cannot be provided. Courts have recognized that this argument is inconsistent with the existence of Rule 30(b)(6), and rejected that as a basis to avoid producing a 30(b)(6) witness, and having that witness properly prepared.

> [T]he argument that a lawyer would be involved in the preparation process is simply a truism which, if sufficient to preclude 30(b)(6) depositions, would eliminate that discovery tool.

SEC v. Merkin, 283 F.R.D. at 696, objections overruled, 283 F.R.D. 699 (S.D. Fla. 2012). While that does not preclude counsel for defendant to objecting to questions that go to truly privileged communications during the deposition, it cannot block the deposition entirely. Facts known by the corporation do not become protected from disclosure simply because a lawyer helped bring them to the attention of the designated 30(b)(6) witness. *United States v. Pepper's Steel &*

Alloys, Inc., 132 F.R.D. 695, 698-99 (S.D. Fla. 1990) (holding objections and instructions not to answer during 30b6 deposition were "completely erroneous" and that defendant "cannot shield itself from discovery by objecting to all questions which would require the deponent to testify regarding facts learned while reviewing documents selected by ... counsel.").

C. Objections to the Notice Do Not Provide Basis for Instruction Not to Answer

It has become increasingly common for Defendants to respond to a Rule 30(b)(6) notice by serving written objections to the notice, as well as to objecting on the record at the outset of the deposition. Sending a letter in advance of the deposition or objecting to the scope of the deposition notice on the record at the outset of the deposition do not relieve defendant from the obligation of producing and preparing a witness to testify on the topic noticed. As courts have acknowledged, that would provide a corporate despondent a benefit that no other despondent has. *New World Network Ltd. v. M/V Norwegian Sea*, No. 05-22916-CIV, 2007 WL 1068124, at *4 (S.D. Fla. Apr. 6, 2007).

Sending objections in advance is not improper – indeed using that as an occasion to meet and confer is appropriate and may permit the parties to resolve disputes ahead of the deposition. However, if no agreement is reached, the deposition must proceed according to the noticed topics. The objection to the topic is not a valid basis to instruct the witness not to answer a question. *Id*. If the witness is not adequately prepared on the designated topic, that provides a basis for a motion to compel a more complete response, as is always the option when a witness is not produced. *Id*. *See infra* section V.

D. Asking Questions Outside the Scope of the Topics Designated

It is common that there are some questions in a Rule 30(b)(6) deposition that do not fall squarely within the listed topics. It is improper to instruct the witness not to answer such questions. For example:

> If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (i.e. Fed. R. Civ. P. 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6).
>
> However, if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem.

King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995). However, it is appropriate for the defending counsel to note that the responses to questions outside the scope of the deposition notice are testimony in the witness's personal capacity only, and not testimony on behalf of the corporation. *See Detoy v. City and Cty. of S. F.*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000) ("[C]ounsel shall state the objection on the record and the witness shall answer the question, to the best of the witness's ability."); *First Fin. Bank, N.A. v. Bauknecht*, No. 12-cv-1509, 2014 WL 949640, at *3 (C.D. Ill. Mar. 11, 2014) ("Graymont may well wish to make clear which testimony is corporate testimony and which is not.").

III. STRATEGIC CONSIDERATIONS RULE 30(b)(6) VS NAMED WITNESS

A. Advantages of Rule 30(b)(6) witness

1. You do not have to guess at what named person has the information that you need. You should not hear a string of "I don't know" responses in a 30(b)(6) deposition. Though if you do, see below at Section V.

2. You do not have to depose multiple witnesses, each of whom have a small part of the information that you need – or if you do end up deposing multiple witnesses, at least it only counts as one deposition.

3. The testimony is admissible as the testimony of the corporation. While that does not mean it will be judicial admission, even if contradicted, it gives added weight to the tie binding the company.

B. Disadvantages of 30(b)(6) witness

1. Corporations will sometimes designate an "empty vessel" who has no relevant knowledge, so that the only knowledge they will have, the only testimony they can give, is based upon what counsel for the company provides to them. However, such witnesses can rarely answer all of the questions asked of them on their designated topic, leading to motions to compel.

2. You do not have control over who defendant selects, and the result may be a witness who presents more favorable testimony for defendant than the witness whom you would have named.

C. Advantages of Named Witness

1. By not identifying topics in advance you can surprise the witness and perhaps get more candid testimony.

2. Someone with first-hand knowledge may be less susceptible to preparation by counsel that aims to skew the content of the testimony.

3. Some named witnesses may be more sympathetic to your point of view than you might expect, or at least more sympathetic than someone selected by defendant to testify.

D. Disadvantages of Named Witnesses

1. If they don't know answers to your questions, you have no recourse but to find another witness. You can get a lot of people testifying they don't know and it must be someone else who does, and burn through a lot of depositions.

2. Named witnesses who are not managers or agents may provide testimony that is not binding on the company and cannot be used as a deposition of the party.

E. Considerations of Timing/Sequence

1. Given the advantages of each type of witness, the obvious solution is to mix them and obtain testimony from each

2. To the extent you can control timing, one reason to take named deponents first is that if you are satisfied with their testimony, and if they are managers who can bind the company, then you can skip designating a topic that would duplicate it, which can give defendant an effective "do over."

3. However, using a 30(b)(6) notice permits you to get essential testimony early on, before you may know enough to know who, by name, you want to depose.

IV. SOME EXAMPLES OF TOPICS FOR WHICH THE 30(B)(6) DEPOSITION IS USEFUL

A. Databases – learning the structure and usage of payroll, timekeeping, HR and other databases, the calculations that are programmed in, et cetera. For such depositions it is helpful to request that the deponent have access to the database during the deposition, as that often permits the best answer to deposition questions.

B. Timekeeping, Payroll Practices – what records are kept, what instructions are given employees about reporting time, who records time, etc.

C. Classification Decisions – the information considered by the employer in classifying a position as exempt, the factors considered, the employer's analysis, anything that was the basis of the employer's classification decision.

D. Good faith/willfulness – this one can be particularly difficult to pin down with a named witness, who can simply point to one or more other people who are aware of the company's efforts to comply with the FLSA. As with the classification decision, this gives you the chance to explore every fact and argument the company considered in making its decisions, and their interactions with the Department of Labor.

E. Policies, practices, training – other policies and practices can also be useful, particular ones that relate to job responsibilities or requirements which may go to compensability. Changes to policies and training on those policies/practices are also good sub-topics.

F. Some examples are attached. Note you should designate the time period covered and, to the extent relevant, the geographic/organizational scope of the employer for which you are seeking testimony.

V. WHAT TO DO WHEN WITNESS IS UNPREPARED AND CANNOT ANSWER

A. Corporation Has Obligation to Prepare Witness With All Information Available to Corporation on Topics Specified

Given a Rule 30(b)(6) notice, a corporation must designate a person or persons with knowledge of the matters set forth in the 30(b)(6) notice to testify on its behalf. The designated witnesses are not required to have first hand knowledge or involvement in the underlying transaction. *See Reed v. Bennett*, No. Civ.A.-98-2313-CM, 2000 WL 744019 (D. Kan. May 2, 2000); *Nutramax Labs. v. Twin Labs.*, 183 F.R.D. 458, 469 (D. Md. 1998).

However, if the corporation designates an individual who does not have personal knowledge of the matters contained in the 30(b)(6) notice, then the corporation must adequately prepare its designee to testify fully and completely regarding the matters described in the notice. *See Poole v. Textron, Inc.*, 192 F.R.D. 494, 504 (D. Md. 2000), *citing United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) ("the corporation has a duty 'to prepare the designees so that they may give knowledgeable and binding answers of the corporation' and that this duty 'goes beyond matters personally known to the designee or to matters in which the designee was personally involved.'"); *SmithKline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 116082, at *8 (N.D. Ill. Jan. 24, 2000) ("30(b)(6) imposes a duty upon the named business entity to prepare its selected deponent to adequately testify not only on matters known by the deponent, but also on subjects the entity should reasonably know"); *Alexander v. FBI*, 186 F.R.D. 148, 152 (D.D.C. 1999) (same); *Audiotext Commc'ns Network v. U.S. Telecom, Inc.*, No. 94-2395-GIV, 1995 WL 625962, at *13 (D. Kan. Oct. 5, 1995) (same); *EEOC v. Winn-Dixie, Inc.*, 2010 U.S. Dist. LEXIS 53005 (S.D. Ala. May 28, 2010) (same). "[T]he corporation [and its counsel have] a duty 'to prepare the designees so that they may give knowledgeable and binding answers for the corporation.'" *Cont'l Cas. Co. v. Compass Bank*, No. CA04-0766-KD-C, 2006 WL 533510, at *18 (S.D. Ala. Mar. 3, 2006). Indeed, the deponent is expected to testify not only about facts within the corporation's knowledge "but also its subjective beliefs and opinions. . . . [to] provide its interpretation of documents and events." *Taylor*, 166 F.R.D. at 361.

Moore's Federal Practice summarizes the duties imposed by Rule 30(b)(6):

> (1) the deponent must be knowledgeable on the subject matter identified as the area of inquiry; (2) the designating party must designate more than one deponent if necessary in order to respond to the relevant areas of inquiry specified by the party requesting the deposition; (3) the designating party must prepare the witness to testify on matters not only known by the deponent, but those that should be known by the designating party; and (4) the designating party must substitute an appropriate deponent when it becomes apparent that the previous deponent is unable to respond to certain relevant areas of inquiry.

7 James Wm. Moore et al., *Moore's Federal Practice*, ¶ 30.25[3] at 30.68.

A corporation's failure to prepare the deponent adequately constitutes a failure to comply with its 30(b)(6) obligations. *See Resolution Trust Corp. v. Southern Union Co. Inc.*, 985 F.2d 196, 197 (5th Cir. 1993) ("When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all."); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff'd* 213 F.3d 646 (11th Cir. 2000) ("If the designated deponent cannot answer those questions, then the corporation has failed to comply with its Rule 30(b)(6) obligations . . . ."); *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999) (same). If the designated deponent is deficient, the corporation is under an obligation to provide a substitute. *See Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) ("Even if defendant in good faith thought that the [designee] would satisfy the deposition notice, it had a duty to substitute another person once the deficiency of its Rule 30(b)(6) designation became apparent during the course of the deposition."); *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) (the corporation is obligated to provide a substitute if it becomes obvious the designee is deficient), *Starlight Int'l*, 186 F.R.D. at 639 (same); *Alexander*, 186 F.R.D. at 152 ("the designating party has a duty to substitute an appropriate deponent when it becomes apparent that the previous deponent is unable to respond to certain relevant areas of inquiry.")

Practice Tips: (a) at the outset of the deposition, review designated topics with the witness and ask if they are prepared to testify on those points; (b) when someone cannot answer, ask them who would know, how they would find out the answer; (c) if a narrow question, where you won't need a lot of follow up, ask if they would take a break and go call someone for the answer; (d) put on the record that the witness was not able to respond, and that another witness who can address the topic is requested.

B. When Corporation Does Not Provide Adequate Witness, Move to Compel and Seek Costs

If the defendant refuses to provide a witness or any other acceptable remedy for an unprepared 30(b)(6) designee, then plaintiff may move to compel and, where the lapse has been egregious, seek costs for taking additional depositions.

Federal Rule of Civil Procedure 37(d) permits a court to impose appropriate sanctions, including costs, for a party's failure to appear at a deposition. *See* Fed. R. Civ. P. 37(d). Failure to present a prepared witness constitutes a failure to appear for the purposes of Rule 37(d). *See Resolution Trust*, 985 F.2d at 197 ("If [the designee] is not knowledgeable about relevant facts . . . then the appearance is, for all practical purposes, no appearance at all.); *Starlight Int'l*, 186 F.R.D. at 639, citing *Taylor*, 166 F.R.D. at 363 ("Producing an unprepared witness is tantamount to a failure to appear at a deposition."); *King*, 161 F.R.D. at 476 ("If the designated deponent cannot answer [ ] questions, then the corporation has failed to comply with its Rule 30(b)(6) obligations and may be subject to sanctions"); *Marker*, 125 F.R.D. at 126 ("An inadequate Rule 30(b)(6) designation amounts to a refusal to answer a deposition question").

Sanctions are appropriate whenever the designee's failure to be prepared is a result of bad faith on the part of the corporation or the deponent's testimony is egregious rather than merely lacking in desired specificity. *See Boland Marine & Mfg. Co., Inc. v. M/V Bright Field*, No. CIV.A. 97-3097, 1999 WL 280451, at *3 (E.D. La. May 3, 1999) ("the inadequacies in a deponent's testimony must be egregious"); *Bank of N.Y. v. Meridien Biao Bank Tanzania Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997), *citing Zappia Middle East Constr. Co. v. Abu Dhabi*, No. 94 Civ.1942, 1995 WL 686715, at *8 (S.D.N.Y. Nov. 17, 1995) ("In order for the Court to impose sanctions, the inadequacies in a deponent's testimony must be egregious"); *Starlight Int'l*, 186 F.R.D. at 640 ("defendants . . . made no good faith effort to adequately prepare [the designee] to testify in accordance with Rule 30(b)(6)").