



DAILY LABOR REPORT



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The tightened pleading standard set out by the U.S. Supreme Court in *Ashcroft v. Iqbal* is pitted against the “heavyweight of the courts’ dockets,” wage and hour collective actions, in this BNA Insights article by plaintiffs’ attorneys David Borgen and Lin Chan of Goldstein Demchak Baller Borgen & Dardarian. The authors outline the new pleading requirements and examine strategies attorneys for employers and employees have used to bring and defend against “*Iqbal* motions” in wage and hour cases.

Clash of the Titans: *Iqbal* and Wage and Hour Class/Collective Actions

BY DAVID BORGEN AND LIN CHAN

The U.S. Supreme Court’s new pleading standards have set the stage for a new “clash of the titans,” as emboldened employers seek to utilize their new weapon against the current heavyweight of the courts’ dockets, the wage and hour class and collective actions. As expected, management counsel have rushed into the battlefield filing newly styled motions to dismiss. However, as detailed below, the wage-and-hour causes of action have proven to be resistant to this new attack.

Traditional federal pleading standards under the Federal Rules of Civil Procedure (Rule 8) required only a “short and plain statement of the claim showing that the pleader is entitled to relief.” Under *Conley v. Gib-*

son, 355 U.S. 41, 45-46, 9 FEP Cases 439 (1957), a case was not subject to dismissal “unless it appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief.” The Supreme Court’s recent opinions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 77 USLW 4387 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 75 USLW 4337 (2007), however, established heightened pleading standards that go beyond the lenient requirements of *Conley*. This article introduces the new *Iqbal* pleading standards and surveys how both employers and employees have used “*Iqbal* motions” in the wage and hour context.

Standard of ‘Plausibility.’ *Iqbal* and *Twombly* established a new standard of “plausibility,” requiring pleadings to state “sufficient factual matter” to “allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. In assessing the sufficiency of pleadings, courts first separate factual allegations from conclusory ones and second decide whether the factual allegations give rise to a plausible claim for relief. *See, e.g., Doe I v.*

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Wal-Mart Stores Inc., 572 F.3d 677, 15 WH Cases 2d 7 (9th Cir. 2009), 132 DLR AA-1, 7/14/09 (plaintiffs failed to plead sufficient facts to show that Wal-Mart was plaintiffs' employer); *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 900 (M.D. Tenn. 2009) (in a Fair Labor Standards Act retaliation case, plaintiff sufficiently outlined a "facially plausible" claim for relief).

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Despite *Iqbal's* heightened pleading requirements, *Iqbal* and *Twombly* do not eviscerate basic notice pleading. Courts evaluating pleadings still draw reasonable inferences from facts pleaded in the complaint and consider what plaintiffs cannot "possibly show at this [early] stage in the litigation" without discovery. *Braden v. Wal-Mart Stores Inc.*, 588 F.3d 585, 48 EBC 1097 (8th Cir. 2009), 226 DLR AA-1, 11/27/09 (in an ERISA fiduciary duty class action, denying *Iqbal* motion because Rule 8 "does not [] require a plaintiff to plead 'specific facts' explaining precisely how the defendant's conduct was unlawful").

Moreover, the standards for "plausibility" are different in the context of wage and hour cases than they are for cases based on the complicated conspiracies alleged in *Iqbal* and *Twombly*. Wage and hour cases tend to be more straightforward and therefore less likely to strain the limits of plausibility. See, e.g., *Schlinsky v. Action Video Prods. Inc.*, No. 09-CIV-61779 (S.D. Fla. Jan. 13, 2010) ("[U]nlike the complex antitrust scheme at issue in *Twombly* that required allegations of an agreement suggesting conspiracy, the requirements to state a claim of an FLSA violation are quite straightforward," quoting *Sec. of Labor v. Labbe*, 319 F. App'x 761, 763 (11th Cir. 2008)); *Acho v. Cort*, No. C 09-00157 (N.D. Cal. Oct. 27, 2009) ("For an alleged FLSA violation, the requirements are simple and straightforward").

Employers' New Weapon. Since the advent of *Iqbal* and *Twombly*, employers have used *Iqbal* as a new weapon in defending against wage and hour cases. See, e.g., *Nicholson v. UTI Worldwide Inc.*, No. 3:09-cv-722-JPG-DGW (S.D. Ill. Feb. 12, 2010) (dismissing minimum wage claim where plaintiff failed to plead that his total weekly wage was less than his hours worked multiplied by the minimum hourly rate); *Moriarty v. Alvarez*, No. 09 C 3969 (N.D. Ill. Jan. 22, 2010) (dismissing FLSA retaliation claim where complaint failed to link earlier complaint for failure to pay overtime with the employer's decision to discharge plaintiff); *Puma v. Hall*, No. 1:08-cv-1451-LJM-JMS (S.D. Ind. Dec. 17, 2009) (dismissing claim for unpaid wages and overtime where plaintiffs failed to plead the elements to show that defendant was their employer).

In *Smith v. Pizza Hut Inc.*, No. 09-cv-01632-CMA-BNB (D. Colo. Mar. 11, 2010), the defendant filed a motion to dismiss for failure to sufficiently plead FLSA recordkeeping and business expense reimbursement claims. The court granted the motion to dismiss based

on lack of clarity of the claims alleged and lack of factual allegations. The court found that it was "unclear whether Plaintiffs are asserting automobile-related expense claims or uniform claims, or both," and that lack of specificity gave insufficient notice to defendant of plaintiffs' claims. *Id.* Plaintiffs also failed to plead facts about what they were required to wear to show that these requirements constituted "uniforms" under state and federal law. Although plaintiffs attempted to allege new facts in their response to the *Iqbal* motion, the court found that "Plaintiffs cannot rectify their pleading deficiencies by asserting new facts in an opposition to a motion to dismiss."

Cases such as *Pizza Hut* outline an effective strategy to dispose of ill-pleaded wage and hour cases early and before the employer has expended copious resources defending against such claims. This strategy is best pursued where the plaintiff has failed to plead every element of the claim. See, e.g., *Nicholson v. UTI Worldwide Inc.*, No. 3:09-cv-722-JPG-DGW (S.D. Ill. Feb. 12, 2010) (dismissing minimum wage claim where plaintiff failed to plead that his total weekly wage was less than his hours worked multiplied by the minimum hourly rate); *Fenters v. Yosemite Chevron*, No. CV-F-05-1630 (E.D. Cal. Dec. 14, 2009) (dismissing FLSA retaliation claim where plaintiff failed to plead prima facie case); *Chen v. Domino's Pizza Inc.*, No. 09-107 (D.N.J. Oct. 16, 2009) (dismissing overtime class action where plaintiffs failed to sufficiently plead that an employment relationship existed with defendant).

Of course, *Iqbal* pleading standards only apply to cases in federal court. For wage and hour class actions filed in state court, defendants would have to remove the cases to federal court under the Class Action Fairness Act, 28 U.S.C. § 1332(d). After removal, defendants would be free to file Federal Rule of Civil Procedure 12(b)(6) motions to dismiss based on *Iqbal*.

Weighing the Benefits of Early Dismissal. *Iqbal* motions, however, may only provide temporary relief because most courts will grant the *Iqbal* motion to dismiss with leave to amend the pleadings. See, e.g., *Pizza Hut*, (granting *Iqbal* motion but also granting plaintiff leave to amend complaint); *Field v. Am. Mortgage Express, Corp.*, No. C 09-01430 (N.D. Cal. Oct. 27, 2009) (granting *Iqbal* motion on plaintiff's minimum wage and overtime claims, but granting leave to amend complaint). Employers, therefore, may want to weigh the benefits of an early dismissal based on an *Iqbal* motion against the costs where plaintiffs may proceed in any event based on improved amended pleadings. Therefore, this may suggest that an *Iqbal* motion should be avoided except in the unusual circumstance where the employees' counsel will not be able to cure the defective pleading.

Additionally, fact-intensive wage and hour actions may be viewed as inappropriate for early dismissal. See, e.g., *Laguna v. Coveral N. Am. Inc.*, No. 09cv2131 (S.D. Cal. Dec. 18, 2009) (denying motion to dismiss because the "issue of alter ego involves an assessment of numerous factor[s] with no single determinative factor"); *Haskins v. VIP Wireless Consulting*, No. 09-754 (W.D. Pa. Dec. 7, 2009) (denying motion to dismiss misclassification claim because "detailed, fact-intensive analysis is impossible at this stage of the litigation"); *Field* (declining to dismiss Cal. Labor Code § 201 claim for failure to allege facts relating to a joint employer issue because it was a "close issue" and not suitable for adjudi-

cation at that early stage); *Davis v. Group Homes for Children, Inc.*, No. 2:09cv415-WHA (M.D. Ala. Sept. 8, 2009) (denying motion to dismiss because “whether a defendant has enterprise status under the FLSA requires a thorough factual analysis”).

Courts may reasonably conclude that FLSA exemptions are inappropriate for *Iqbal* motions to dismiss given the fact-intensive inquiry involved in making the misclassification determination. *Nieves v. Ins. Care Direct Inc.*, No. 09-61330-Civ (S.D. Fla. Jan. 25, 2010) (whether or not defendant was a retail or service establishment such that plaintiff, a commissioned sales agent, was exempt from FLSA coverage was a fact question beyond reach at the motion to dismiss stage). Plaintiffs need not plead facts relating to affirmative defenses and exemptions because it is the employer that bears the burden of proving those defenses. *McCullough v. Lennar Corp.*, No. 09cv1808-WQH-NLS (S.D. Cal. Nov. 10, 2009) (“Plaintiff is not obligated to plead facts showing that he is not exempt”); *Rumpz v. Am. Drilling & Testing Inc.*, No. 09-10971 (E.D. Mich. Oct. 23, 2009) (“Even under *Iqbal*’s heightened pleading standard, a plaintiff is not required to anticipate and respond to every affirmative defense that a defendant may choose to assert”).

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In this vein, class or collective actions, which are often more costly than individual cases, generally involve questions that are too fact-intensive and dependent on further discovery to warrant dismissal prior to the class certification stage. *Nicholson v. UTI Worldwide Inc.*, No. 3:09-cv-722-JPG-DGW (S.D. Ill. Feb. 12, 2010) (pleadings “on information and belief” are permitted and sufficient to withstand *Iqbal* motion); *Tahir v. Avis Budget Group, Inc.*, No. 09-3495, (D.N.J. Dec. 14, 2009) (“Defendants’ attack on those portions of this Complaint that relate to the pleading of a collective action is misplaced at this stage of the litigation”); *Hoffman v. Cemex Inc.*, No. H-09-3144, (S.D. Tex. Dec. 8, 2009) (declining to consider the collective action issue in a Rule 12(b)(6) motion).

Prevention the Best Approach for Plaintiffs. From the plaintiffs’ perspective, prevention will be the best approach. Although courts often grant leave to amend their complaint to comply with *Iqbal* pleading, the time permitted to file such amendments will be short. See, e.g., *Pizza Hut* (granting plaintiff twenty-one days to file an amended complaint that complies with the *Twombly/Iqbal* plausibility standard before the case is dismissed with prejudice). Therefore, plaintiffs must be prepared to refile quickly with improved pleadings based on sufficient facts. Taking time to fully investigate the claim, breaking up each element of the claim, and making sure that each element is supported by adequate factual allegations are critical to preventing and defending against *Iqbal* motions to dismiss.

Often, in the wage and hour context, pleading requirements are easy to satisfy. For the run-of-the-mill overtime claim, for instance, pleading requirements remain simple. The prima facie elements of the FLSA claims are generally easy to allege. Most significantly, the plaintiff must allege that he or she regularly worked more than 40 hours per workweek, and that he or she was not paid for those overtime hours. See, e.g., *Hoffman v. Cemex Inc.*, No. H-09-3144 (S.D. Tex. Dec. 8, 2009) (denying motion to dismiss class FLSA overtime claims); *Connolly v. Smugglers’ Notch Mgmt. Co.*, No. 2:09-CV-131 (D. Vt. Nov. 5, 2009) (denying motion to dismiss state and federal overtime claims); *Acho* (same). Courts have noted that it is unreasonable to require more than such allegations before the plaintiff has had the opportunity to conduct discovery. *Connolly*.

Specific allegations of willfulness, specific instances of unpaid overtime, and the exact number of overtime hours worked are *not* required. See, e.g., *Nieves* (allegations that defendant had a practice of not recording time actually worked sufficiently alleged constructive knowledge); *Hoffman* (where plaintiffs alleged that they were paid their regular rate for overtime hours, plaintiffs need not plead specific facts about any decisionmaker’s state of mind); *Acho* (plaintiff need not plead specific instances of unpaid overtime before being allowed to proceed to discovery); *Connolly* (“Few employees could possibly remember the exact overtime hours they worked over a period of years without being able to engage in discovery”).

However, simply identifying an employer’s policy or practice that results in unpaid overtime work without actual allegations that plaintiff worked overtime and received less than all wages due may be too conclusory and insufficient to state an overtime claim. *Harding v. Time Warner Inc.*, No. 09cv1212-WQH-WMc (S.D. Cal. Jan. 26, 2010) (allegations that defendant engaged in a process of “rounding” was insufficient to state a claim for overtime).

If faced with an *Iqbal* motion, plaintiffs should request in the alternative an opportunity to replead their claim. Failure to do so may lead a court to dismiss the claims with prejudice. See, e.g., *Bailey v. Border Foods Inc.*, No. 09-1230 (D. Minn. Oct. 6, 2009) (dismissing FLSA claims with prejudice because plaintiffs failed to request leave to replead and plaintiffs had two prior opportunities to amend their complaint).

Plaintiffs’ Use of *Iqbal/Twombly* Motions. Significantly, a creative plaintiff can also use *Iqbal/Twombly* motions to defeat defendants’ boilerplate affirmative defenses and counterclaims. Although Rule 8(c) of the Federal Rules of Civil Procedure governs the pleading of affirmative defenses, affirmative defenses are subject to the same Rule 8(a) pleading standards that apply to complaints. *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999).

In the wage and hour context, plaintiffs have successfully employed the heightened pleading standards of *Iqbal* and *Twombly* in motions to strike boilerplate affirmative defenses. For instance, where an “affirmative defense states in its entirety, ‘Plaintiffs’ claims are barred by the doctrine of laches,’ ” the affirmative defense is “plainly deficient under the *Iqbal* standard and should be stricken.” *Tracy v. NVR Inc.*, No. 04-CV-6541L (W.D.N.Y. Sept. 30, 2009); see also *Tran v. Thai*, No. H-08-3650 (S.D. Tex. Mar. 1, 2010) (granting plain-

tiff's motion to dismiss affirmative defenses where "[t]he defendants have merely repeated the statutes in their answer"); *Mumphrey v. Credit Solutions of Am. Inc.*, No. 3:09-cv-1025-M (N.D. Tex. Feb. 24, 2010) (granting plaintiffs' motion to strike affirmative defenses stating that plaintiffs' claims are barred by "the doctrines of res judicata and collateral estoppel" and by "illegal and/or improper motives"). The *Iqbal* and *Twombly* heightened pleading standards have also been successfully applied to motions to dismiss counterclaims in the FLSA context. *Jackson v. BECCM Co.*, No. 3:09cv00054 (W.D. Va. Jan. 5, 2010) (concluding defendant failed to properly state a claim for tortious interference with business expectancy because defendant failed to allege the basic elements of such a claim).

However, the application of *Iqbal* and *Twombly* to affirmative defenses has not been universally accepted. A number of district courts outside of the wage and hour context have rejected such motions to strike because Rule 8(c) does not contain any specific requirement to plead factual allegations. *See, e.g., McLemore v. Regions Bank*, Nos. 3:08-cv-0021, 3:08-cv-1003 (M.D. Tenn. Mar. 18, 2010) (finding *Iqbal* and *Twombly* inapplicable to affirmative defenses because they focus exclusively on the pleading burden that applies to plaintiffs' complaints); *Charleswell v. Chase Manhattan Bank, N.A.*, No. 01-119 (D.V.I. Dec. 8, 2009) (finding *Twombly* and *Iqbal* only interpreted Rule 8(a) and that

"[t]here is no requirement under Rule 8(c) that a defendant 'show' any facts at all"). Given the disagreement amongst district courts as to the applicability of *Iqbal* and *Twombly* pleading standards to affirmative defenses, it is likely that this issue may be the subject of further appellate litigation.

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In sum, the number of motions to dismiss wage and hour cases under the *Iqbal/Twombly* heightened pleading standard is growing. In grappling with these *Iqbal* motions, courts generally hesitate to dismiss cases where the facts alleged support each element of the claim or where the legal issue involves detailed factual analysis. However, both plaintiffs and defendants are increasingly employing the plausibility standard under *Iqbal* as a tool to dispose of scantily pleaded complaints and boilerplate affirmative defenses.