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# eLunch Briefings



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# Developments in Wage & Hour Laws

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Brought to you by Winston & Strawn's Labor & Employment Practice Group

# Today's eLunch Presenters



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# What We Will Cover

- Settlements
- Class Certification
- DOL
- Off the Clock
- Misclassification
- Independent Contractors
- California

# Settlements

- Wal-Mart: for off-the-clock claims, up to \$54 million to 100,000 class members, floor of \$6.5 million (Minnesota) (\$540/employee)
- Ralph Lauren: \$4 million to 6,700 outlet retail employees for time waiting during bag searches at quitting time (California) (\$800/employee)
- APAC Customer Services: \$4 million to 5,000 call center employees for off the clock claims (Wisconsin) (\$800/employee)
- Aramark: \$3.9 million to 23,000 employees who claimed they worked after clocking out during meal periods (\$169/employee)
- Costco: \$440,000 to 220 managers in bakery, deli. and meat departments for misclassification (California) (\$2,000/employee)

# Class Actions Still Going Strong

- 6,165 new FLSA filings in 2009, up from 5,199 in 2008
- Approximately 100 wage and hour class actions filed each month in CA
- Significant number of classes certified since January 2009, in every jurisdiction, involving wide range of employees and employment practices
  - OTC leads the way
  - But misclassification still significant with new theories developing



# Sample of Rule 23 OTC Classes Certified

State	Job
WA	Janitors
AR	Agriculture workers
NE	Production line employees
NV	Limo Drivers
IA, 6 <sup>th</sup> Cir	Poultry workers
CA	Drivers
WA	Farm workers
KS	Beef processing plant employees

# Sample of FLSA OTC Classes Certified

State	Job
NY	Construction workers
KY	Heavy equipment operators
NE	Meatpacking employees
FL	Tax agents
PA	Financial services representatives
MO	Customer service phone employees
AR	School bus drivers and dispatchers
WI	Customer service representatives
PA	Retail employees
NY	Food service employees

# Sample of Misclassification Classes

State	Jobs	State	Jobs
WI	-Plant engineers -Commissioned sales reps	IN, MN, CA	-Drivers
NY	-Research associates -IT support specialists -Loan officers	MN	-Financial consultants -Senior financial associates -Securities brokers
PA	-Assistant store managers -Analysts (billing, tax)	MI	-Assistant clinic managers -Clinic managers
CA	-Audit employees -Business banking officers -Collections supervisors -Administrative supervisors -Store managers	TX	-Sales representatives -Telephone and remote computer support employees
KS	-Loan originators	FL	-Loss prevention managers
GA	-Computer troubleshooters -Satellite technicians	OR	-Quality control workers

# DOL

- Wage and Hour Division:
  - 2009 – 15% FTE increase
  - 2010 – 28% FTE increase
- Wage and Hour Administrator – still vacant
- Aggressively pushing legal interpretation and authority
  - Withdrawing numerous wage and hour opinion letters
  - Developed “Administrator's Interpretations”
- Tremendous power to influence courts on exemption issues (*Novartis*)
- Can retroactively change rules simply by issuing new interpretive guidance
- Expect DOL to take much narrower position on:
  - Administrative exemption
  - Outside sales

# “Off the Clock”

- What is “compensable” time?
  - Donning and doffing?
  - Other pre-or post-work time activity?
  - Commute time?
  - Rounding?
- Any time after first “principal activity”
  - Are employees engaged to wait, or are they waiting to be engaged?
- Activity that is “integral and indispensable” to principal activity
- UNLESS, time is “de minimis”
  - And if it is easy to track, plaintiffs argue it is not de minimis.



# “Off the Clock”

- Donning/Doffing DOL Admin Bulletin June 16, 2010
  - Considered FLSA Section 3(o) that provides time spent “changing **clothes** or washing at the beginning or end of each workday” is excluded from compensable time if excluded under “the express terms or by custom or practice” under a collective bargaining agreement.
  - Held: this exemption “does not extend to **protective equipment** worn by employees that is required by law, by the employer, or due to the nature of the job.”
  - Noted: “donning and doffing, which may include clothes changing, can be a ‘principal activity’ under Portal to Portal Act.” SC held activities that are integral and indispensable are principal activities, and activities occurring after first principal activity and before last principal activity
  - are compensable.
    - Held: “clothes changing covered by section 203(o) may be a principal activity. Where that is the case, subsequent activities, including walking and waiting, are compensable.”



# “Off-the-Clock” Claims

## ■ Commuting

- *Rutti v. Lojack* (9th Cir. Aug. 21, 2009):

- ▶ Employee drove company-provided vehicle to customer locations, and was paid on an hourly basis from time he arrived at his first job until he left his final customer.
- ▶ Employee required to map and prioritize his assignments for the day before heading to the first customer, and upload information from home via company-provided modem after completing work at customer locations.
- ▶ Court held:
  - commute time not compensable because use of company vehicle can be a condition of employment and employer is not required to pay for commute time,
  - “receiving, mapping, and prioritizing jobs” are related to commute and not compensable, and are de minimis in any case, but
  - evening activities may be compensable.

# Timeclock Rounding

- Timeclock rounds up or down to nearest 15-minute increment?
  - **Generally, rounding permitted if it is used in manner that does not result, over a period of time, in failure to compensate employees for all time worked.**
  - *Austin v. Amazon.com* (E.D. Wa.): Employee brought collective action regarding 15-minute rounding practices. Because of rounding, employees who clock in and begin working at 8:09 a.m. are paid starting at 8:15 a.m. Up to 21,000 employees could be included.



# Misclassification – Administrative

- Challenges being made to:
  - IT professionals
  - Construction project engineers
  - Non-CPA accounting staff
  - Banking industry
  - Insider sales employees who are recast as administrative employees
- Employee must exercise discretion and independent judgment with respect to matters of significance
- Primary duty must be “the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers”
  - [Production v. administrative distinction](#)

# March 2010 Administrator's Interpretation

- Held that mortgage loan officers (MLOs) typically do not qualify for the administrative exemption (outside sales still possible), and withdrew two earlier opinion letters that determined certain MLOs were administratively exempt.
  - Primary duty of administratively exempt employees must be “performance of office or non-manual work **directly related to the management or general business operations of the employer** or the employer's customers.”
  - MLOs do not typically engage in work related to general business operations.
  - Resurrected “production” v. “administrative” dichotomy.
  - Primary duty is sales: job description, qualifications, training, payment method, are key; analyzing and recommending options given customer's needs are incidental to sale.
  - Such sales duties “constitute[] the **production** work of an employer engaged in selling or brokering mortgage loan products,” rather than internal management or general business operations of the company.
  - Contrasted MLO's duties (production) with those employees working in human resources department, accounting department, or research department (administrative).



# Misclassification

## ■ Store/Bank Managers

- *Cruz v. Dollar Tree Stores* (N.D. Cal. 2009)
  - Class action brought after 2005 settlement of misclassification claims from store managers, managers in training and assistant managers, resulting in:
    - \$125 per workweek to each misclassified employee
    - Reclassification of managers in training and assistant managers
    - Revision of store manager job duties
- *Family Dollar v. Morgan* (U.S.S.C. 2009)
  - In October 2009, the United States Supreme Court declined to consider whether district court abused its discretion in denying employer's motion for decertification of a FLSA collective action by 1,424 store managers alleging misclassification

# Misclassification

## ■ Information Technology Workers

- Administrative employees? Claims asserted that IT workers do not have requisite amount of discretion for administrative exemption.
  - Use of skill v. use of independent judgment and discretion with regard to matters of significance
- Computer Professional Employees? *Clarke v. JP Morgan/Chase (NY 2010)*
  - *Employer obtained summary judgment on named plaintiffs' claims, resulting in Court denying as moot Motion for Certification*
    - *Court held that in light of reclassification, non-willful statute of limitation applied, and fact of reclassification could not be used as evidence of misclassification.*
    - *Held no genuine issue of material fact, and plaintiff covered by computer systems analyst exemption.*

# Misclassification

## ■ Financial Services

- In-store branch managers: *Spainhower v. US Bank* (C.D. Cal. 2010):
  - Obama appointee denied class certification of in-store bank branch managers because discretion in deciding what duties to perform and how much time to spend on those duties precluded common issues predominating.
- Loan underwriters: *Davis v. JP Morgan Chase* (2d Cir. NY, Nov. 2009):
  - 2d Circuit reversed summary judgment in favor of employer and found loan underwriters **not exempt** under the administrative exemption
  - Plaintiff did not perform work directly related to management policies or general business operations
  - Work was production work
  - Line between administrative and production is not a clear one – it does not track the level of responsibility, importance, or skill needed to perform a particular job – the monetary value connected to the employee’s responsibility is not conclusive
  - Court mentioned indications that employer understood underwriters to be engaged in production work, such as referring to work as “production work,” evaluating employees by measuring transactions per day.

# Misclassification – Outside Sales

## ■ Outside sales exemption

- ▶ Primary duty must be “making sales” or “obtaining orders or contracts for services or for the use of facilities.”
- ▶ Employee must be “customarily and regularly engaged away from the employer's place of business” in performing such primary duty.

## ■ *Pablo v. Terminix* (N.D. Cal. 2009):

- Certification of outside salespersons selling termite control services denied because individualized inquiries predominated over common questions.
  - ▶ Individualized inquiry to determine what each person did each day, and how much time outside.

# Misclassification

## ■ Pharmaceutical Sales Representative

- *In re Novartis Wage and Hour Litigation (2nd Cir, July 6, 2010):* Reps do not meet FLSA outside sales exemption because they do not sell drugs to doctors, and do not meet administrative exemption because do not exercise sufficient independent judgment and discretion.
  - *DOL's amicus brief opined that Reps are non-exempt because:*
    - *No outside sales because no good or service actually sold*
    - *Although reps work with very little supervision, specific instructions provided for each aspect of job*
    - *"Nature and level" of decisions were too low to qualify as matters of significance*
  - *Court held that secretary's interpretations were entitled to "controlling" deference.*

# Misclassification

- Highly compensated (\$100K) Exemption under the FLSA
  - Recruiter could pursue claims for overtime (*Ogden v. CDI Corp.*, D. Arizona, July 2010)
  - Employer had to show employee regularly performed at least one exempt duty of administrative employee
  - Fact employee was earning > \$100K not enough
- Challenges to IT administrative workers made regardless of pay

# Independent Contractors

- Misclassification of employees as independent contractors is not itself an FLSA violation, but expect DOL to look aggressively for opportunities to weigh in on misclassification matters
- Consequences can be significant:
  - Overtime and recordkeeping violations, liability for failure to include in benefit plans, tax liability, unemployment
- Every agency and every state uses different multi-factor test, but FLSA “economic realities” test is broadest
  - Some key factors: right to control manner and means of performance, personal investment in equipment, length of employment, right to terminate at will, basis of payment (per job?), whether work is part of employer's core business
- State and Federal government seek income for lost taxes from independent contractor misclassification
  - National shipping company: \$3 million to Massachusetts for misclassifying drivers as independent contractors



# California Meal and Rest Break Claims

- What does “provide” mean?
  - *Cal Labor Code § 512*: An employer may not employ an employee for a work period of more than five hours per day without **providing** the employee with a meal period of not less than 30 minutes...An employer may not employ an employee for a work period of more than 10 hours per day without **providing** the employee with a second meal period of not less than 30 minutes.
  - *Cal Labor Code § 226.7*: If an employer fails to **provide** an employee a meal period or rest period in accordance with the applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not **provided**.

# California Meal and Rest Break Claims

- *Brinker v. Superior Court (Hohnbaum)*, 80 Cal. Rptr. 3d 781, Cal. App. 4th (2008)
  - Court decertified a class of restaurant workers, holding that § 226.7 does not require employers to **ensure** that employees take meal and rest breaks.
  - Current Status: Case is **still** currently pending before the Cal. Supreme Court. Fully briefed. Oral argument not set.

# California Class Certification

- Recent line of mixed results:
  - *In re Wells Fargo* (9th Cir. July 2009)
    - Court overturned class certification, rejecting *Wang v. Chinese Daily News Inc.*, and holding that plaintiffs could not show predominance based on a “blanket exemption policy”
    - Court acknowledged that uniform corporate policies may be a factor in favor of certification, but asserted that “courts must still ask where the individual employees actually spent their time”
  - *Jaimez v. Daiohs* (Feb. 2010) (California appellate court):
    - Effectively rejected 9th Circuit’s balancing approach to the predominance inquiry in *In re Wells Fargo*;
    - Court of Appeal found Defendant’s uniform classification of employees as exempt was sufficient to establish predominance of common legal and factual issues;
    - Trial court had denied class certification, but Court of Appeal reversed

# California Class Certification

## ■ Recent line of mixed results:

### ● *Arenas v. El Torito* (Mar. 2010):

- ▶ Court concluded plaintiffs' theory of recovery—that managers, based solely on their job descriptions, were as a rule misclassified — was not amenable to common proof and affirmed denial of class certification
- ▶ Court credited defendant's evidence that it had conducted multiple surveys regarding managers duties to determine whether they should be classified as exempt as well as evidence that duties and time spent on individual tasks varied widely by location
- ▶ Court found common questions of law and fact did not predominate over individualized inquiry

### ● *Faulkinbury v. Boyd & Associates* (June 2010):

- ▶ Class certification defeated on meal and rest period and overtime claims
- ▶ Court found individualized inquiry predominated
- ▶ Addresses *In Re Wells Fargo* and *Jaimez*



# California Administrative Exemption

- *Harris v. Liberty Mutual, 64 Cal. Rptr. 3d 547 (2007)*
  - Question is whether the production dichotomy test should be applied in every administrative exemption case
  - Current status: California Supreme Court has not decided this case
  - Causing issues for exemption analysis, operationally for most employers

# California Expense Reimbursement

## ■ *Gattuso v. Harte-Hanks:*

### ● Three methods of reimbursement:

- Actual expense – requires burdensome recordkeeping by employee
- Mileage reimbursement – can be at IRS rate or other rate agreed to, employee's burden to prove inadequate to cover expenses, or
- Lump sum payment – but employer has burden to separately identify the amounts that represent payment for labor v. expense reimbursement

## ■ *Stuart v. RadioShack*

- Labor Code section 2802 requires employer to reimburse employees for necessary business expenses, even if the employee does not follow internal expense reimbursement procedures



# California Private Attorney General Act (PAGA)

- Private Attorney General Act (PAGA) enacted in 2004 to offer financial incentives to individuals to enforce state employment laws
  - Any “aggrieved employee” may recover civil penalties against an employer on behalf of other current and former employees
  - 75% to CA Labor & Workforce Development Agency; 25% to the employees
  - Penalties recoverable: those provided in the underlying Labor Code, or, if no penalty listed:
    - \$100 per person, per pay period – First violation
    - \$200 per person, per pay period – each subsequent violation
  - Administrative prerequisites must be exhausted
  - Until recently, unclear if class action standard applied



# California PAGA

- Employees can bring claims on behalf of themselves and others, without meeting class certification standards
- Unclear what, if any, pleading standard plaintiffs must meet
- Attorneys' fees are available, making PAGA attractive to plaintiffs' lawyers
- Almost any statutory (or wage order) violation can form the basis of a PAGA claim!



Questions?



Thank You.

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