

TRENDS IN WAGE & HOUR LITIGATION

Christopher A. Tinari, Esquire
Margolis Edelstein

PANELISTS

Christopher A. Tinari, Esquire
(Moderator)
Margolis Edelstein



The Honorable Diane Welsh
JAMS, Inc.



Ivette Ligano
United States Department of Labor

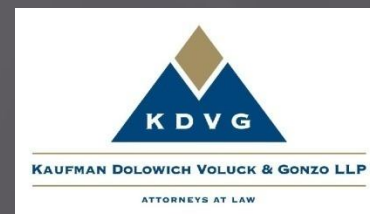


David Muir
United States Liability Insurance
Group



UNITED STATES LIABILITY INSURANCE GROUP
A BERKSHIRE HATHAWAY COMPANY

Philip Voluck, Esquire
Kaufman, Dolowich, Voluck, Gonzo LLP



INTRODUCTION

- Wage & Hour Litigation is on the Rise
- Individual Plaintiffs
- Class and Collective Action Litigation
- Massive Awards and Settlements



FOUR (4) TRENDS DEVELOPING

1. Class Claims Growing
2. Misclassification Cases Continuing
3. Claims Over “Winding Up” and
“Winding Down” at Work
4. Working Off the Clock



CLASS CLAIMS GROWING

- ▣ In 2004, U.S. Dept. of Labor (DOL) Launches FairPay Initiative
 - Revisions to Fair Labor Standards Act (FLSA)
 - ▣ Strengthen Overtime Protections
 - ▣ Clarify Areas of White Collar Exemptions
 - Since Release of the 2004 Regulations, FLSA Class and Collective Actions Have Grown at a Significant Rate



CLASS CLAIMS GROWING

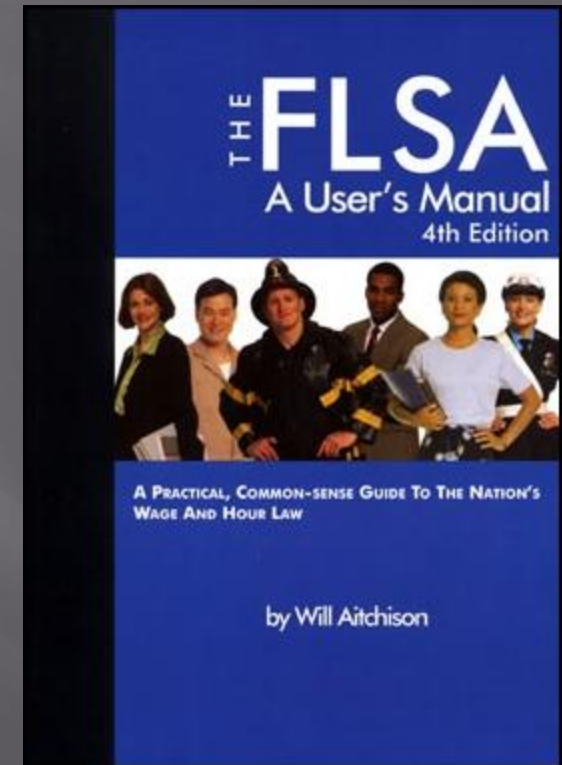


- ▣ Class Claims Have Grown From:
 - 1,094 Cases Filed in 2004
 - 2,167 Cases Filed in 2007
 - 2,411 cases Filed in 2008
 - ▣ This Growth Represents Over a 120 Percent Increase From 2004 to 2008



CLASS CLAIMS GROWING

- Virtually Any Employee Can Bring a Private Action Against His or Her Employer Under the FLSA
- Under the FLSA, Claims May Be Brought Within a Two Year Time Frame, in Some Cases, Three Years
- State Law Claims Generally Mirror the FLSA



CLASS CLAIMS: VERDICTS & SETTLEMENTS

- Plaintiffs' Recovered \$90 Million Against Farmers Insurance for Unpaid Overtime (Bell v. Farmers Ins. 137 Cal. App. 4th 835 2004)
- In 2005, a California Jury Awarded \$172 Million to 100,000 Wal-Mart Employees for Alleged Denial of Meal and Rest Breaks (242 Cal. Super. Ct. 2006)



CLASS CLAIMS: VERDICTS & SETTLEMENTS

- Such Verdicts Have Made Way for Hefty Settlements, as Employers Fear Taking Cases to Trial
- Because of Litigation Costs and Potentially Crippling Jury Verdicts, Huge Settlements Have Also Made the Headlines
- Mediation is Now A Popular Alternative Dispute Resolution Forum



CLASS CLAIMS: VERDICTS & SETTLEMENTS

- State Farm Mutual Insurance Company Settled Claims in the Amount of \$135 Million by Insurance Adjusters Alleging Misclassification of their Exempt Status (Guittierez v. State Farm Ins. Co., Cal. Super. Ct. 2005)
- Due to an Enforcement Action by the DOL, Cingular Wireless Agreed to Pay \$5.1 Million in Back Wages to 25,000 Employees Who Worked Off the Clock Without Compensation (Chao v. Cingular Wireless, No. 05-3009, C.D. ILL 2005)



CLASS CLAIMS: VERDICTS & SETTLEMENTS

- ▣ Employers Have Fared No Better in Recent Years
 - In 2008, Starbucks Agreed to Pay up to \$3 Million to Settle Claims Alleging Failure to Reimburse Employees for Mileage and Expenses Under California Law
 - In December 2008, Wal-Mart Agreed to Pay \$640 Million to Settle 63 Different Wage & Hour Class Actions.
 - ▣ Meanwhile Class and Collective Actions are being Filed and Certified on a Daily Basis



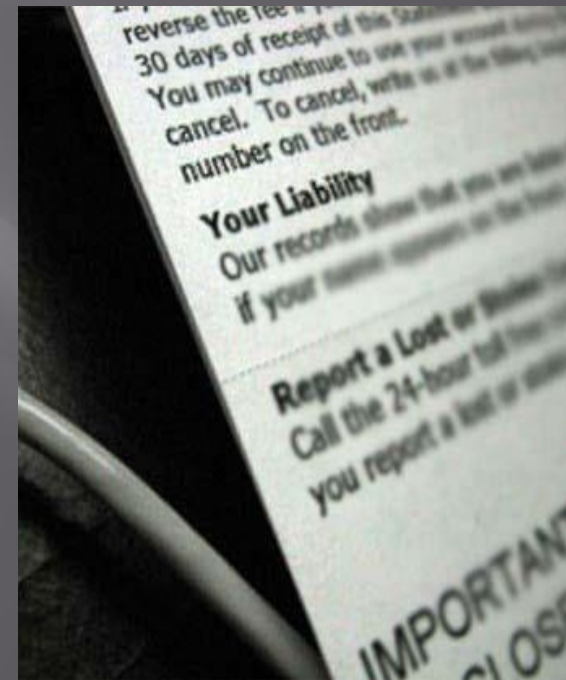
MISCLASSIFICATION CASES CONTINUING

Classic Class Action Case Under the FLSA
Involves the Claim That An Employer has
Misclassified a Certain Employee or Group of
Employees as Exempt from the FLSA Overtime
Provisions



MISCLASSIFICATION CASES: Penalties

- ▣ Liability
 - Employer Responsible for Overtime Wages
 - ▣ 2 Years
 - ▣ 3 Years for Willful Violation
 - Liquidated Damages (Double)
 - Attorney Fees
 - Interest
 - Fines
 - Injunctive Relief



MISCLASSIFICATION CASES CONTINUING

- ▣ Employer Problems:
 - Fail to Analyze Existing Exemptions for Employees in Positions that Really are Not Exempt
 - Left to Guess in Close Classification Cases, with Little Legal Guidance



MISCLASSIFICATION CASES CONTINUING

- Misclassification Claims are as Strong as Ever and Continue to Proliferate
- In Attempt to Avoid Litigation, Employers Should Review the FLSA Exemptions as Revised in the 2004 Regulations' Amendments
- Most Common Are the “White Collar” Exemptions: Executive, Administrative & Professional



EXECUTIVE EXEMPTION

- Salary - \$455 Per Week
- Primary Duty – Managing
- Direct the Work of Other Employees
- Hire/Fire Authority

ADMINISTRATIVE EXEMPTION

- Salary - \$455 Per Week
- Office/Related to general Business Operations
- Discretion/Independent Judgment

PROFESSIONAL EXEMPTION

Learned



Creative

LEARNED PROFESSIONALS

- Salary - \$455 per Week
- Advanced Knowledge
- Science or Learning
- Prolonged Specialized Intellectual Instruction
- Veteran Status Insufficient
- College Degree Requirement Generally Insufficient



CREATIVE PROFESSIONALS

- Salary - \$455 per Week
- Invention, Imagination, Originality, Talent
- Artistic or Creative Endeavor
- Case-By-Case
- Journalists



HIGHLY COMPENSATED EMPLOYEES EXEMPTION

- Salary - \$100,000 or More
- Office/Non-Manual Work
- Customarily and Regularly Perform at Least One of the Duties of Executive, Administrative, or Professional



OUTSIDE SALES EXEMPTION

- Sales, Orders, Contracts for which Consideration Will Be Paid by the Client or Customer
- Customarily and Regularly Engaged Away from the Employer's Place or Places of Business



COMPUTER RELATED OCCUPATIONS EXEMPTION

- Salary - \$455 per Week
OR
- Hourly - \$27.63 per Hour
- Must Be Skilled Employee



COMPUTER RELATED OCCUPATIONS EXEMPTION

- Application of Systems Analysis Techniques and Procedures
- Design, Development, Creation, Testing, Modification – Hardware or Software
- Employees Engaged in Manufacture, Service or Repair Are Not Exempt
- Help Desk Employees



WINDING UP & WINDING DOWN AT WORK

- ▣ U.S. Supreme Court Speaks
 - IBP, Inc. v. Alvarez, 546 U.S. 21 (2005)
 - Infamous “Donning and Doffing” Case
 - “The Donning of a New Day”
 - Clarified What Constitutes Compensable Time Under the FLSA



WINDING UP & WINDING DOWN AT WORK

- The Court Addressed Two Cases Together Both Involving Allegations That Employees in Meat and Poultry Processing Were Not Compensated Properly for Time Spent Pre- and Post-Shift on Work Related Activity



WINDING UP & WINDING DOWN AT WORK

- ▣ The Court Held:
 - Time the Employees Spent Walking Between Changing and Production Areas was Compensable;
 - Donning and Doffing Gear That is “Integral and Indispensable” to Employees’ Work is a “Principal Activity”;
 - Time Employees Spent Waiting to Don the First Piece of Gear that Marked the Beginning of the Continuous Workday was Not Compensable (Preliminary Activity)



WINDING UP & WINDING DOWN AT WORK

- The Court Opinion Affected Every Employer That Asks Employees to Perform Some Activities before or After Their Primary Work Shift
- If Those Activities are “Integral and Indispensable” to the Job, the Time Spent will Ordinarily be Compensable



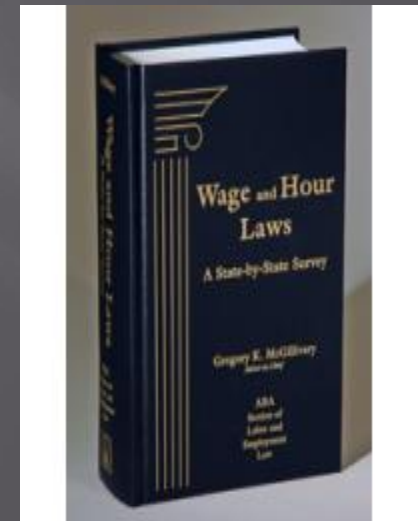
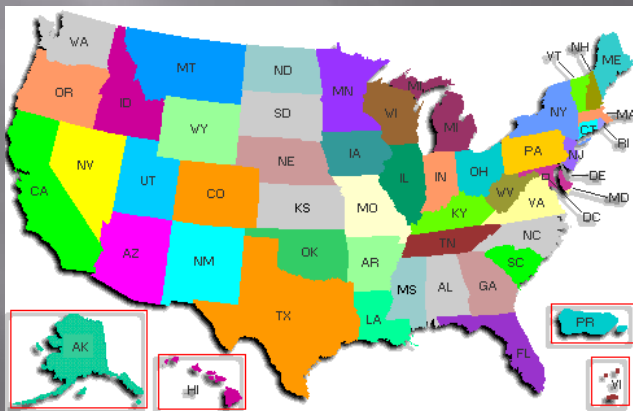
WHAT IS COMPENSABLE TIME

- Service Technicians Leave Their Home to Make Service Calls ??
- Call Center Employees Boot Up Their Computers and Load Software ??
- Restaurant Employees Changing Into Their Uniform Before Their Shift Starts ??



WORKING OFF THE CLOCK

- Employers Continue to Grow in Size and Begin to Use New Technologies Face Huge New Challenges
- Growth, Merger, Consolidation, Employers Operating in Many States with Different Wage & Hour Laws



WORKING OFF THE CLOCK

- ▣ OFF The Clock:
 - An Employee Performs Work-Related Tasks But Does Not Report the Time on His or Her Time Record
 - ▣ Voluntary : Employee Choice
 - ▣ Involuntary : Manager Order or Suggestion
 - ▣ BOTH UNLAWFUL

WORKING OFF THE CLOCK

- If Employer Knows, or Has Reason to Know About It, It is Compensable
- Track Employees' Hours
- Security Check in
- Donning and Doffing
- Checking E-Mails
- Booting Up Computer
- Picking Up Work
- Pre/Post Shift Meetings



BLACKBERRY TIME

- If More Than De Minimus – Compensable
- Require Employees to Report Time
- Implement Policies Setting Limits on Employees' Use of Devices



PENALTIES



- ▣ Liability
 - Employer Responsible for Overtime Wages
 - ▣ 2 Years
 - ▣ 3 Years for Willful Violation
 - Liquidated Damages (Double)
 - Attorney Fees
 - Interest
 - Fines
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Overtime Wage Claim? **TIMESHEET**
Authorized timesheets must be received by Monday before

EMPLOYER: _____
CLIENT COMPANY: _____
EMPLOYEE: _____
WEEK ENDING DATE: _____

DAY	START TIME	FINISH TIME
Example	09:00	05:00
Monday	8:00	4:00

Contact us now
for a **FREE** initial
consultation

THANK YOU

Questions

Holiday Party Reception

