

By Paul A. Wilhelm

**E**xploring the most highly litigated disputes and winning strategies for employers.

# Top Five Trends in Wage and Hour Litigation

Wage and hour litigation is increasing at an exponential pace, and the surge is not expected to end soon. These claims are still being brought by individual plaintiffs, of course, but the most dramatic rise has been in class and

collective action litigation. These class and collective action wage and hour claims, sometimes state-specific, sometimes multi-jurisdictional, have resulted in massive awards and settlements that have crippled employers. Legal newswires flood with stories almost daily of another high-profile company hit with a collective action under the Fair Labor Standards Act (FLSA), and the plaintiffs often also seek class action treatment under state law.

In reviewing the current state of wage and hour litigation in the U.S., at least five trends become evident. This article explores these five trends and suggests strategies for employers and their counsel to succeed in wage and hour disputes. The best way for employers and their counsel to prepare for such litigation is to (1) know what areas are growing, and (2) how to combat such litigation.

**Trend #1—Class Claims Growing**  
**Do Employers Resemble Fish in a Barrel?**

In 2004, the U.S. Department of Labor

(DOL) launched a FairPay Initiative in connection with the revisions to the FLSA regulations issued that year. These DOL regulations were meant to strengthen overtime protections and clarify areas of the white collar exemptions. As the DOL proclaimed on the effective date of the Final Rule, “The regulations had not been substantially updated for over 50 years, creating confusion for workers and employers, generating wasteful class action litigation, and failing to effectively protect workers’ pay rights. ‘Today, workers win...’” See U.S. Employment Standards Administration (DOL) News Release (Apr. 20, 2004). Although the DOL’s press release implied that class action litigation might trail off, just the opposite happened.

Since release of the 2004 regulations, FLSA class and collective action litigation has, in fact, grown at an exponential pace—from 1,094 cases filed in 2004, to 2,167 cases in 2007, to over 2,411 in 2008. See Jacqueline Bell, *Class Action Rise Paints Complex Picture*, Law 360 (Jan. 13, 2009).



■ Paul A. Wilhelm is an associate in the Detroit office of Dykema, where he concentrates his practice on employment litigation and counseling, including representing national and regional employers in wage and hour matters. Mr. Wilhelm litigates cases for employers in state and federal courts and represents employers before administrative agencies. He is a member of the steering committee of DRI’s Employment Law Committee.

This growth represents over a 120 percent increase from 2004 to 2008.

Employers must note that virtually any employee can bring a private action against his or her employer under the FLSA. Even undocumented employees may bring FLSA claims for damages, according to some federal courts. *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N.J. 2005); *Chellen v. John Pickle Co., Inc.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006). Under the FLSA, claims may be brought within a two-year time frame, and in some cases, three years. State law claims, of course, have their own statutes of limitations, some of which mirror the FLSA, some of which provide a longer statute of limitations and some a shorter statute of limitations period.

#### Verdicts and Settlements Roll In

For plaintiffs' attorneys in the wage and hour arena, the past several years have been a gravy train with multimillion dollar verdicts. For example, plaintiffs recovered a \$90 million verdict against Farmers Insurance Exchange for claims of unpaid overtime. *See Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715 (2004); 137 Cal. App. 4th 835 (2006). In 2005, a California jury awarded \$172 million to over 100,000 Wal-Mart employees for alleged denial of meal and rest breaks. *See Savaglio et al. v. Wal-Mart Stores Inc.*, No. C835687, 2006 WL 3626295, 12 Wage & Hour Cas. 2d (BNA) 242 (Cal. Super. Ct. Dec 06, 2006) (motions for JNOV and for new trial denied). These sorts of verdicts do not escape the headlines. *See Jury Slaps Wal-Mart with \$172M Ruling*, CNN-Money (Dec. 22, 2005).

Such verdicts have made way for hefty settlements, as employers fear taking cases to trial. Because of the litigation costs and potentially crippling jury verdicts, huge settlements have also made the headlines, including the headline-generating settlement by employer State Farm Mutual Insurance. *See Gutierrez v. State Farm Mutual Auto. Ins. Co.* (Cal. Super. Ct. Jan. 2005) (\$135 million settlement approved on claim by insurance adjusters allegedly misclassified as exempt). Due to an enforcement action by the DOL, Cingular Wireless agreed to pay \$5.1 million in back wages to more than 25,000 customer service representatives who allegedly worked off the clock without

compensation. *Chao v. Cingular Wireless LLC*, No. 05-3009 (C.D. Ill. Jan. 13, 2005) (consent judgment filed). Office Depot agreed to pay \$3.3 million to settle a case alleging misclassification of assistant managers. *See John Accola, Office Depot Reaches Settlement in Pay Suit*, Rocky Mountain News (Mar. 22, 2005). Ralph's/Safeway/Vons/Albertson's agreed to pay a \$22.4 million settlement to janitors for alleged violations. *See CCH, Labor Law Reports—No. 889*, Jan. 24, 2005. Computer Sciences Corp. agreed to pay \$24 million to settle claims made by 30,000 technical support workers. *See CSC Workers' Overtime Claims Settled for \$24 Million*, L.A. BUSINESS JOURNAL (July 25, 2005).

Employers have fared no better in recent wage and hour cases. In late 2008 alone, Starbucks agreed to pay up to \$3 million to settle claims alleging failure to reimburse employees for expenses and mileage under California law; Hewitt agreed to pay \$4.9 million in a wage and hour suit by its benefits analysts; and FedEx agreed to a \$8 million settlement under California law over meal and rest breaks. In December 2008, Wal-Mart agreed to pay approximately \$640 million to settle 63 different wage and hour class actions. Meanwhile class and collective actions are being filed and certified on a daily basis.

#### Trend #2—Misclassification Cases Continuing

The classic collective action under the FLSA involves the claim that an employer has misclassified a certain employee or group of employees as exempt from the FLSA's overtime provisions, when in fact they are not. If found liable, an employer may become responsible for paying overtime wages, along with liquidated damages and attorneys' fees. Employers are vulnerable to this misclassification charge for two main reasons: (1) they fail to analyze existing exemptions for employees in positions that really are not exempt; and (2) they are left to guess in close classification cases, with little legal guidance, and after choosing to classify a large group within the same job category as exempt, they are hit by plaintiffs' attorneys who find a perfect setup for a large, collective action. Even when employers' classifications are technically "correct," once a class or collective action is certified,

the cost of litigation and potential exposure leads many to settle immediately.

Misclassification claims are as strong as ever and continue to proliferate. Classic cases involve managers and/or assistant managers of fast food restaurants, service stations, or other retail or service establishments. The plaintiffs' bar, however, has become sophisticated and has found

### The plaintiffs' bar...

has become sophisticated and has found that industry-based attacks are a lucrative model.

that industry-based attacks are a lucrative model. Investment firms, insurance companies, pharmaceutical companies, and others have all faced wage and hour claims, often involving investment advisors, adjusters and sales representatives.

In an attempt to avoid litigation in the first place, employers should carefully review the FLSA exemptions as revised in the 2004 regulations' amendments. The most commonly used are the "white collar" exemptions, among which are the executive, administrative and professional exemptions, as described below.

#### Executive Exemption

To qualify for an executive employee exemption under the FLSA, all of the following tests must be met:

- The employee must be compensated on a salary basis, as defined in the regulations, at a rate of not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommen-

dations on hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

#### Administrative Exemption

To qualify for the FLSA administrative employee exemption, all of the following tests must be met:

**Employers often forget that fancy job titles are insufficient to confer an exemption on an employee.**

- The employee must be compensated on a salary or fee basis, as defined in the regulations, at a rate of not less than \$455 per week;
- The employee's 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; and
- The employee's primary duty must include the exercise of discretion and independent judgment in significant matters.

#### Professional Exemption

To qualify for the *learned* professional employee FLSA exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis, as defined in the regulations, at a rate of not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and that also involves the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized, intellectual instruction.

To qualify for the FLSA's *creative profes-*

sional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis, as defined in the regulations, at a rate of not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

See 29 C.F.R. Part 541, Subparts A–D (also setting forth the computer employee exemption).

Employers often forget that fancy job titles are insufficient to confer an exemption on an employee. Instead of relying on titles, employers must review and monitor the *actual duties* of proposed exempt employees. In writing job descriptions, employers should clearly and accurately outline the duties assigned to each category of employee. Once job duties are clearly defined, employers should thoroughly analyze those duties to determine which employees will fall within either the white collar exemptions described above or any of the other exemptions provided by the overtime regulations.

Importantly, the regulations acknowledge that not every employee fits neatly into one of the FLSA's exemption categories. The DOL and the courts, accordingly, have recognized a "combination exemption," such as a hybrid administrative-executive exemption. See 29 C.F.R. §541.708 ("Employees who perform a combination of exempt duties... may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative work and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section."). See also *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 292–94 (4th Cir. 2007) (explaining the combination exemption and the position of the DOL, and noting the salary basis test still must be met).

#### Trend #3—Claims over "Winding Up" and "Winding Down" at Work

The U.S. Supreme Court's unanimous decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)—the infamous "donning and

doffing" case that sparked such catchy headlines as "the donning of a new day"—clarified what constitutes compensable time under the FLSA in some situations. 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 activities, which included donning and doffing protective gear, walking between areas, and having to wait. The Court held: (1) the time the employees spent walking between changing and production areas was compensable; (2) donning and doffing gear that is "integral and indispensable" to employees' work is a "principal activity" under the statute, and therefore, the time the employees spent walking to and from the production floor after donning and before doffing, as well as the time spent waiting to doff, was compensable; and (3) the time employees spent waiting to don the first piece of gear that marked the beginning of the continuous workday was not compensable, as it was two steps removed from productive activity on the assembly line and qualified as a "preliminary" activity.

This decision affects not only meat and poultry processing employers, but nearly 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 ordinarily will be compensable. Plaintiffs' attorneys have filed wage and hour class actions over whether compensable time begins when service technicians leave their homes to make service calls, call center employees boot up their computers and load software, and similar activities. Employers have paid millions to settle cases in this arena already, and more creative claims are on the rise.

#### Trend #4—Working Off the Clock

Employers, as they continue to grow in size and begin to use new technologies, face huge, new challenges in wage and hour compliance. Due to growth, merger and consolidation, many employers operate simultaneously in numerous states, each of which has its own wage and hour laws. Indeed, the main workday issues, such as breaks and meal times, are almost

exclusively a matter of state law. Employers seeking to apply uniform wage payment practices across all states can often miss a new development in one state and, as a result, end up becoming liable for repeated (and expensive) wage and hour violations under state law.

Additionally, as employers operate with new technologies, they face claims over employee time spent outside the regular workday and away from the worksite engaged in duties connected to work, such as responding to customer service issues on mobile phones and e-mailing via handheld devices or home computers. See Jacqueline Bell, *Policing BlackBerry Use: When Nonexempts Are Wired*, Law 360 (Apr. 11, 2008). Employers undertaking cost-cutting measures often have to “do more with less,” which can cause employees to feel they must take work home with them. Also, with employers making flexible work schedules available, to attempt to retain gender equity and a family-friendly workplace, many employees now telecommute. All of these trends raise issues about what and how much of time is really compensable for the non-exempt employee.

#### **Trend #5—Growing Use of Hybrid Actions**

For several years, plaintiffs have been filing claims not only based on FLSA collective action, with the opt in device, but also claims of “class-wide” violations of state law, to be analyzed under Federal Rule of Civil Procedure 23. Under Rule 23, all who fall within a certified class definition are bound by the ultimate outcome, unless they affirmatively opt out. In contrast, Section 216(b) of the FLSA provides, “No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed with the court in which the action is brought.” In other words, participants in an FLSA collective action must affirmatively opt in.

Given this distinction, courts remain divided on whether there exists an “inherent incompatibility” in allowing plaintiffs in an FLSA collective action to also bring state law claims using Rule 23 in the same lawsuit. In parallel lawsuits, the federal court must simultaneously administer opt-in and opt-out procedures, which

can result in procedural difficulties of a large order. Some courts have dismissed parallel state law class action claims based on this incompatibility argument, but others have not. See, e.g., *Woodard v. FedEx Freight East, Inc.*, 250 F.R.D. 178 (M.D. Pa. 2008) (state law claims procedures would be “antithesis” of collective action procedure); but see *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 909 (N.D. Iowa 2008) (the differences between FLSA collective action and class action procedures do not require dismissal of plaintiffs’ state law wage and hour claims). In *Bouaphakeo*, the court noted that the procedural incompatibility argument, as well as an argument that the FLSA preempts parallel state law claims and the attendant procedures, “is particularly popular among district court dockets right now.... No clear or consistent resolution appears imminent, however, and like the question of preemption, there is no controlling authority for the court to rely on.” *Id.* See also *Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d at 449–52 (W.D. Pa. 2007) (opt-in and opt-out procedures create a conflict that requires dismissal of the parallel state claims); but see *Freeman v. Hoffmann-LaRoche, Inc.*, No. 07-1503, 2007 WL 4440875, at \*2 (D. N.J. Dec. 18, 2007) (denying motion to dismiss state law class action based on alleged “inherent incompatibility” with the asserted FLSA collective action); *Robertson v. LTS Management Services LLC*, No. 07-0865, 2008 WL 4559883 (W.D. Mo. Oct. 9, 2008) (denying motion to dismiss state law claims based on incompatibility between the FLSA and Rule 23); *Lindsay v. Government Employees Ins. Co.*, 448 F.3d 416 (D.C. Cir. 2006) (FLSA’s opt-in certification provision did not expressly prohibit the exercise of supplemental jurisdiction over the state law claims of opt-out class members, and thus, the exercise of supplemental jurisdiction was not barred on that basis).

Even when an employer’s incompatibility argument has not succeeded, some courts have ultimately rejected class certification of state law claims due to other concerns, such as pendent party jurisdiction, in which the state law claim would include a much greater number of plaintiffs than the collective action. See *Hasken v. City of Louisville*, 213 F.R.D. 280 (W.D. Ky. 2003);

*Zelaya v. J.M. Macias, Inc.*, 999 F. Supp. 778 (E.D.N.C. 1998). The law is still developing on these issues across the federal courts, and appears fluid.

#### **Strategies for Combating Class and Collective Action Claims**

##### **Vigorously Contest the Conditional Certification**

One of the first steps in an FLSA collective action is for one or more plaintiffs to request a court ruling on certification. This involves a court determination that the named plaintiffs are “similarly situated” to the proposed class of plaintiffs and/or have been subjected to a single policy or practice. Certification of a collective action is normally a two-step process. The first step is known as “conditional certification,” or the “notice stage.” When plaintiffs satisfy this first step, notices are sent to putative, or would-be, class members, giving them the choice to opt in to the collective action. The second certification step—the ultimate certification decision—occurs after the opt-in class has formed. Discovery normally is conducted on both the named and opt-in plaintiffs so that the court can make an ultimate decision on whether collective action is warranted. If the class is too large to accommodate discovery on all opt-in plaintiffs, discovery may need to be taken by representative sample. The same basic issues are relevant here—*i.e.*, those surrounding the “similarly situated” inquiry. At this second stage, courts may re-approve the class, or decertify it. In some cases, a court may find it appropriate to divide the class into smaller subclasses. Obviously, the costs of proceeding through both stages can be significant.

Counsel must act quickly to oppose the plaintiffs’ motion for conditional certification. While the certification burden born by plaintiffs has been described as “fairly lenient,” employers still can defeat or greatly limit the certification at this conditional stage. See *Thompson v. Speedway SuperAmerica LLC*, No. 08-cv-1107 (D. Minn. Jan. 20, 2009) (rejecting conditional certification); *Carlson v. Leprino Foods Co.*, No. 1:05-CV-798, 2006 WL 1851245, at \*5 (W.D. Mich. June 30, 2006) (declining to allow notice to be issued nationally: “the factual differences between the respective plants are so significant that they appropri-

ately warrant trials in separate fora dedicated to their own specific policies, plant organizations, time card systems, and the like”); *Mike v. Safeco Ins. Co.*, 274 F. Supp. 2d 216, 220 (D. Conn. 2003) (employee failed to establish others were similarly situated to form a collective action based on exemption/misclassification claim). In *Carlson v. Leprino*, the court reasoned, “Justice will not be served by forcing multiple distinct factual scenarios onto a Procrustean Bed which aspires to a single plan or policy.” 2006 WL 1851245, at \*5; *but see Gil v. Solectron Corp.*, No. C-07-06414, 2009 WL 88346 (N.D. Cal. Jan. 9, 2009) (granting certification to issue broad notice without evidence of different policies across different locations). Of course, conditional certification is just that—conditional—and a class can later be decertified. But significant costs are saved by defeating a class certification at the outset.

#### **Demand Discovery of Named Plaintiffs Early**

The success of most collective actions will depend upon the ability of a small number of named plaintiffs to demonstrate violations through representative evidence. The factual and legal realities surrounding the named plaintiffs affect the viability of the entire collective action. By deposing the named plaintiffs early, counsel can test the plaintiffs’ evidence, perhaps find new defenses that can help defeat certification, and perhaps gather necessary evidence to file an early motion for summary judgment against the named plaintiffs.

#### **Gather Other Evidence Early to Defeat Certification**

To defeat a motion for certification, a defendant should present evidence that there is no common policy or practice that vio-

lates the FLSA. *See Thompson v. Speedway SuperAmerica LLC*, No. 08-cv-1107 (D. Minn. Jan. 20, 2009) (rejecting conditional certification in part because company presented evidence that it had a policy to pay employees for off the clock work and employees other than plaintiff were, in fact, paid for that time). When appropriate to do so, conducting employee interviews can provide excellent information for submission to a court at this stage, whether through affidavits or otherwise. These same tactics apply to opposing class certification under Rule 23, especially under the commonality and typicality prongs of that analysis.

#### **Focus on Differences in Policies and Duties**

Counsel for employers have successfully opposed certification of collective or class actions by showing that the highly individualized nature of these claims make the certification improper. This can be accomplished by demonstrating how proposed class or collective action members are not similarly situated, and that the potential class or collective action is improper because a fact-specific inquiry is needed to determine violations and/or liability. For example, where plaintiffs seek class certification for claims challenging their classification as exempt employees, it helps to argue that the court must examine evidence of the job duties actually performed by all such employees—through a case-by-case inquiry. Employers and their counsel should gather evidence showing that, whatever a particular plaintiff’s situation may have been, others in the same job category actually performed their duties in such a manner that rendered them properly exempt.

#### **Look for Arguments to Dismiss State Law Claims**

A number of arguments exist against the compatibility of a Rule 23 action with a Section 216(b) action. These arguments boil down to a preemption analysis and the inherent conflict in purpose and procedure. As described above, employers have used these arguments with mixed success. Depending on the jurisdiction, an early motion on the incompatibility of Rule 23 and Section 216(b) actions can successfully dispose of parallel state law claims. The effective litigator will stay attuned to case law developments on these compatibility arguments, as the district courts and circuits work out controlling law in this area.

#### **Conclusion**

Class and collective actions over wage and hour disputes are on the rise and are not going away anytime soon. The claims involve much more than traditional misclassification cases. To prepare for and succeed in defending these claims, employers should know what areas present the most fertile ground for new litigation and some of the strategies that have worked for others. Because the costs of defending a collective action are high, employers should challenge the certification at the earliest possible time—and, in most cases, this means challenging the conditional certification vigorously. Employers and counsel should gather valuable evidence early, even from internal sources, critically analyze the business practices that have been called into question, and research precedent for early dismissal of claims. Also, employers and counsel should seek creative arguments to dismiss duplicative state law claims, as the law is still developing in this area. Employers cannot avoid all wage and hour litigation, but they can be prepared. 