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CLASS ACTION TRENDS REPORT

Wage and hour claims: the class and collective behemoth

XYZ Corp. operates four call centers that provide customer service for mid-size manufacturing and retail clients. (The original call center is at company headquarters in Nevada; another facility was opened in California early on and, more recently, XYZ launched centers in Ohio and Georgia.) The demands of the business require a constant presence on the phones. To ensure seamless service, XYZ requires its customer service specialists to be fully prepared for business when their shifts begin—desks in order, computers booted up, logged in to the customer service software, and ready to take calls—so employees typically arrive 5 to 10 minutes before the start of their shifts. And, because they also must be available for customers through their entire shift, employees can't log off until the proverbial bell rings (and sometimes later, if they are still servicing a customer). XYZ pays the customer service specialists on an hourly basis, from the moment they log in to the moment they log off; its sophisticated timekeeping software tracks the hourly employees once they key into the customer service system and automatically records their standard 30-minute meal breaks.

XYZ's line managers (one team leader for each client company) do an outstanding job training and leading their teams, ensuring that the specialists maintain timely attendance and provide optimal service. Taking calls alongside their subordinates, the managers know full well the demands of the job—the stress of high call volumes, the missed lunch breaks, the frequently irate customers—and it makes them better supervisors. The managers also ensure their teams are meeting productivity goals by tracking call completions and other metrics through daily reports at shift's end. Also during the post-shift period, managers evaluate which problem calls require follow-up and which problem employees require further development, and attend to other administrative duties.

XYZ was in growth mode, gaining new clients and using temp agency workers at the Georgia facility during overflow periods. And then, a setback: the company was hit with a lawsuit alleging that it violated the Fair Labor Standards Act (FLSA) and the overtime laws of four states. The suit proposed a class of customer service specialists who allegedly were entitled to pay for their time booting up and shutting down their computers before and after shifts. The complaint also contended the line managers were wrongly classified as exempt from overtime and improperly denied

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A WORD FROM WILL AND STEPHANIE

Despite a slight drop in filings in 2016, it remains a "bull market" for wage and hour class actions, with no crash in sight. Indeed, the number of wage and hour filings increased 450 percent since 2000 and, aside from the litigations, the U.S. Department of Labor touted more than $266 million in wages recovered for 280,000 workers in fiscal year 2016 alone. The scary news: these statistics do not account for lawsuits filed in state courts under state wage and hour laws.

Wage and hour lawsuits are big business and the stakes in these cases remain quite high for companies. Legal challenges to the applicability of overtime exemptions and the compensability of "donning and doffing" and alleged off-the-clock work fill court dockets across the country. While your company's policies may appear compliant, potentially risky practices and procedures may slip through the cracks. For example, does your company permit nonexempt personnel remote access to the company's computer systems? Does your company have a method to capture such time? Does your company require an employee to boot-up a computer to clock in to work? Does the timeclock capture the amount of time it takes to complete the boot-up? If you answered "yes, no, yes, no" your company looks awfully similar to employers subject to these lawsuits.

The broader the impact of the company procedure or practice, the greater the risk. Although a lone employee working five minutes per day off the clock may appear manageable, if there were 100 other employees subject to the same practice, the exposure increases exponentially. The FLSA's three-year statute of limitations for willful violations and seemingly automatic assessment of liquidated (double) damages quickly turns the liability period into the equivalent of six years. If this were not appetizing enough for the plaintiff's bar, plaintiff's counsel also collects costs and attorney's fees if the jury returns a verdict in the plaintiffs' favor.

Procedurally, the deck appears stacked against employers. With a split in the circuits regarding the enforceability of class-action waivers, relatively low standard to obtain conditional certification, questionable efficacy of offers of judgment, and opt-out procedures for state wage and hour law claims, significant challenges await defendants in these actions.

As legendary UCLA basketball coach John Wooden has said, failing to prepare is preparing to fail. This issue discusses the types of claims filling the dockets (*e.g.*, tip-pooling, donning and doffing, computer boot-up, and off-the-clock work), tips for avoiding these claims, and defense strategies against collective and class action lawsuits asserting wage and hour claims. After you read this edition, you should come away with a better understanding of the risks your company faces in collective and class action claims. We urge you to absorb this material and apply it to find any potential vulnerabilities that a plaintiff's attorney may exploit in a lawsuit. Indeed, preparation is the only way to avoid failure in the defense against class and collective wage and hour claims.

Very truly yours,

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About the ***Class Action Trends Report***

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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overtime compensation. The named plaintiff, a line manager in Ohio, claims she works 10-12 hours of unpaid overtime per week—more than 500 hours per year. But she's a salaried employee—so who's keeping track?

Wage and hour claims make up the bulk of multi-plaintiff employment litigation by a significant margin. The sheer volume of cases, coupled with the size of possible classwide damages, make potential wage and hour violations the proverbial "keeps you up at night" issue for employers, small and large. To make matters worse, the FLSA is complex and its application can be unpredictable. Even the most sophisticated and conscientious employers can find themselves inadvertently facing a potential violation.

... more than most litigation, wage and hour suits are driven disproportionately by the plaintiff's bar.

A growth industry. Once a sleepy New Deal-era statute seemingly destined to lay dormant for decades as a source of litigation, during the past 20 years the FLSA emerged as a "go-to" cause of action once the plaintiff's bar discovered it could make for booming business. There are several reasons why this occurred. As noted, compliance with the statute is challenging. The FLSA also does not require a showing of ill intent to establish a violation. Perhaps most importantly, the FLSA (and most of its state counterparts) has a statutory attorney's fee provision. "Plaintiff's lawyers know they are going to get their fees every time," said Justin Barnes, a Principal in the Atlanta office of Jackson Lewis. "Even if they get just $1,000 for their client, they can ask for $100,000 in fees."

Consequently, more than most litigation, wage and hour suits are driven disproportionately by the plaintiff's bar. Plaintiff's attorneys are keenly aware of the complexities of the statute and the pitfalls awaiting employers. "As a plaintiff's attorney, you know that if you start digging you are going to find something wrong," Barnes said. "And as soon as you find something wrong..."

Wage and hour cases are far more likely to be class cases than single-plaintiff suits. The FLSA's resurgence, coinciding with the general rising tide of class litigation, has left employers increasingly vulnerable.

Different than discrimination. Wage and hour cases differ both in form and substance from discrimination suits. Generally speaking, plaintiffs are not required to exhaust administrative remedies before pursuing wage and hour claims, and collective wage and hour claims brought under the FLSA have distinct procedural mechanisms. Also, on the plus side, they tend to differ markedly in tone.

"Wage and hour cases are generally not about malicious conduct or painting someone as evil," said Paul DeCamp, a Principal in the Washington, D.C. Region office of Jackson Lewis and former Administrator of the U.S. Department of Labor's Wage and Hour Division. "Often the facts presented by the two sides are not fundamentally irreconcilable the way they can be in harassment or discrimination litigation. The factual disputes in wage and hour cases are more often a matter of degree, such as whether an employee spent five minutes or fifteen minutes on a task, or how often an employee had occasion to direct the work of other employees, as opposed to a straight-up credibility dispute in a discrimination case where the jury ordinarily has to sort out which side is lying less. And certainly the stigma associated with a technical and non-willful wage and hour violation, such as failure to include a nondiscretionary bonus in the regular rate, is less than the reputational harm that results from allegations of bias against, or hostility toward, a protected class of workers."

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By the numbers ...

In 2016, of the class action cases that Jackson Lewis attorneys defended, 79 percent were wage and hour class and/or collective actions.

In 2017, 80 percent of the firm's class action cases year-to-date are wage and hour class and/or collective actions.

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Plenty of room for error. Each workday is an opportunity for employers to run afoul of the FLSA. Consider the call center hypothetical above. Its employees *may* be entitled to pay for their pre-shift computer boot-up and post-shift time and other pre- and post-shift duties such as organizing their desks and so on. If their pay was docked for lunch breaks they did not actually take, that would be another violation. If the line managers are found to be nonexempt employees, the company would be liable for any unpaid overtime the managers worked. And if the employer did not maintain records of the manager's hours, it may be hard-pressed to effectively limit the employees' claimed hours.

"I don't know that I have ever come across an employer that I can say with one-hundred percent certainty that it is absolutely doing everything right and is not susceptible to any claims," said Barnes. "It's nearly impossible to avoid an employee claiming he or she did more work than she was paid for. And there are so many nuances to calculating the regular rate of pay under the statute, and other requirements—nuances other than just making sure you're paying for the time you're supposed to pay for."

"I have come to the conclusion that it is literally impossible for a business of any size to be 100-percent compliant with every aspect of wage and hour law to the point where no worker can even plausibly allege a violation," echoed DeCamp. In fact, in 2016, the U.S. Department of Labor (DOL) itself paid out approximately $7 million for misclassifying a large group of its own employees as exempt from overtime, he noted. It was not the agency's first offense. "If even the federal agency tasked with interpreting and enforcing these laws cannot find a way to comply, suffering repeated violations, what chance do mom-and-pop businesses have of being perfect?"

"It's not just the DOL—we see plaintiff's firms get hit with wage and hour claims, too," Barnes added.

Changing targets. Plaintiff's attorneys seem to graze from industry to industry searching for wage and hour violators. Federal and state courts have fielded an onslaught of lawsuits from mortgage underwriters, financial services advisors, insurance brokers, and retail managers alleging they were misclassified as exempt white-collar professionals. Courts have also seen a surge of cable installation technicians, oilfield workers, information technology professionals, truck and ridesharing drivers, and even exotic dancers, to name a few, arguing they are statutory employees and *not* independent contractors (despite the contractual agreements under which they provide their labor). Most recently, bakery delivery drivers appear to be riding this particular litigation wave.

Plaintiff's attorneys look for sectors with common ways of doing business—uniform employment practices that they will argue are unlawful. "You can count on plaintiff's attorneys to look for industries where there are widespread practices that may arguably violate the FLSA," Barnes said. "An industry where it's been done one way—and done that way for 70 years—will be vulnerable." For example, as independent contractor misclassification suits have heated up, the plaintiff's bar has pursued industries that have long utilized this business model, such as firms in construction, transportation, and technology.

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Which FLSA requirements commonly "trip up" well-meaning employers?

"We see a lot of challenges regarding failure to include all necessary elements of employees' compensation (such as commissions, bonuses, and shift differentials) in the regular rate, leading to underpayment of overtime," Paul DeCamp cautioned. "We also see day rate and partial hourly pay arrangements for exempt employees that do not necessarily comply with the rules regarding 'salary basis' compensation."

Those compliance challenges will be addressed in forthcoming issues of the *Class Action Trends Report*.

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"Plaintiff's attorneys will come up with a theory, go out and attack a few companies, see if they can get any traction, see if they can keep it rolling," Barnes explained. "If not, they move on to another industry."

Theories of liability. Generally, employers violate the FLSA if they do not pay nonexempt employees at least the minimum wage for each hour worked, or fail to pay an overtime premium for hours worked over 40 in a workweek. While some theories of liability are tried and true, the plaintiff's bar constantly trolls for new and creative ideas for bringing claims. Alleged violations can come in various permutations.

- *What are "hours worked"?* Does "off-the-clock" time spent walking to and from the assembly line, "donning and doffing" work gear, taking training courses, or waiting to have one's bags checked after clocking out for the day count as compensable time?
- *Who is an "exempt" employee?* Financial advisors, insurance claims investigators, independent salespersons, assistant retail managers, and help desk technicians have systematically challenged their status as overtime-exempt.
- *Where's my pay?* Does the employer "auto-deduct" time for meal periods even when the employee works through the meal break? Is the employer rounding its employees' time to the nearest quarter hour or other increment? If so, to the extent the rounding is benefiting the employer more than the employee, the employer could be on the hook for unpaid time.
- *Where's the rest of it?* Does the employer factor in all forms of compensation, such as commissions and certain bonuses, when calculating the "regular rate of pay" for overtime purposes? Is it properly availing itself of the "tip credit"? Can it include kitchen staff in the servers' tip pool? Are the costs of uniform cleaning dropping hourly wages below the mandatory minimum?
- *Who are "employees"?* In recent years, student interns, college athletes, consignment volunteers, and even independent cosmetics sales consultants have argued they are employees under the FLSA and are entitled to overtime pay.
- *Who is the "employer"?* Are national franchisors "joint employers" and thus liable for wage violations by their franchisees? What about companies that use staffing agencies to operate particular functions of their enterprise?

As the world of work evolves and new technologies emerge, new theories of wage and hour liability unfold. Must employers pay nonexempt employees who respond to their work email from home at night? Are rideshare drivers "employees," or simply app users? How are GPS and other employee tracking devices altering timekeeping practices? Employers must consider the compliance implications of these and future developments.

Moreover, wage and hour cases often involve *multiple* types of claims. "For example," DeCamp said, "an exemption misclassification case will often include a claim for failure to provide meal or rest periods required under state law, especially in California. Independent contractor misclassification cases can also seek recovery for time spent donning and doffing."

As the world of work evolves and new technologies emerge, new theories of wage and hour liability unfold.

State-law claims. In addition to the FLSA, employers must comply with state wage and hour laws and wage payment statutes that may be more protective of employees than the federal law. The minimum wage rate varies by state—sometimes sharply—and more recently, by municipality. Some jurisdictions require that overtime be paid after eight hours in a single workday—not just for hours beyond 40 in a week. Some states require employers to provide additional "spread of hours" compensation if employees work more than 10 hours in a single workday. Allegations that employees were required to work through meal and rest periods without pay are frequently asserted state-law claims. Further, while many states mirror the FLSA's criteria for defining statutory overtime exemptions, some states apply different standards for employers to satisfy. State laws can also impose additional penalties beyond those found in the FLSA. All of this is particularly vexing for employers with operations in more than one state.

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Moreover, where class actions are concerned (again, in the wage and hour context, plaintiffs usually sue on behalf of a putative class), there are important procedural differences when litigating state vs. federal wage and hour claims. Section 216(b) of the FLSA provides for *collective action* suits, in which employees interested in joining the action may affirmatively *opt in*, while state-law wage claims proceed according to standard Rule 23 *class action* procedures, which call for class members to *opt out* if they do not wish to be included. Of course, many lawsuits assert both FLSA and state-law claims, leaving employers to defend a *hybrid* action, having both collective (opt-in) and class (opt-out) claims. The prevalence of each type of suit varies by state.

"It varies significantly depending on where you are," Barnes noted. "In Georgia, for example, you are not going to see Rule 23 wage and hour claims because there are not state wage laws that are very susceptible to bringing Rule 23 claims. However, in California—although we are seeing more FLSA collective actions there of late—you will litigate the vast majority of your wage and hour class actions under Rule 23. Finally, there are those states where you will see hybrid actions. Those are usually states that have state wage and hour laws, but the laws are not as broad as states like California. We see this often in the Midwest."

Procedural differences abound between Section 216(b) and Rule 23 litigation. Most significantly, in Rule 23 cases, the statute of limitations is tolled at the time the complaint is filed, so, Barnes noted, "there is no rush to litigate certification quickly." The opposite is true in FLSA cases (with the court-created, two-stage certification procedure),

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But we weren't clocking them—they're *salaried*!

One of the unique frustrations of wage and hour compliance and litigation is that many employers do not require their exempt employees to track their work time. Indeed, exempt employees will tell you this is one of the particular advantages of *being* exempt. The problem arises, however, when those employees challenge their exempt status and contend they should have been classified as nonexempt—and paid overtime for all those hours they claim to have worked beyond 40 in a given workweek. How can employees establish the overtime hours they've worked? And how can an employer challenge their assertion without the benefit of time records? The employer's failure to track their hours is a distinct disadvantage.

In *Anderson v. Mt. Clemens Pottery*, the U.S. Supreme Court endorsed a burden-shifting approach in such situations that creates challenges for employers. Under this approach, absent records accurately showing exactly how much time was worked (which are rare in the case of misclassification claims), employees can satisfy their initial burden simply by proving that they performed work for which they were not properly compensated and by proving the amount of unpaid work "as a matter of just and reasonable inference." The burden then shifts back to the employer to rebut the claim by producing records or other evidence showing precisely how much time was worked. Without such evidence, the court can award damages based on the estimates provided by the employees even if they are "only approximate."

This problem is present not just in misclassification cases, where the likelihood of *any* time records is rare. It also exists where employees are claiming they were forced to work off the clock, such that the time records the employer *does* have are allegedly inaccurate. The problem is exacerbated because of, quite simply, human nature. Most everyone believes they work hard at their jobs. It is common to overstate or exaggerate the amount of time actually worked. Therefore, guess what happens when an employee is asked to provide an "approximation" of how much time she worked, each week, week in and week out, during what could be a three-year statute of limitations period? An overstated and exaggerated estimate.

Multiply this inflated "approximation" by the number of class members and one can see the problem that it poses for employers. From the employer's perspective, employee-plaintiffs rarely underestimate their claimed hours.

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since the statute of limitations is not tolled until an opt-in plaintiff files the requisite consent form. Consequently, when facing an FLSA collective action, an employer must oppose conditional certification much sooner in the case. "In Rule 23 cases, you often will not fight certification until really late in the case. But in FLSA cases, you have to decide really early on—almost immediately—whether you are going to fight conditional certification and, if so, how to do it."

The call center case. As for the XYZ Corp. litigation about to unfold in our hypothetical scenario above, the company and its defense counsel will grapple with these and other open questions:

- Is the time spent preparing for the day and winding down at day's end so insignificant as to be "de minimis" and not compensable (and is the "de minimis" rule even applicable now)?
- Did *all* the employees work through lunch breaks? Can they all have spent the same amount of time preparing for the workday? If not, are they "similarly situated" for purposes of certifying their class claims?
- Are the line managers engaged in management as their primary duty, or are they mainly customer service specialists, like their subordinates?
- Do the line managers belong in the same class with their subordinates either way?
- How can the employer defend the overtime claims when it classified the managers as exempt, salaried employees—and never tracked their hours?
- How can the customer service specialists prove they worked through lunch breaks?
- Will the line manager's daily reports help or hurt defense of the claims?
- What computer systems did the employees utilize, and did those systems keep records of individual users that may be used to reconstruct potential work time?
- Are the temporary workers XYZ's employees? If so, can they join the putative Georgia class? Are they a viable subclass?
- If XYZ is found to have misclassified its line managers, will the employees be entitled to backpay at a time-and-a-half rate? How far back must it pay, given that the challenged practice has been in place for years?
- Will the call center's own clients get dragged into this lawsuit as joint employers?
- If a class or collective action is certified, how large is the putative class/collective? How many people do we anticipate will join the collective or opt out of the class?
- Are the employees entitled to liquidated (double) damages under the FLSA or additional liquidated damages under applicable state laws?
- If XYZ loses, will it be on the hook for plaintiff's attorney's fees? Could those fees eclipse the amount of money the plaintiffs are seeking?
- Will the company's insurance cover this?
- What steps should I take now to cut off any ongoing exposure?

Moreover, in addition to the federal claim, there may be four distinct state laws to contend with in the litigation—*including* California law, which presents its own unique set of problems.

Mapping the defense strategy. "Certain types of claims, such as those that truly involve a pay practice that affected a broad group of employees in roughly the same way, tend to be strong candidates for conditional or class certification," DeCamp explained. "Understanding the judge, the claim, and the jurisdiction, and how those factors bear on the likelihood of certification certainly informs the defense strategy," he said.

"There are many judges and jurisdictions that have earned a reputation for being plaintiff-friendly with respect to conditional or class certification," DeCamp continued. "We represented a client several years ago in putative class cases in the Eastern District of Virginia and the Southern District of New York. The cases involved very similar claims, and the judge in Virginia denied conditional certification. In the New York case, by contrast, not only was conditional certification essentially a foregone conclusion, but in the initial conference, the court sua sponte asked, "So, there's going to be a Rule 23 class, right?"

Right out of the gate, the strategic defense decisions also require knowing your opponent. "One of the first things I need to do is know who my opposing counsel is," Barnes said. "Once I know who they are, I have a better understanding of what their end goal is. For example, plaintiff's firms differ in their approaches to early settlement, class and collective action certification,

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discovery and motion practice. Some firms wish to explore possible resolution pre-suit or pre-certification while others want to aggressively litigate through the certification stage." Armed with this knowledge, the client can make an informed decision about how it wishes to proceed.

"*When* to oppose class certification is one of many critical strategic decisions that go into defending a wage and hour claim," Barnes explained further. "Even in Section 216(b) collective action cases, there may be reasons *not* to fight certification early on," he notes. "There are situations where I have not fought conditional certification, or only fought conditional certification in part by seeking to pare down the class. However, even if you do not challenge conditional certification early, you are still developing your strategy with an eye to seeking decertification of the class down the road."

"There is no 'one size fits all' when defending a class action," Barnes stressed.

Barnes also said, "I also look to see if the claim is a hot issue right now, or a gray area that people are litigating, because it may signal that this plaintiff's attorney is trying to make some law. It certainly affects the strategy in such a case." (In other words, a plaintiff's firm may be trying to make a name for itself by creating new law or setting favorable precedent. If the firm is leading the charge, it can make itself the "go to plaintiff's firm" on an issue.) Currently, joint employer issues fall under this category—particularly cases involving franchises. For some time, plaintiff's attorneys had been pushing the legal envelope in donning and doffing cases, too. "Donning and doffing was really hot for a while, and a handful of plaintiff's attorneys were really trying to make law on the issue" Barnes explained. When a client is sued by them, we would caution that this particular firm is trying to create the law on this issue, and you should assume this case is not going away quickly."

The other important variable is the client. Each client has unique business considerations to weigh and its own preferences on how to proceed. "Some employers will say, 'If the plaintiff is trying to make law, I want to make law, too. Let's do it—let's make law.'" said Barnes. "Other clients say they do not want to be the first one to make this law, so if there are other similar cases going on that are litigating this issue, we try to slow the case down."

It is critical for employers (and their counsel) to consider the strategic goals that might inform the defense strategy. "Do you have an upcoming acquisition? Are you concerned about publicity? These factors may tip the scale toward early resolution. Is this an important issue to you? Is it a fundamental attack on your business model? There may be something on the horizon for the business that counsels in favor of fighting, or delaying, or an early settlement. It's not always about taking the gloves off," Barnes stressed. "We do what's best for the client."

The decision of whether to enforce an arbitration agreement in a wage suit, even one that includes a class-action waiver, is similarly nuanced. "Often we will try to enforce those agreements," Barnes said, "but there are certainly situations where, in consultation with the client, we may decide not to. If we think we can manage the size of the class, and it makes business sense from a cost perspective not to enforce those agreements, we would not."

The key takeaway: "There is no 'one size fits all' when defending a class action," Barnes stressed. "There is never an instance where the defense should do something *automatically*. It has to be a decision made by the client depending on a variety of factors that are not necessarily limited to the merits of the claims."

A daunting prospect. "Employers that have not faced class or collective wage actions before may find such a situation scary. Even relatively small cases can be very scary," Barnes said. Our aim over the next few installments of the *Class Action Trends Report* is to make the prospect of defending a multi-plaintiff wage and hour suit a bit less daunting. We will discuss the types of collective and class wage and hour claims and the challenges that arise in defending them, and will offer preventive tips and other strategies for employers to ready themselves. ■

The legislation

The Fair Labor Standards Act sets a minimum wage floor, requires that employees be compensated at an overtime premium for all hours worked over 40 in a workweek (unless they fall within one of the broad statutory overtime exemptions), restricts the use of child labor, and—thanks to subsequent amendments to the statutes—prohibits discrimination in compensation on the basis of sex.

The Depression-era remedy, enacted in 1938, has been amended over the years to address the evolving nature of work; however, many observers lament that those modest revisions to the FLSA simply have not kept up with the 21st century workplace. It has left employers fitting the square peg of modern-day work into the round hole of an industrial-era regulatory regime. The complexities of the statute and its enabling regulations, and an eager plaintiff's bar looking to capitalize on inevitable lapses, make the already arduous task of compliance more difficult.

FLSA, Section 216

Federal wage and hour claims are brought under Section 216(b) of the FLSA, which affords employees a private right of action for violations of the law's substantive provisions. It allows employees to recover unpaid minimum wages or overtime compensation due, as well as an equal amount in liquidated damages. It also allows an award of plaintiff's attorneys' fees and costs.

Under Section 216(b), one or more employees may maintain an action "for and on behalf of himself or themselves and other employees similarly situated." The law further 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 in the court in which such action is brought." This language gives us the unique "opt-in" collective action mechanism through which employees pursue FLSA claims on a classwide basis.

Section 216(c) authorizes the Secretary of Labor to bring a court action to recover unpaid minimum wages or overtime on employees' behalf. Once the Secretary files a complaint on behalf of employees, the employees' right to sue is extinguished (unless the Secretary moves to dismiss the action).

FLSA or Rule 23? Or *both*?

Rule 23 of the Federal Rules of Civil Procedure governs class actions brought under state wage and hour laws. (The requirements for certifying a class action under Rule 23 were discussed in detail in previous issues of the *Class Action Trends Report*.) The standard for certifying a collective action under the FLSA is no more stringent than that for certifying a class under Rule 23. But there is a significant difference: Unlike a Rule 23 class, in which employees must affirmatively "opt *out*" of a class litigation if they do not wish to take part in its potential recovery or be bound by a final judgment, the FLSA requires prospective members of a collective action to affirmatively "opt in" to the litigation. Opting in and opting out may appear inherently incompatible, yet plaintiffs often bring "hybrid" federal and state wage and hour claims on a class basis.

The nation's courts are split on whether a plaintiff can bring a Rule 23 class action concurrently with a collective action under the FLSA, and the Supreme Court has yet to address the question. However, the Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeal have held that a state-law Rule 23 class action may be maintained in the same proceeding as an FLSA collective action.

In 2016, the Eleventh Circuit issued its opinion in *Calderone v. Scott*, observing that the purpose behind both collective actions and Rule 23 class actions is to resolve common claims efficiently. When the underlying factual bases for the claims are identical, it would not be convenient or economical to relitigate the state law claims in state court, the appeals court reasoned. While it recognized that the district court below was concerned about the procedural differences between the two types of claims, the appeals court also found nothing confusing about sending two separate notices, or about the other procedural components involved in class or collective actions. Simply, Rule 23 and FLSA actions are not "irreconcilable."

Other courts have disagreed. Those courts have refused to certify a Rule 23 class action based on state wage statutes as well as a collective action based on overlapping FLSA claims because the two were "mutually exclusive" and would create confusion. Consequently, the future of dual-filed class and collective actions remains uncertain. Nevertheless, it appears that circuit courts around the country will start pushing the Supreme Court to review a decision on this issue and resolve the circuit split. ■

Prevention pointer: Money can't buy happiness … but avoiding a wage and hour lawsuit can!

By Vincent E. Polsinelli and Christopher J. Stevens

When it comes to preventing wage and hour class or collective actions, the best offense is a good defense. Wise companies are proactive, and take steps to identify and mitigate risk to prevent these actions before they are ever filed. This "Prevention Pointer," like others before it, is designed to help you avoid these actions. We will identify several mistakes that frequently give rise to such actions, and offer guidance on steps that your company can take to avoid them and/or limit its exposure.

Misclassification of nonexempt employees as exempt. Perhaps the most common setting for wage and hour class actions is when exempt, salaried employees claim they were misclassified and, therefore, are entitled to unpaid overtime. Recently, the hottest flashpoint in this ongoing battle has been over whether employers properly exempted middle-management positions under the executive exemption (*e.g.,* assistant managers, department managers, shift supervisors, team leaders, and the like).

Employers with exempt employees in those roles can, and should, consider taking steps to reduce their risk of facing a class action. These steps may include:

- drafting detailed job descriptions that accurately reflect the duties of these employees
- reviewing those job descriptions periodically to ensure continued accuracy, and
- having employees sign those job descriptions during annual reviews.

Employers also should consider conducting an audit (internal or external) of any positions identified as particularly close calls. When conducting such an audit, maintaining privilege is key. The only way to keep audits away from the prying eyes of future plaintiffs is to conduct them under the protection of the attorney-client privilege. Employers should keep that in mind throughout the audit process.

Misclassification of employees as independent contractors. Federal and state departments of labor have been particularly aggressive on the misclassification front in recent years, seeking to reinforce their positon that nearly all workers are employees (as opposed to independent contractors). Thus, while independent contractor arrangements can often provide significant benefits, they invariably create some risk.

In order to mitigate this risk, companies should scrutinize their independent contractor agreements themselves and, more importantly, the actual economic realities of the relationship. Although the issue can get quite complex, a good starting point is to ask: Does the relationship more closely resemble an arm's length transaction between two businesses or a traditional employment relationship? In the former case, the individual is more likely to be a true independent contractor. In the latter, there is a good chance that a court or jury will find that the person is actually an employee. In most cases, an employer cannot merely "paper over" a relationship with a written agreement.

Joint employment. A recent National Labor Relations Board (NLRB) decision on joint employers sent shockwaves through this area of law. Previously, to be deemed a joint employer, a company must have actually exercised direct and immediate control over the terms and conditions of a particular employee's work. After the NLRB's 2015 decision in *Browning-Ferris Industries*, however, the company's actual exercise of control is no longer dispositive. The mere potential to exercise even indirect control is what matters.

This increased risk of being deemed a joint employer should prompt companies to evaluate the wage and hour practices of business partners with whom they might be deemed joint employers. Companies should review the agreements giving rise to such relationships and either shift or mitigate that risk.

Off-the-clock work. The potential exposure for failing to pay employees for their off-the-clock work has increased drastically as the workplace has become more mobile and

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technology-driven. Gone are the days when an employee could only work from the office. Today, many employees can work (or claim to have worked) from almost anywhere and at any time as long as they have a smartphone or laptop handy. This creates significant risks for employers that may be subject to claims that they failed to pay nonexempt employees for time worked off the clock, even after employees have punched out for the day.

In order to guard against this risk, the best practice is to limit nonexempt employees' access to telecommuting/smartphone technology that could allow them to credibly claim that they worked off the clock. In addition, a strong policy prohibiting off-the-clock work is critical. Employees should be presented with, and asked to acknowledge, this policy at the time of hire. If an employee violates this policy, he or she still must be paid for any time actually worked, but the employee also should be disciplined for the policy violation, and employers should apply progressive discipline if additional violations occur. For their part, front-line supervisors should be trained to detect and report off-the-clock work.

Compensable time. Must an employee be paid for travel time to or from a work assignment? Or the time it takes to get through a security checkpoint once they get there? How about the time that it takes the employee to put on or remove a uniform or safety equipment once they get inside the workplace? These questions have given rise to an increasing number of class actions in recent years.

As one might suspect, the answers are fact-specific. Employers with a workplace that involves such time should analyze carefully whether the time is compensable under the unique circumstances presented.

Tipped employees. Service-industry employees such as restaurant servers, bartenders, and bussers are suing employers with increasing frequency. Such cases can involve a variety of alleged minimum wage violations, including claims that gratuities (or portions thereof) were withheld unlawfully, that a service or similar charge should have been passed along as a gratuity, that gratuities were required to be included in an unlawful tip pool, or that tipped employees spent too much time performing nontipped work. In many such cases, plaintiffs argue that the allegedly unlawful practice invalidates the tip credit, and entitles them to the difference between their actual hourly rate and the minimum wage for every hour worked within the applicable statute of limitations, plus liquidated damages. If accepted, those arguments can result in significant liability.

Service-industry employers such as hotels and restaurants therefore must be increasingly mindful of their wage practices relating to tipped employees. In particular, they must be aware of who is participating in any tip pooling. Employers should ensure that tipped employees are properly informed of the tip-credit arrangement. And employers should be on the lookout for any additional charge tacked on to bills that could arguably be perceived as a gratuity.

State-specific issues. In addition to the overarching issues discussed above, many states also have their own wage and hour laws that serve as additional bases for potential liability, creating even greater risk. In many cases, those rules apply in addition to, and are stricter than, federal law. For example, many states (including New York) impose a higher salary threshold for exempt employees. Many others have unique rules governing call-in pay, meal breaks, spread-of-hours or split-shift pay, and more.

Thus, in addition to being aware of federal law, it is important to be mindful of applicable state and local laws. This is especially so for nationwide or multi-state employers that may operate and are subject to the laws of several different states. Assuming that compliance with the FLSA will suffice is not a sound business practice.

Knowledge is power. An awareness of the applicable laws, both federal and state, and the risks they create is imperative to identifying and addressing potential red flags. It is often said that "knowledge is power," and that adage rings especially true in preventing wage and hour class or collective actions.

Wise employers will work with counsel to identify and mitigate risk before it evolves into litigation. Unlike fine wines, wage and hour issues do not get better with time. If an employer becomes aware of a potential issue (*e.g.*, a potentially misclassified position), ignoring it and hoping that nobody else will notice is never a winning strategy.

Be on the lookout for additional prevention pointers on these wage and hour quandaries in coming issues of the *Class Action Trends Report*.

Only in California

While the Fair Labor Standards Act establishes federal wage and hour requirements, state law typically offers more generous employee protections beyond the federal "floor." California, in particular, imposes greater compliance challenges for employers, which means a much greater risk of significant liability for violations of the state's statutory provisions. Indeed, it is perhaps in the wage and hour area where California most earns its reputation as an unabashedly pro-employee state.

The state's wage and hour mandates and wage payment requirements are embodied in the California Labor Code and Wage Orders established by the Industrial Welfare Commission. Additional statutory enactments, such as the Business and Professions Code and Private Attorneys General Act (PAGA), make damages for violations of those provisions much more costly.

"In most states, former employees file FLSA and state-law based overtime claims," notes Cary Palmer, a Principal in the Sacramento office of Jackson Lewis. "However in California, FLSA claims are rarely alleged because of the state's more onerous daily overtime rules, and former employees often allege a long list of other claims, including PAGA claims, wage statement violations, and meal and rest period violations."

California's burdensome minimum wage and overtime provisions will be discussed in coming issues of the *Class Action Trends Report*. This issue looks at some of the *other* uniquely cumbersome wage and hour mandates that set California apart. A breach of these provisions invites a cause of action unto itself—usually brought on a representative basis. Moreover, these provisions typically are used by plaintiff's attorneys to obtain information when pursuing claims alleging substantive wage violations.

Wage notices. At the time of hire, employers must provide California nonexempt employees a written Wage Theft Prevention Act notice. Among other information, the notice must include specific details about:

- rate(s) of pay
- designated pay day
- the employer's intent to claim allowances (meal or lodging allowances) as part of the minimum wage
- the basis of wage payment (by hourly rate, shift, day, week, piece, and so on)
- applicable rates of pay (including overtime rates), and
- paid sick leave entitlements.

Employers must provide a new notice within seven days following any change to the required information, unless the information is shown on the employee's pay stub for the following pay period or other legally required written notice. Notice must be provided in the language that the employer normally uses to communicate employment-related information to the employee.

A separate statute requires employers to provide most employees who receive commissions with a signed written commission plan.

Moreover, every paycheck must be accompanied by an itemized wage statement. Labor Code Section 226(a) spells out the information that must be included on wage statements. Labor Code Section 226.2 requires piece rate

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Class action alert!

Employers must be diligent in ensuring their wage statements comply with the law. Plaintiff's attorneys almost automatically include a claim under Section 226 when they file a California wage and hour suit alleging underlying wage violations, *i.e.*, failure to pay overtime. By asserting this cause of action in their class action complaint, plaintiffs are provided with the ability to access written itemized wage statements (more commonly known as pay stubs) of:

- a sample of putative class members, regardless of whether a class action is certified; and
- the entire class if a class action is ultimately certified.

At first glance, disclosing pay stubs may not seem problematic except for the time and expense associated with doing so. However, once the plaintiff's attorneys are in possession of those pay stubs, they will scrutinize them to determine if they are noncompliant on their face, which can create large penalties for an employer.

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compensation to be set forth. In addition, the California paid sick leave law requires employers to include the amount of available paid sick leave on the wage statement or other written statement provided to employees with each regular paycheck.

Deductions from pay. It is illegal to dock an employee's pay for mistakes that cause a monetary loss to the company, unless the employer is prepared to prove dishonesty or "gross negligence." Even then, the deduction might be subject to challenge in court. An employer also may not unilaterally offset debts owed by an employee to the employer. Use-it-or-lose-it vacation policies are unlawful as well; however, employers may place a "reasonable" cap on the amount of vacation time an employee may accrue.

California's Wage Orders contain a number of other oddball mandates that can readily trip up employers ...

Stringent requirements must be met before an employer may make any deduction from wages, and California's Division of Labor Standards Enforcement has opined that deductions from final wages are not permitted.

When to pay. California Labor Code Section 204 sets strict limits on *when* employers are required to pay wages. Generally, for work performed between the 1st and 15th of a month, wages of nonexempt employees must be paid by the 26th. Wages for work performed between the 16th and the end of the month must be paid by the 10th of the following month.

California law permits weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period. The California Supreme Court has ruled that employers must pay earned commissions in accordance with Section 204's requirements and not monthly, as had been a generally accepted practice.

If an employee quits without notice, all accrued wages are due within 72 hours. Employees who provide notice are entitled to receive accrued wages at the time of termination or within 72 hours after notice, whichever occurs later. Fired employees are entitled to their accrued wages *immediately*. "Accrued wages" include earned but unused vacation and personal time and so-called floating holidays. It also may include bonus, profit sharing, or commission payments depending upon the particular arrangement between the employer and the employee.

An employer that fails to pay wages when due at termination also may be liable for "waiting time" penalties, that is, one day of wages for every day the employee has to wait to get paid, up to a maximum of 30 days.

***How* to pay.** If an employer uses a check or other "instrument" to pay California employees, those employees must be able to cash that check without having to pay any fee at some place of business in the state, and the name and address of that business must appear on the face of the check (not on the pay stub, but on the check). Be careful even if you use a California bank to issue payroll; many banks will charge a fee to cash a paycheck even if drawn on an account with that bank if the person cashing the check does not have an account with that bank. Direct deposit agreements may be the way to go, but they must be voluntary.

Other mandates. California's Wage Orders contain a number of other oddball mandates that can readily trip up employers—and which entrepreneurial plaintiff's lawyers have successfully unearthed to extract classwide monetary concessions. The most recent example is the Wage Orders' "suitable seating" requirements, which say employees "*shall* be provided with suitable seats when the nature of the work reasonably permits the use of seats." Whether the nature of work permits employees to be seated has been the source of much litigation over the past several years (particularly in lawsuits against retail employers), even drawing the California Supreme Court's attention. ■

Regulatory roundup

Unlike discrimination claims, plaintiffs bringing wage claims under the Fair Labor Standards Act are not required to exhaust their remedies with an administrative agency before filing suit. However, the presence of the U.S. Department of Labor is still keenly felt, in the enforcement actions that the agency brings on behalf of workers in targeted industries and in the significant regulatory role that it plays, impacting *all* covered employers.

The Trump DOL

The DOL promulgates regulations (and "sub-regulations") to implement the FLSA's provisions, offers guidance to employers in interpreting the law, and seeks to advance its legal position on wage and hour issues by filing "friend-of-the-court" or amicus briefs in cases being litigated in the courts. The agency veers in more or less employee-protective directions with each new administration. During the next few years, we expect to see an unusually dramatic swing of the pendulum, as the Trump administration seeks to temper what it perceives as the pro-worker excesses of the previous administration.

"Under the Obama administration, we had a Department of Labor that not only was active in bringing enforcement actions and filing lawsuits in many cases, it was also very active in appearing as amicus in a lot of cases and trying to advance its position that way," said Justin Barnes, a Principal in the Atlanta office of Jackson Lewis. "It will be interesting to see how that changes under President Trump. I think we are going to see a DOL that is more focused on educating companies and increasing compliance as opposed to aggressive enforcement," Barnes predicted.

During the next few years, we expect to see an unusually dramatic swing of the pendulum, as the Trump administration seeks to temper what it perceives as the pro-worker excesses of the previous administration.

A shift in enforcement approach is usually expected with a shift in the political winds. However, it becomes hard on employers when the DOL revises its substantive position on specific legal questions under the FLSA and its enabling regulations. When the agency changes its legal stance on whether a particular job falls within one of the white-collar overtime exemptions, for example, or in setting the parameters for applying a tip credit to employees' minimum wage rate, it is that much harder for employers to comply with an already complicated area of law.

Is deference due?

Moreover, the DOL's flip-flopping has made the federal courts uneasy over whether to defer to the agency's interpretation of its own rules. "I think this is something we are going to see the Supreme Court take up in the next five years," Barnes said. "I expect the Court to seriously reconsider the concept of deference to government agencies." (Newly seated U.S. Supreme Court Justice Neil Gorsuch has criticized judicial deference to agency rulemaking as regulatory "whipsawing.")

Informal guidance. In its 1944 *Skidmore v. Swift & Co.* decision, the U.S. Supreme Court held that the DOL's "rulings, interpretations and opinions," while not controlling on the courts, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Courts grant *Skidmore* deference when reviewing the agency's sub-regulatory guidance—not the formal rules enacted through "notice and comment" rulemaking, but opinion letters and other informal interpretations of the law. Where the DOL has sought to do too much through informal means, there has been pushback. For example, in 2014, the U.S. Court of Appeals for the Sixth Circuit rebuffed the agency's attempts at "regulation by amicus," holding in *Smith v. AEGON Companies Pension Plan* that a DOL amicus brief did not warrant *Skidmore* deference—even though both the Supreme Court and the Sixth Circuit had accorded such deference to amicus briefs in the past. Why? In part because the DOL's current interpretation

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of the issue—venue selection clauses under ERISA—was an "about-face" from its earlier position. "An agency's mood is not entitled to *Skidmore* deference," the appeals court reasoned. (The amicus briefs did not merit higher "*Chevron*" deference either, which is reserved for when an agency is "acting with the force of law" by issuing formal rulemaking.)

No rulemaking. In one of the most significant cases in decades for federal regulatory agencies, a unanimous Supreme Court in *Perez v. Mortgage Bankers Association* held that a DOL Wage and Hour Division Administrator Interpretation reversing course on the agency's position on the exempt status of mortgage loan officers was a valid agency interpretation, even though the guidance was issued without undertaking notice-and-comment rulemaking. (The emergence of "Administrator Interpretations" itself reflected a departure by the Obama administration from the issuance of opinion letters, which employers had commonly sought from the agency when the law was unclear on an issue.) The Administrative Procedure Act (APA) does not require federal agencies to engage in formal rulemaking when merely promulgating such "interpretive rules," the High Court concluded. The Justices rejected the notion that the guidance was arbitrary and capricious because it contradicted opinion letters issued by the agency in 1999 and 2001, as well as a 2006 opinion letter that was issued after the DOL revised its "white collar" regulations in 2004, but was since withdrawn.

In a concurring opinion, though, Justice Antonin Scalia noted that the APA's exemption of interpretive rules from the notice-and-comment mandate was "meant to be more modest in its effects than it is today," and that "by a grant of deference to interpretive rules, agencies have used them not just to advise the public, but also to bind them." Therefore, these rules *do* have the force of law, Scalia argued. Justice Clarence Thomas, writing separately, also bemoaned what he characterized as "a transfer of the judicial power to an executive agency" by the "steady march toward deference."

Justice Antonin Scalia noted that the APA's exemption of interpretive rules from the notice-and-comment mandate was "meant to be more modest in its effects than it is today..."

Flip-flop. A year later, however, in *Encino Motorcars, LLC v. Navarro*, the Supreme Court refused to grant *Chevron* deference to the DOL's latest iteration of its regulation on the exempt status of automobile service advisors. The 2011 version of the regulation was inconsistent with the agency's longstanding earlier position, and the industry had significantly relied on that prior interpretation.

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DOL withdraws 'guidance' on independent contractors, joint employers

Labor Secretary R. Alexander Acosta offered employers welcome relief when he announced on June 7 that he was withdrawing the Department of Labor's informal guidance on joint employment and independent contractors, issued in 2015 and 2016 under the Obama administration.

With the many changes wrought by the growing "gig" economy and the rise of the "fissured" workplace (in the parlance of Dr. David Weil, former Administrator of the DOL's Wage and Hour Division under President Obama), the DOL said it wanted to ensure that workers continued to be protected under laws that did not envision the contemporary employment relationships that exist today. In Administrator's Interpretation No. 2015-1, the DOL came down strongly on the side of

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Consequently, the revised rule would not carry the force of law without the agency providing a reasoned explanation for departing from its earlier position, as set forth in an opinion letter issued in 1978, and a 1987 amendment in the DOL's Field Operations Handbook.

When an agency issues a regulation for a statute that it enforces, the agency's interpretation receives deference if the statute is ambiguous and the agency's interpretation of the statute is reasonable. However, if that regulation is "procedurally defective," deference is not due. In this case, the DOL offered little rationale for the decision to abandon its decades-old practice of treating service advisors as exempt. Agencies are free to change their existing policies, the Supreme Court observed, but they must recognize that longstanding policies have "engendered serious reliance interests that must be taken into account." The "unexplained inconsistency" in DOL policy was arbitrary and capricious, so it was not entitled to *Chevron* deference.

Inroad for the defense. DOL flip-flopping can be a minefield for employers trying to comply with the FLSA's mandates. As a defense strategy, employers are finding it increasingly fruitful to challenge the DOL regulations head-on in light of the agency's changing interpretations. "We have seen lots of cases in which defense counsel flat-out questioned the validity of the DOL's regulations or positions," Barnes said. Judges are increasingly receptive to these arguments, as the ground continually shifts for employers. ■

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finding an employment relationship as opposed to an independent contractor arrangement, taking the position that most workers are employees under the Fair Labor Standards Act's "economic realities" test. Administrator's Interpretation No. 2016-1 broadened the definition of "joint employment," using the same expansive "suffer or permit to work" language found in the FLSA's definition of employment. That standard was even broader than the common law test or the test set forth under the National Labor Relations Act. Its aim: to ensure "that the scope of employment relationships and joint employment under the FLSA… is as broad as possible."

Opponents of these efforts viewed the DOL as overreaching, contending the agency was exceeding its statutory authority and erecting potential barriers to job growth. Opposition to the policies embodied in the sub-regulatory guidance documents sparked several rounds of congressional committee hearings. Observers were anticipating that Acosta would withdraw the DOL's Obama-era directives and restore the "independent contractor" and "joint employer" standards that have long been in effect.

"The withdrawal of the Administrator's Interpretations on joint employment and independent contractor misclassification is probably best seen not as a fundamental shift in substantive legal doctrine or the positions that the DOL will take in any given investigation, but rather as a sign of new overall enforcement priorities and a willingness to revisit positions taken during the previous administration," said Paul DeCamp, a Principal in the Washington, D.C. office of Jackson Lewis, and the former Administrator of the Wage and Hour Division under President Bush. "Secretary Acosta's action signifies a shift in emphasis away from novel and exotic theories, such as the fissured workplace, to broaden the employment relationship and toward a more traditional understanding of responsibility for wage and hour issues."

On the radar

As we settle into the first year of a new presidential administration with new leadership at the helm at the Department of Labor, Equal Employment Opportunity Commission, and National Labor Relations Board, there is much in flux. Supreme Court Justice Neil Gorsuch has taken his seat on the bench, breaking an ideological stalemate as the High Court is poised next term to take up class arbitration waivers and other important issues.

What does this mean for the DOL's overtime rule, currently "on ice" in federal court? Will the EEOC continue to focus its resources on systemic litigation? Will the NLRB soon reverse its controversial "joint employer" standard? Will the High Court emphatically reaffirm the unfettered right of employers and employees to forego classwide arbitration? Stay tuned. ■

Up next ...

Continuing our focus on class and collective action wage litigation, our next issue of the *Class Action Trends Report* will discuss minimum-wage requirements under the Fair Labor Standards Act and state laws, and the types of minimum-wage violations typically asserted by plaintiffs.

- Who is entitled to a minimum wage?
- What time is compensable?
- How might employers unwittingly pay their workers less than the statutory minimum hourly rate?

Practical tips for avoiding common pitfalls and, failing that, strategies for defending class minimum-wage claims will be highlighted.

STAY IN THE KNOW!

Don't wait until our next issue of the *Class Action Trends Report* for the latest developments in class and collective actions. Jackson Lewis, **Employment Class and Collective Action Update** blog will keep you apprised and enlightened on what's happening in this critical area of the law.

Also visit Jackson Lewis' **Wage & Hour Law Update** blog for recent news and expert analysis.