



# ***The Wage & Hour Collective and Class Litigation Webinar Series for Wage & Hour Blog Subscribers***

***Drafting the Blueprint:  
Modeling An Effective &  
Efficient Defense to Collective  
and Class Actions***



# Introduction

- **The *Wage & Hour Collective and Class Litigation* Webinar Series for Wage & Hour Blog Subscribers**
  - ▶ [www.wagehourlitigation.com](http://www.wagehourlitigation.com)
- Today's initial webinar: ***Drafting the Blueprint: Modeling An Effective & Efficient Defense to Collective and Class Actions***
- Second webinar (May 2): ***Fighting to Win: Deconstructing Conditional & Class Certification***
- Third webinar (June 6): ***"Winning" the Case: The End Game***



# *Wage & Hour Collective and Class Litigation* (Law Journal Press, 2012)

- *Wage & Hour Collective and Class Litigation*
  - ▶ Dedicated to substantive and procedural issues critical to effective defense strategies
  - ▶ The definitive treatise on this important subject
- Our panelists today are the 3 co-authors, partners
  - ▶ Noah Finkel – Chicago Office
  - ▶ Brett Bartlett – Atlanta Office
  - ▶ Andrew Paley – LA/CC Office
- They were assisted by ~100 Seyfarth Shaw lawyers who were authors of/contributors to the book's 27 chapters
- The treatise is available through Law Journal Press,  
[http://www.lawcatalog.com/product\\_detail.cfm?productID=17136&sestlist=0&return=search\\_results](http://www.lawcatalog.com/product_detail.cfm?productID=17136&sestlist=0&return=search_results)



# ***Drafting the Blueprint: Modeling An Effective & Efficient Defense to Collective and Class Actions – What We Will Cover***

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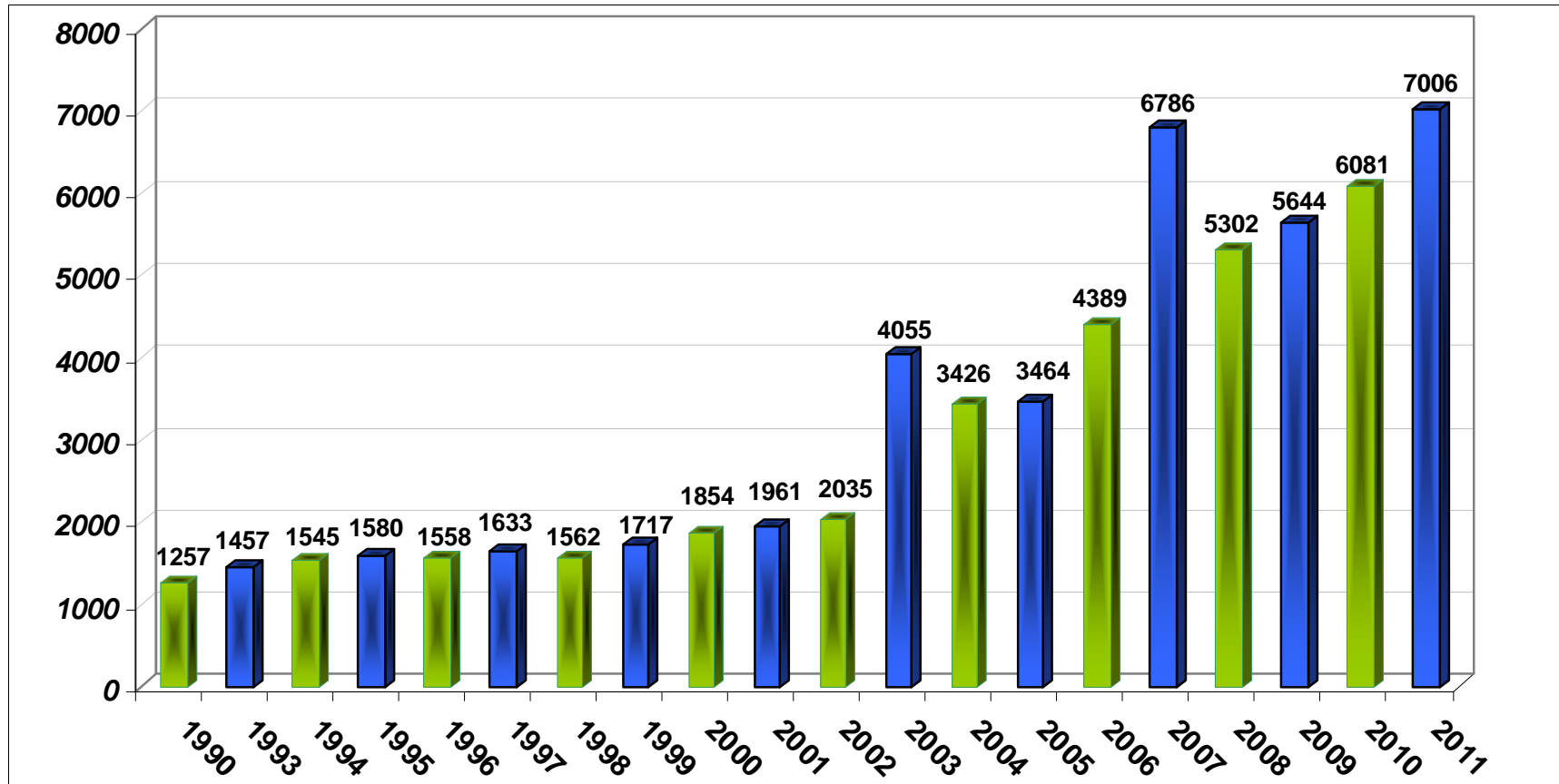
- The Wage & Hour Litigation Landscape
- Initial Case Assessment
- Establishing the Business Objectives and Creating the Strategy Aimed at Achieving It
- Benefits & Risks of Early Resolution
- Pros and Cons of Arbitration
- Discovery Concerns -- The Importance of a Plan



# Overview of the Wage & Hour Litigation Landscape



# Current Trend of Litigation: FLSA Cases in Federal Court : 1990 – 2011





# Reasons For The Dramatic Increase In Wage & Hour Litigation

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- Increased attention to wage & hour laws from regulatory amendments and court decisions helpful to plaintiffs
- Low standard for “conditional” certification for FLSA collective actions
- Ambiguities and inconsistencies in the law result in vulnerability to lawsuits challenging classifications, pay practices, payroll calculations
- Difficulties applying 1938 statute to 21<sup>st</sup> Century workplace
- Large settlements fuel plaintiffs’ lawyers’ interest (attorney’s fees)
- Liquidated and multiple damages



# Predictive Analysis of Future Trends: Where Are We Headed?

- Bad news
  - ▶ Likelihood that wage & hour lawsuits will continue to increase
  - ▶ The number of sophisticated plaintiff lawyers filing wage and hour cases has increased and will continue to increase
- Good news
  - ▶ With appropriate planning and effective implementation of an objective-oriented strategy, employers can optimize their chances of defending these cases at the lowest possible cost and burden.
- Impact of recent Supreme Court rulings
  - ▶ *Wal-Mart v. Dukes* – Made it more difficult for plaintiffs to obtain class certification and should have same effect on collective certification
  - ▶ *AT&T Mobility v. Concepcion* - Increased the chances that arbitration agreements will be enforced on an individual basis
  - ▶ *Christopher v. SmithKline* -- (1) weight, if any, due to USDOL opinions in amicus briefs; (2) scope of outside sales exemption





# Initial Case Assessment



# Evaluating the Complaint

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- **The Basics** – Jurisdiction, Judge, & Plaintiff's Counsel
- **Plaintiff** – What do you know about him / her?
- **The Law** – FLSA Claim / State Law Claim / Hybrid
- **Merits** – State A Claim? Exemption? Off-the-Clock? Meal Break? Overtime Calculation?
- **Factual Grounds** – Are the stated facts sufficient to support the merits claims?
- **Collective / Class Action Allegations** – Too vague to survive? Too broad? Can it be limited to a facility, a state, or a region? Or is it national in scope?



# Preliminary Exposure Analysis

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- Rough analysis. Not intended to be perfect and detailed
- Key Factors
  - ▶ Statutes of limitations
  - ▶ Misclassification or “off-the-clock” case
  - ▶ Number of workweeks / people at issue
  - ▶ Number of hours at issue
  - ▶ Rate(s) of pay



# Preliminary Exposure Analysis: Statute of Limitations

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- **Rule 23** – Applicable statute of limitations tolls as of complaint date
- **FLSA** – Class members' opt-in dates
  - ▶ Plaintiff's request for tolling



# Preliminary Exposure Analysis: Type of Case

- FLSA Misclassification
  - ▶ Time and a half for hours over 40, using 40 as the divisor to determine regular rate
  - ▶ Half-time, using fluctuating hours to determine regular rate (majority of courts use this method)
- Off-the-clock: Time and a half for hours over 40
- Other: Sometimes the time of time and a half has already been paid



# Preliminary Exposure Analysis: Number of Workweeks / People at Issue

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- Number of workweeks at issue provides the more accurate estimate of exposure
- Number of people provides a less accurate estimate, but can be discounted based on tenure averages
- Each will over-estimate unless discounted for weeks when no overtime would be worked
- USDOL, Wage and Hour Division, Uses 40 weeks out of a 52-week year (or approximately 77%)
- In FLSA cases, opt-in participation rates vary



# Preliminary Exposure Analysis: Number of Overtime Hours at Issue and Employees Rates of Pay

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- Number of Hours at Issue
  - ▶ Early Stage: Use 2.5, 5, 10, 15 overtime hours, unless more exact estimate is available
  - ▶ Later Stages: Determine more accurate estimates derived from data points and discovery
  
- Employees Rates of Pay
  - ▶ Averages are okay
  - ▶ Actual is better



# Preliminary Exposure Analysis: Example

- Weekly Salary = \$800 Average Weekly Hours = 45

- Misclassification Case Using Time and a Half:

$$\mathbf{\$800/40 = Regular Rate of \$20}$$

$$\mathbf{\$20 \times 1.5 = Overtime Rate of \$30}$$

$$\mathbf{5 \times \$30 = Weekly Overtime Pay of \$150}$$

- Misclassification Case Using Half-Time:

$$\mathbf{\$800/45 = Regular Rate of \$17.78}$$

$$\mathbf{\$17.78 \times .5 = Overtime Rate of \$8.90}$$

$$\mathbf{5 \times \$8.90 = Weekly Overtime Pay of \$44.50}$$

- Half-Time = Less than a third





# Fact Investigation

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- Who is the plaintiff?
- What was his / her position?
- What were his / her duties?
- How was he / she paid?
- Where did he / she work?
- Who were his / her supervisors?
- What other factors differentiate him from putative class members?
- How many putative class members are there?
- What are the meaningful factors that actually differentiate each class member from the other?



# Document Preservation

- Determine the proper scope of the duty to preserve including what information, systems and persons may be relevant. Consider the following:
  - ▶ Scope of preservation: Rule 23 versus FLSA
  - ▶ HR/Admin/Class Managers – Personnel files, payroll records, time records, etc. Emails and documents regarding HR practice, procedure, and issues, training, etc.
  - ▶ Security/IT – System Logs (i.e. log-in and logout records from various systems used), phone or call center records, security videos, etc.
  - ▶ Class Members – Emails among class members or with managers/supervisors/HR, electronic documents on PC's, network servers, and other media, logs on their PC's (web browser history, log in/out, etc.), and daily work product
  - ▶ Structured Data – Information from business applications used by class members (data exports, reports, etc.)
  - ▶ Third Party Information – Documents held by others (ADP, claims admins, etc.)
- Identify best method to preserve each document source identified above
- Follow-up early with opposing parties regarding scope, objections, issues, costs and burdens, and sampling for preservation



# Establishing the Business Objective and Creating the Strategy Aimed at Achieving It



# The Business Objective: Ensuring that Counsel & Client Are On the Same Page

- What is the employer's goal?
  - ▶ Maintaining optimal business practice?
  - ▶ Recruiting and retention of top employees?
  - ▶ Minimizing risk?
  - ▶ Minimizing publicity?
  - ▶ Minimize total costs of litigation?
  - ▶ Minimize disruption?
  - ▶ Reducing likelihood of future suits?
  - ▶ Minimizing costs of business practices?
- Client and counsel will need to prioritize -- and re-prioritize -- these goals



# Case Strategy Tailored to Fulfill Business Objective

- What is the exit strategy?
  - ▶ Litigate to the end,
  - ▶ Or settle
    - Settlement is often a matter of when and how, not if
    - The litigation is a means to that end, and often determines the degree to which a settlement is favorable to the employer
- All litigation activities must be undertaken with that in mind
- This can affect several things
  - ▶ Budget
  - ▶ Extent to which oppose certification
  - ▶ Whether certain motions are filed
  - ▶ Whether to engage in a declaration campaign



# Early Resolution



# Is Early Resolution Viable or Overly Risky?

- Benefits
  - ▶ Minimizes disruption among:
    - management
    - employees
  - ▶ Reduces costs and attorneys fees
  - ▶ Plaintiffs' counsel make lower investment
  - ▶ May prevent Plaintiffs' counsel from discovery efforts that could lead to further claims



# Is Early Resolution Viable or Overly Risky?

- Risks
  - ▶ Become an easy target for future cases
  - ▶ Could be forced into change in business practices
  - ▶ May pay more than necessary due to:
    - lack of investigation and discovery
    - perception by Plaintiff's counsel of not having confidence in its defense
    - inability to capitalize on low opt-in rate
  - ▶ If too early and without enough discovery, court may not approve settlement





# Strategies to Secure a Favorable Early Resolution

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- Before mediation
  - ▶ Early investigation
  - ▶ Discovery to gain leverage
  - ▶ Strategic timing on rollout of strongest defenses
  - ▶ Look at the case backwards
- During and after mediation
  - ▶ Think creatively on scope of and procedure for settlement



# Pros and Cons of Arbitration



# Class and Collective Action Waivers

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- Arbitration agreements and class / collective action waivers may be an effective way to avoid class actions
- Enforcement of waivers is not guaranteed
- Potential pitfalls
  - ▶ Class arbitration
  - ▶ Converting an opt-in action to an opt-out action
  - ▶ Multiplicity of individual suits



# Recent Supreme Court Decisions

- *Stolt – Nielsen S.A. v. Animalfeeds* (2010)
  - ▶ Reaffirmed FAA’s primary purpose of enforcement of arbitration agreements according to their terms
  - ▶ Class arbitration cannot be compelled when agreement is silent on issue and parties agreed that there was no agreement on this question
  - ▶ Emphasized that intentions of the parties control
  - ▶ Class arbitration may not be compelled absent evidence that the party agreed
- *AT&T Mobility v. Concepcion* (2011)
  - ▶ FAA preempts CA law barring enforcement of class action waivers in consumer cases
  - ▶ State law or policy requiring availability of class arbitration interferes with the “fundamental attributes of arbitration” and is inconsistent with FAA
  - ▶ Can still challenge arbitration agreements on grounds of unconscionability
- *CompuCredit Corp. v. Greenwood* (2012)
  - ▶ Claims under Credit Repair Organization Act
  - ▶ Arbitration agreements must be enforced according to their terms “even when federal statutory claims are at issue”
  - ▶ FAA’s mandate can only be “overridden by a contrary Congressional command”



# Lower Court Decisions

- Most federal decisions are faithful to *Concepcion* and *Stolt-Nielsen* but application of *Concepcion* to collective actions is a mixed bag
  - ▶ *Raniere v. Citigroup, Inc.* (S.D.N.Y. 2011)
    - Collective action waiver unenforceable because it would prevent plaintiffs from vindicating substantive statutory rights
    - “Waiver of the right to proceed collectively under the FLSA is per se unenforceable”
    - Collective actions are a “unique animal”
    - Because agreement had a “blow up” provision stating that if the collective action waiver was found unenforceable, the action shall proceed in court, rather than arbitration, the Court declined to order class arbitration
  - ▶ *LaVoice v. UBS Financial Services, Inc.* (S.D.N.Y. 2012)
    - No absolute right to a collective action
    - Statutory rights would not be precluded by enforcement of class action waiver



# NLRB's *D.R. Horton* Decision

- Section 7 of the NLRA invalidates a class action waiver in a workplace arbitration agreement
- Arbitration agreement unlawfully barred employees from engaging in “concerted activity” protected by the NLRA
- Ruling does not require class arbitration as long as the agreement leaves open a judicial forum for group claims
- Being challenged on appeal
- Good news – several district courts have refused to follow *D.R. Horton*
- *Johnmohammadi v. Bloomingdales, Inc* (C.D. CA 2012)
  - ▶ Tentative decision
  - ▶ Class action waivers are enforceable where voluntary and not a condition of employment
  - ▶ Employees allowed to opt out of arbitration provision; no threats of retaliation
  - ▶ Suggests ruling might be different if arbitration agreement imposed through coercion or if employee did not understand agreement
- *Grabowski v. C.H. Robinson Co.* (S.D. CA 2011)
  - ▶ Class action waiver does not violate Section 7 of the NLRA
  - ▶ Reads Section 7 narrowly to focus on employee’s right to participate in union organizing activities



# Arbitrator Decisions

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- Arbitrators clause construction and interpretation may permit class arbitration
  - ▶ Disregarding Stolt-Nielsen and ordering class wide arbitration of Title VII claims despite silence on class arbitration
- Possible worst – case scenario of moving to compel putative opt-in collective action to arbitration, with result of opt-out class arbitration, deters some employers from moving to compel arbitration



# California Decisions

- California state appellate courts have demonstrated reluctance to apply *Stolt-Nielsen* and *Concepcion*
- *Brown v. Ralphs Grocery Co.* (2011)
  - ▶ Right to pursue representative actions under PAGA may not be waived in arbitration agreement
  - ▶ PAGA creates a public right – i.e. plaintiff “acts as a proxy or agent of state labor law enforcement agencies, representing the same legal right and interests of those agencies”
  - ▶ Remanded to the trial court to determine whether to sever the unenforceable PAGA waiver provision or whether to refuse to enforce the entire arbitration agreement
- *Mayers v. Volt Management Corp.* (2012)
  - ▶ Disability and age discrimination suit
  - ▶ Arbitration provisions in employment handbook was unconscionable and unenforceable because plaintiff did not receive a copy of the AAA rules





# California Decisions

- Federal courts are more likely to enforce arbitration agreements even as to non-class claims
- *See e.g. Quevedo v. Macy's, Inc.* (C.D. CA 2011)
  - ▶ PAGA claims are subject to arbitration class / collective waiver
- *Grabowski v. C.H. Robinson Co.* (S.D. CA 2011)
- *Kilgore v. KeyBank* (9<sup>th</sup> Cir. 2012)
  - ▶ Public injunctive claims under CA Unfair Competition Law subject to arbitration
  - ▶ Rejects unconscionability argument:
    - arbitration clause in a conspicuous place; individuals allowed to opt out; clear instructions on how to opt out; plain language used; individuals warned to read agreement carefully before signing



# Pros and Cons of an Arbitration Program

- Pros
  - ▶ Avoid class / collective actions
  - ▶ Confidentiality
  - ▶ May be able to limit discovery in some jurisdictions
  - ▶ Faster
  - ▶ Arguably less expensive
  - ▶ Avoid jury trials
- Cons
  - ▶ Uncertainty over ability to enforce
  - ▶ Possibility of class arbitration
  - ▶ Possibility of converting an opt-in collective action into an opt-out proceeding
  - ▶ Potential multiplicity of individual suits
  - ▶ Difficulty in obtaining dismissal on papers
  - ▶ Arbitrators may split the baby
  - ▶ Employers may fare better before juries on certain claims



# Discovery Concerns -- The Importance of a Plan



# Understanding the Scope of Discovery

- Key to developing an efficient plan is for counsel and client to have a shared understanding of the scope of potential discovery, as well as a plan for collecting what will be needed
- The case will begin small. It is a reasonable position to argue that, pre-conditional certification, the scope of discovery is limited to the named plaintiff, and relevant general policy documents or at most extends to pre-conditional certification opt-ins and the documents relevant to them
- Understand the claims and defenses
- Understand the grounds to oppose conditional certification
- Understand that summary judgment, decertification, and (yes even) trial may be in your future



# Information & Documents Helpful to the Defense

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- Job titles and associated job descriptions
- Self-evaluations
- Resumes
- Supervisors' names / titles
- Payroll summaries
- Paycheck stubs
- Pay plans. Bonus plans
- Clock rules
- Organizational charts
- Web pages



## Conclusion and Questions