



# Reclassifying Exempt Employees: Navigating Wage and Hour Pitfalls

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Presented By:

Rebecca Pratt Bromet, Esq.  
Jeremy W. Stewart, Esq.



# Top 10 Wage and Hour Settlements in 2011

- \$42 Million – JPMorgan Chase & Co. (misclassification of loan underwriters)
- \$35 Million – Oracle (failure to pay overtime and provide meal periods to quality assurance engineers, customer support engineers and project managers)
- \$34 Million – CVS Caremark Corp. (failure to pay overtime to store managers)
- \$32 Million – Tyson Foods, Inc. (failure to compensate for donning and doffing and other pre- and post-shift work-related activities)
- \$17.3 Million – Partners HealthCare System, Inc. (failure to pay for work during scheduled meals and breaks)
- \$15 Million – Dick Sporting Goods (failure to pay for time worked during break periods and waiting to leave at the end of their shift)
- \$14 Million – Beneto Bulk Transport (failure to pay truck drivers adequate overtime)
- \$11.3 Million – Cin-Lan, Inc. (misclassification of exotic dancers as exempt)
- \$10.5 Million – DHL Express (USA), Inc. (various wage & hour violations)
- \$10 Million – Spearment Rhino Cos. Worldwide, Inc. (failure to pay minimum wage and splitting tips to pay overhead)



# Wage and Hour Challenges

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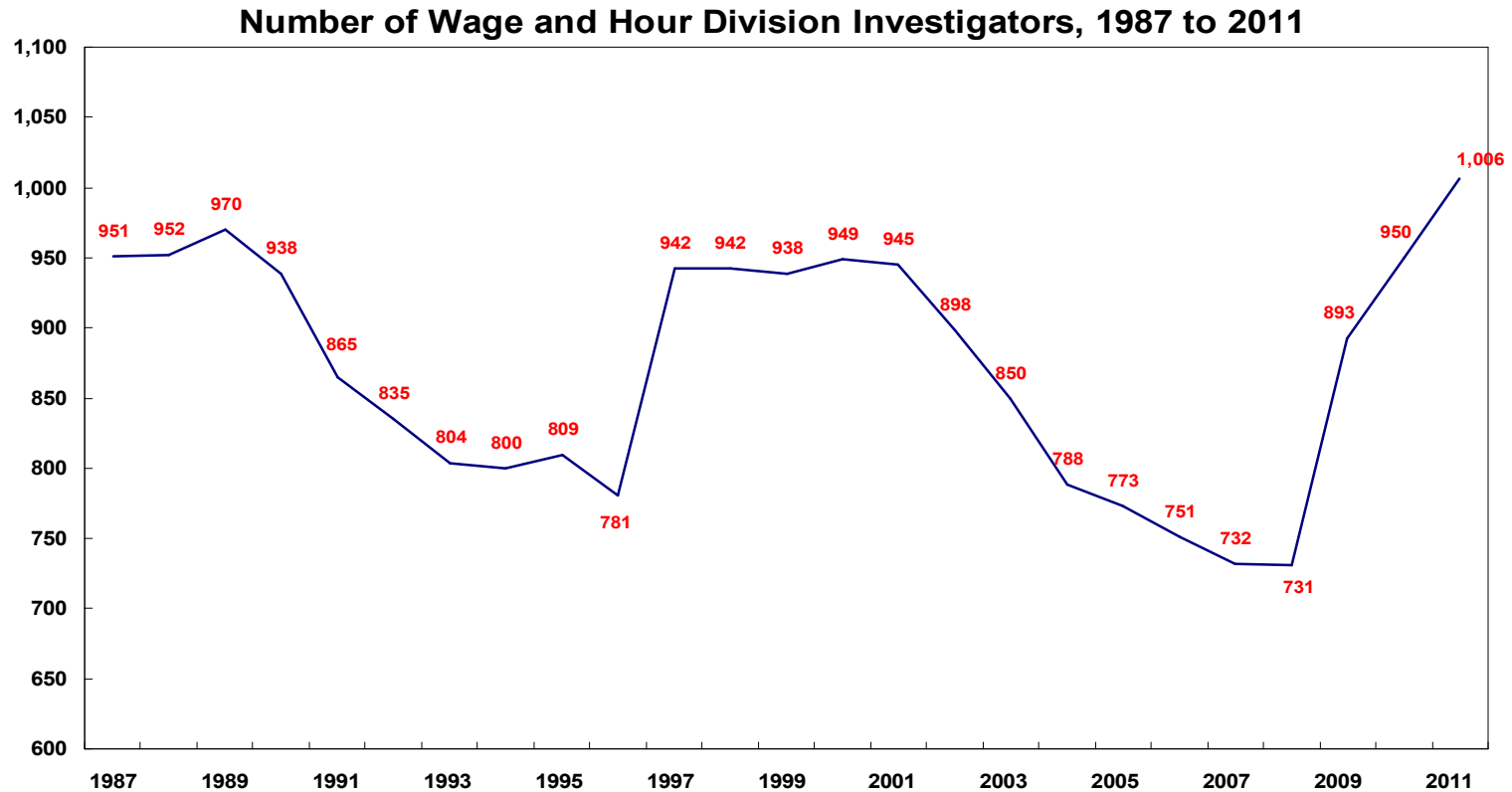
- Governments desperate for tax revenues
- Misclassification may affect 10 to 30 percent of employers<sup>1</sup>
- Increased DOL funding
  - ▶ President Obama's FY2012 budget sets aside \$240 million for misclassification-specific initiatives
  - ▶ Between FY 2009 and FY 2010, 1,000 enforcement personnel hired throughout DOL. Trend continues in 2011 with the opening of 13 new offices, the expansion of 6 others, and an increase in the number of investigators.

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<sup>1</sup> Weil, D., *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* (2010) (available at <http://dol.gov/whd>).



# Increased WHD Enforcement Capabilities



Applied Economic Strategies, using U.S. Department of Labor, Wage and Hour Division data.

- Opened 13 new offices nationwide and expanded 6 others in 2011



# U.S. DOL Strategic Plan 2011-2016

## Outcome Goal 1.5 – Secure Wages and Overtime

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- **Protecting Vulnerable Workers**
  - ▶ Focus on subcontracting; third-party management; franchising; independent contracting; and other contractual forms that make worker-employer relationship tenuous and less transparent
- **Targeting Industries**
  - ▶ High-risk industries include the agricultural, janitorial, construction, and hotel/motel industries



# U.S. DOL Strategic Plan 2011-2016

## “Plan / Prevent / Protect”

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- Principle: employers and others must “find and fix” violations before DOL investigator arrives
- Replace “catch me if you can” with Plan/Prevent/Protect



# U.S. DOL Strategic Plan 2011-2016

## Wages and Overtime

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- Multi-lingual public awareness campaign, *We Can Help*, to reach workers who are reluctant to report violations
- Campaign addresses such topics as rights in the workplace and how to file a complaint with WHD



## “Bridge to Justice”

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- **November 2010:**
  - ▶ The Wage and Hour Division and the American Bar Association announced an unprecedented collaboration providing for an Attorney Referral System.
  - ▶ When FLSA or FMLA complainants are informed that the Wage and Hour Division is declining to pursue their complaints, they may also be given a toll-free number to contact the newly created ABA-Approved Attorney Referral System.
  - ▶ In addition, WHD will also provide prompt relevant information and documents on the case to complainants and representing attorneys.





# DOL Timesheet App

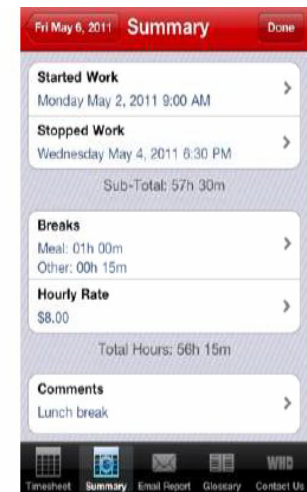
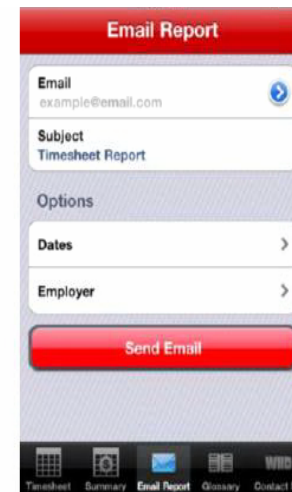
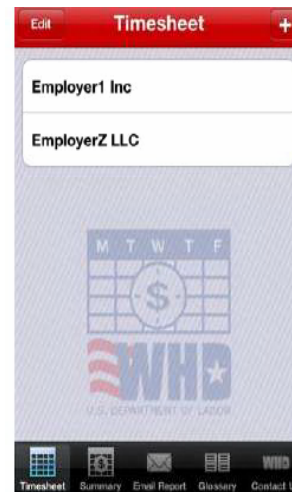
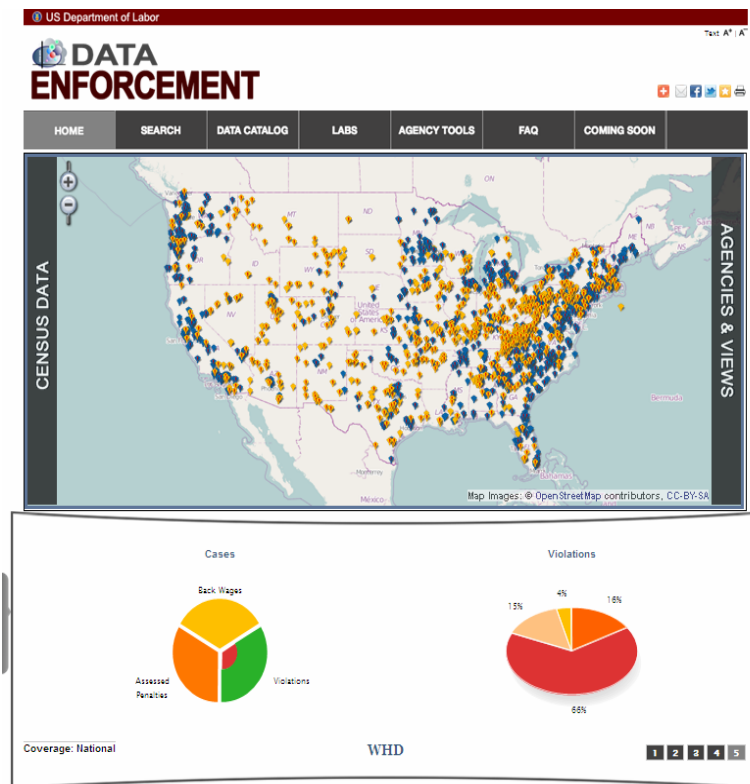
- May 9, 2011:
  - ▶ DOL announces launch of its first application for smartphones: a free timesheet to help employees independently track the hours they work and determine the wages they are owed.
  - ▶ Available in English and Spanish
  - ▶ Allows users to track regular work hours, break time and any overtime hours for one or more employers.
  - ▶ “This new technology is significant because, instead of relying on their employers’ records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records.”
  - ▶ Currently: iPhone and iPod Touch. Future: Android and BlackBerry
  - ▶ Future: other pay features including tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest.



# “Big Brother” Goes Digital

Welcome to DOL 2.0

Yes, there’s an “App” for That





# Audits



# Reasons to Do An Audit

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- Reasons to do an exempt status audit
  - ▶ Ensure internal legal compliance
  - ▶ Avoid future lawsuits/DOL investigations
  - ▶ Create a “good faith defense”
  - ▶ Know your own problems before the rest of the world



# Audit Checklist

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- What To Do?
  - ▶ Identify your exempt positions
  - ▶ Prioritize positions to be reviewed
  - ▶ Gather and review documents
  - ▶ Conduct interviews
  - ▶ Assess Facts
  - ▶ Develop communication plan
  - ▶ Implement changes



# Special Considerations

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- Keep it confidential!
- Get it right
- Consider engaging counsel
  - ▶ Good Faith Defense
  - ▶ Privilege Issues



# Identify Exempt Positions

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- Identify all exempt positions
  - ▶ Job titles
  - ▶ Number of individuals in the position
  - ▶ Locations of positions
  - ▶ Departments/Divisions
  - ▶ Managers
  - ▶ Direct reports
  - ▶ Degrees
  - ▶ Pay
  - ▶ Other information to help prioritize



# Prioritize Positions to be Reviewed

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- Identify clearly exempt or low-risk positions
  - ▶ CEO
  - ▶ Executives
  - ▶ Doctors
  - ▶ Lawyers
  - ▶ Scientists
  - ▶ Engineers
  - ▶ Accountants, CPA required for position
  - ▶ People Managers with 5+ direct reports
  - ▶ \$100,000+, if state law permits





# Prioritize Positions to be Reviewed

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- Identify clearly non-exempt or high risk positions
  - ▶ Accounts Payable, Accounts Receivable, Bookkeeping
  - ▶ Customer Service
  - ▶ Inside Sales (non-retail or service establishments)
  - ▶ Administrative Assistants
  - ▶ Help Desk



# Prioritize Positions to be Reviewed

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- **Prioritize Remaining Positions**
  - ▶ Number of people in the position
  - ▶ Location of position
  - ▶ Red Flag job titles for DOL
  - ▶ Internal concerns



# Assess Positions

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- Investigator
  - ▶ Who will conduct the investigation?
  - ▶ Consistent messaging
  - ▶ Prepare template introduction
  - ▶ Prepare template questions



# Assess Positions

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- Fact Gathering – Salary Level Test
  - ▶ \$23,660/year (\$455/week)
- Fact Gathering – Salary Basis Test
  - ▶ Payroll records
  - ▶ Timesheets
  - ▶ Memos re leave policies, docking
  - ▶ Handbooks



# Assess Positions

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- Fact Gathering – Duties Test
  - ▶ Interviews
    - Supervisors
    - Employees
  - ▶ Observe employees
  - ▶ Review documents
    - Job Descriptions
    - Performance Reviews
    - Self-evaluations
    - Hiring posts



# Assess Positions

- Fact Gathering – Duties Test
  - ▶ Management Employee
    - Hire/Fire authority
    - Department size
    - Management duties
      - Interviewing, selecting, and training employees
      - Setting and adjusting pay and work hours
      - Maintaining production or sales records
      - Appraising employee productivity and efficiency
      - Handling employee complaints and grievances
      - Disciplining employees
      - Planning and apportioning work among employee
    - Assistant Managers



# Assess Positions

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- Fact Gathering – Duties Test
  - ▶ Administrative Exempt Employees
    - Office or non-manual work
    - Sales or production work
    - Exercise discretion and independent judgment
  - ▶ Computer Professional
    - Help Desk v. Programmers
    - Exercise discretion and independent judgment



# Assess Positions

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- Fact Gathering – Duties Test
  - ▶ Outside Sales
    - Making sales
    - Away from the
  - ▶ Motor Carrier
    - Interstate commerce
    - 10,001+ pounds
  - ▶ Other exemptions





# Reclassification Issues

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- What if a position is on the bubble?
- What if a position “needs to be exempt for recruiting purposes”?
- What if the employee wants to be exempt?



# Reclassification Issues

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- Impact on other employment conditions
  - ▶ Benefit plans
  - ▶ Bonuses
  - ▶ Non-Monetary Issues



# Reclassification Issues

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- Communication
  - ▶ Executive Leadership Team
  - ▶ Managers of reclassified positions
  - ▶ Individuals in positions
    - Who tells them
    - Consistent messaging
    - Point person for follow-up questions
    - Develop responses to anticipated FAQs
    - In writing v. verbal



# Reclassification Issues

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- Why is my position being reclassified?
- What do these changes mean to me?
- How do I record my time?
- How is overtime calculated?
- When will I begin receiving overtime pay?
- How does this impact my benefits?
- How does this impact my bonus/incentive compensation?
- Who can I talk to about follow up questions?
- Am I being demoted?
- Will I receive less pay?
- So, does this mean I can work as much overtime as I please?
- What if I would rather receive comp time instead of overtime?



# Reclassification Issues

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- On your own, without back pay
- On your own, with back pay
  - ▶ Release
  - ▶ How far back?
  - ▶ Liquidated Damages?
- With DOL
- During litigation
  - ▶ Part of settlement
  - ▶ Before settlement



# Thank You!

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## For additional information:

**Rebecca Pratt Bromet**

**Jeremy W. Stewart**

Seyfarth Shaw LLP

131 South Dearborn

Suite 2400

Chicago, IL 60603

(312) 460-5956 or 460-5662

*[rbromet@seyfarth.com](mailto:rbromet@seyfarth.com)*

*[jwstewart@seyfarth.com](mailto:jwstewart@seyfarth.com)*