

# Wage & Hour Litigation

Practice Overview





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Multi-plaintiff wage and hour lawsuits pose the greatest employment litigation threat to American businesses today. Federal court filings of wage and hour class and collective actions have increased more than 500% since 2000, far surpassing employment discrimination class actions. Wage and hour settlements and verdicts have reached into tens of millions of dollars and more.

Seyfarth Shaw LLP's defense of employers in wage and hour litigation has become one of the hallmarks of the firm's nationally recognized employment law practice. Our Wage & Hour Litigation practice group consists of more than 80 attorneys in offices across the country. We optimize results for our clients by constantly reviewing recent legal developments, investigating how to counter new tactics by plaintiffs' counsel, and developing appropriate defense strategies. We have litigated hundreds of complex wage and hour cases in nearly every federal jurisdiction and in courts of almost every state, as well as before administrative agencies and on a multi-jurisdictional basis. These cases include claims alleging:

- Misclassification of employees as exempt
- Misclassification of workers as independent contractors
- Failure to pay otherwise exempt employees on a salary basis
- Regular rate and minimum wage issues
- Failure to pay for pre- and post-shift activities, including donning and doffing, and other "off-the-clock" claims
- Miscalculation of commissions and bonuses
- Failure to pay overtime to drivers based on the SAFETEA-LU amendments to the Motor Carrier Act exemption
- Tip and "service charge" claims
- Unpaid on-duty meal periods
- Denied reimbursements
- Other state law pay practices claims

In California, a state whose complex Labor Code poses unique risks for employers, Seyfarth Shaw's employment lawyers boast a proven track record of effective representation against wage and hour class actions. For example, we achieved the first defense verdict in a major wage and hour class action jury trial. In another case, we persuaded the California Supreme Court to adopt the employer's position that the employer had broad latitude in how it chose to reimburse employee business expenses. Having defended in excess of 250 California wage and hour class actions, we have become the "go-to" management attorneys there.

## Defending Management Across the Litigation Spectrum

Nationwide, our multi-plaintiff wage and hour defense practice is second to none. We have defended our clients against all forms of multi-plaintiff wage and hour lawsuits, ranging from small to large national classes and opt-in groups numbering in the tens of thousands. These cases have included high-stakes litigation seeking unpaid wages and overtime, liquidated and punitive damages, statutory penalties and attorneys' fees and interest. Seyfarth Shaw's collaborative and team-based approach to each case joins a comprehensive knowledge of wage and hour laws, regulations and agency opinion letters to strengthen the effectiveness of the firm's extensive litigation experience. We shape our defense strategy to the particular needs of each case and the business goals of our clients. This approach allows us to be extremely effective at defeating or minimizing exposure from such potentially high-risk cases and developing appropriate "exit" strategies that combine our litigation, mediation, and audit capabilities.

## Leveraging Our Experience To Benefit Our Clients

Attorneys in our Wage & Hour Litigation Practice Group have broad legal and practical knowledge enhanced through years of advising employers about wage and hour compliance issues. We understand the relevant issues—whether procedural or substantive—from our extensive experiences counseling employers on and litigating wage and hour issues in virtually all industries. This enables us to assist our clients in modifying their job classification and pay practices in order to limit employer exposure and reduce the potential of becoming targets for litigation. Industries in which we have wide-ranging experience include construction, financial services, health care, high tech, hospitality, insurance, life sciences, manufacturing, media (print and broadcast), professional services, public sector, retail (big box stores, independent stores, and call centers), telecommunications, and transportation.

## Wage and Hour Litigation Approach

When litigation begins, the cumulative experience of our wage and hour trial lawyers permits us to achieve exceptional case management effectiveness. We have developed collective, class and hybrid action, and multi-jurisdictional strategies that allow clients to navigate successfully the complex jurisdictional and procedural issues that often arise in wage and hour litigation:

- We start with a thorough initial case assessment, exposure analysis, and strategic plan, and assist clients through increasingly difficult document retention and litigation hold issues. We work closely with our clients to shape our defense strategies to conform with their business goals.
- We proceed, as appropriate for the needs of each case, with data and fact gathering, declaration campaigns, opposition to initial class certification, discovery and motions for summary judgment, and, if necessary, class decertification.
- We conclude litigation as early as practicable—if not through dispositive motion practice, then, as appropriate, with mediation and settlement, or trial and appeal.

While wage and hour class and collective actions have become a serious employment litigation threat, employers throughout the country have come to rely on Seyfarth Shaw's Wage & Hour Litigation practice group to defend these cases effectively and efficiently, in a manner that brings them to conclusion consistent with our clients' business goals. Our national platform, deep substantive knowledge in wage and hour law, lawyers seasoned in litigating such cases (through trial when needed), and team-based approach differentiate us and make us a leading firm in this practice area.

Our defense of employers in wage and hour litigation has become one of the hallmarks of the firm's nationally recognized employment law practice.

## Proven Track Record

### Federal

- Securing a trial verdict that City of New York Police Department sergeants are exempt from the FLSA's overtime requirements under the post-2004 FLSA-amended regulations on the executive exemption, after obtaining an earlier summary judgment on all NYPD sergeant claims that pre-dated the 2004 FLSA-amended white collar regulations. *Mullins v. City of New York*, 04-CV-02979 (SAS)(S.D.N.Y. 2008).
- Defeating several motions for class and collective action certification and constraining discovery to the two named plaintiffs in a federal lawsuit alleging that a professional staffing agency had misclassified certain employees as exempt from state and federal overtime requirements. The first of these motions was premised on plaintiffs' theory that individuals similarly situated to plaintiffs did not perform exempt duties, and the other two motions were premised on the theory that the company's vacation and sick leave policy might have resulted in deductions from pay that, according to plaintiffs, violated the salary basis test for exempt status. In addition, we defeated plaintiffs' attempts to take discovery on their putative class action claims. *O'Donnell v. Robert Half Int'l*, 429 F. Supp. 2d 246 (D. Mass. 2006); 534 F. Supp. 2d 173 (D. Mass. 2008); 250 F.R.D. 77 (D. Mass. 2008).
- Obtaining summary judgment in one of the constituent cases in a multi-district litigation of four nationwide collective actions alleging that insurance claims adjusters were misclassified as exempt employees. The ruling effectively terminated the entire MDL proceeding on the merits in favor of the client, preserving the exempt status of approximately 8,000 putative class members. *In re Allstate Insurance Co. Fair Labor Standards Act Litigation*, MDL No. 1541 (U.S. District Court, District of Arizona).
- Obtaining a dismissal with prejudice in a purported nationwide FLSA "off-the-clock" case against a temporary services company. The plaintiffs alleged that the company had a policy requiring employees to report to work up to an hour before they were

## We Wrote the Book

We authored *Wage & Hour Collective and Class Litigation*, a first-of-its-kind treatise designed to help companies defend against wage and hour lawsuits. Published by

allowed to clock in. We obtained a settlement for a nominal sum prior to the plaintiffs' motion for collective action certification. (U.S. District Court, Eastern District of Texas).

- Achieving dismissal of a multi-plaintiff lawsuit for alleged unpaid overtime for intrastate drivers in exchange for a nominal settlement amount. We successfully argued that these drivers were employed by a motor carrier in furtherance of interstate commerce so that the Motor Carrier Act exemption applied, despite the fact that their routes did not cross state lines and that the definition of a "motor carrier" was narrowed under the amendments to the Motor Carrier Act through SAFETEA-LU. (U.S. District Court, Southern District of Florida).
- Resolving, on favorable terms for the employer, a large hybrid collective and class action alleging pre- and post-shift work and travel time claims against the employer's repair organization, by creative use of the Motor Carrier Act exemption and the FLSA's Employee Commuting Flexibility Act. (U.S. District Court, Eastern District of New York).
- Eliminating national exposure and the threat of multi district litigation in a putative FLSA collective action by negotiating a favorable settlement on behalf of a national private education provider with hundreds of locations across multiple jurisdictions. (U.S. District Court, Northern District of Georgia).
- Minimizing the size of the putative class in an FLSA misclassification case against a national financial services firm, resulting in a small number of opt-in plaintiffs, the decertification of the class, and the dismissal of a pendant state law claim. *Trezvant v. Fidelity Employer Services Corp.*, 434 F. Supp. 2d 40 (D. Mass. 2006).

American Lawyer Media, this unique new handbook has been described as “an indispensable companion” for those battling wage-hour suits in courts across the country.

- Obtaining dismissal with prejudice of a class action under the Illinois Minimum Wage Law for the company’s alleged failure to pay for time spent donning and doffing uniforms. *Carletto v. Quantum Foods Inc.*, No. 1-05-3163 (Ill. App. Ct. 1st Dist. 2006), appeal denied, 2006 Ill. LEXIS 1725 (Ill. 2006).
- Obtaining early dismissal of state overtime law class action involving misclassification allegations against an insurance company because they conflict irreconcilably with FLSA collective action allegations, which led to the settlement of the case on terms favorable to the employer. (U.S. District Court, District of New Jersey).
- Defeating the plaintiffs’ motions in two separate lawsuits seeking to allow exempt status claims to proceed as collective actions, which would have included approximately 1,000 alleged misclassified exempt employees of the City of Albuquerque, New Mexico. (U.S. District Court, District of New Mexico).
- Resolving a collective action, at an early stage and on favorable terms for the employer, brought by telecommuting customer service representatives who claimed that they spent substantial time each day without pay logging in to the employer’s computer system and launching applications. The settlement was reached through mediation following presentation of two key pieces of evidence that persuaded plaintiffs’ counsel that the value of the case was much less than hoped: an expert report (with video clips) based on a replication of the log-in experience for telecommuters that demonstrated that the average log-on time did not take as long as claimed and an analysis of the company’s records that showed that even crediting plaintiffs with additional work

time would not often result in more than 40 hours of work per week. (U.S. District Court, Eastern District of Missouri).

## California

We have handled hundreds of California wage and hour class action lawsuits concerning virtually every conceivable California-specific issue. Examples of recent California successes include:

- Prevailing in appeal affirming a summary judgment for a restaurant chain in a tip pooling class action. The case established the lawfulness of a widespread practice at restaurants where servers are required to share tips with other non-management employees in the restaurant, such as bartenders. The appellate decision clarified that tip sharing need not be limited to employees who provide “direct table service.” *Budrow v. Dave & Busters of California, Inc.*, 171 Cal. App. 4th 875 (2009).
- Prevailing as co-counsel on the appeal to the Ninth Circuit which held that all of the company’s claims adjusters are properly classified as exempt employees. This decision overturned a trial judgment of significant monetary value and has had widespread effects throughout the insurance industry and beyond in terms of the proper analysis of the administrative exemption under federal law. *In re Farmers Insurance Exchange Claims Representatives’ Overtime Litigation*, 481 F.3d 1119 (9th Cir. 2007).
- Prevailing on a dispositive motion in a wage and hour class action against a large media company for alleged pay stub, uniform reimbursement, and meal and rest break violations. In addressing a number of threshold legal issues we presented, the Court held that the company’s wage statements satisfy the requirements of the Labor Code and that the company’s union agreements caused federal law to preempt the meal break and uniform reimbursement claims. The ruling resulted in dismissal of all class allegations and a very modest single plaintiff settlement. (Los Angeles Superior Court).

- Achieving the first defense jury verdict in a major wage and hour class action in California by defeating the plaintiffs' claim that the company, an office services provider, had not reimbursed business expenses of its 1,300 outside sales employees. (San Francisco Superior Court) This verdict followed summary judgments dismissing two alleged classes of outside sales personnel, decertification of another class claim, and favorable settlements of three other wage and hour claims. The decertification of the class of outside sales employees, allegedly misclassified as exempt, was upheld on appeal. *Walsh v. IKON Office Solutions, Inc.* (Case No. A113172, Cal. App., First App. Dist. Mar. 1, 2007).
- Obtaining a pre-certification partial summary judgment for a large nationwide sporting goods retailer against the named plaintiff in a putative "hybrid" suit alleging a nationwide FLSA collective action and a California state law Rule 23 class-action. The Court dismissed all of the claims, precluding him from proceeding with either of his putative classes. (U.S. District Court, Eastern District of California).
- Defeating class certification of a meal break claim under California law involving a consumer services company, based on the federal Court's interpretation of the employer's obligation to "provide" a meal break. (U.S. District Court, Northern District of California).
- Obtaining a complete defense verdict at trial in a case filed by two retail store managers who claimed that the employer failed to provide meal and rest periods and pay for alleged off-the-clock work. (Los Angeles Superior Court).
- Prevailing in appeal reversing \$7 million judgment for plaintiff class who contended that the employer unlawfully calculated bonus overtime. The decision establishes that the federal method for bonus overtime calculation also applies in California. *Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804 (2008).

## Wage and Hour Assessments

Experience shows that the best defense against wage and hour liability is to assess and, where necessary, to correct current wage and hour policies and practices to bring them into full compliance with federal and state wage and hour laws. Seyfarth Shaw offers employers a number of assessment tools:

**Classification Assessment:** A review of policies and practices to determine whether employees are properly classified as exempt from state and federal minimum wage and overtime requirements or as independent contractors.

**Pay Practices Assessment:** A review of policies and practices for compliance with federal and state laws governing regular rate and overtime pay, minimum wage, uncompensated work periods, pooling and distribution of gratuities, meal breaks, the timeliness of wage payments, vacation pay, and Sunday and holiday premium pay.

**Wall-to-Wall Assessment:** A review that combines a Classification Assessment and a Pay Practices Assessment, and thus permits a comprehensive assessment of exposure while achieving economies in human capital and expenditures.

Across all industries, employers have recognized the substantial benefit of mitigating risk against the proliferation of wage and hour lawsuits under federal and state laws, and the profound impact that the changing legal landscape has caused to wage and hour liability risk. Our wage and hour practitioners have substantial experience triaging exposure to that risk and proactively eliminating or reducing it. Our experience spans every size of company across all industries. We have researched key industry litigation trends, and we frequently assist our clients to identify their points of potential exposure and to correct the challenges that cause them. Our broad base of experience permits

us to prioritize issues relevant to our clients' specific industries. From that basis, we are able to develop an issue-targeted understanding of each client's operations and to conduct the selected level of assessment efficiently and effectively.

We recognize that different assessments call for varying fee arrangements. Our efficient and comprehensive assessment tools—developed through our experience with Six Sigma methodologies—enable us to provide alternative, fixed-fee or detailed-budget proposals, or a combination of these arrangements.

### Representative examples of the value we provide clients in wage and hour assessments:

- A large national retailer observed that other retailers were facing an increasing number of wage and hour lawsuits—with an ever-increasing dollar value of settlements and judgments—many of which were pursued under new legal theories. We reviewed the entirety of the company's pay practices, with an eye toward not only the types of claims that we saw being brought at that time, but also on what we foresaw as the likely next generation of wage and hour claims in this industry. Through a combination of policy reviews; attendance at a week-long "camp" with human resources, compensation, and payroll managers at corporate headquarters; and interviews of managers and payroll clerks in the field, we identified several hot areas of potential legal risk. We advised our client on how it could minimize its exposure to wage and hour class actions and made suggestions for practical business-focused changes consistent with the company's culture.
- A mid-sized information technology consulting company became aware that its peer companies were facing class action lawsuits alleging that the companies had misclassified employees as exempt under the computer employee exemption. We reviewed the exempt status of all but its highly compensated exempt employees to determine whether the company had relied too broadly on that exemption. We conducted a series of quick-hitting interviews with a large sampling of the managers

of the hundreds of employees in question, after which we made recommendations for the proper classification of the positions at issue. In connection with the implementation of those recommendations, we provided guidance on a communications plan to minimize the effect on employee morale and reduce the likelihood of lawsuits by employees displeased by the anticipated changes.

## Seyfarth Shaw's Labor and Employment Department

For more than 60 years, Seyfarth Shaw has been recognized as one of the "go-to" labor and employment firms for business by providing extraordinary, cost-effective results. By understanding each client's business objectives, we provide strategic solutions to the complex issues facing employers. Our national presence, with over 300 employment attorneys at all levels of experience, ensures seamless, consistent representation across jurisdictions. What truly distinguishes our approach is a focus on expertise within the broad field of employment law and litigation.

To put us in the best position to understand the needs of our clients and deliver results, our labor and employment attorneys are organized to leverage their knowledge of key workplace subspecialties and specific industry experience. Our practice areas include:

- Affirmative Action/Diversity
- Business Immigration
- California Labor Code Litigation
- Complex Discrimination Litigation
- ERISA & Employee Benefits Litigation
- Employment Law Training
- Environmental, Safety & Toxic Torts
- International Labor & Employment Law
- Labor Management Relations
- Single Plaintiff Litigation
- Wage & Hour Litigation
- Workplace Counseling & Solutions ■

## About Seyfarth Shaw

Seyfarth Shaw LLP (“Seyfarth”) was founded in 1945 by three lawyers and has grown to more than 850 lawyers across 13 markets in the U.S. and abroad. We handle issues for our clients in all key areas including labor and employment, litigation, construction, corporate, employee benefits, environmental, government contracts, intellectual property, commercial litigation, real estate, securities litigation, trade secrets, trusts and estates, and workouts and bankruptcy, among others.

Our success is the result of a constant, unrelenting focus on the needs of our clients. Our commitment to excellence and our belief in the strength of a team-based approach to the delivery of our services offers an atmosphere of creative and innovative thinking.

Our clients are our partners in business and we are committed to listening to their needs and to aligning the skills and abilities of our people to respond to those needs. Our clients range from *Fortune* 100 to midsize companies, and include publicly traded and privately held companies and various types of funds. We represent clients of all sizes across all industries and we are diligent in providing the same level of commitment to each client.



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