



Time Well Spent

10 Years of Wage & Hour Wisdom
and What's on the Way

Brett Bartlett, Noah Finkel, Andrew Paley

August 2, 2023

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2023 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

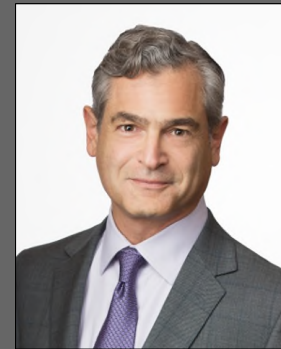
Speakers



Brett C. Bartlett
Partner
Atlanta



Noah Finkel
Partner
Chicago

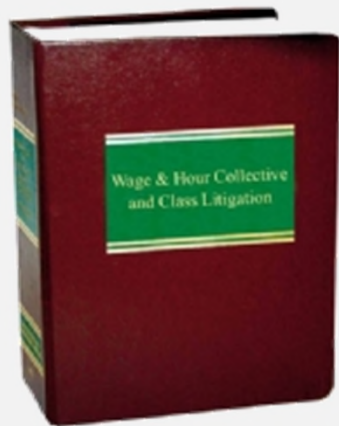


Andrew Paley
Partner
Los Angeles



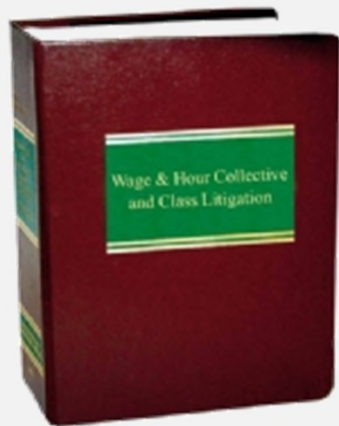
Our Agenda

- 1 | Overview of the Wage and Hour Litigation Landscape
- 2 | The Decade's Top Litigation Developments
- 3 | The Decade's Top Compliance Developments
- 4 | The Decade's Top California Developments
- 5 | The Next 10 Years: What's on the Horizon?
- 6 | Upcoming Webinar Sessions



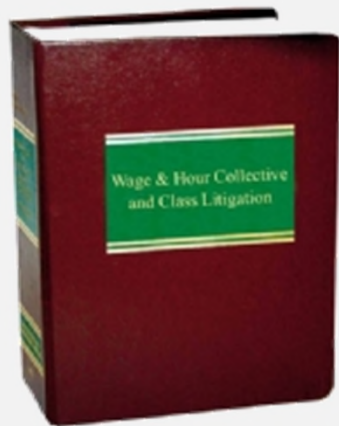
The Authoritative Wage
& Hour Litigation Treatise

- First published in 2012
- Andrew, Brett, and Noah served as co-editors and “authors,” with a tremendous amount of support from the Seyfarth Team
- Provides well cited explanations of everything from the genesis of a wage and hour lawsuit to defensive tactics, through trial



The Authoritative Wage
& Hour Litigation Treatise

- Andrew, Brett, and Noah did not write each of the treatise's 1,000-plus pages of text
- Our firm's national Wage and Hour Litigation Practice Group shouldered the lion's share of the work that it took to forge the first edition
- Seyfarth's WHLPG comprises nearly 100 lawyers who devote a substantial part of their practice to defending wage and hour litigation -- and preventing it in the first place
- The Group's cutting-edge lawyers drafted and edited the original text, under the guidance of our former Practice Group leader, Richard Alfred



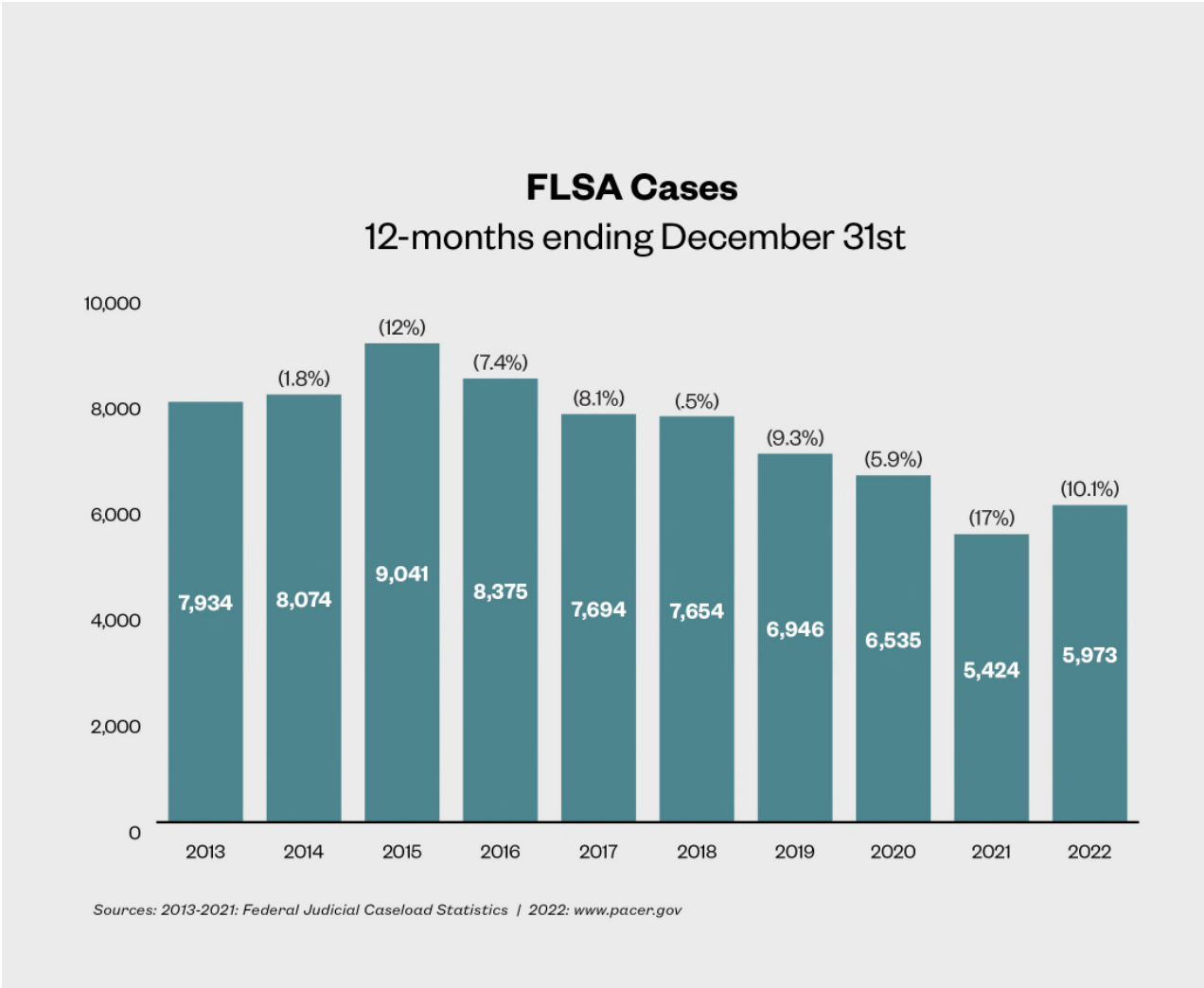
The Authoritative Wage
& Hour Litigation Treatise

- We have updated it twice a year
- For that, we offer special kudos to Kelly Koelker, a member of our Practice Group, who prepares comprehensive supplements, with the assistance of other team members. Thank you!
- We also express our gratitude to Amy Abate, our Practice Development Manager
- And, of course, we extend our thanks to ALM
- Now that we have celebrated its 10-year anniversary last year, we thought it was time to catch up to see where we've been, and where we might be going...



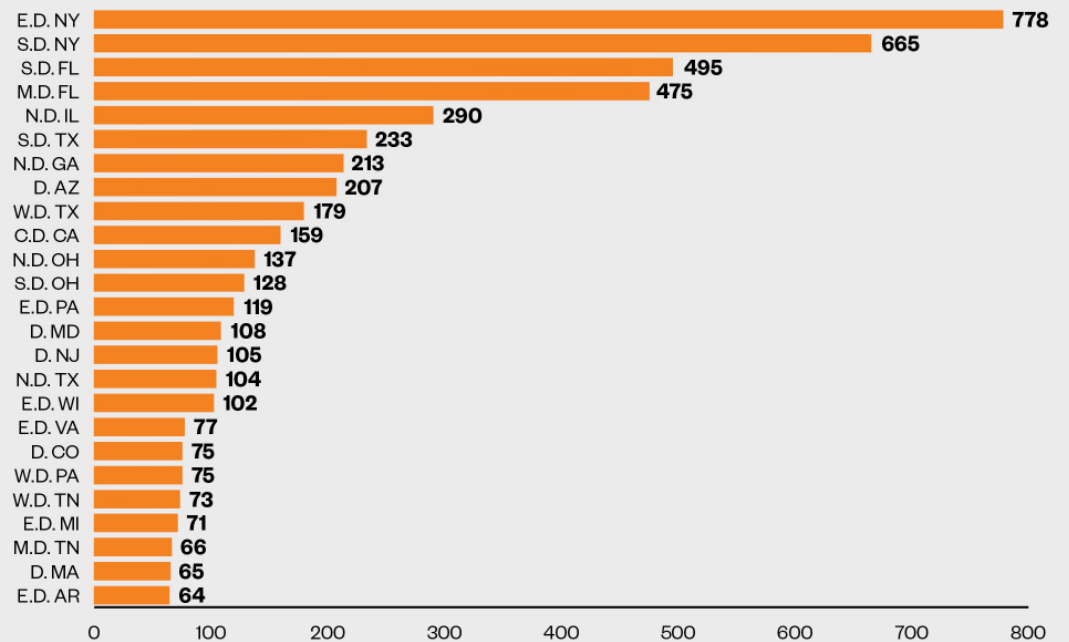
Wage and Hour Landscape

The Last 10 Years, By the Numbers . . .



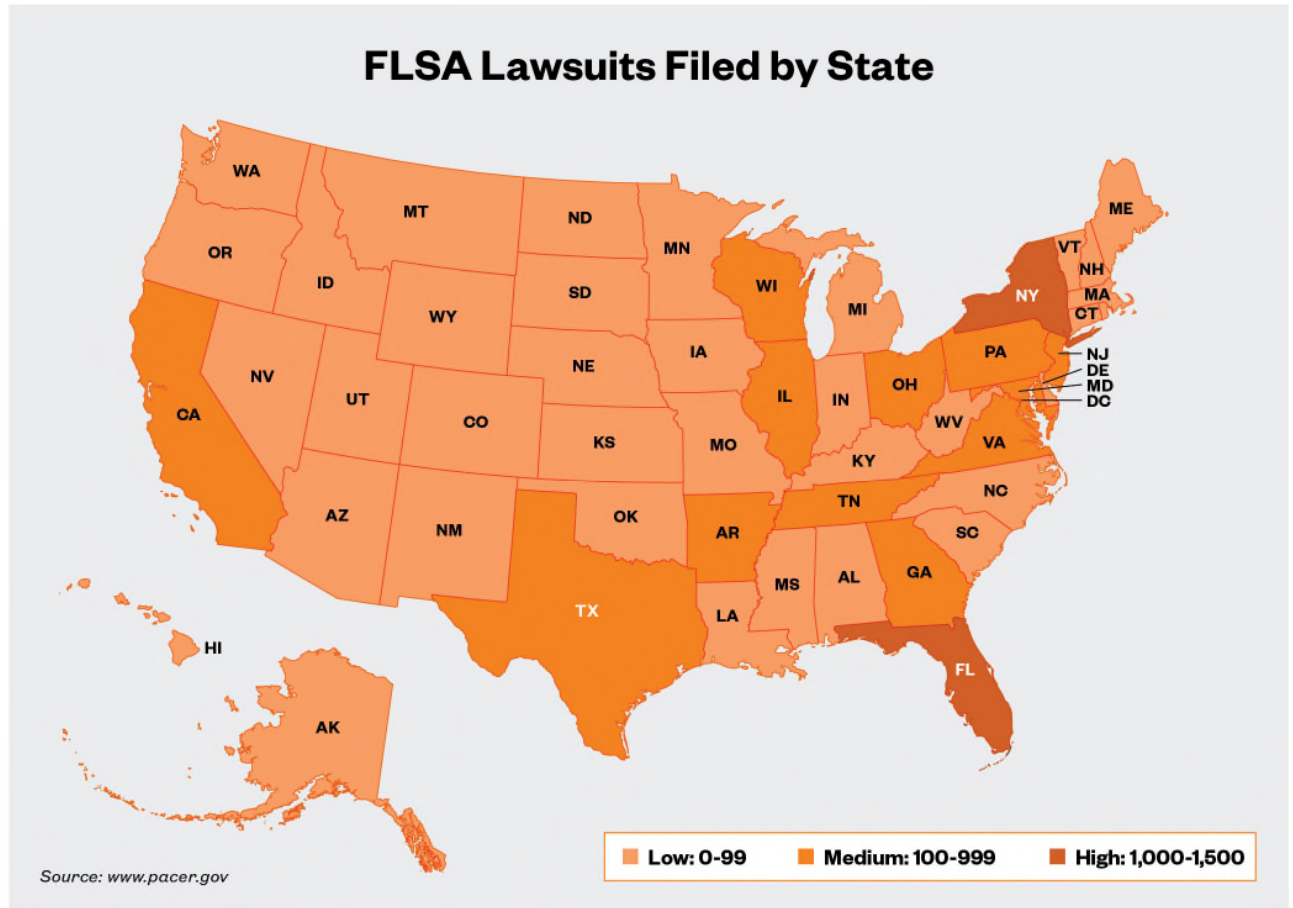
What We're Seeing in Federal Courts

US District Court Trends



Source: Lex Machina

FLSA Lawsuits State-by-State



This map reflects only filings under the FLSA and does not include complaints alleging violations of state wage-hour law. California, for example, sees thousands of filings each year under its state wage-hour laws.

Which Industries Are Seeing the Most Impact?

Industries Impacted

The top industries that these employees' advocates attacked:

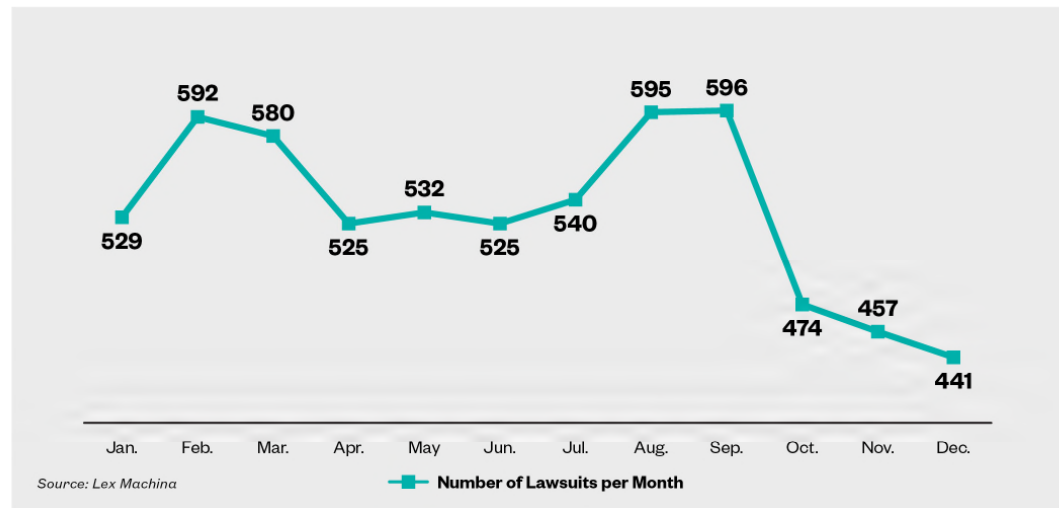
Health Care: 11.7%	Food & Agriculture: 3.5%
Retail: 10.5%	Consumer Products: 3.2%
Business Services: 9.4%	Technology: 2.7%
Services More Generally: 8.3%	"Other Industries": 2.5%
Leisure: 7.6%	Automotive & Transport: 2.1%
Industrial Manufacturing: 6.1%	Telecommunications: 1.6%
Construction: 5.9%	Chemicals: 0.9%
Transportation: 5.7%	Pharmaceuticals: 0.7%
Real Estate: 4.7%	Media: 0.5%
Insurance: 4.3%	Natural Resources: 0.3%
Financial Services: 4.1%	Aerospace & Defense: 0.1%
Energy: 3.6%	

Last Year's Topography

Litigation Trends - 2022

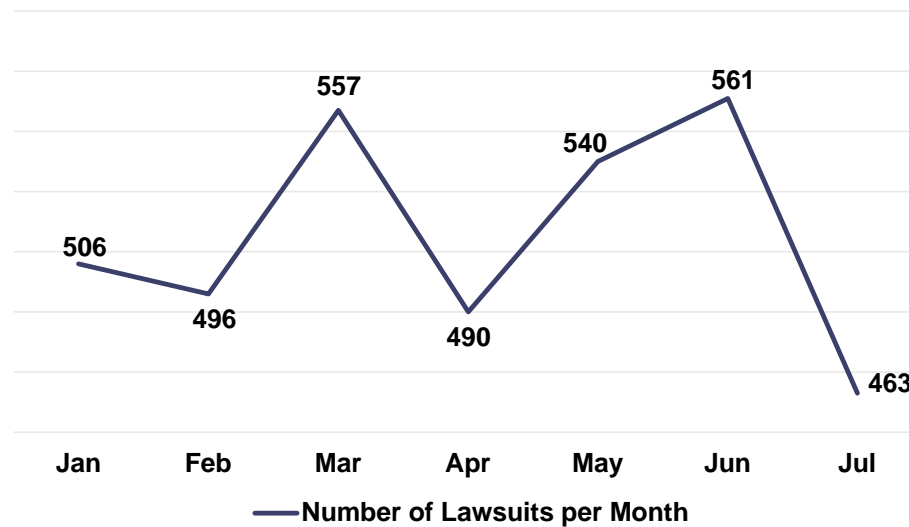
Suit Spikes

The number of lawsuits spiked in the first and third quarters of the year, with approximately 1,700 and 1,730 filed in each, respectively, compared to approximately 1,580 and 1,372 in the second and fourth, respectively.



So Far in 2023 – Developing Trends

Litigation Trends – YTD 2023



Source: Lex Machina

3,613 total through July '23 versus 3,762 Jan. – July '22

So Far in 2023 – California

Litigation Trends in California

- Over the last 10 years, increasing trendline
- Currently, approximately 20-25 new cases **every day**
- Lately, more PAGA cases are being filed than class actions due to the increased use of arbitration agreements with class action waivers
- Slight dip in PAGA dips after *Viking River* but have since shot back up again



Decade's Top Litigation Developments

Wage-Hour Litigation

Questions 10 Years Ago

- Are highly-paid pharmaceutical sales representatives exempt?
- Does a security check constitute compensable time under the FLSA?
- The regular rate? Is that a thing?
- Will *Wal-Mart v. Dukes* put the breaks on collective action certification?
- Is it lawful/enforceable for an employer to maintain a mandatory arbitration program that includes a class waiver?
- How will *Brinker* impact meal/rest periods in California?
- Do we need to worry about PAGA claims?

Top Developments

in 10 Years of Wage-Hour
Litigation - National

1. Mandatory arbitration agreements with class waivers permissible
2. Use of social media by Plaintiffs' counsel to obtain clients/mass arbitration (plus PAGA workaround)
3. Continued use of a lenient standard on first-stage collective action certification
4. But some circuits now buck the trend
5. Growth of state (other than California) law wage-hour claims, both substantive and procedural
6. Litigation commenced by demand letter rather a complaint
7. Nationwide collective actions (usually) need to be brought where the company is
8. Litigation of regular rate claims as a lever
9. Defense of exempt status claims a little easier due to *Encino Motorcars* "fair reading" holding
10. Many courts are making settlements of wage-hour claims more difficult

A pair of golden scales of justice is the central focus, set against a dark background. The scales are balanced, with two pans hanging from a central vertical post. The pans are filled with gold coins, and many more coins are scattered across the surface in the foreground. The lighting is dramatic, highlighting the metallic sheen of the scales and the texture of the coins.

Decade's Top Compliance Developments

Top Developments

in 10 Years of Wage-Hour
Compliance - National

1. Remote work issues, exacerbated by COVID restrictions
2. Pre-shift, post-shift, and interrupted meal break “work” issues
3. The continuous workday—when does an employee’s workday begin?
4. Regular rate and overtime premium calculations – What is includable? And what is excludable?
5. Guarding the outside sales exemption when employees cannot work outside
6. Store manager, first-line manager, and assistant manager exempt classification challenges
7. Independent contractor classification
8. Overpayments, undeserved bonuses, and employers’ ability to recoup them
9. Furloughs and work shortages
10. Adapting to seemingly ever-changing local, state, and federal wage and hour laws



Decade's Top California Developments

Top Developments

in 10 Years of the California
Wage-Hour Landscape

1. Independent contractor / employee misclassification cases and the ABC test
2. Expanding the standard for joint employment claims
3. Regular rate of pay claims – what is included / excluded; and requirement to pay meal / rest premiums and sick pay at the RRoP
4. Shifting burden of proof for meal period claims
5. Demise of the *de minimis* doctrine has led to more off the clock claims
6. Elimination of rounding is imminent
7. Remote work – more off the clock and expense reimbursement claims
8. Surge in non-derivative wage statement claims
9. Tip pooling claims have increased
10. PAGA, PAGA, PAGA

A background image of colorful wooden blocks stacked together, with a white text box overlaid in the center. The blocks are in various colors including red, yellow, blue, green, orange, and purple, and are arranged in a way that creates a sense of depth and texture. The text box is white with a thin black border and contains the text "Other Developments Worth Noting" in a bold, white, sans-serif font.

Other Developments Worth Noting

Other Developments

- Weakening of deference paid to DOL (and other agency) authority
- Waxing and waning aggression of federal Wage and Hour Division investigators
- Interloping state and local agencies and attorneys general
- Uncertainties about what's necessary to prove good faith compliance
- Ebbs and flows of investment in internal exemption and pay practices assessments
- Threats by Congress to change the laws



What's on the Horizon for the Next 10 Years?

The Next 10 Years – Litigation/National

- Attacks on class waivers in arbitration
 - Federal legislation banning forced arbitration
 - Reverse forum selection clauses
 - State PAGAs (Washington is next)
 - More mass arbitration
- More draconian remedies at the state level
- Greater reliance on data and AI by the DOL and plaintiffs' counsel to target employers
- Adoption of general consent by jurisdiction statutes, enabling more frequent forum shopping
- More courts may make conditional certification (collective action notice) more difficult for plaintiffs to achieve
- The *de minimis* defense may perish

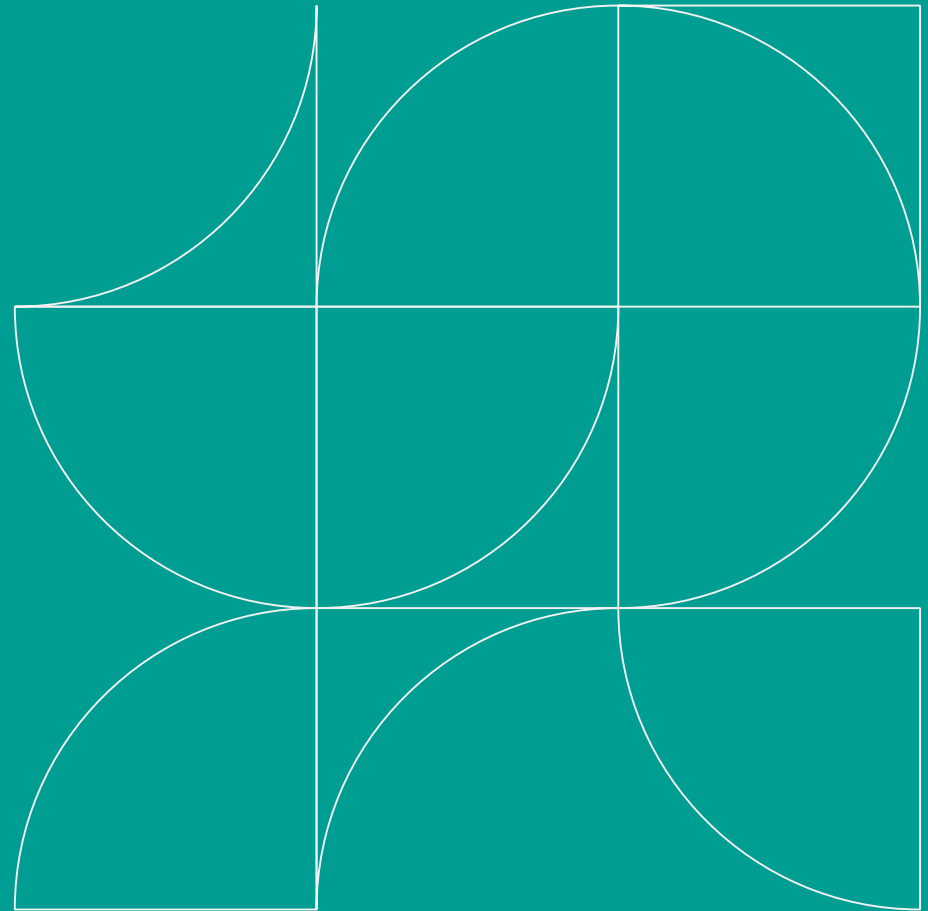
The Next 10 Years – Compliance

- Expansion of the definition of employment
- Third rail of employment—something between an employee and independent contractor?
- How to apply the continuous workday rule to remote work
- Possible significant increase to minimum wage, with derivative effects on exemptions.
- The end of the tip credit
- Demise of rounding
- Significant increase in the minimum salary level
 - Or is that a major question?
- Decline (or death?) of deference to DOL
- Reduced reliance on administrative and outside sales exemptions.
 - Technology may routinize jobs and constrict discretion and independent judgment
 - Reduced in-person sales may mean salespeople are not sufficiently “outside”

The Next 10 Years – California

- More PAGA claims
 - Bifurcated procedure – arbitration of the “individual” PAGA claims
 - Continued battles over the scope of discovery in “representative” portion of case
 - Motions to dismiss for unmanageability
- Who is your employee? Expansion of independent contractor and joint employment liability
- Remote work leads to more off the clock and expense reimbursement lawsuits
- Adoption of the continuous workday rule
- Demise of *de minimis* and rounding results in more off the clock suits
- Regular rate claims continue to increase
- Predictive scheduling and pay equity claims

CLE Code



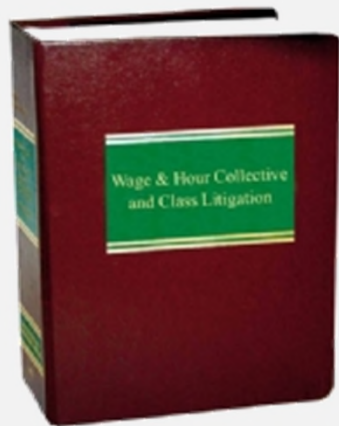


Upcoming Webinars



Webinar Series . . .

- 1** | Defeating or Limiting Plaintiffs' Motions to Distribute Collective Action Notice
- 2** | Winning the Battle over Class Action Certification and Collective Action Decertification
- 3** | The Rise of Mandatory Arbitration Programs
- 4** | Developing and Defending Exempt Status Classifications
- 5** | The Shifting Concept of Employment
- 6** | What is "Work?"



The Authoritative Wage
& Hour Litigation Treatise

If you don't already have a copy of the treatise, the book can be purchased here:

<https://www.lawcatalog.com/wage-hour-collective-and-class-litigation.html>

The order link will be provided in our webinar follow up materials, or please reach out to your favorite Seyfarth attorney to order a copy.

**thank
you**

For more information,
please contact

Brett Bartlett
email: bbartlett@seyfarth.com
phone: 404-888-1875

Noah Finkel
email: nfinkel@seyfarth.com
phone: 312-460-5913

Andrew Paley
email: apaley@seyfarth.com
phone: 310-201-5224