



Navigating Wage and Hour Risks Under the Biden Administration

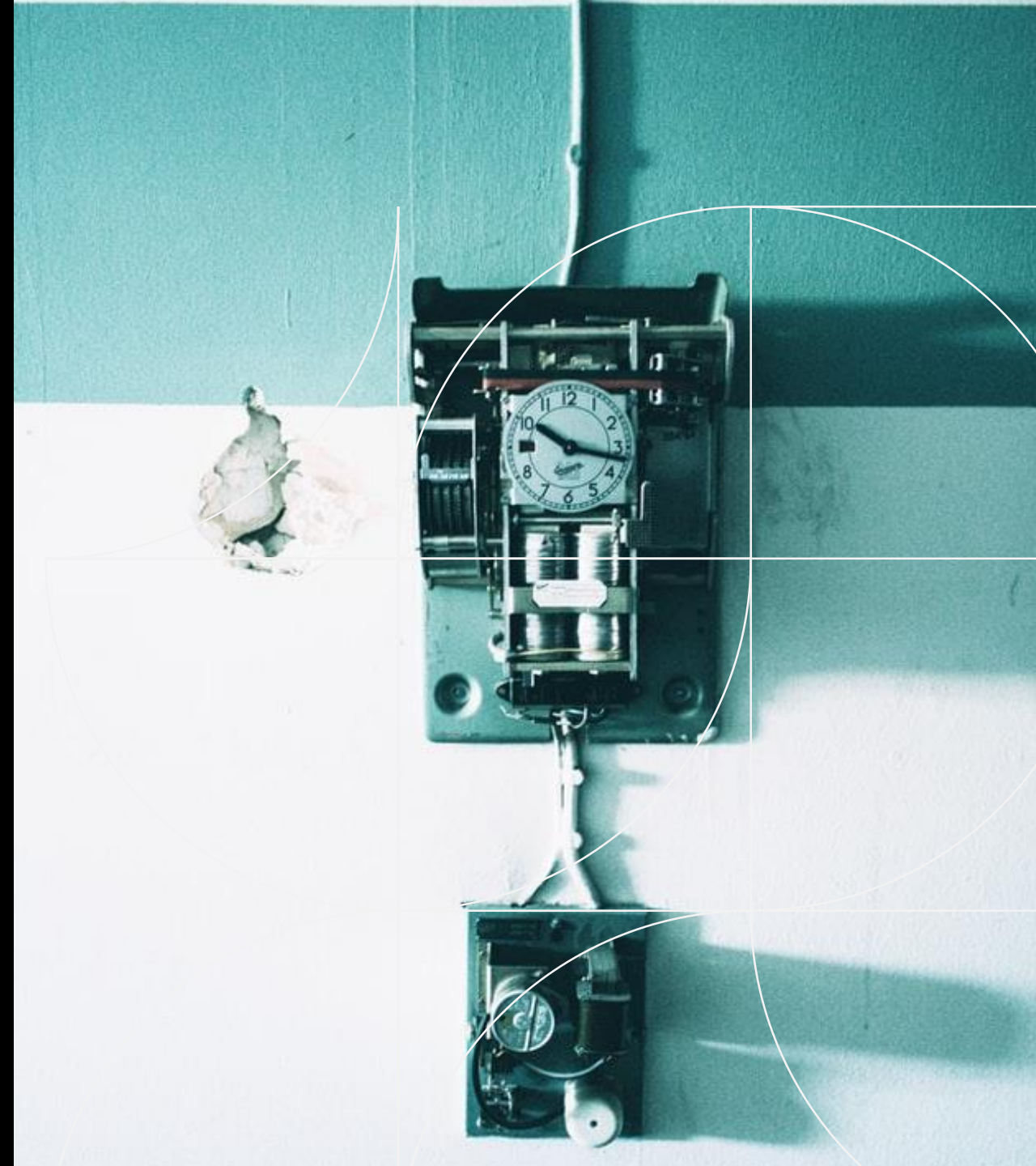
Brett Bartlett
Noah Finkel
Kerry Friedrichs
Scott Hecker

May 20, 2021

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2021 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.

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Joining You Today



Brett Bartlett
Partner
Atlanta
bbartlett@seyfarth.com



Noah Finkel
Partner
Chicago
nfinkel@seyfarth.com



Kerry Friedrichs
Partner
San Francisco
kfriedrichs@seyfarth.com



Scott Hecker
Senior Counsel
Washington, DC
shecker@seyfarth.com

Agenda

01	The Biden Effect on FLSA Enforcement by the Federal Wage and Hour Division
02	How to Respond to a WHD Investigation
03	16(b) Litigation Trends
04	Mitigating Wage and Hour Risks: Best Practice Pointers for Conducting an Effective Self-Assessment

The Biden Effect on FLSA Enforcement by the Federal Wage and Hour Division



Scott Hecker
Washington, DC

- New SES's with Regional Voices
- Data-Driven Initiatives and Strategic Enforcement Will Remain
 - Relaxed Case Selection Criteria?
- Publicity

“[E]nforcement procedures must send the consistent message that persistent, egregious, and workplace-wide infractions of the law will be met with significant consequences.”

Dr. David Weil, The Once and Future WHD Administrator
Improving Working Conditions Through Strategic Enforcement

What will WHD focus on during President Biden's Watch?

Independent contractor / gig economy issues

- Julie Su was focused on future of work in California, and we know about Dr. Weil's interest in these topics.
- President Trump's IC rule has been rescinded, prompting litigation by groups that supported the rule.
- Trump's joint employment rule is in the queue was struck down by a NY federal judge in October 2020 and will likely be rescinded as well.

Minimum wage issues

- Walsh has shown support for Biden and Democratic efforts to increase minimum wage to \$15.
- President Biden issued EO 14026 setting a \$15 per hour minimum wage for federal contractors.
- Expect action around the 80/20 rule and the tipped credit generally.

Likely advocate for paid family/medical leave

- Walsh strongly advocated for paid family leave for Boston city employees.

Likely advocate for enhanced pay equity measures

Bad Actors Beware

- Under **Trump**:
 - Business-friendly, **compliance assistance**.
 - Use data; numbers-driven **case selection**.
 - Limit press** releases “shaming” employers.
- Under **Biden**:
 - More “bad actors,” **increased enforcement**.
 - Use data; freer, region-driven **targeting**.
 - Publicity as deterrence**.
 - No: PAID program.
 - Yes: Liquidated damages.

How to Respond to a WHD Investigation



Brett Bartlett
Atlanta

Why Does it Start?

Employee Complaint

vs.

Random, Directed, or Targeted

Investigations initiated by
a worker complaint



Investigations initiated
by WHD



The Standard Information Request

- Company information
 - Name, EIN, address
 - Name & addresses of owners, officers
 - Tax records for 3 years demonstrating annual dollar volume
 - Organizational chart
- Worker information
 - List of employees with name, address, pay rate, classification, & *phone numbers*
 - 1099 information
 - DOB for employees <18

Re: Wage & Hour Investigation

Dear

The Wage and Hour Division (WHD) of the U.S. Department of Labor is responsible for administering and enforcing a number of federal labor laws, including the Fair Labor Standards Act (FLSA). This letter is to inform you of the agency's plans to visit your establishment on **November 20, 2015** to determine your compliance with the FLSA. The enclosed pamphlet briefly describes the FLSA.

Authority for this investigation is contained in Section 11(a) of the FLSA. Section 11(a) states, "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter or which may aid in the enforcement of the provisions of this chapter."

I will visit your establishment on _____ at **10:30 AM** to determine such compliance. The normal procedure is to hold an opening conference with a representative of the company, check certain records for a two-year period, interview a representative number of employees, and hold a closing conference to discuss the results of the investigation.

In order to conduct the investigation with as little disruption to your business operations as possible, please have available for our inspection on the above date, all documents providing the following information for the last two years, ending with your last completed payroll:

- (1) Names, addresses, and telephone numbers of all business owners and company officers (e.g., President, Treasurer, Secretary, Board of Directors and other Corporate Officers) along with a company organizational chart if you have one;
- (2) Legal name of the company and all other names used by the company (e.g., "Doing Business As" names);
- (3) Records demonstrating your gross annual dollar volume of sales. Please provide these records for the **past three years**; example Federal corporate Income Tax Returns – IRS Form 1120
- (4) A list of all employees with their address, hourly rate or salary, descriptive job title, shift, and whether you consider that employee exempt from overtime for all current and former employees;

- (5) Payroll and time records for the past two weeks, if there are apparent FLSA violations; I will need to see and review the entire two years of payroll and time records.
- (6) Birth dates for all employees under age 18 who worked during the past 24 months
- (7) 1099 Forms and contract documents with any independent contractors, subcontractors or day laborers at this establishment
- (8) Federal Employer Identification Number (FEIN)
- (9) List of addresses of other locations owned by you
- (10) Organizational chart of the business structure
- (11) Employee handbook

We request that you have all of the listed documents available on the designated meeting date pursuant to the authority contained in Section 11(a) and (c) of the FLSA and in Part 516 of the Code of Federal Regulations.

Per section 15(a)(3) of the FLSA, you are prohibited from retaliating against any person who files a complaint with the Wage and Hour Division or who cooperates with a Wage and Hour Division investigation. You are also prohibited from retaliating against your employees for accepting payment of the wages owed to them or from requiring your employee to return or decline payment of the wages owed to them.

Every effort will be made to conduct this investigation expeditiously and with a minimum of inconvenience to you and your employees. However, please note that the above is not intended to be an exhaustive or final list of records to be examined.

If you are unable to be present on the date and time indicated, you may designate a representative to act on your behalf. Additionally, should you or your representative be unable to attend the scheduled meeting, please notify me as soon as possible but no later than the preceding business day.

If you have any questions, feel free to call me at

Sincerely,

72-Hour Demand: *These Requests are on Fire!*



- Have a plan
- Know who is responsible for the plan
- Ensure every location understands the plan
- Consider having outside counsel on speed dial as part of the plan

Preparation Begins Before First Contact

Wage-Hour Compliance Plan	Self Assessment
Hourly Workers	Worker Classification

- Assess initial letter from WHD
- Think like an investigator
 - Review sample time and attendance/payroll records
 - Investigate prior complaints/issues
 - Identify any exempt status questions
 - Ensure posters displayed
 - Confirm child labor compliance
 - Other issues:
 - FMLA
 - Service Contract Act
 - Davis-Bacon Act

Preparation *After First* Contact

- Investigators are not all cut from the same cloth
 - Different levels of experience
 - Different levels of aggression
 - Different levels of “strictness”
- Almost all investigators push for speed
- Almost all investigators start with very broad requests
- Most investigators are nice as pie
at least at the beginning

What to Expect During the Investigation

- Many investigators are working remotely and will want to conduct all proceedings virtually
- Some are reverting to in-person
- Opening conference
- Employee interviews
- Mailers and phone calls
- Previews of findings
- Closing conference

What to Expect During the Investigation (Cont'd)

:)	No Findings		
:(Back Wages	Liquidated Damages	Civil Money Penalties
:/	Self Audit	Expanded Investigation	
>:(Litigation Under 16(c)	Notice Under 16(b)	Litigation Under 16(b)

**Closing the Investigation:
Range of Potential Outcomes**

Closing the Investigation: *The Forms*

WH-56

Summary of back wages

- Employer signs to confirm commitment to pay by given date
- Pay attention to: (i) payment deadline; and (ii) recovery period
- Generally 90 days is the longest WHD will allow

WH-58

Receipt and release

- Employer asks employee to sign
- Returned executed form provides receipt of wage payment and confirms release of FLSA claims for defined period
- Valid receipt and release may also be reflected by copy of deposited check

Instructions

- Instructions lay out timing for different milestones leading up to closure of back wage process
- Includes deadlines for sending payments, returning preliminary evidence, returning final evidence, and paying net unpaid amount to DOL

- Back wage distribution
- Collection of WH-58s
- Establishing payment
- Coordination with WHD representative
- Payment of net total for unpaid / unlocated employees
- The risk of parallel 16(b) litigation

The Final Steps

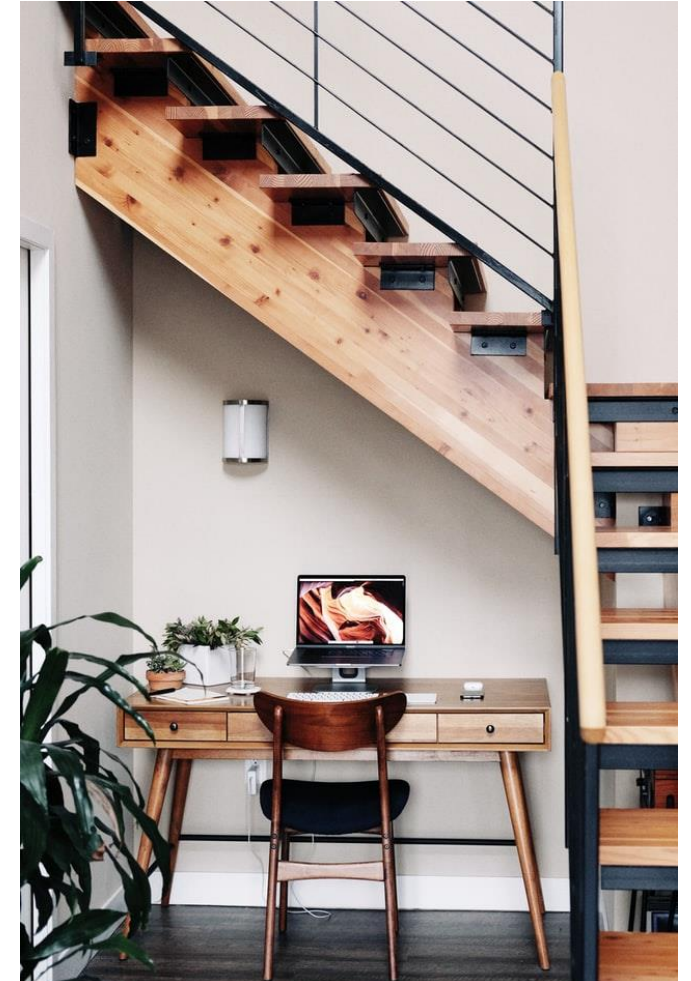
16(b) Litigation Trends



Noah Finkel
Chicago

What Subjects Will Be Litigated the Next Four Years?

- Same-old, same-old
 - Exempt status
 - Off-the-clock claims
- Continue to trend upward
 - Regular rate
 - Independent contractor classification*
 - Joint employment*
- What will increase
 - Work from home claims
 - Hybrid working claims
 - Compensability of health screenings/temperature checks



Defining the Employment Relationship

Contractor vs. Employee

- No definition of “employee” in FLSA itself
- No regulatory definition existed until Jan. 6, 2021
- Courts used various versions of economic realities balancing tests
 - Ill fit for growing gig economy
- Early 2021 DOL test provided simplified analysis
- DOL withdrew guidance on May 6, 2021
- New guidance likely to focus on economic dependence, per David Weil’s 2016 Administrator Interpretation
 - Likely will not be ABC test
 - Will courts defer to it? Or will they focus on actual control?

Defining the Employment Relationship

Joint Employment

- No definition in FLSA itself
- Only a vague regulatory definition existed
- Courts defined joint employer in several different ways, mostly in terms of control
- 2016 Administrator Interpretation broadened definition
- 2019 DOL rulemaking focused on actual control
- *State of New York v. Scalia* (S.D.N.Y. Sept. 8, 2020) enjoined this rulemaking, finding that the rule ignores FLSA's broad definitions and departs from prior interpretations without justification
 - On appeal to 2nd Cir.
- DOL has announced that it will rollback that rule
- New rule or interpretation likely to be broadened
- Places premium on effective indemnification provisions

Will the DOL's Position Become Less Relevant?

The erosion of deference

- Multiple district courts have refused to follow DOL's withdrawal of 80/20 tip credit rule on "sidework"
- Opinion letter allowing employers to use "a reasonable approximation" of delivery drivers' expenses in determining the amount of reimbursement to ensure minimum wage compliance rejected by district court

Injunctions of DOL rulemaking

- Minimum salary level for white-collar exempt employees from \$23,660 to \$47,476 enjoined by E.D. Tex. in 2016
 - Later increase to \$35,568 not challenged
- DOL definition of "joint employers" enjoined by S.D.N.Y. in 2020
 - Likely will result in broader definition by Biden Administration, but could face questionable reception in courts
 - Injunction remains on appeal
- Broader trend of skepticism of *Chevron* deference

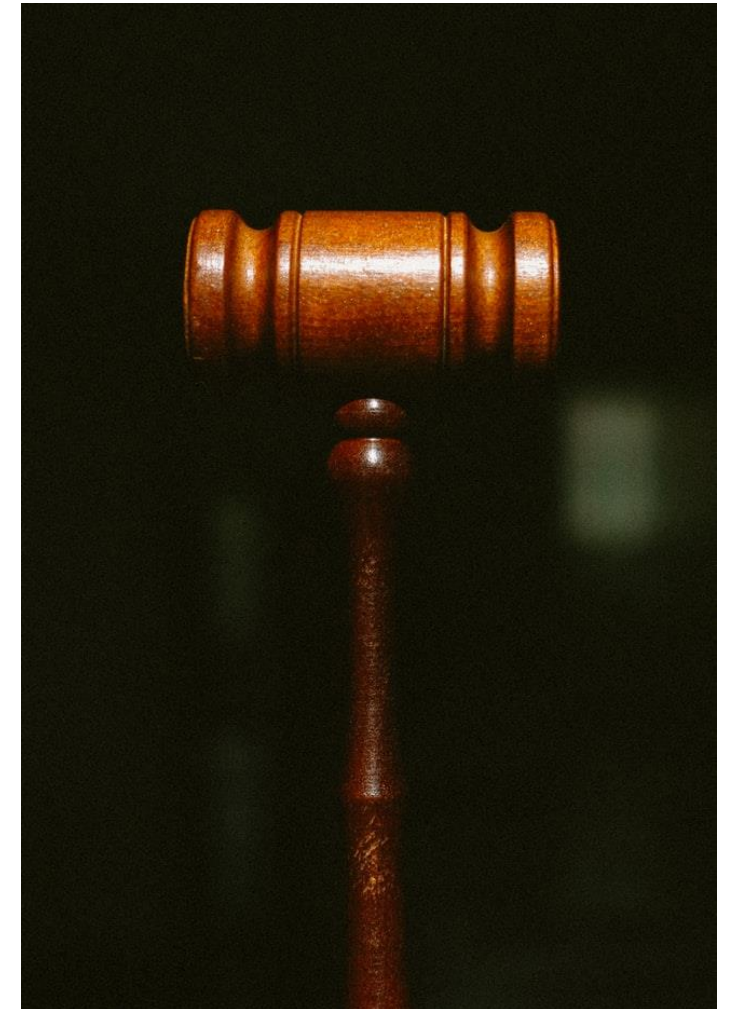
How Might FLSA Collective Action Litigation Change?

The Fifth Circuit's rejection of the two-step approach to collective action certification

- *Swales v. KLLM Transp. Servs., LLC* 985 F.3d 430 (5th Cir. 2021)
- Most courts follow the *Lusardi* approach
 - Plaintiff need only make a “modest showing” to carry a “low burden” to satisfy a “lenient standard for conditional certification; merits not to be considered; little to no discovery taken
 - 84% of conditional certification motions granted in 2020
 - Decertification stage following discovery using a heightened standard
- 5th Cir. rejected *Lusardi*. In its place:
 1. Decide what facts and legal questions are material to the “similarly situated” analysis early in the case
 2. Authorize preliminary discovery on those issues
 3. Analyze all evidence available to determine if putative collective is similarly situated
- To what extent will other courts adopt this framework?

How Might FLSA Collective Action Litigation Change?

- Limit on plaintiffs' ability to maintain nationwide collective actions?
 - *Bristol-Myers Squibb v. Superior Court of BMS*, 137 S. Ct. 1773 (2017):
 - For a court to exercise specific jurisdiction, the suit must arise out of relate to the defendant's contacts with the forum.
 - *Canaday v. The Anthem Cos., Inc.*, No. 20-5947 (6th Cir. Aug. 19, 2020):
 - Whether *BMS* applies to FLSA collective actions
 - Favorable decision for employers may result in plaintiffs' filing collective actions in the district where the defendant maintains is principal place of business



FLSA Litigation Storm Clouds

- Increasing sophistication in the plaintiffs' bar in finding individuals outside the conditional certification process through social media
- Threat to arbitration agreements with class/collective action waivers
 - Forced Arbitration Injustice Repeal (“FAIR”) Act
 - Bars enforcement of mandatory arbitration provisions
 - Currently in committee
 - Likely to pass House and would be signed by President Biden
 - Highly unlikely to make it out of Senate
 - Similar to PRO Act
 - Mass arbitration filings



Mitigating Wage and Hour Risks: Best Practice Pointers for Conducting an Effective Self-Assessment



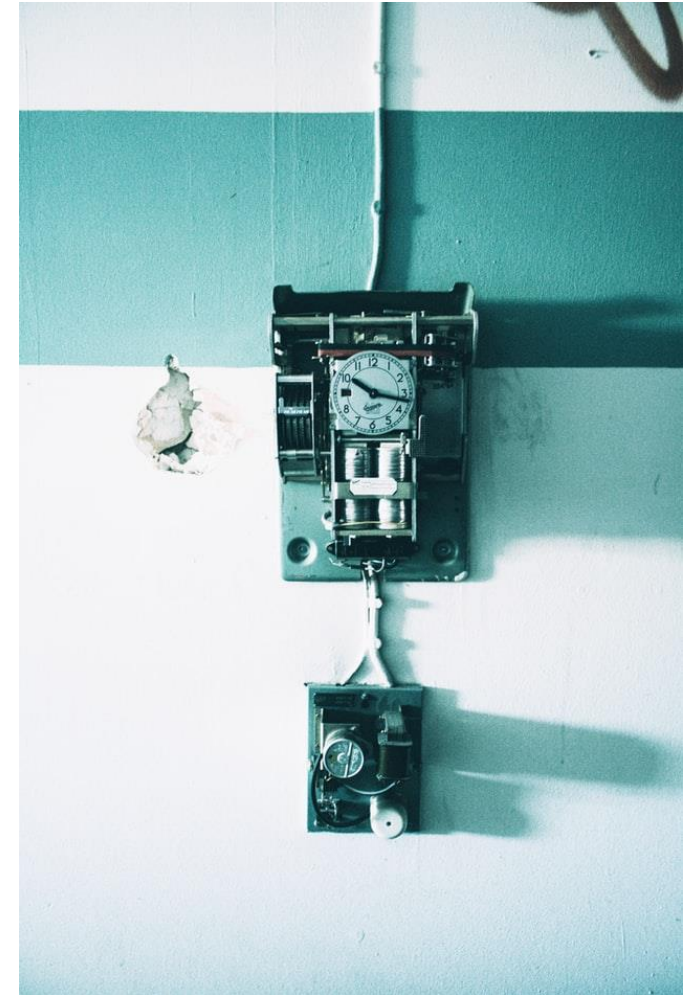
Kerry Friedrichs
San Francisco

What Can Employers Do?

- Consider your practices as a plaintiff's lawyer would
 - **Assess** your wage-hour policies and practices
 - **Fix** policies and practices that pose risk
 - **Train** managers and non-exempt employees to follow policies
 - **Audit** for compliance
- Promote a culture of compliance by motivating managers to comply

Conducting an Effective Assessment: Timekeeping and Off-the-Clock Issues

- Timekeeping practices
 - How is time recorded? Time clocks or manual entry?
 - Rounding and grace periods
 - Auto-deduct for meal periods? Rounding?
 - Understand actual work practices and impact of timekeeping settings
 - Attestations
- Off-the-clock work
 - Understand practices and identify any systematic potential off-the-clock work
 - Ensure policies emphasize reporting of all work
 - Consider mobile devices

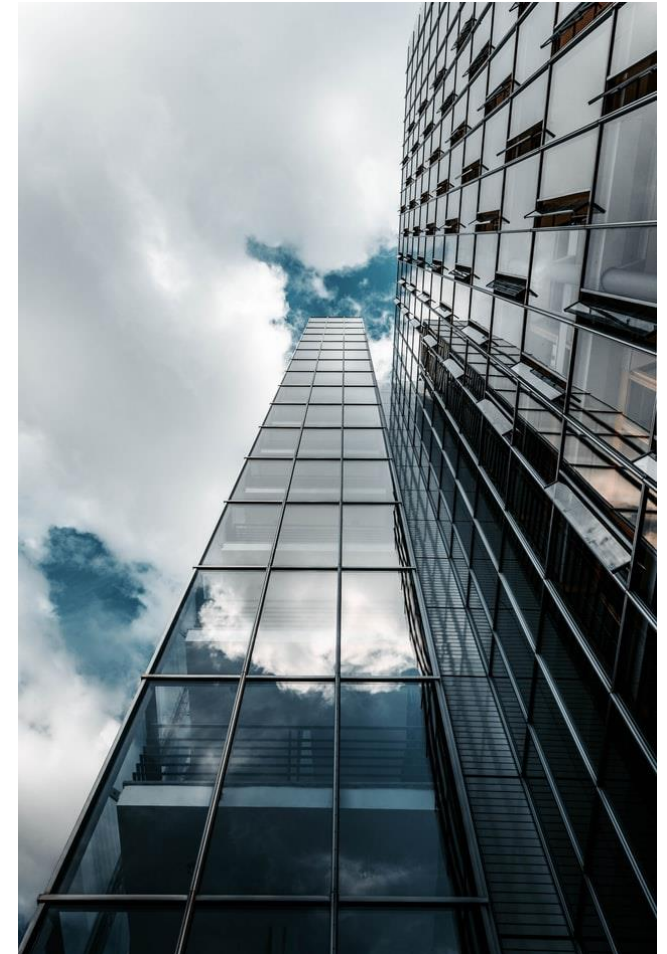


Conducting an Effective Assessment: Regular Rate of Pay

- Regular rate of pay claims are very common
- Know your pay codes and evaluate configuration
- Ensure that the payroll provider is processing pay codes properly
- Establish a process for implementation of new codes
 - At what rate will it be paid?
 - How will it contribute to the regular rate?
- Pay special attention to bonuses and do not rely on “discretionary” language
- Consider state-specific differences

Conducting an Effective Assessment: Incentive Plans

- Many claims involve incentive plans: commissions, bonuses, piece rate, etc.
 - When are they earned?
 - Are they ever recoverable?
 - What happens at termination?
 - Must the plan be in writing? Should it be in writing anyway?
- Consider other impacts of incentive plans
 - Regular rate of pay
 - Pay equity
 - Tax issues



Conducting an Effective Assessment: Exempt Classification

- Evaluate employee duties – just because a position has long been classified as exempt does not mean that it is
 - Understand what employees are doing on a day-to-day basis, and not just what the job description states
 - Update job descriptions if necessary
- Evaluate pay and salary basis requirements
 - Level/type of pay (including applicable state law)
 - Deductions from salary
- Pay extra attention to litigation trends with respect to particular job classifications and industries
- Careful reclassification of positions when appropriate

Conducting an Effective Assessment: Worker Classification

- Review closely any independent contractor and potential joint employer relationships
- Document worker relationships properly
- Strengthen risk-mitigating provisions
 - Staffing agency relationships: control of worker
 - Vendors/contractors: indemnities & representations of non-employee status, ensure all requirements for contractor status are met under applicable law
- Consider benefits of ensuring third party compliance with wage-hour laws
- Pay extra attention to litigation trends with respect to particular industries
- This is an area in which we expect significant change under the new Administration – stay informed and consider options



Available Now: 2021 *FLSA Handbook*

What It Does:

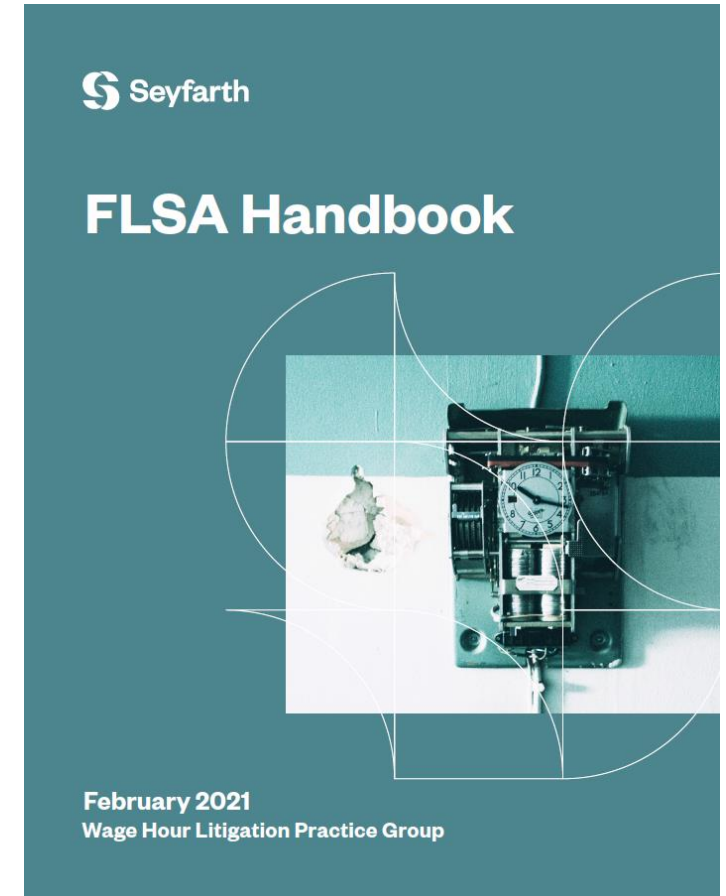
- Summarizes substance of the federal wage and hour laws
- Provides guidance for employers' responses to investigations and checklists for conducting self-audits
- Identifies frequently encountered issues arising in the rapidly evolving wage and hour compliance space and offers solutions

How We Can Help:

- Forms and guidelines found in the appendices provide starting points for compliance measures...
- **BUT** Seyfarth can help tailor any reviews for your specific needs.

Next Steps:

- [Request your copy of the Handbook here.](#)
- Contact any of the presenters to discuss how our attorneys can assist.



**thank
you**

CONTACT INFORMATION

For more information please contact:

Brett Bartlett

bbartlett@seyfarth.com

Noah Finkel

nfinkel@seyfarth.com

Kerry Friedrichs

kfriedrichs@seyfarth.com

Scott Hecker

shecker@seyfarth.com