



THE GROWING TIDAL WAVE

TRENDS IN WAGE & HOUR CLASS LITIGATION

Randall D. Avram & David C. Lindsay

May 13, 2010 12:30–1:30



Randall D. Avram

(919) 420 - 1812

RAvram@KilpatrickStockton.com



David C. Lindsay

(919) 420 - 1811

DLindsay@KilpatrickStockton.com

- Randy and David are partners – and Randy is the team leader – on Kilpatrick Stockton’s Labor and Employment team
- They have successfully defended employers against numerous wage and hour class/collective actions in the health care, manufacturing, technology, retail, and transportation industries
- Randy and David regularly advise employers on wage and hour compliance, and they structure and conduct compliance audits
- They both also defend employment class actions outside the wage and hour context

THE GROWING TIDAL WAVE

- Wal-Mart settles for \$65 million...then for \$55 million...then for \$35 million, all to settle wage and hour suits in 2009
 - Cases brought in Nevada, Missouri, and Washington, respectively
- Jury slaps Family Dollar Stores with \$35 million verdict for misclassifying store managers as exempt and not paying them overtime.
- Merrill Lynch agrees to pay \$44 million to settle consolidated FLSA class and collective actions brought by financial advisors.

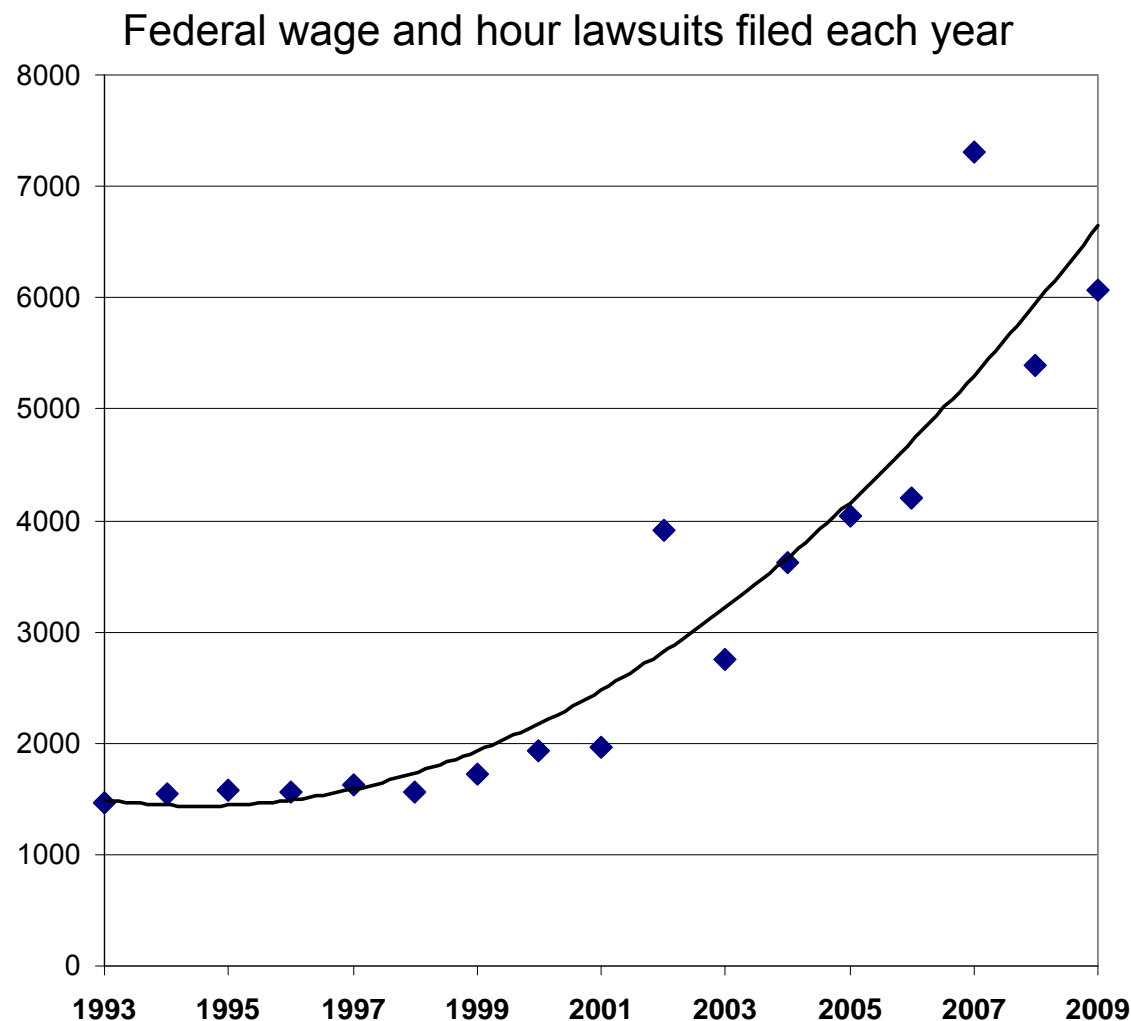
- **Wage and Hour Suits on the Rise**
- **Areas of Greatest Activity**
 - **Exempt / Non-Exempt Misclassification**
 - **Off-the-Clock Time**
 - **Employee / Independent Contractor Misclassification**

Wage and Hour Lawsuits are on the Rise



W&H Suits On the Rise

- FLSA lawsuits are on the rise
 - The number of FLSA cases filed per year has nearly quadrupled since the late 1990's

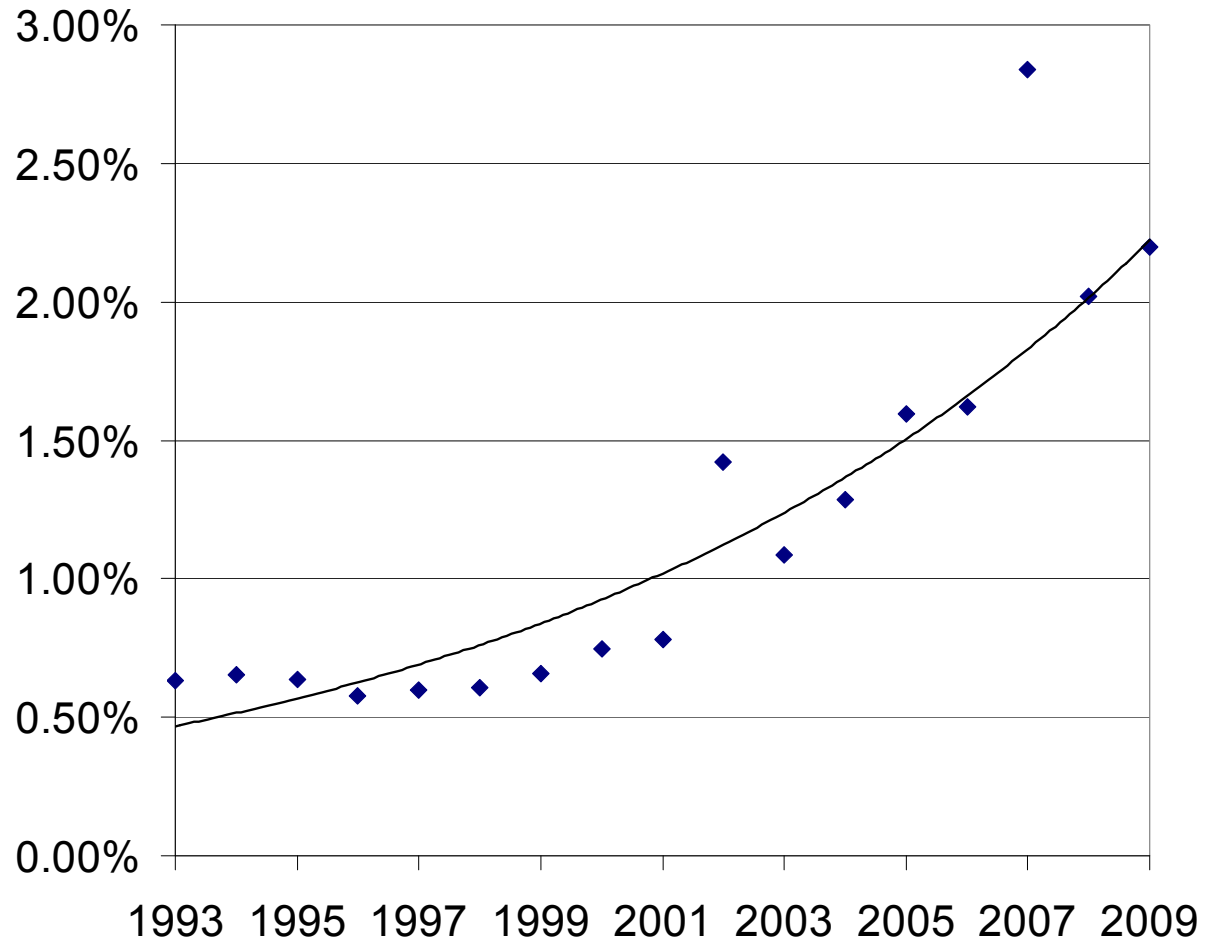


based on <http://www.uscourts.gov/judbususc/judbus.html>

W&H Suits On the Rise

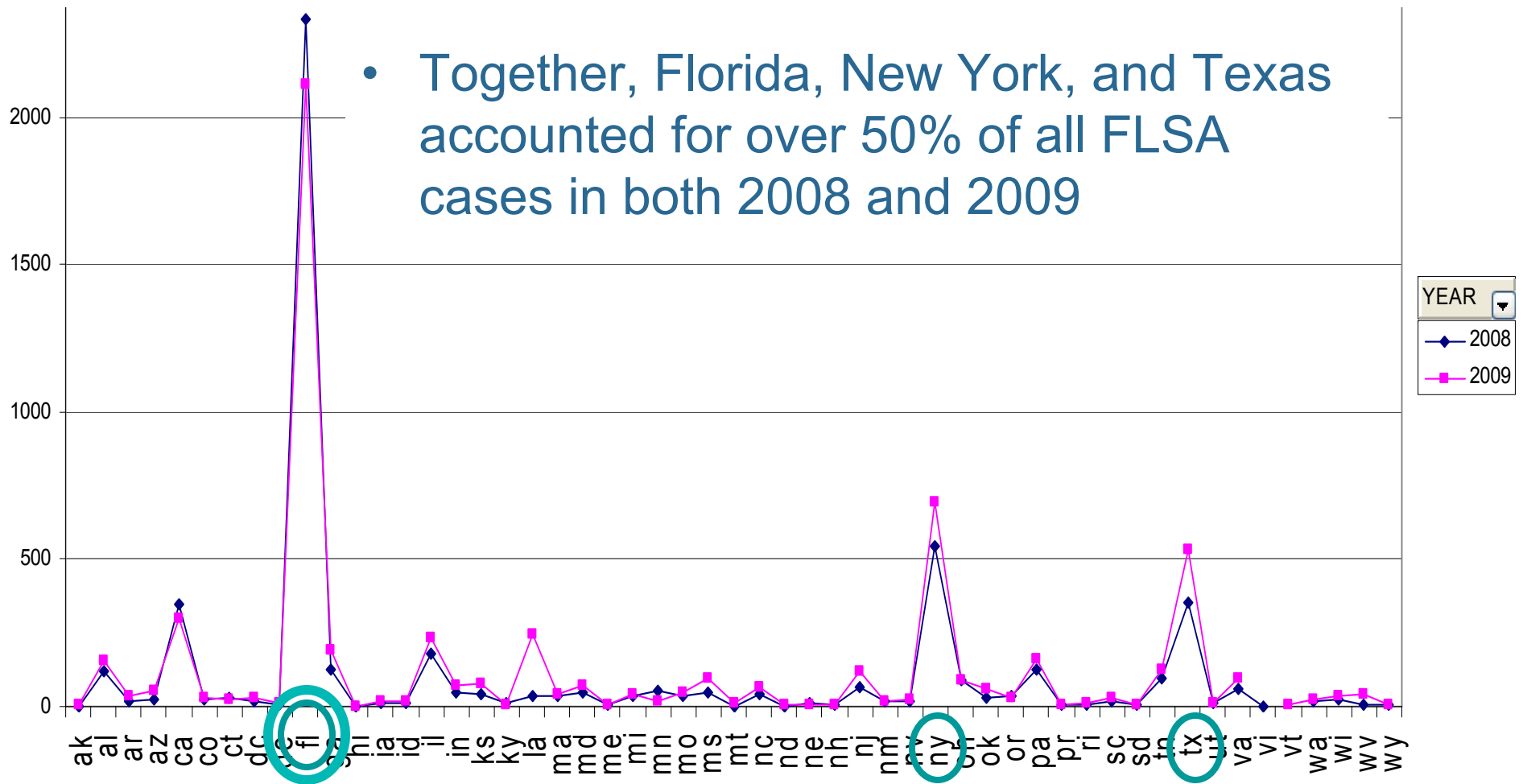
- This sharp increase in FLSA cases over the past 10 years occurred while the total number of federal case filings has remained stable ($\approx 1\%$ increase)
- FLSA cases now account for over two percent of all federal litigation

Percentage of all federal cases made up of wage and hour suits



based on <http://www.uscourts.gov/judbususc/judbus.html>

W&H Suits On the Rise

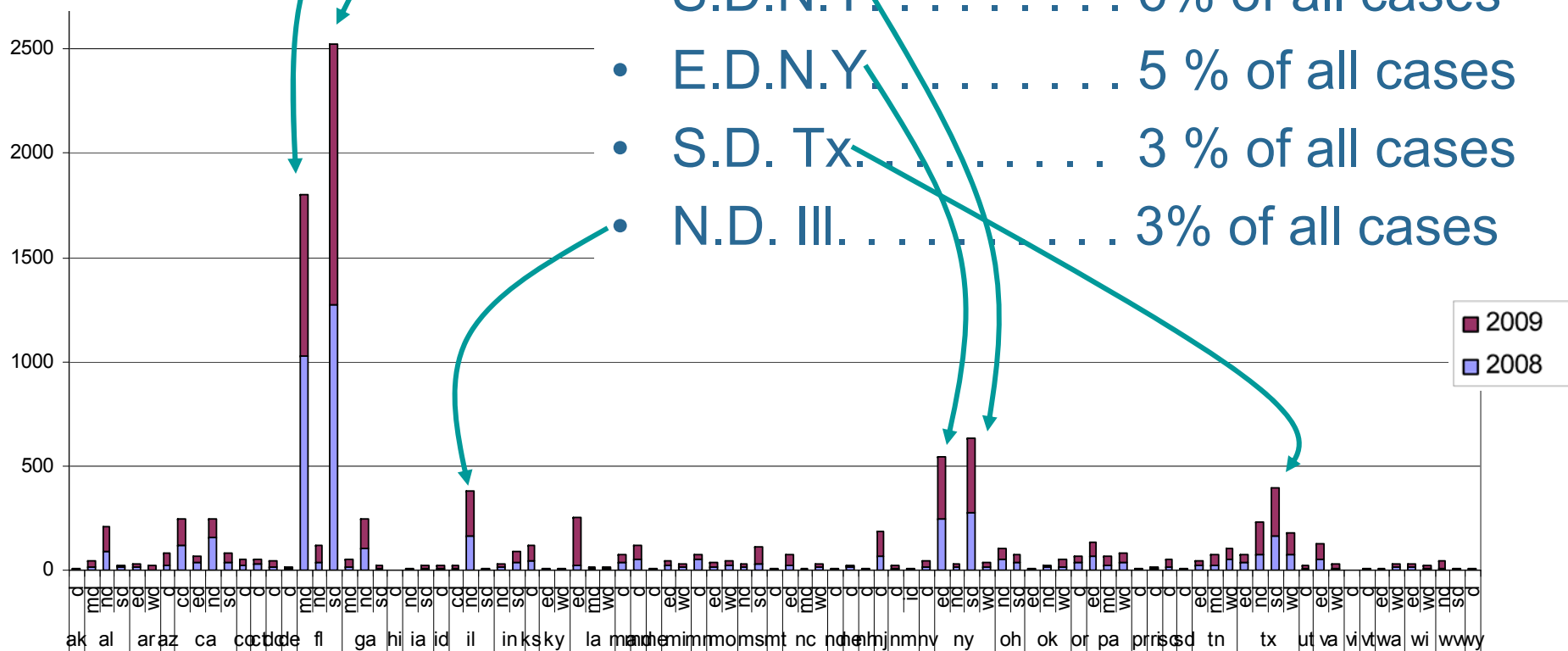


based on Kilpatrick Stockton's analysis of CM/ECF records

W&H Suits On the Rise

Hot Districts in 2008 & 2009

- S.D. Fla. 22% of all cases
- M.D. Fla. 16% of all cases
- S.D.N.Y. 6% of all cases
- E.D.N.Y. 5 % of all cases
- S.D. Tx. 3 % of all cases
- N.D. Ill. 3% of all cases



based on Kilpatrick Stockton's analysis of CM/ECF records

W&H Suits On the Rise

- Government Also Targeting Wage and Hour Violations
 - DOL Enforcement
 - In 2008, DOL concluded 28,242 compliance actions, found violations in 80% of investigations, & collected \$185 million in back wages
 - Proposed DOL budget includes additional \$25 million to focus on misclassification
 - Tax Audits
 - Conducting random audits of 6,000 employers starting February 2010 to identify employee misclassification and other tax gaps
 - State Agency Enforcement
 - State agencies targeting employee misclassification
 - State legislation increasing fines for misclassification
 - Proposed DOL budget to encourage state enforcement

W&H Suits On the Rise

- Government Also Targeting Wage and Hour Violations
 - Employee Misclassification Prevention Act (S. 3254), if passed, would amend the FLSA to:
 - require employers to keep records of workers classified as independent contractors
 - provide specific penalties for misclassifying these workers
 - require employers to notify non-employees of their classifications
 - require states to conduct audits and strengthen state fines
 - State legislation
 - Illinois relied on new Employee Classification Act to issue \$300,000 civil penalty against Chicago-area contractor
 - Connecticut lawmakers have proposed a bill that would convert current \$300 penalty for misclassifying employees as independent contractors to a daily penalty.

Determining which employees are exempt from the FLSA's overtime requirements can be quite difficult



Exempt vs. Non-Exempt

- Professional Employees
 - Primary duty is performance of work requiring advance knowledge in field of science or learning
 - Customarily acquired by a prolonged course of specialized intellectual instruction
 - Paid at least \$455/week, on salary basis

Exempt vs. Non-Exempt

- Administrative Employees
 - Primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer or its customers
 - Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
 - Paid at least \$455/week, on salary basis

Exempt vs. Non-Exempt

- Executive Employees
 - Primary duty is managing the enterprise or a recognized subdivision thereof
 - Customarily and regularly directs the work of two or more employees
 - Paid at least \$455/week, on salary basis

Exempt vs. Non-Exempt

THE FLSA IS HIGHLY TECHNICAL

Example: Engineers at Company A, who have degrees from reputable engineering schools, repair state of the art computer hardware. The engineers receive an \$80,000/year salary, a premium in the computer-repair industry. The engineers are scheduled to work 50 hours per week, though they actually work 60 (yielding an average hourly pay rate of \$25).

Were the engineers correctly paid?

- A) The engineers are professional employees, and were thus correctly paid
- B) The engineers should technically have been paid overtime, but they were paid a premium salary and thus have no damages for the lack of overtime
- C) The engineers are “highly compensated” employees under the FLSA, and are thus exempt employees who were correctly paid
- D) The employees should have been paid overtime at 1 1/2 times their regular hourly rate for all hours worked over 40.

Exempt vs. Non-Exempt

THE FLSA IS HIGHLY TECHNICAL

Example: Engineers at Company A, who have degrees from reputable engineering schools, repair state of the art computer hardware. The engineers receive an \$80,000/year salary, a premium in the computer-repair industry. The engineers are scheduled to work 50 hours per week, though they actually work 60 (yielding an average hourly pay rate of \$25).

29 C.F.R. § 541.401: computer engineers not exempt when employed to repair and/or manufacture computers

D) The employees should have been paid overtime at 1 1/2 times their regular hourly rate for all hours worked over 40.

Exempt vs. Non-Exempt

FLSA DAMAGES CAN ADD UP

Example: Engineers at Company A, who have degrees from reputable engineering schools, repair state of the art computer hardware. The engineers receive an \$80,000/year salary, a premium in the computer-repair industry. The engineers are scheduled to work 50 hours per week, though they actually work 60 (yielding an average hourly pay rate of \$25).

- Calculate “regular rate” : weekly salary / scheduled hrs (50) = \$30.77/hr
- Pay time-and-a-half regular rate for hours worked in excess of their scheduled hours (10 per week)
- Pay $\frac{1}{2}$ x regular rate for scheduled hours over forty (10 per week)

$$\begin{aligned}\text{weekly underpayment} &= [10 \text{ hrs} \times (1 \frac{1}{2} \times \$30.77)] + [10 \text{ hrs} \times (\frac{1}{2} \times \$30.77)] \\ &= \$615.40\end{aligned}$$

$$\begin{aligned}\text{yearly underpayment} &= 52 \text{ wks} \times \$615.40 \\ &= \mathbf{\$32,000/yr}\end{aligned}$$

Exempt vs. Non-Exempt

FLSA DAMAGES CAN ADD UP

Example: Engineers at Company A, who have degrees from reputable engineering schools, repair state of the art computer hardware. The engineers receive an \$80,000/year salary, a premium in the computer-repair industry. The engineers are scheduled to work 50 hours per week, though they actually work 60 (yielding an average hourly pay rate of \$25).

$$\begin{aligned}\text{weekly underpayment} &= [10 \text{ hrs} \times (1 \frac{1}{2} \times \$30.77)] + [10 \text{ hrs} \times (\frac{1}{2} \times \$30.77)] \\ &= \$615.40\end{aligned}$$

$$\begin{aligned}\text{yearly underpayment} &= 52 \text{ wks} \times \$615.40 \\ &= \mathbf{\$32,000/yr}\end{aligned}$$

-
- In this example, even though Employer A already paid the engineers \$80,000, a premium salary, the FLSA would calculate their underpaid wages as \$32,000 per employee, per year.
 - Double that amount (\$64,000) unless employer has good faith defense.
 - Multiply this (already doubled) amount by 2 years -- 3 for willful violations.
 - Damages can thus equal up to **\$192,000 . . . per employee!**

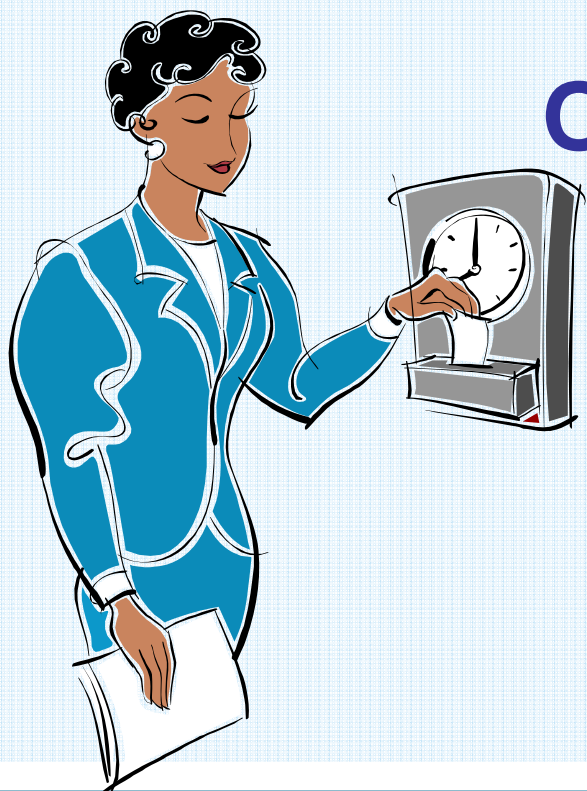
Exempt vs. Non-Exempt

- Common misclassification traps
 - Treating employees as exempt simply because:
 - they are salaried
 - they are expected to work over 40 hours/week
 - their job is important
 - E.g., loan officers
 - In response to several recent lawsuits, the Department of Labor recently clarified that loan officers are typically not exempt from overtime
 - Improper pay deductions can void employees' exempt-status
 - Life Time Fitness Inc. held liable for overtime to otherwise-exempt salaried employees because it required partial repayment of pre-paid bonuses for failure to meet performance goals.

Exempt vs. Non-Exempt

- Common misclassification traps
 - Misclassifying Assistant Managers
 - Assistant managers may not have the “primary duty” of managing employees, especially when working in conjunction with a manager
 - A number of restaurants, retail, and department stores recently hit with assistant manager collective actions
 - In fact, store managers can have the same problem, if they defer to higher-ups for managerial decisions
 - See Morgan et al. v. Family Dollar Stores, Inc.
 - Jury awarded \$35 million in damages and found that, in light of district managers’ heavy involvement, store managers did not have primary duty of management
 - Verdict and jury award upheld by 11th Circuit

Off-the-Clock Work



Off-the-Clock Work

- “Suffer or permit to work”
 - Employee work time can be compensable even if not requested or desired
- FLSA has extremely specific rules regarding compensable time
 - Travel time (depends on when employee has commenced working, whether they travel out of town, etc.)
 - Waiting time (whether engaged to wait or waiting to be engaged)
 - Donning and doffing
- Even a few minutes per day add up, when multiplied across workforce for 2 to 3 years

Off-the-Clock Work

- Common pitfalls / targets
 - Forced clock-out when waiting for customers/work
 - Computer boot-up time
 - Companies operating call centers hit with series of collective actions for employees' unpaid time spent booting up computers in preparation to take customer calls.
 - Donning and doffing
 - 2009 saw a slew of suits against food processing plants alleging unpaid time for preliminary and postliminary activities, such as donning and doffing safety gear and walking to and from the production line

Off-the-Clock Work

- Common pitfalls / targets
 - Automatic lunch break deductions
 - Hospitals recently targeted in suits arising out of nationwide investigation into automatic meal break deductions
 - Several complaints add RICO claim.
 - No compensation for after-hours calls/e-mails
 - Paying for scheduled hours even when work early/late
 - ProMed Ambulance Service recently sued in action alleging that ambulance drivers, EMTs, and paramedics were paid for 16 hours of work for each 24 hour shift, regardless of whether their scheduled rest periods were interrupted by a call to duty.

Employee / Independent Contractor Misclassification



Employee vs. Independent Contractor

- State-court class action against Orange County Register results in \$42 million settlement with newspaper carriers misclassified as independent contractors.
- DOL brings suit against Time Warner, settles for \$5.5 million.
- IRS investigation into Microsoft's independent contractor classifications prompts lawsuit resulting in \$97 million settlement.
- FedEx receives \$319 million tax bill from the IRS for classifying drivers as independent contractors.

Employee vs. Independent Contractor

IRS 20 Factor Test

- Instruction
- Training
- Integration of worker into business operations
- Personal services
- Hiring, supervising and paying assistants
- Continuing relationship
- Set hours of work
- Full time required?
- Doing work on employer's premises
- Order or sequence set
- Oral or written reports
- Payment by the hour, week or month
- Payment of business and/or traveling expenses
- Furnishing of tools and materials
- Significant investment
- Realization of profits or loss
- Working for more than one firm at a time
- Making service available to the general public
- Right to discharge
- Right to terminate

Employee vs. Independent Contractor

Avenues of Attack Against the Company that “Misclassifies”

- IRS audit
- State/federal wage and hour class actions
- State unemployment claims
- Workers’ compensation claims
- Benefits issues
- Due diligence in debt/equity financing or M&A/IPO events
- Discrimination lawsuits

Employee vs. Independent Contractor

IRS Action

- SS-8 request for classification determination
- Payroll tax audit
 - Review of reporting consistency (1099's, W-2's)
 - Review of classifications
 - Can result in adjustments for a three-year period
 - IRS National Research Program to audit 6,000 employers over three years to close tax gap caused by employee misclassification and employment tax noncompliance
 - Taxes, fines and penalties
 - Safe harbor – Section 530
 - Companies protected if have a reasonable basis for classification
 - Pending legislation (Taxpayer Responsibility, Accountability, and Consistency Act of 2009) would narrow
 - Administration proposal would eliminate
- IRS audit can lead to lawsuit or administrative investigation

Employee vs. Independent Contractor

Wage and Hour Investigations and Class Actions

- Class-based relief is common, and quite expensive
- Defenses hampered by lack of record keeping when contractors are involved
- FLSA provides for overtime liability, plus liquidated damages and attorneys' fees

Employee vs. Independent Contractor

- *Labrie v. UPS Supply Chain Solutions, Inc.*
 - UPS subsidiary sued in N.D. Cal. under FLSA and California state law for misclassifying drivers and couriers as independent contractors.
 - On behalf of purported class of affected employees, plaintiffs sought to recover:
 - overtime wages;
 - minimum wages;
 - reimbursement for certain business expenses (e.g., gas);
 - reporting and waiting time penalties.
 - UPS settled for \$12.8 million in December 2009.

Employee vs. Independent Contractor

State Unemployment Claims

- Unemployment insurance generally covers only employees
- Increasing number of contractors are filing for unemployment
- Agencies finding employment status
- States seeking increased tax revenues

Employee vs. Independent Contractor

Workers' Compensation Claims

- Workers' compensation generally applies only to employees
- Contractors increasingly raising claims
 - Agencies tend to be liberal in construing employee status
 - May apply factors differently than the IRS does

Employee vs. Independent Contractor

Benefits Concerns

- Microsoft case – contractors improperly excluded from benefits plans
- Important to check plan verbiage to limit exposure
- Can create millions of dollars of exposure if contractors reclassified as employees

Employee vs. Independent Contractor

Other Concerns

- Due diligence in debt/equity financing or M&A/IPO events
- Discrimination lawsuits

How to Prepare for Wage/Hour Challenge

**How does your company defend
against a wage and hour claim?**

Tune in next time...





THE GROWING TIDAL WAVE

TRENDS IN WAGE & HOUR CLASS LITIGATION

Randall D. Avram
RAvram@KilpatrickStockton.com
(919) 420-1812

David C. Lindsay
DLindsay@KilpatrickStockton.com
(919) 420-1811