

CLIENT ADVISORY

Wage and Hour Litigation is Here to Stay

Massive class action lawsuits against Wal-Mart, Allstate, UPS and Citi Group have propelled alleged violations of wage and hour laws into the headlines. But companies of all sizes are contending with a rising tide of such claims. For smaller employers, the bottom line impact may be far greater than for large employers.

Wage and hour laws mandate that certain employees should be paid at hourly rates and be eligible for overtime payments. These employees are commonly referred to as “nonexempt” employees because they are not exempt from overtime laws.

A common misconception among employers is that if you simply pay someone a salary, they are automatically classified as an exempt employee. In reality, the determination of whether an employee is exempt or nonexempt depends on the functions they perform in their job, not the way in which the employer has elected to pay them.

Consider this example: A convenience store employee who has been paid on an hourly basis is promoted to assistant manager. As a result, the employee is now thought to be exempt and is paid a salary rather than hourly. He performs all of the same job functions – the only difference being that he has been given a key and can open or close the store as necessary.

There will now be a difference in the amount of money he takes home. He works the same hours as before the promotion, but he does not get paid overtime. In essence, he is doing the same job for less pay.

Many cases have been brought on behalf of such employees claiming that their new jobs have been improperly classified as exempt and that they are entitled to receive overtime pay. These “reclassification” claims are often brought as class actions and can be very costly, both in terms of defense and resulting liability.

Wage and hour cases can be brought on a variety of theories either by single plaintiffs or as class action suits. In many cases, a wage and hour violation may result in a modest sum owing to a single plaintiff, but if the same violation occurs in calculating wages for hundreds or thousands of employees, the aggregate award can be significant.

In situations where the potential payback for an individual claimant would be dwarfed by the costs of litigation, it may make sense for claimants to band together to pursue a class action. This is why wage and hour laws are fertile ground for class action litigation.

With employment law, it can often be difficult to calculate damages connected to an alleged wrongful act. With Wage and Hour claims, it becomes a math exercise. The plaintiffs can apply a formula totaling how many hours an employee worked in excess of 40 hours a week and multiply that against their hourly salary and come up with the figure. There are tools out there making it even easier for plaintiffs to track and total the unpaid wages. There is an app for the iPhone and iPad that helps employees track their own timesheet. The Department of Labor has a tool on their website that applies the wages for multiple time periods.

Department of Labor FLSA Calculator: <http://www.dol.gov/elaws/otcalculator.htm>

iPhone and iPad DOL Timesheet tracking tool:
<http://itunes.apple.com/us/app/dol-timesheet/id433638193?mt=8>

Even more complex are the problems posed by so-called “off-the-clock” work. The proposition that

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If you do not have a contact at AmWINS to help with your financial services risks, [click here for a list of brokers on our website](#).

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employees are entitled to be paid wages for hours worked may appear clear-cut, but consider the example of workers who are required to wear uniforms while on the job. If these workers arrive at their workplace, don their uniforms, then clock in to work, clock out again and take off their uniforms before returning home, a wage and hour violation may have occurred. If the uniform is required to be worn as part of the job, the employees' work day may be deemed to start when they begin putting the uniform on, and end when they have finished taking it off. This type of claim has been called a "donning and doffing" claim.

A similar issue is presented by requiring employees to attend meetings or training sessions. If the meeting or training is considered to be mandatory, then the time employees spend at the meeting is considered to be compensable.

Similarly, if an employee arrives at the job early and begins the work day by logging onto the computer or performing other job-related tasks in anticipation of the work day, that time is also compensable, and failure to include that time in the calculation of wages may lead to a wage and hour suit.

Another gray area is travel time. The time employees spend traveling to and from their place of employment are generally not considered to be included in hours worked and therefore is not compensable. An exception that can get you in hot water is if a manager and employee regularly share a ride to work. If work topics are discussed on the ride, it is arguable that the ride is compensable.

Are my clients already insured for this?

It is quite likely that they are not currently insured for this. The response to the increase in this type of claim by the insurance community is to exclude coverage for this type of claim. There are some insurers that offer the coverage on a limited basis. Some insurers are providing defense only coverage up to a sublimit (amount lower than your policy limit) such as \$100,000 or \$250,000. There are some insurers that will include both defense and settlement amounts within that sublimit.

When reviewing your current employment practices or a client's D&O insurance policy you likely won't see a "Wage & Hour Exclusion." It can either be as subtle as putting something like this within the definition of loss: "Loss shall not include: any unpaid salary, bonus, hourly pay, overtime pay, severance pay vacation days or sick pay." These claims are essentially unpaid overtime. The other likely place to see coverage excluded is in the exclusion section where you will likely see an exclusion for anything "based upon, directly or indirectly arising out of, or in any way involving any actual or alleged violation of the Fair Labor Standards Act (except the Equal Pay Act)." This is the law that governs Wage and Hour claims.

Conclusion

Wage and Hour rules abound with such subtle but material distinctions. The first challenge for employers is, wherever possible, to identify them up front and avoid the traps that can land the unwary with expensive lawsuits and unwelcome publicity. Online risk management advice from a trusted source can be particularly helpful in this context. The second necessity is broad, robust insurance coverage for the traps that still prove elusive.

For more information, see the appendixes on the following two pages.

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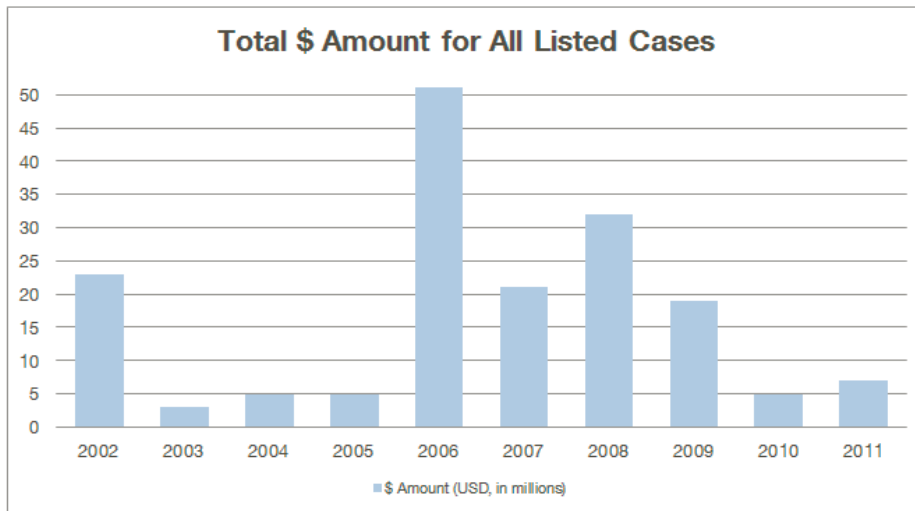
Settlement and Defense totals for all Wage & Hour claims in the MSCAd Database, not limited by industry or size.

Source: Advisen, Ltd.



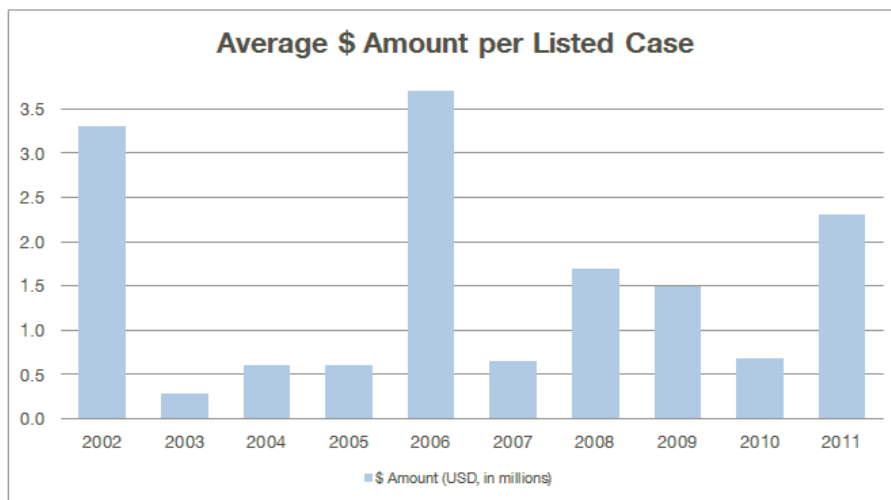
Total number of Wage & Hour claims in the MSCAd Database, not limited by industry or size.

Source: Advisen, Ltd.



Settlement and Defense totals for all Wage & Hour claims in the MSCAd Database, limited to organizations with revenues under \$50 million and less than 500 employees.

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