

HR STAR 2014

Hot Topics in Wage and Hour Litigation

Clare Draper

Partner

Alston & Bird LLP

404-881-7191

clare.draper@alston.com

www.alston.com

Hot Topics in Wage and Hour Litigation

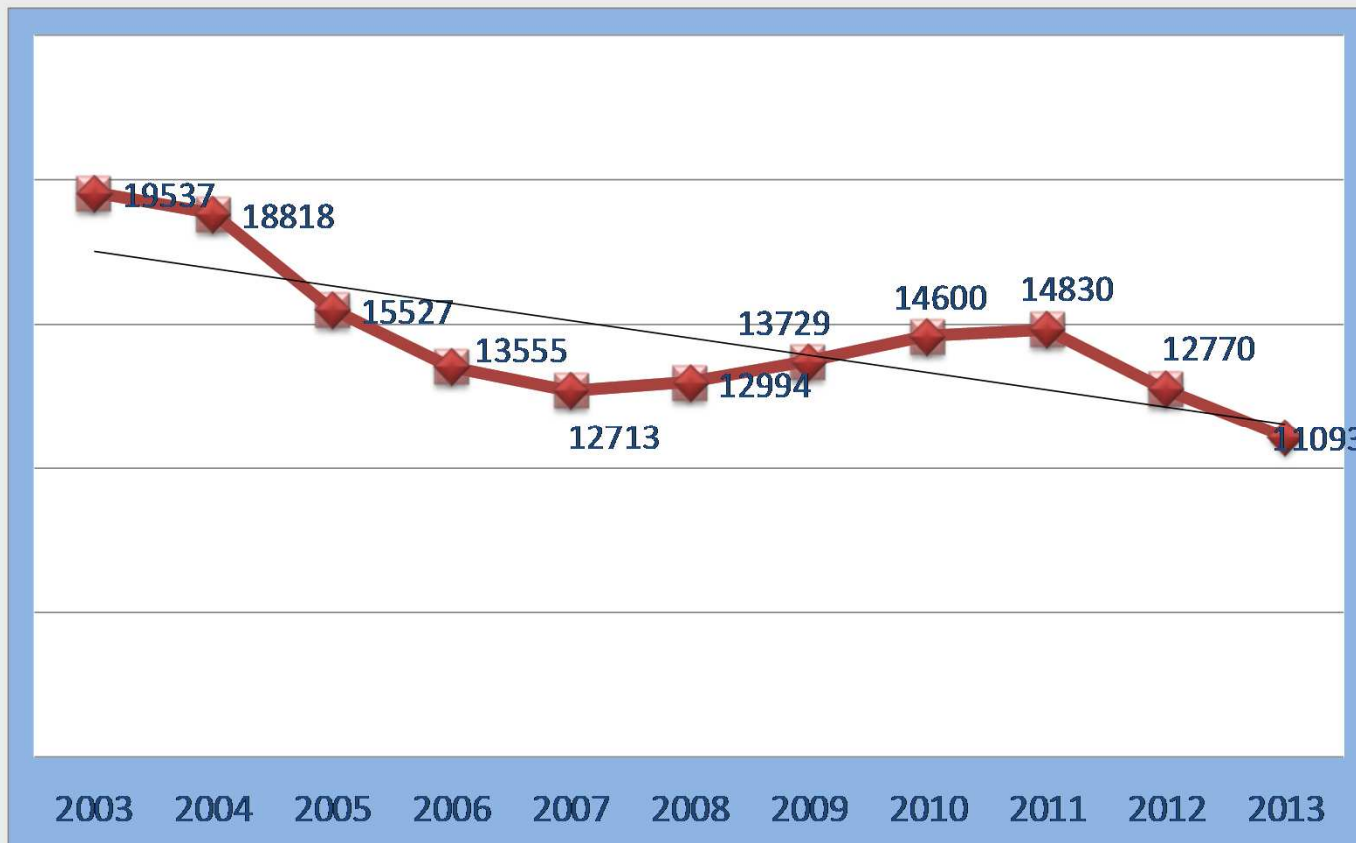
- FLSA cases are the fastest growing segment of employment litigation and the number of FLSA collective actions far exceeds the number of all other employment class actions.
- Agenda
 - FLSA background and basics
 - FLSA trends
 - Hot areas of FLSA litigation
 - Litigation avoidance



FLSA Cases Filed Annually in Federal Courts

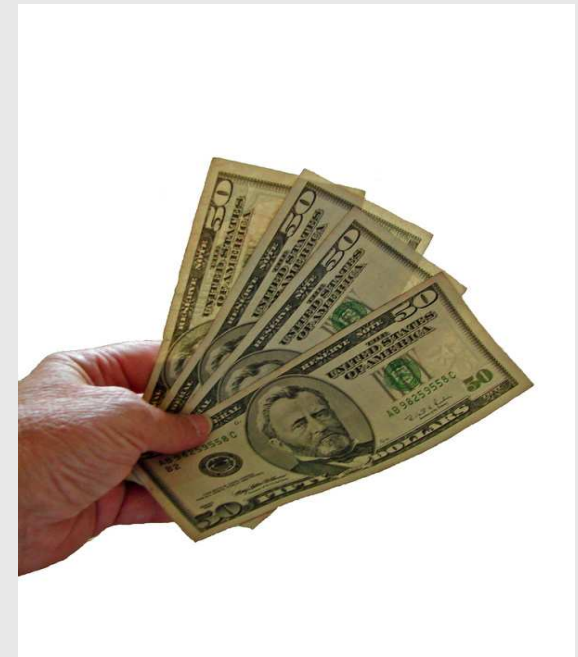


Compare: Title VII Cases Filed Annually in Federal Courts – All Types



Fair Labor Standards Act – The Basics

- Federal law
- Minimum wage (Currently \$7.25/hour)
- Overtime
- Payment for all time worked
- Certain employees exempt
- Real independent contractors not covered



Note: Executive Order 13658 raised minimum wage for federal contractors to \$10.10 per hour beginning January 1, 2015.

FLSA – Litigation Trends

- 1938 statute based on 1938 concepts
- Continuing increase in litigation for a decade
- Many are collective actions
- More FLSA collective actions than all other employment class actions
- Often combined with state law wage claims
- Increased DOL enforcement



FLSA Collective Action Litigation Trends

- **Current hot areas include:**

- Exempt versus non-exempt classification issues
- Contractor versus Employee classification issues
- Off-the-clock work, break time
- Miscalculation of regular rate of pay
- State law claims
- Settlement

- **No Industry Immune**

- **Some good recent cases, but no slowdown**



Behind the Trends

- Widespread noncompliance with FLSA
 - statute complex and compliance difficult
 - statute and regs based on outdated concepts
- Difficult to remedy noncompliance without inviting litigation
- Barriers to release of claims
- Employer policies apply to groups of employees
- Increase in DOL audits and litigation
- Plaintiff-friendly statute
 - burdens on employer
 - easy to pursue collective claims
- ATTORNEYS' FEES

Strategy of Plaintiffs' Lawyers

- Follow the DOL trail
- Mimic prior cases
- Focus on vague and disputed requirements
- Use the Internet to recruit
- Take advantage of publicity
- Aggregate claims and use size as a hammer



State Wage and Hour Laws

- Not preempted by FLSA
- Often different from FLSA
 - higher minimum wage
 - different calculations for regular rate
 - different exemption rules/tests
 - longer statute of limitations
 - overtime requirements based on workday instead of workweek
 - Required paid meal and rest breaks
- Often opt-out class actions



Classification Battlegrounds

- Exemption Misclassification
- Contractor Misclassification

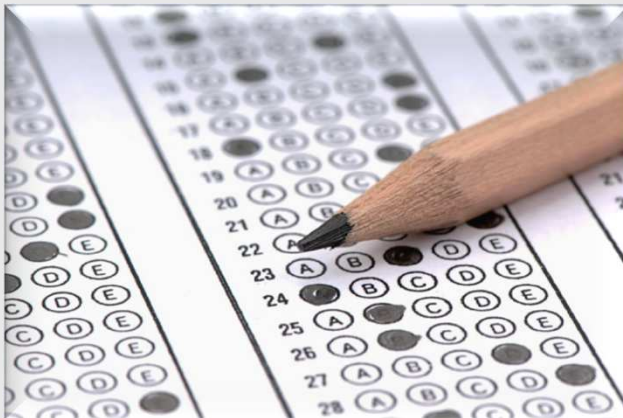


Hot Topic - Exemption Misclassification

- **Plaintiffs' lawyers love exemption issues because rules are complex, outdated and hard to apply**
 - Easy to certify collective actions
 - Hard for defendants to win on summary judgment
- **FLSA “White Collar” Exemptions**
 - Administrative
 - Executive
 - Professional (learned, creative)
 - Outside sales
 - Certain computer employees

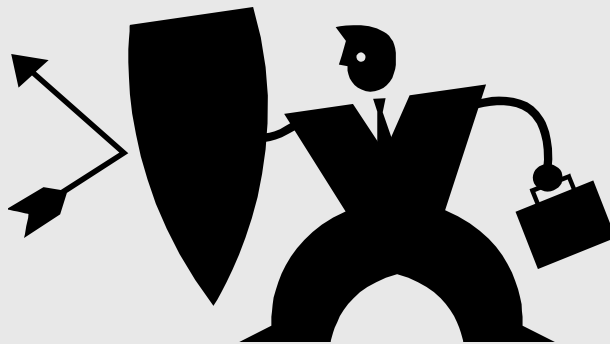
Tests for Exemption

1. “Duties Test” – employee must perform primarily exempt work
2. “Salary Level Test” – employee must be paid a minimum salary (\$455/week)
3. “Salary Basis Test” – employee must be paid on a salary basis



Primary Battleground: Administrative Exemption

- Primary duty must be office work directly related to management or general business operations of employer or customers
- Primary duty must involve exercise of discretion and independent judgment with respect to matters of significance



Secondary Battleground: Learned Professional Exemption

- Primary duty must be performance of work requiring advance knowledge
- In a field of science or learning
- Acquired by a prolonged course of specialized intellectual instruction, resulting in specialized, usually advanced degree
- Well educated does not mean exempt

Secondary Battleground: Outside Sales Exemption

- Primary duty must be making sales, obtaining orders or contracts for services or use of facilities
- Must be away from employer's place(s) of business
- Cannot be performed from employee's home office
- Note: no salary or income requirement

Secondary Battleground: Computer Employee Exemption

- Minimum salary of \$455 per week or \$27.63 per hour
- Primary duty must be:
 - Application of system analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or
 - Design, development, documentation, analysis, creation, testing, modification of computer systems or programs, related to user or system design specs or machine operating systems; and
 - Employee is employed as computer systems analyst, computer programmer, software engineer, or similarly situated worker in computer field performing such job duties

Hot Topic - Contractor Misclassification

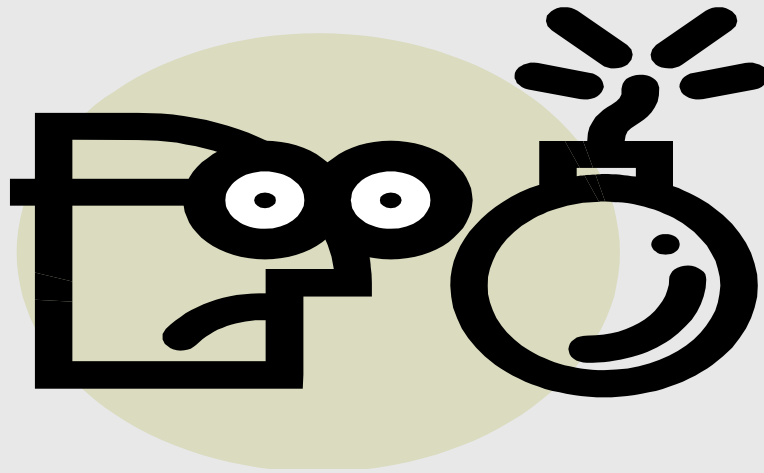
- DOL's stated priority
- Easy to certify collective actions
- False assumption that title is determinative
- False assumption that 1099 is determinative
- False assumption that having a contract is determinative
- Key elements include:
 - Lack of direction and control
 - Regularly works as contractor
 - Independent skill and knowledge
 - Covers own expenses

Misclassification Example:

- IT employee misclassified as contractor (or exempt employee)
- \$50,000 annual contract pay (or salary)
- Works average of 50 hours per week, 50 weeks per year
- $\$50,000/\text{year} = \$1,000/\text{week}$ and $\$1,000/40 \text{ hours} = \$25/\text{hour}$
- $1.5 \times \$25/\text{hour} = \$37.50/\text{hour}$ for overtime
- $\$375/\text{week}$ (10 hours/week) = $\$18,750/\text{year}$
- 3 year period, doubled = $\$112,500$
- 10 similar employees = **$\$1,125,000$**
- PLUS ATTORNEYS FEES

Battlegrounds for Non-Exempt Employees

- Failure to pay for all time worked
- Failure to calculate overtime properly



Hot Topic - Failure to Pay for All Time Worked

- **Donning and doffing**
 - When does work start?
 - Changing clothes v. safety equipment
- **Pre-clock and post-clock**
 - Early arrival requirements
 - Post-clock paperwork
 - Procedure for reporting extra work
- **Meal and rest breaks**
 - California rules
 - Auto-deduction systems
 - Procedure for reporting extra work

Hot Topic - Failure to Pay for All Time Worked

- **Use of smartphones, PDAs and other remote tools**
 - Failure to record time; failure to pay for time
- **Rounding**
 - Generally allowed but being challenged
 - With modern technology, harder to justify



Hot Topic - Overtime Calculation

- Failure to include bonuses, commissions and other pay in regular rate
- Failure to count “on call” time



Litigation Avoidance

- Employer's best tools = preparation and compliance
- After 2 or 3 years (statute of limitations), risk eliminated
- Make exemption determinations on job-by-job basis – reduces misclassification and collective action risk



Litigation Avoidance

- **Privileged self-audit and risk assessment**
 - audit job descriptions for breadth and accuracy (duties tests, title inflation)
 - audit payroll policies and practices (salary basis, automatic deductions, time clock – rounding)
 - review employment policies
- **Good policies are critical**
 - Policy requiring pay for *all* time worked
 - Policy requiring reporting of *all* time worked
 - Policy and procedure for reporting all time, including exceptions like after-hours work

Litigation Avoidance

- **Build arsenal for when DOL knocks or plaintiff files suit**
 - Have ways of tracking work time if exemption or contractor status is risky
- **Build good faith defense / defense to willfulness**
 - Legal advice
 - Reliance on DOL opinion letter
 - Document reliance on advice or DOL



Litigation Avoidance

- **Management training:**
 - what constitutes work time
 - breaks and meal periods
 - dangers of off-the-clock work
 - All work time must be paid, whether authorized or not
- **Payroll training:**
 - how to calculate overtime
 - automated time clock rules

Managing Exposure When Problem Discovered

- Situation specific
- Seek advice of counsel
- Issues to address:
 - Prospective fix only?
 - Offer back pay?
 - Include former employees too?
 - Settlement and release? (requires DOL approval or court approval if in litigation)

Irony of FLSA

- Often face resistance from affected employees
- Status, prestige associated with exemptions
- Many workers prefer to be contractors
- Employer must follow FLSA rules even if employees would prefer to waive them



Questions?

Clare Draper

Partner

Alston & Bird LLP

404-881-7191

clare.draper@alston.com

www.alston.com