

FOLEY EXECUTIVE BRIEFING SERIES



## WAGE AND HOUR CLASS ACTIONS

The New Wave of Employment Litigation



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## Litigation Statistics

- FLSA suits have increased by 230% since 1990 and 120% since 2000
- FY 2006, 4207 FLSA actions filed in federal courts, up from 1935 in FY 2000 and 1257 in 1990
- From 2001 – 2004, the number of FLSA collective actions tripled, from 397 to 1076
- By way of contrast, employment discrimination cases have fallen 32% since 2000



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## Litigation Statistics

- FLSA collective action cases now consistently outpace discrimination class actions in the number of filings each year
- Total monetary value of the top 10 private settlements entered into in 2007 for wage and hour class actions totaled \$319.3 million



## SOURCE OF W/H CLASS ACTIONS

- Compensable Time Cases
- Exemption Cases
- Independent Contractor Cases



## Compensable Time Cases

- “SUFFER OR PERMIT”
- CLOCKING IN EARLY
- WORK PERFORMED BEFORE START OF REGULAR WORK DAY
- TRAVEL TIME



## SUFFER OR PERMIT

- Bates v. Lucht’s Concrete Pumping--  
Dispatcher received calls after hours at home, required to take a Nextel radio/phone home.
- Fletcher v. Universal Technical Institute, Inc.--  
Employee’s supervisor knew of OT hours, employees told not to report OT on time records.



## SUFFER OR PERMIT

- **Gonzalez v. McNeil Technologies**--Employee submitted time cards showing eight hours a day but claimed she worked an extra two hours a day because the office was open for 10 hrs/day and she was sole office employee.
- **Juan v. Hillsborough County**--Social worker alleged that as a result of Agency policies and practices she was required to take work home and worked more than 40 hours/week



## SUFFER OR PERMIT

- **Kissel v. US Steakhouse Bar & grill, Inc**-- Employee regularly submitted time cards and her scheduled hours of work. Time averaged 84 hours of work a week.
- **Reyna v. ConAgra Foods, Inc**—A policy that all overtime hours must be approved does not shield an employer from OT liability.



## SUFFER OR PERMIT

- **Wood v. Mid-America Management Corp**— Employees directed to report all hours, warned that he would not get paid if he did not report all hours, and employer never disapproved of hours submitted.
- **Chao v. Gotham Registry**—Gotham suffered or permitted the nurses' overtime and, by failing to compensate them, violated the FLSA



## SUFFER OR PERMIT

- **Hunter v. Sprint Corp.**--Employer claimed that employee was required to submit accurate time cards, and that his failure to do so precluded payment for overtime hours.  
Employee claimed he was misclassified as exempt and that exempt employees did not have to submit ot hours  
Court agreed. Held that employer could not excuse its knowledge that employer worked through lunch, and stayed late.



## CLOCKING-IN EARLY

- **Chao v. Akron Insulation & Supply**—Clocked in early to receive employer assignments.
- **Fast v. Applebee's**--Bartender ordered meals for customers before work hours, but he recorded work hours as “clock in as scheduled.”



## PRELIMINARY ACTIVITIES

- **Standard:** Is the activity integral and indispensable to the performance of the employee's principal activity.



## PRELIMINARY ACTIVITIES

- **Gorman v Consolidated Edison Corporation—**  
**Employees sought to be paid for**
  - Waiting in traffic outside plant gate
  - Badge inspection
  - Parking and walking to command post
  - Waiting in line to swipe ID badge
  - Going to locker room to obtain and don metal capped safety boots, safety glasses and helmet
  - Walking to job site
  - At end of shift, doing these in reverse



## PRELIMINARY ACTIVITIES

- **Gorman v Consolidated Edison – 2<sup>nd</sup> Cir**
  - “Indispensable” not synonymous with “integral”
  - Activities for which plaintiffs seek compensation, while arguably indispensable, are not integral to their principal activities.
  - Security measures that are rigorous and lengthen the trip to the job site are not “principal activities”
  - The donning and doffing of a helmet, safety glasses and boots are “relatively effortless” non-compensable, preliminary tasks.



## PRELIMINARY ACTIVITIES

### ■ Bonilla v. Baker Concrete Construction-11<sup>th</sup> Cir—

Construction workers at an airport terminal project brought suit against their employer for the time spent going through airport security including riding in a bus to a secure construction site.

Ct. held that “mandatory security is not compensable because the screening is not ‘integral and indispensable’ to plaintiff’s principal activity.”



## PRELIMINARY ACTIVITIES

### ■ Lemmon v. City of San Leandro – Calif.

- The Judge disagreed with the Department of Labor’s advice memo that stated that if employees were allowed to change at home the time was not compensable: “this court does not agree with this conclusion and holds that donning and doffing may be compensable even if performed off the employer’s premises.”
- The Court held that all time spent donning and doffing police uniforms and equipment was compensable.





## TRAVEL TIME

- **Preliminary Travel—Smith v. Aztec Well Servicing Company-10<sup>th</sup> Cir.—travel time not compensable**
- **Whipkey v. Cencon, LLC-D. Kan—Plaintiff’s activities included loading the company vehicle, traveling to work site, working at site, reloading the vehicle, traveling to employer’s premises, unloading equipment, and clean and refueling vehicle. Ct found travel time could be compensable.**



## TRAVEL TIME

- **Dooley v. Liberty Mutual—Mass Fed Ct—Auto damage appraisers who performed administrative work at home before traveling to their first appointment must be compensated for their commute because the travel time was part of their work day.**
- **State of Washington regulation—If an employer provides a company owned vehicle to the employee, the commuting time is compensable.**



## TRAVEL TIME

- **Travel All In A Day's Work—Chao v. Akron Insulation & Supply-6<sup>th</sup> Cir.—**Travel from the employer's place of business to off-site work locations was compensable.
- **Burton v. Hillsborough County-11<sup>th</sup> Cir.—**Travel from a secured County operated site to the first and last stop of the day was compensable.



## Misclassification Cases

- EXECUTIVE EXEMPTION
- ADMINISTRATIVE EXEMPTION
- PROFESSIONAL EXEMPTION
- OUTSIDE SALES EXEMPTION



## EXECUTIVE EXEMPTION

- **Employee's primary duty must consist of the management of the enterprise in which he/she is employed or a customarily recognized department or subdivision thereof**
- **Employee must customarily and regularly direct the work of two or more employees**
- **Employee must have the authority to hire or fire other employees or the suggestions and recommendations as to hiring, firing, advancement, or promotion must be given *particular weight***

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## Executive Exemption



**NEW SECTION...541.106**

**Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption**

**Example—assistant manager in a retail establishment**

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## PRIMARY DUTY-- MANAGEMENT

- **Store Managers –retail stores**
- **On-call supervisor—temporary nurse agency**
- **Resident Managers of RV park**
- **Restaurant Manager**
- **Director of Services in hotel**



## PRIMARY DUTY-- MANAGEMENT

- **Amount of time spent in performance of managerial duties**
- **Relative importance of managerial tasks to non-managerial work**
- **Discretionary power and freedom from supervision**
- **Relationship between manager's salary and that of nonexempt employees**



## CUSTOMARY AND REGULAR DIRECTION OF TWO OR MORE EMPLOYEES

- Store Managers – not required to physically or in-person direct two employees on daily basis
  
- Day time supervisor -- “directed” night crew by identifying and correcting errors, discussing work with crew at end of shift and appraising work of night crew
  
- Roving managers – One service station to another



## AUTHORITY TO HIRE AND FIRE

### Davis v. Mountaire Farms, Inc. -3<sup>rd</sup> Cir

- Written duties did not include recruiting, hiring or firing
- Five crew leaders testified that in their 35 yrs of service they had only recommended 10 crew members, some of whom were hired, some were not
- During the 35 years of service, the crew leaders had only recommended termination twice for excessive absenteeism.

Court concluded authority to hire and fire quite limited.



## ADMINISTRATIVE EXEMPTION

Primary duty consists of

**Office or Non-manual Work  
Directly Related to Management or  
General Business Operations of the  
Employer or Employer's Customers**



**Must exercise discretion and  
independent judgment with  
respect to matters of  
significance**



## Directly Related to Management or General Business Operations

- tax, finance, accounting, budgeting, auditing
- insurance, quality control, purchasing,  
procurement,
- advertising, marketing, research,
- safety and health, personnel management,  
human resources, employee benefits, labor  
relations,





## Directly Related to Management or General Business Operations

- public relations, government relations
  
- computer network, internet and database administration,
  
- legal and regulatory compliance



## Discretion and Independent Judgment

541. 202(a)

**THE EXERCISE OF DISCRETION AND INDEPENDENT JUDGMENT GENERALLY INVOLVES COMPARING AND EVALUATING POSSIBLE COURSES OF CONDUCT AND ACTING OR MAKING A DECISION AFTER THE VARIOUS POSSIBILITIES HAVE BEEN CONSIDERED**





## Administrative Exemption Job Titles

**(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include**



## Administrative Exemption Job Titles

**(a) ...activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.**





## Administrative Exemption Job Titles

**(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; ...**



## Administrative Exemption Job Titles

**(b) ... determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.**



## Administrative Exemption Job Titles

**(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.**



## DOL OPINION LETTERS

- **Purchasing Agent**
- **School Resource Officer**
- **Film Location Manager**
- **Registered Financial Services Representative**
- **Community Events Supervisor**
- **Loss Prevention Manager**



## PROFESSIONAL EXEMPTION

### *The Learned Professional--*

Employee must perform work requiring Advanced Knowledge

The Advanced Knowledge must be in a Field of Science or Learning and

The Advanced Knowledge must be Customarily Acquired by a Prolonged Course of Specialized Intellectual Study



## “In a field of science or learning”

- LAW
- MEDICINE
- THEOLOGY
- ACCOUNTING, ACTUARIAL COMPUTATION,
- ENGINEERING
- ARCHITECTURE
- TEACHING
- PHYSICAL, CHEMICAL AND BIOLOGICAL SCIENCES
- PHARMACY





## DOL OPINION LETTERS

- Radiology Technologist
- Respiratory Therapist
- Social Workers and Case Workers
- Medical Coders

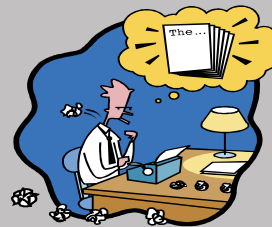


## PROFESSIONAL EXEMPTION

### *The Creative Professional—*

Any employee whose primary duty consists of performing work **REQUIRING:**  
Invention, imagination, originality or talent

in a recognized field of artistic or creative endeavor.





## COMPUTER PROFESSIONAL EXEMPTION

### *The Computer Professional's Primary Duty—*

- **The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;**



## COMPUTER PROFESSIONAL EXEMPTION

- **The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications**



## COMPUTER PROFESSIONAL EXEMPTION

### *The Computer Professional's Primary Duty—*

- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems
- A combination of the aforementioned duties the performance of which requires the same level of skills.



## COMPUTER PROFESSIONAL EXEMPTION

- Hunter v. Sprint Corp—help desk employee not covered
- Pellerin v. Xspedius Management Company—computer program and analyst



## OUTSIDE SALES EXEMPTION

An employee with a primary duty of:

- ❖ Making sales *or* obtaining orders or contracts for services
  
- ❖ Employee is customarily and regularly engaged away from the employer's place of business in performing such primary duty



## “away from the employer’s place of business ”

- January 25, 2007 DOL Opinion letters—Home sales, Resort Time Share Sales
  
- Billingslea v. Brayson Homes, Inc.—sales in model home of a new subdivision



## Determining Independent Contractor Status

### Use the Economic Reality Test

- Degree of control
- Opportunity for Profit/Loss
- Investment in Facilities
- Permanency of the Relationship
- Required Skills to do the Job



## Helpful Hints in Addressing the Independent Contractor Relationship

- ❖ Is the individual a former employee or a retiree?
- ❖ Is the individual an employee of a company or a partnership?
- ❖ What unique skills and abilities does the individual possess?
- ❖ How regularly does the individual work for the institution?





## EMPLOYEE OR INDEPENDENT CONTRACTOR

- Armitage v. Dolphin Plumbing & Mech—  
Project manager was an employee
  
- In re Fedex Ground Package System, Inc—  
Court conditionally certified a class of fed ex  
ground drivers



## Joint Employer Issues

- Barfield v. New York Health and Hospitals—  
Whether a nurse placed to work in a hospital  
for over 40 hours a week by several nursing  
referral agencies was “jointly employed” by  
each referral agency and that hospital?
  
- Security companies, cleaning companies,  
construction companies, social service  
agencies