

WAGE AND HOUR CLASS ACTIONS – At What Cost?

Kathleen H. Klaus, Esq.



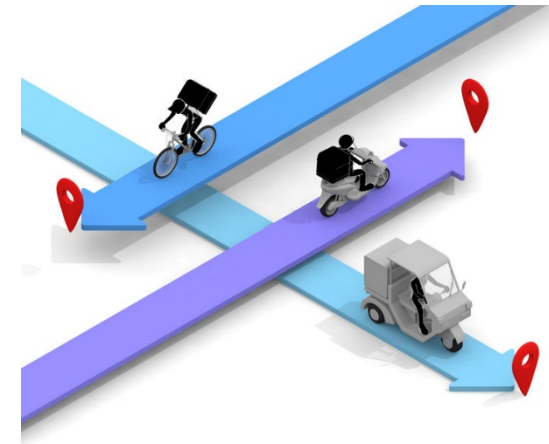
Overview

- Understand the Fair Labor Standards Act (FLSA) requirements and how to maintain a compliant workplace.
- Identify strategies for avoiding a class action lawsuit.
- Determine when to litigate and when to settle.

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Fair Labor Standards Act (“FLSA”)

- The FLSA sets forth provisions and standards concerning minimum wages, equal pay, overtime pay, record keeping, and child labor.
 - Also contains anti-retaliation provisions.
- Common issue is “transportation workers.”



Update on FLSA Issues and the COVID-19 Pandemic

- Working from home:
 - Treated the same as working on-site for compensation purposes.
 - No obligation to investigate hours worked from home.
 - But employer must pay for all hours they know of have reason to believe were performed.
 - Best practices is to implement “reasonable” reporting methods.



Update on FLSA Issues and the COVID-19 Pandemic

- Flexible hours:
 - Do not have to pay for “in between time” when an employee is engaged in non-work related activities.
 - Example: A telework agreement of 7–9 a.m., 11:30–3 p.m., and 7–9 p.m. would equal 7.5 hours worked, NOT all 14 hours from 7a.m. to 9p.m.
- Salaried employees are paid for the full week regardless of hours worked.



Update on FLSA Issues and the COVID-19 Pandemic

- Flexible duties:
 - Exempt employees can perform work of non-exempt employees on a limited “emergency” basis without losing exempt status.
 - Must still be paid at least \$684 per week.
- Employers may reduce salary for lack of work, but only prospectively.
- Donning and doffing

EXEMPT



Strategies For Avoiding a Class Action Lawsuit



What is a Class Action?

- Employers that fail to comply with federal and state wage and hour laws could face class-action lawsuits.
- One person can file suit on behalf of a group of people who are “similarly situated.”
- Expensive to defend, settle and to lose; almost no chance of recovering costs.
- Insurance may or may not cover you.



Class Actions Are on the Rise

- In 2019, plaintiffs won approximately 81% of the class action rulings – more than any year in the past decade.
- The 10 private-plaintiff wage and hour class actions in 2019 totaled \$449.05 million.



FLSA – Not Really a “Class Action”

- The FLSA provides for “collective actions,” but the gist is the same.
- Key difference – employees have to “opt in” rather than automatically being included as a prospective plaintiff and being able to “opt out.”



Common FLSA Class Actions

- Misclassification of workers (exempt vs. non-exempt)
- Independent contractor misclassification
- Off-the-clock work



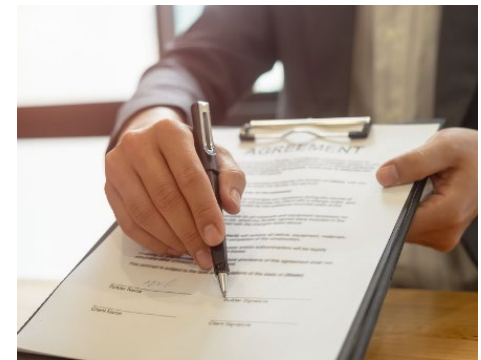
Common FLSA Class Actions

- Unpaid on-duty meal and rest breaks
- Improper calculation of the regular rate
- Illegal tipping practices
- Inadequate recordkeeping



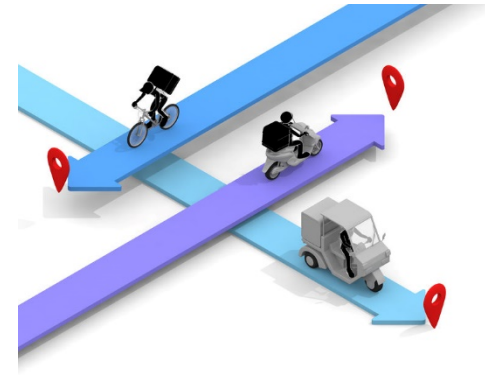
Class Action Waivers are Enforceable

- Employment agreements – require employees to bring any claims against the company in an individual capacity.
- Arbitration agreements – but that may have negative consequences.
 - Door Dash had to pay \$12 million in arbitration filing fees, when a law firm filed 6,250 individual arbitrations. Their request for relief was denied.



Class Action Waivers are Enforceable

- The Supreme Court upholds class-action waivers if the waiver does not preclude employees from vindicating their statutory rights.
- Transportation workers are a possible exception.
 - Courts have split on whether “gig economy” workers like Uber drivers and food deliverers are “transportation” workers.



Have Well Documented Policies and Procedures

- Accurately account for all hours worked.
- Ensure all employees are properly classified.
- Ensure any compliance with any regulatory changes, including COVID-19 changes.
- Consult with counsel if you have any concerns or questions regarding these issues.



Considerations When Determining When to Litigate and When to Settle



Insurance

- Does not cover these claims, although you can procure defense costs insurance.
- May be able to incorporate wage and hour insurance with your management liability insurance.
- There are dedicated Wage and Hour policies that cover a broad range of coverage you can purchase, however these carry the highest premiums.



CLAIMS

Damages and Remedies

- Cases can be catastrophic.
- The average settlement value for a wage and hour case in 2019 was \$8.2 million.
- The most common outcomes a successful wage and hour suit is the award of back pay for unpaid wages and overtime.
- Employees may also be able to recover liquidated damages and attorneys' fees and costs.



Trending Issues

- Jurisdiction for multi-state employers
 - Defense trend of limiting the scope of nationwide collective actions that are NOT filed in the district court where the company is incorporated or has its principal place of business.
- Challenges to certification
 - Can challenge the certification of the class or even ask that a class be “decertified” by proving that the class is not “similarly situated.”



Settlements

- Most jurisdictions require court approval of an FLSA settlement.
 - Courts assess whether the settlement is “fair and reasonable” and the product of a bona fide dispute over the application of the FLSA’s provisions, rather than a waiver of statutory rights.
 - Once the court approves the settlement, all opt-in plaintiffs are bound by it.



Thank you!

Kathleen H. Klaus

KKlaus@maddinhauser.com

(248) 359-7560 (direct dial)

