

**Strafford**

*presents*

# **FLSA Collective Action Litigation Strategies**

## **Navigating Certification, Discovery and Settlement Issues in Wage and Hour Collective Lawsuits**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

William C. Martucci, Partner, **Shook Hardy & Bacon**, Washington, D.C.

Martin T. Wymer, Partner, **Baker Hostetler**, Cleveland, Ohio

A. Craig Cleland, Shareholder, **Ogletree Deakins Nash Smoak & Stewart**, Atlanta

**Wednesday, October 20, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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*FLSA Collective Action  
Litigation Strategies*  
**Understanding and Addressing  
“The Wage Wars” in the New Era  
of the Litigation Tidal Wave**

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Washington, DC • Orange County • San Francisco • Miami • Tampa • Houston • Kansas City • London • Geneva

# *The Wage Wars*

- **Workers – from truck drivers to stockbrokers – are winning huge overtime lawsuits.**
- **These are the days of “the wage wars,” according to *Business Week*.**

*Business Week*  
October 1, 2007

# BusinessWeek

# *"A U R A"*

**A**wareness

**U**nderstanding

**R**eflection

**A**ction



## *The Wage Wars*

No one tracks precise figures, but lawyers on both sides estimate that over the last few years companies have collectively paid out more than \$1 billion annually to resolve these claims, which are usually brought on behalf of large groups of employees. What's more, companies can get hit again with suits on behalf of different groups of workers or for alleged violations of different provisions of a complex tapestry of laws. Framed on the wall of Attorney Thierman's office, for example, is a copy of a check from a case he settled for \$18 million in 2003 on behalf of Starbucks store managers in California. (Thierman is a former corporate defense counsel.) But the coffee chain is currently defending overtime lawsuits, filed by other attorneys, in Florida and Texas. Wal-Mart Stores is swamped with about 80 wage and hour suits, and in the past two years has seen juries award \$172 million to workers in California and \$78.5 million in Pennsylvania.

*Business Week*



## *The Wage Wars*

“This is the biggest problem for companies out there in the employment area by far,” says J. Nelson Thomas, a Rochester (N.Y.) attorney, who, like Thierman, switched from defense to plaintiffs’ work. “I can hit a company with a hundred sexual harassment lawsuits, and it will not inflict anywhere near the damage that [a wage and hour suit] will.” Steven B. Hantler, an assistant general counsel at Chrysler, says plaintiffs’ lawyers are “trying to make all employees subject to overtime. It’s subverting the free enterprise system.”

*Business Week*

# *The Wage War Dollars*

- **Plaintiffs' lawyers everywhere in America are very in tune with bringing wage and hour violation actions.**
- **This is the Big Dollar field in the American employment arena.**





## *The Wage Wars*

In overtime cases, Depression-era laws aimed at factories and textile mills are being applied in a 21st century economy, raising fundamental questions about the rules of the modern workplace. As the country has shifted from manufacturing to services, for example, which employees deserve the protections these laws offer? Generally, workers with jobs that require independent judgment have not been entitled to overtime pay. But with businesses embracing efficiency and quality-control initiatives, more and more tasks, even in offices, are becoming standardized, tightly choreographed routines. That's just one of several factors blurring the traditional blue-collar/white-collar divide. Then there's technology: In an always-on, telecommuting world, when does the workday begin and end? The ambiguity now surrounding these questions is tripping up companies and enriching lawyers like Thierman.

*Business Week*

## *The Wage Wars Under the “New Deal” Law*

- **The core wage and hour law, the federal Fair Labor Standards Act (FLSA), has been on the books since 1938.**
- **The New Deal statute, which mandated that a broad swath of the workforce receive 90 minutes’ pay for every hour worked beyond 40 in a week, had two goals:**
  - One was to reward laborers who put in long hours.
  - Another was to expand employment by making it cheaper for companies to hire additional workers than pay existing ones time and a half.

# *Types of Wage/Hour Class Actions*

- Misclassification – Exempt v. Nonexempt.
- Misclassification – Contractor v. Employee.
- Unpaid Off-the-Clock Work Time.
- Docking and Other Wage Calculation Issues.



# *What Makes the Costs Skyrocket?*

- Class size.
- Multiple (“copy cat”) lawsuits.
- Consultants/experts often required.
- Operational changes may be prudent.
- Unusual procedures (FLSA opt-in structure).



# *Obtaining or Defeating Certification – the Opt-In Process of 216(b)*

- Standard for FLSA: 29 U.S.C. §216(b)
  - “An action ... may be maintained ... by any one or more employees for and on behalf of himself or themselves and other employees similarly situated.”
- Usually a two-stage process for FLSA collective action.
- District court has authority to conditionally certify an FLSA collective action and facilitate notice to the putative class members.
  - *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989)

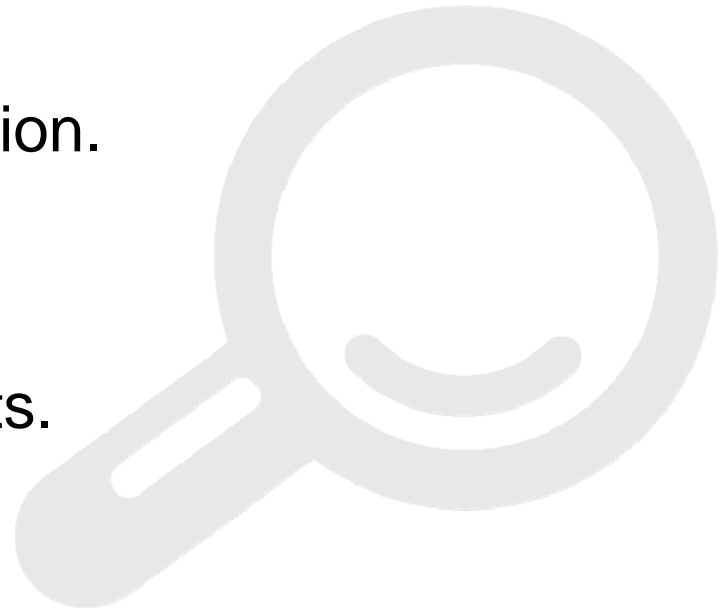
# *Obtaining or Defeating Certification*

## *– FRCP 23 Class Actions*

- FRCP 23 provides standards for class certification under federal law (other than FLSA).
  - Numerosity, commonality, typicality, adequacy.
- Standard for class action under state law.
- Plaintiffs' strategies for certification.
- Defendants' strategies to defeat certification.
  - Show inconsistency across organization.
  - Use statistics.
  - Develop individualized defenses.

# *Discovery*

- Preservation obligation.
- Personnel files and other confidential information.
- Use of sampling techniques.
- Fed. R. Civ. P. 30(b)(6) deposition.
- Plaintiff depositions.
- Discovery sought by Plaintiffs.
- Discovery sought by Defendants.



# *FLSA – The Basics*

- **The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and youth employment (child labor) standards.**
- **State law “trumps” the FLSA where it has more stringent standards.**

# *FLSA – The Basics*

- **Minimum Wage: No “off the clock” work**
  - Travel time
  - On-Call (Technology)
  - Pre/Post Work Activities
  - Child labor
  - Pay for any break less than 20 minutes
  - Tip Credit and Subminimum Wage
- **Overtime: after 40 hours of work in a workweek**
  - 1 ½ times regular rate
  - Watch out for State Law (CA and a handful of other states)



# *FLSA – The Basics So Essential*

- **“Executive”**
- **“Administrative”**
- **“Professional”**
  - “Exempt” from the FLSA’s overtime requirements
  - Definitions revised in 2004



# *FLSA – The Basics*

- **Executive Exemption**

- The employee must be compensated on a salary basis at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

# *FLSA – The Basics*

- **Administrative Exemption**
  - The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;
  - The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

# *FLSA – The Basics*

- **Professional Exemption**

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- 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 instruction.

# *1938 Law Remains Largely Intact*

- **Exemption for Computer Professionals**

- Small Business Job Protection Act of 1996
- Computer Systems Analyst
- Computer Programmer
- Software Engineer

29 U.S.C. § 213(a)(17)

# *FLSA – The Basics*

- **Clocking Violations Concepts**
  - What is “work”?
  - A record of time worked.
  - The de minimis concept.
  - Starting and ending times.
  - Meal and break periods.
  - Continuous workday concept.
  - Engaged to wait vs. waiting to be engaged.
  - Good associates go the extra mile.
  - Followers embellish time effort expended.



# *Practical Examples – Retail Industry*

- **Multiple locations**

- Shared policies and time-keeping systems “executed” at each location by the on-site manager.
  - Timekeeping and tracking systems only as good as the on-site management and audit procedures.



# *Practical Examples – Retail Industry*

- **Nature of the business**
  - “Peak” periods followed by slow periods.
    - Meal Periods and Rest Breaks.
    - On-call and technology issues.
- **Unique nature of workforce**
  - Transitory, often times have other jobs.
    - Training delivery and acknowledgement.



# *Practical Examples – Industrial Sector*

- **Donning and Doffing**
  - More than safety equipment.
- **Preliminary and postliminary activities**
  - Clock rounding.
  - Preparations for work and clean up at day's end.
  - Systems, policies and discipline.
- **Meal and break period issues**
  - Removing employees from the work area.



# *Practical Examples – Office Environment*

- **Non-exempt schedules and record keeping (the general lack thereof)**
- **After hours in an electronic world**
  - Emails, laptops and blackberries.
- **Meal and break periods**
  - Working through breaks, working lunches and more.
- **Errands and other off site activities**



# *The Biggest Wage and Hour Risks Today*

## Litigation Strategies

- **Misclassifying Employees**
- **Failure to Pay Overtime**
- **Waiting Time/On-Call Time**
- **Off-the-Clock Work**
  - ✓ Meal and rest periods.
  - ✓ Time shaving.
  - ✓ Preliminary and postliminary activities.

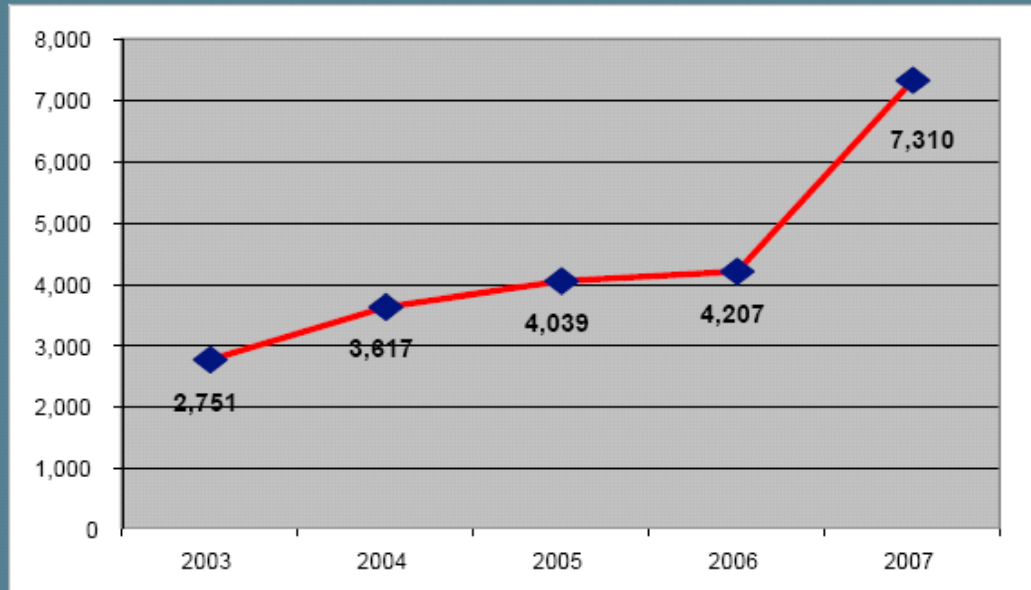
# *FLSA Litigation Trends*

## Litigation Strategies

- **Between 2000 and 2009, FLSA filings in federal courts tripled.**
- **Plaintiffs are increasingly bringing hybrid State and FLSA Claims. Thus, defense counsel must be aware of:**
  - The differing class certification standards under FRCP 23 and FLSA s. 216(b); and
  - The “opt-out” rule under FRCP 23 as opposed to the “opt-in” rule under FLSA s. 216(b).

# Federal FLSA Complaints

## Federal FLSA Complaints



# *An Effective Set of Policies*

## Litigation Strategies

- **Policies must address all areas of potential wage and hour compliance concerns.**
- **Policies must be well-publicized and easy to locate.**
- **All employees should acknowledge and review policy review on a regular basis.**
- **All employees should be trained on key policies.**
- **All employees should verify and approve time sheets and checks.**

# *Common Wage/Hour Policies*

## Litigation Strategies

- **Payroll Integrity**
- **Off-the-Clock Work**
- **Overtime Policy**
- **Meals and Rest Periods**
- **Compensatory Time off Prohibited**
- **On-Call/Emergency Call-Back**
- **Non-Exempt Employee Travel**
- **Paid Time Off**
  - Holidays
  - Vacation
  - PTO Bank

# *Implement a Complaint Mechanism*

## Litigation Strategies

- **An effective and confidential complaint mechanism allows the employer to uncover and correct issues before litigation.**
- **Give employees a choice:**
  - Ethics or compliance hotline (1-800 #)
  - Designated HR professional
  - A senior manager
- **Must be well publicized. Employees should be specifically informed that wage and hour concerns can be reported to the hotline.**

# *Follow Through: Investigate & Resolve*

## Litigation Strategies

- **Your organization must follow through on complaints.**
  - Written investigation procedures
  - Assign accountability so issues do not fall through the cracks
- **Investigate with same vigor as sexual harassment complaints.**
- **Ensure confidentiality to extent possible.**
- **Investigate promptly and thoroughly.**
- **Provide closure to complaining employee.**
- **Fix problems promptly.**

# *An Effective Set of Dynamic Compliance Features*

- **Adopt and publicize clear timekeeping policies and procedures.**
- **Train managers and employees on key FLSA concepts, timekeeping policies, and complaint mechanism.**
- **Require employees to review, and, if correct, certify the accuracy of time records.**
- **Implement a robust complaint mechanism specifically targeted to wage and hour complaints.**
- **Audit time records to ensure employees and managers are complying with policies and procedures.**
- **Discipline managers and employees for violation of timekeeping policies and procedures.**
- **Reinforce timekeeping policies through periodic reminders.**

# *Train, Train, Train*

## Litigation Strategies

- **If you want your employees to do the right thing in this area you must train them – and not just managers.**
- **Training gives your employees the tools they need to become compliance allies.**

# **FLSA Collective Action Litigation Strategies**

**Wednesday, October 20, 2010**

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# How Does Certification Work In Collective Actions?

- Most courts apply “two-tier” framework:
  - “Notice” stage, typically early in case to facilitate class-wide discovery.
  - “Decertification” stage, typically after full discovery and close to trial.

*Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D.N.J. 1988)

*See also See Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989)

# How Does Certification Work In Collective Actions?

- Notice Phase
  - The issue at this stage is whether to notify other potential opt-in plaintiffs that case is pending.
  - Certification at this stage is often referred to as “conditional.”
  - Issue is revisited at decertification stage, following opt-in process and discovery.

# How Does Certification Work In Collective Actions?

- Notice Phase (cont'd).
  - Focus is on whether sufficient evidence exists to suggest that plaintiffs and putative class members are **similarly situated** in regard to violation alleged.
  - Plaintiffs must present proof that they and proposed class “together were victims of a common policy or plan that violated the law.” *E.g.*, *Johnson v. Bridges of Ind.*, 2010 U.S. Dist. LEXIS 103696 at \*5 (S.D. Ind. Sept. 28, 2010).

# How Does Certification Work In Collective Actions?

- Notice Phase (cont'd).
  - Example: In a ***misclassification*** case, plaintiffs must provide some evidence that all putative class members perform similar, actual duties, since exempt status depends on actual duties.
  - Example: In a ***donning and doffing*** case, plaintiffs must provide some evidence that all putative class members were subject to a policy requiring them to use the same types of protective equipment under the same circumstances but were not compensated for the time to put on/take off the equipment.

# How Does Certification Work In Collective Actions?

- Notice Phase (cont'd).
  - Lenient standard typically applies because notice phase is usually pre-discovery.
  - Motion for conditional certification in these circumstances often is based on pleadings and affidavits.
  - Court determines whether plaintiffs have made “modest factual showing” that they are similarly situated to absent class members.
  - Standard is lenient, but not automatic.

# How Does Certification Work In Collective Actions?

- Notice Phase (cont'd).
  - Though not expressed, courts seem to require greater showing of named plaintiffs' personal knowledge regarding absent class members where request for certification involves numerous locations.

*E.g., Pfohl v. Farmers Ins. Group*, 2004 U.S. Dist. LEXIS 6447 (C.D. Cal. March 1, 2004)

*Bah v. Shoe Mania, Inc.*, 2009 U.S. Dist. LEXIS 40803 (S.D.N.Y. May 13, 2009)

# How Does Certification Work In Collective Actions?

- Notice Phase (cont'd).
  - Many courts apply higher level of scrutiny if substantial discovery has been completed.
  - Similar/same as standard applied at decertification phase.
  - Rationale is that lenient standard applies only where factual record is insufficient to make full determination on “similarly situated” question.

# How Does Certification Work In Collective Actions?

Example: *Pacheco v. Boar's Head Provisions Co.*, 2009 U.S. Dist. LEXIS 112335 (W.D. Mich. Dec. 3, 2009) (applying heightened scrutiny after two months of discovery because parties “had an ample opportunity to obtain substantial information . . . [and] there [was] a sufficient evidentiary record to determine whether this action can be managed on a collective basis”)

# How Does Certification Work In Collective Actions?

- Testing the propriety of plaintiffs' proposed notice.
  - Limit the class description.
  - Set forth your defenses.
  - Object to superfluous language.
  - Explain discovery obligations.
  - Limit the opt-in period (30-60 days).
  - Object to cover letters.

# How Does Certification Work In Collective Actions?

- Notice Period
  - Eligible individuals must **opt in** by filing Consent to Join form; **no opt-out process.**
  - Employees who do not opt in cannot be bound by result and can pursue separate lawsuits.
  - Opt-in vs. opt-out distinction affects participation rate; studies show that the opt-in rate generally falls between 20 and 25 percent.

# How Does Certification Work In Collective Actions?

- Phase II: Decertification
  - At the decertification stage, a more stringent standard is applied. Analyzing discovery, the courts consider:
    - Disparate factual and employment settings of each plaintiff.
    - Various defenses available to the defendant which appear to be individual to each plaintiff.
    - Fairness and procedural considerations.

# Potential Discovery Strategies In FLSA Collective Actions

- Early engagement in discovery.
  - Engage plaintiffs immediately in discovery process; thorough initial disclosures, notice depositions of plaintiffs, consider requests for admission, *etc.*
  - Where there has been significant discovery, some courts have analyzed motions for conditional certification using more stringent test.

# Potential Discovery Strategies In FLSA Collective Actions

- Proactively create/manage the record.
  - Identify plaintiffs' theory of common policy (*i.e.*, misclassification, donning/doffing, *etc.*).
  - Identify factual differences that would refute existence or application of common policy.
  - Identify managers/corporate representatives with relevant knowledge.
  - In misclassification cases, obtain declarations from representative sample of managers with firsthand knowledge of daily job duties of putative collective action members.

# Potential Discovery Strategies In FLSA Collective Actions

- Consider steps to address contact of putative class members by plaintiffs' counsel.
  - There are limitations imposed by the rules of professional responsibility.
    - Advertising
    - Ex parte communications with managerial employees
  - The First Amendment is not a shield to misleading and coercive communications.

# Potential Discovery Strategies In FLSA Collective Actions

- Proactive Use of E-Discovery
  - Duty to preserve goes both ways.
  - Demand e-discovery from plaintiffs, including relevant information stored on home computers and hand-held electronic devices.
  - Image hard drives of work computers and “server-dump” to gather relevant information from all plaintiff-employees.
  - Explore social media and Internet sources.
    - e.g., LinkedIn
  - Former employees: Seek résumé and other job search documents from third parties (employment agencies, new employers).

# Potential Discovery Strategies In FLSA Collective Actions

- E-Discovery: Preservation Obligations
  - Obligation to issue internal “litigation hold” once party “reasonably anticipates litigation.”
    - *Zubulake v. UBS Warburg* (Zubulake IV), 220 F.R.D. 212 (S.D.N.Y. 2003)
    - *Pension Committee v. Bank of America Securities, LLC*, 210 WL 184312 (S.D.N.Y. Jan. 15, 2010) (“failure to issue written litigation hold constitutes gross negligence”)

# Potential Discovery Strategies In FLSA Collective Actions

- E-Discovery: Preservation Obligations (cont'd).

**Sedona Conference:**

The duty to preserve involves reasonable and good faith efforts, taken as soon as practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the information.

Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

# Potential Discovery Strategies In FLSA Collective Actions

- **Electronic Document Preservation**
  - Very dependent on employer/industry.
  - Early/consistent attention reduces risk and time intensity.
  - Establish ongoing process early in case.

# Potential Discovery Strategies In FLSA Collective Actions

- Electronic Document Preservation (cont'd).
  - Step 1: Identify potentially relevant electronic systems/databases and custodians (*i.e.*, timekeeping, email, online policies, webinar materials, *etc.*).
    - Consider including all supervisors of potential class members.
  - Step 2: Disseminate document retention notice to distribution list created in Step #1.
  - Step 3: Establish process for updating distribution list based on manager interviews, ongoing discovery.
  - Step 4: Reminder notice on established schedule.

# Potential Discovery Strategies In FLSA Collective Actions

- Document Collection Issues
  - Information on computers of employee-plaintiffs.
  - Supervisors of plaintiffs.
  - Relevant HR personnel.
  - Self selection vs. electronic searches.

# Potential Discovery Strategies In FLSA Collective Actions

- Other E-Discovery Issues
  - Engage plaintiffs' counsel early in regard to time/format for production.
  - Engage client on whether vendor is needed and, if so, the expectations regarding the work for which the vendor will be retained.
  - Designate client point person for e-discovery issues.

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# FLSA Collective Action Litigation Strategies

Navigating Certification, Discovery and Settlement  
Issues in Wage and Hour Collective Lawsuits

## SETTLEMENT STRATEGIES

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# Mediating FLSA Collective Actions

## Reasons to—and not to—mediate

Merits

Potential exposure

Fees and costs of litigation

Certification

Other litigation

Business reasons

Other



# Mediating FLSA Collective Actions

When to mediate

Choosing a mediator

Which claims to mediate

Federal, state, or both

FLSA opt-ins or supplemental classes

Mediate to mediate



# Mediating FLSA Collective Actions

Structure mediation to dispute

Staged mediation

Approaches to damages

Methods of calculating backpay

Actual and proxy time records

Willfulness and statutory periods

Liquidated damages

Experts



# Mediating FLSA Collective Actions

Prepare client and manage expectations

Be fluent on facts, law, and damages

Settlement counsel

Be sensitive to process

Prepare for mediation



# Settling FLSA Collective Actions

Court approval and Section 216(b)

Rule 23(e) requirements

FLSA and wrap-around (“hybrid”) actions

Some approaches

*EEOC v. Consolidated Edison* (S.D.N.Y. 1983)

*Binker v. Commonwealth of Pa.* (3d Cir. 1992)

*Woodall v. The Drake Hotel* (7th Cir. 1990)



# Settling FLSA Collective Actions

CAFA requirements

Tax issues

Ethical issues

Rule 68 offers of judgment

DOL-supervised settlements



# Recent FLSA Settlement Cases

*Kakani v. Oracle Corp.* (N.D. Cal. 2007)

*Butler-Jones v. Sterling Casino Lines* (M.D. Fla. 2009)

*Kullar v. Foot Locker Retail, Inc.* (Cal. App. 2008)

*Clark v. American Residential Servs.* (Cal. App. 2009)



# Common Settlement Problems

Insufficient information provided to court

Absence or dearth of discovery

Expedited settlement

Different treatment of class members and representatives

Problematic cy pres awards



# Common Settlement Problems

Reverter clauses

“Reverse auctions”

Insufficient settlement amounts

Overbroad releases

Plaintiffs’ attorneys’ fees and costs



# Settlement Checklist

Claims-made settlements with reversion

Who is in settlement “class”

Formula for allocating settlement proceeds

Responsibility for payroll taxes



# Settlement Checklist

Service payments for plaintiffs and deponents

Contingency fund to effectuate settlement

Drafter of settlement notice

Content of claim form



# Settlement Checklist

Timeframe for accepting and making claims

Plaintiffs and opt-ins who reject or object

Nonresponsive plaintiffs and opt-ins

How long settlement checks are valid



# Settlement Checklist

Outstanding and returned checks

Cooperation clause for lost/damaged checks

When settlement checks will be disbursed

Classifying payments as wages and liquidated damages



# Settlement Checklist

Scope of release

Right to void settlement based on participation

Drafter of settlement approval papers

Timeline for settlement administration



# Settlement Checklist

No admission of liability provision

Confidentiality and no-publicity provision

Governing law provision

No-solicitation provision



# Settlement Checklist

Notice pursuant to CAFA

Settlement administrator and expense

Mediator and mediation expenses

Payment of attorneys' fees

