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ACI's 14<sup>th</sup> National Conference on

# Wage & Hour Claims & Class Actions

January 30-31, 2012 \* Hyatt Regency Miami \* Miami, FL

## I. In-House Roundtable: Preventing and Managing Wage & Hour Claims/Class Actions

### Proactive Strategies for Reducing Exposure to Wage & Hour Claims

- Drafting employment agreements that adequately protect the employer's interests
- Use of employment agreements as effective tools to reduce exposure to wage and hour claims
- Implementing and enforcing policies and practices that will protect employers, both locally and nationally
- Best practices for conducting internal audits
- Assessing your company's specific risk, including:
  - Reliance on independent contractors; sales representative exemptions; joint employer liability; off-the-clock risks

### Preparing for Audits and Working with Outside Counsel

- Best practices for preparing for federal and state audits in light of enhanced enforcement efforts
- Factors to consider when deciding whether to hire outside counsel or stay in-house
- Determining whether to utilize national counsel
- Coordinating your defense, both inside and outside the company

### Managing Costs

- Managing costs in high stakes wage & hour claims
- Managing complex litigation on a realistic and accurate budget
- Narrowing the size of classes for more manageable discovery
- Utilizing experts in an efficient manner



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## **II. Department of Labor and Enforcement Update: Responding to Changing Wage & Hour Federal and State Priorities and Investigations**

### **Emerging areas of focus for the Department of Labor's (DOL) Wage & Hour Division, including:**

- Scrutiny of independent contractor classification
- Enforcement of settlements: liquidated damages and settlement releases
- Tipped employees and notice requirements

### **New developments under the Obama Administration**

- Staying on top of changing regulations and policies
  - Prevent and Protect initiative
  - ABA Referral initiative
- Effects of the increased presence of the DOL in amicus curiae briefs
- Working with the DOL to cure minor violations
- Complying with a Department of Labor Investigation

### **Relying on Administrative Interpretations in lieu of opinion letters**

- Deciphering shifting DOL norms and guidelines
- Complying with increased requirements for diligent and accurate record keeping

## **III. Case Study on *AT&T Mobility Services v. Concepcion*: How To Use the Case and Its Progeny as a Tool for Avoiding Class Treatment and Preventing Litigation**

- The effect of *Concepcion* on arbitration agreements
  - *Concepcion* as a tool for defense
  - Risk management and prevention
  - Restricting claims and class actions to single plaintiff litigation
  - Drafting an arbitration provision to be effective in avoiding class treatment in arbitration and in court
- Status of lower courts decisions post *Concepcion*
- Potential issues arising from increased arbitration
  - Delay and appeals resulting from attempts at enforcement of arbitration provisions
  - Loss of evidence over time
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#### **IV. Case Study on *Wal-Mart v. Dukes*: Countering Your Adversaries' Attempts to Reexamine Discovery & Motions in FLSA Class Actions**

- Status and future of lower court decisions post *Walmart*
- Effect on standards in certification of a Fair Labor Standards Act collective active
  - Reexamining discovery, motion papers, and presentation of a class claim
  - Comparison of standard to class certification in employment discrimination cases
- *Walmart* as a tool for the defense
- Plaintiff's bar strategy changes in light of *Walmart*
- The use of representative testimony in collective action

#### **V. Class Certification: Clarifying What's Now Required to Get Classes Certified (including Notice & Court Approval) to Combat the Use of Class Claims as a Tool for Early Settlement**

- State of Circuit court's decisions regarding certification, including issues of:
  - Notice
  - Court approval
- Prevalence and volume of cases filed under the Fair Labor Standards Act
  - Class claims as a tool for early settlement
  - Lack of administrative requirements for preliminary consideration of a class
- How offer of judgment to a class member affects the class
  - Does this moot the collective action
  - Does this destroy class certification
- Risk evaluation amidst a certification influx: weighing whether to settle
  - Cost benefit analysis of increasing settlement amount
  - Risk of an additional suit
  - Importance of preservation or change in a business practice



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## **VI. Hybrid Claims: Countering Your Adversary's Attempts to Get Both Opt In and Opt Out Benefits in Class Claims**

- Clarifying the Circuit split of whether a federal collective action and state class action can be maintained in the same lawsuit
- Strategic response to plaintiffs bringing more claims under both federal and state provisions to get the benefit of a state law even if a an employer's policy is structured under federal law
- Opt out vs Opt in: the inherent differences in forming a class in class action and collective action claims
  - Structuring litigation under Rule 23 and the FLSA
  - Key strategy in opt in and opt out
  - Managing post litigation issues
- Issues arising out of differing federal and state statutes of limitations

## **VII. Defining “On the Clock” in a Digital 24/7 Work World**

*In today's technology friendly society, employees are constantly available and in touch. Because of the prevalence of Blackberries, laptops, and email, workforces are connected 24/7. While the prevalence of technology is in many ways beneficial, it also raises several complicated questions: How can businesses prevent their non-exempt employees from conducting business after leaving the office? Are employers on notice of, and thus required to pay for, overtime worked beyond employees' scheduled work hours? This session will answer these and several other questions created by the 21<sup>st</sup> century workplace, and provide strategies for implementing and maintaining policies and procedures to prevent issues associated with unpaid overtime. Topics include:*

- Minimizing and Controlling the dangers of “Blackberry claims”
  - Evaluating the benefits of non-exempt employees having mobile devices versus the liability risks
  - Proactive measures to reduce the challenges in proving that the company was unaware of employees working off the clock
    - Requiring accurate hour reporting through strict reporting policies
    - Forbidding work related mobile activity and other off the clock work
  - Defending against claims that an employee's “technological footprint” puts an employer on notice
    - Creating, distributing, and enforcing reporting policies
    - Using the technological footprint to verify or refute a claim
- Weighing the benefits of non-exempt employees having mobile devices, against the potential liability from “off the clock” claims
- What is meant by, “de minimis” time



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- How much time is acceptable for employee's to have to log-in or access a computer or mobile device in order to be "on the clock"

## **VIII. Defending and Managing Claims Involving Meal Breaks and Rest Periods**

- What does it mean to provide a meal break
- What constitutes an interruption in an employee's meal break
- How employers can ensure employees don't work through provided meal break periods
  - Avoid understaffing
    - Monitor and maintain a workforce capable of completing assigned work without using break periods
  - Utilize a clock out system, or electronic monitoring that records what time a task was completed
- How companies with multiple locations can ensure compliance with varying meal break requirements and enforcement

## **IX. View From the Bench**

## **X. Attorney's Fees: How Courts Are Interpreting the Issue of How Much and What to Consider in Granting Fees**

- Are attorney's fees are cut off when the defendant pays all damages outside of a settlement?
  - Possible Circuit Split?
  - *Dionne v. Floormaster Enterprises, Inc.*
- What do judges consider when deciding what to grant in attorney's fees
  - Percentage of amount recovered vs. hourly basis
- Fees as an incentive to avoid litigation

## **XI. View From the Plaintiff's Bar**

- Plaintiff Attorneys' perspectives on the top 10 risk factors
- Types of actions the plaintiffs' bar is focused on
  - What makes a claim attractive
  - What industries are most susceptible
- Deciding whether to consolidate plaintiff claims
  - Strategic issues



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- Pros and cons
- How is the plaintiffs' bar succeeding in bringing diverse wage and hour class actions in light of *Wal-Mart Stores v. Dukes*
- Trial analysis: a step by step discussion on recent case(s) where plaintiff's counsel succeeded at trial, which arguments were made, and what worked for the court or jury

## **XII. Classification/Misclassification of Employees: Using Lessons Learned from Recent Rulings by Courts and DOL to Avoid Critical Misclassifications**

- Independent contractor claims
  - Navigating differing definitions under the FLSA, IRS, and other state and federal statute
  - Increased DOL interest in independent contractor cases
  - Best practices for utilizing independent contractors
  - Joint Employment Concerns
    - Which company controls the independent contractor
    - Risks and protective measures for larger companies
    - Recent cable company cases: Who is responsible for unpaid wages and overtime when larger cable companies hire outside workers and smaller companies?
- Interns
  - DOL test for what constitutes an intern
    - Recent cases and analysis of judicial decision-making in this area
- Tipped employees
  - Improper tip pooling: the restaurant industry's major battles
  - Increased litigation involving tip credit
  - New DOL regulations regarding notice of payment of tip credit and direct wages
- Exemptions
  - How the DOL defines exempt employees in regard to sales representative and administrative employee activity
  - Determining executive, administrative, and professional exemption status under the FLSA and other state laws
- Which industries are most affected, and why?
  - Pharmaceutical Sales
    - Recent Circuit split
    - *Christopher v. SmithKline Beecham*
  - Commission based Employees



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### **XIII. Ethics: Ensuring Confidentiality in the Litigation of Wage & Hour Claims [1 HOUR CLE-ETHICS]**

- Confidentiality of collective actions under the FLSA
- Class member communications
  - Obtaining pre-certification information for the putative class
  - Ex parte communications
  - Appropriate communication when attempting to convey information about claims to the class
- Proper Solicitation of Clients
- Remedies for ethical violations

### **XIV. Settlement: Making the Decision, Calculating Damages, and Assessing Settlement Structure and Administration Considerations**

- Determining whether and when a settlement is the proper course of action
  - Assessing risks at each stage of the case
  - Potential impact on future litigation
  - Considering potential financial consequences
- Settlement strategy
  - Key elements and pitfalls to avoid
  - Working with plaintiffs' counsel to achieve an approved settlement
  - Responding to an attack on your settlement by other plaintiffs
- Settlement administration
  - Common mistakes
  - Assessing the benefits of web-based tools for settlement
  - Time frames for processing and payment schedules
  - Overcoming difficulties in locating class members
  - Tax considerations
  - Best practices for notice
- Ensuring court approval of a settlement

### **XV. Expert Witnesses in Wage and Hour Litigation: Selection and Permissible Use of Expert Testimony**



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- When to use expert witnesses in both pre-trial and trial phase
- What kind of expert to use, including areas such as:
  - Healthcare
  - Staffing
  - Electronic data
  - Liability phase
  - Damage calculation
- Using expert testimony in class certification
  - To assess the appropriate of certification
  - To select representative class members
  - To determine the reliability of representational evidence in damage calculation
- Strategies for conducting expert discovery and taking expert depositions
- Preparing and presenting expert testimony at trial

## **XVI. CALIFORNIA STATE ROUNDTABLE: CA State Specific Jurisdictional Issues in Wage & Hour Litigation and How This Critical State is Treating Claims**

*This is your chance to connect in in depth roundtable format with experts and colleagues who share your Calif. specific interests and challenges. It is also an opportunity to take a deep dive into Calif. specific particular issues, and discuss nuanced topics covered elsewhere within the national in scope main conference.*

- **California**
  - Litigation involving Private Attorney General's Act (PAGA) claims
    - Impact on *Wal-Mart Stores v. Dukes* on class waiver in PAGA claims
    - Impact and scope of *AT&T Mobility Services v. Concepcion* with relation to PAGA claims
    - Whether a claim can be pursued after a class action settlement
    - Avoiding and minimizing PAGA liability
  - Remaining questions after *Sullivan v. Oracle Corp.*, including:
    - Whether California's overtime laws and other benefits apply to nonresident employees



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- Whether California's Business and Professions Code apply to overtime work performed by out-of-state employees employed by a California based employer
  - The effect of *Brinker Restaurant Corp. v. Superior Court* on the provision of meal periods in California