

AS WAGE AND HOUR CLAIMS CLIMB, NEW INSURANCE SOLUTIONS EMERGE

By Adeola Adele, US Employment Practices Liability Product Leader

Over the last decade, risk managers, in-house legal professionals, and human resources departments have been challenged by an explosion of lawsuit filings that has made wage and hour claims the single largest employment practices-related exposure for US employers. The Fair Labor Standards Act (FLSA), initially enacted in 1938, was intended to protect industrial and agricultural workers from substandard wages and working conditions that were considered “detrimental” to their health and overall wellbeing. But in recent years, the FLSA — the law at issue in most wage and hour lawsuits — has become a “gold mine” for the plaintiff’s bar.



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STEADY RISE IN WAGE AND HOUR LAWSUITS

Most employers recognize that under the FLSA they must pay hourly employees 1.5 times the employees’ hourly wage for hours worked in excess of 40 hours per week — overtime pay. However, some employers are unaware that the overtime rates are higher for employees that earn commissions or bonuses, and many are also surprised when they learn that salaried employees or employees with professional degrees (for example, engineers) are not automatically “exempt” from the overtime pay requirements. It is this confusion or lack of in-depth understanding of the complexity of the Act that has caused some of even the most diligent of employers to run afoul of the FLSA and of equivalent state wage and hour laws, which typically provide greater protection and broader remedies for employees.

The number of wage and hour lawsuits filed in federal court between 2010 and 2011 increased more than 15%, according to the United States Department of Labor (DOL). And the number of FLSA filings has skyrocketed since 2002, according to data published by Seyfarth Shaw, LLP, a national labor and employment law firm. In the 12 months ending March 31, 2012, 7,064 FLSA suits were filed in federal court; more than the 7,006 cases filed during the prior 12-month period and the highest for any equivalent 12-month period. It represented a nearly 350% increase from the same period in 2002.

In addition to private lawsuits brought by employees, the DOL and state attorneys general have set their sights on enforcement of wage and hour laws. In May 2011, for example, the DOL announced the launch of its first smartphone application, an electronic timesheet that allows employees to track

their work hours, including meal breaks and rest periods. The information gathered via the timesheet “could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records,” the DOL said.

Wage and hour lawsuits filed under the FLSA, most of which are class and collective actions, have become costly for employers. Under the FLSA’s liquidated damages provision, employees can recover double the wages owed for two years prior to the filing of the lawsuit and any continuing violation period — or three years when it is determined that the employer’s violation was “willful” — plus attorney’s fees and interest. Some states, such as New York, allow for recovery of up to six years of back wages. This could transform a relatively minor violation into a multi-million dollar exposure. In 2012, a pharmaceutical company paid \$99 million to settle a wage and hour class-

action lawsuit brought by its outside sales representatives who alleged that they had been misclassified as exempt rather than non-exempt employees. Companies in the retail, hospitality, and financial services industries (specifically, broker-dealers) have also faced significant wage and hour litigation. The exposure is even greater for companies with operations in California, the venue for most wage and hour lawsuits.

WAGE AND HOUR RISK: STRATEGIES AND SOLUTIONS

Until recently, employment practices liability (EPL) insurers had resisted providing any type of coverage for wage and hour claims, typically citing concerns over frequency, severity, and uninsurability of the actual wages owed. Virtually all employment practices liability insurance (EPLI) policies now include a restrictive exclusion for claims alleging violation of the FLSA or similar state laws. There have been some successful challenges to these exclusions, however they primarily have been in instances in which a wage and hour lawsuit also included an EPL allegation that was covered and the policy at issue was a duty-to-defend policy. Meanwhile, some insurers provide sublimited defense-costs-only coverage (often no more than \$250,000) to private companies, typically those with fewer than 2,500 employees.

Wage and hour claims will remain a source of great trepidation for employers for the foreseeable future. In addition to considering an appropriate risk transfer mechanism, companies can take the following steps to help protect themselves against or minimize the exposure associated with wage and hour claims:

- Hire well-qualified and trained human resources professionals who are familiar with all elements of the FLSA.
- Conduct regular audits of payroll practices and employee classification to ensure compliance with FLSA and state wage and hour laws.
- Consult with an outside law firm with expertise in wage and hour compliance issues and that can provide a “good-faith” defense to liquidated damages under the FLSA in the event of a claim.

Marsh Provides New Wage and Hour Solution

Although some insurers provide sublimited defense-costs-only coverage for smaller companies, wage and hour exposures remain generally unaddressed for midsize and large employers. To meet this need, Marsh recently launched a standalone solution intended to provide wage and hour insurance coverage for companies with more than 4,000 employees.

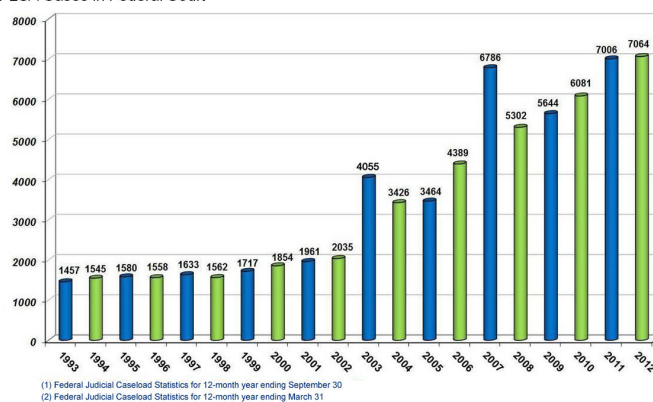
Offered exclusively through Marsh and its international specialist placement broker Bowring Marsh, the Marsh Wage and Hour Preferred Solution is intended to provide defense and indemnity coverage for claims of actual or alleged violations of the Fair Labor Standards Act or similar state laws, such as the California Labor Code and the New York Labor Law. Marsh’s solution also features the ability for insureds to select their own counsel in most instances, and an innovative wage and hour risk management toolkit provided by Mercer, a Marsh & McLennan Companies operating company, at no additional cost.

For more information about this new solution, or any other wage and hour issue, please contact your Marsh representative.

- Train front line supervisors on wage and hour laws and requirements, particularly as respects “off the clock” activities and meal breaks and rest periods for hourly employees.

Figure 1

FLSA Cases in Federal Court



Source: Seyfarth Shaw LLP, “Workplace Class Action Litigation Report,” 2012

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Compliance No: MA12-12088 4587