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together

2013 Labor and Employment
Webinar Series

Wage and Hour Hot Topics

Joel Allen
Eric Meckley
Melissa Rodriguez
Sean Lynch

May 23, 2013

Agenda

- Class/collective action waiver developments
- Developments in independent contractor litigation, legislation, and government enforcement
- “Off the Clock” Risks in the Age of Mobile Devices
- Update on California wage and hour laws
- Recent court decisions and potential implications for ongoing and future litigation

Class/Collective Action Waivers

Class/Collective Action Waivers: Pre-*Concepcion* Circuit Courts Upholding Express Waivers

- Pre-*Concepcion*, Class and/or Collective Action Waivers in Arbitration Agreements Were Upheld by Several Circuit Courts in FLSA/Wage and Hour Cases:
  - *Vilches v. Travelers Cos.*, No. 10-2888, 2011 WL 453304 (3d Cir. 2011) (enforcing collective action waiver after holding that nothing in the text, legislative history, or purpose of the FLSA suggests that Congress intended to confer a nonwaivable right to proceed collectively).
  - *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (enforcing collective action waiver and compelling arbitration of plaintiff's individual FLSA overtime claim).
  - *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004) (compelling arbitration of individual FLSA overtime claim and rejecting claim that the inability to proceed collectively deprives employees of substantive rights under the FLSA).
  - *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) (compelling arbitration of wage and hour claims after concluding that the text, legislative history, and purpose of the FLSA do not suggest that Congress intended to confer a nonwaivable right to a collective action under the FLSA).

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The Supreme Court's Decision in *Stolt-Nielsen*

- *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010)
  - Supreme Court considered whether agreement to arbitrate on a classwide basis could be inferred where the arbitration agreement was *silent* on the issue.
  - Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775.
  - Thus, Court held that class arbitration cannot take place where there is no evidence that the parties agreed to class arbitration. *Id.* at 1776.
- *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011)
  - Second Circuit concluded that the right to proceed on a class/collective basis may be implied, even if the arbitration agreement does not expressly provide for class/collective arbitration.

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Overview of *Concepcion* Decision

- Underlying class claim was that AT&T charged sales tax on phones that were advertised as “free.”
- Plaintiffs’ contracts with AT&T provided for arbitration of all disputes among the parties, and required that claims be brought in the parties’ “individual capacity” and not as any purported class or representative proceeding.
- District court denied motion to compel arbitration on the ground that the arbitration provision containing a class action waiver was unconscionable under California state law (the *Discover Bank* rule).
- Ninth Circuit affirmed but U.S. Supreme Court reversed in a 5-4 decision, finding that the Federal Arbitration Act (FAA) preempts state laws precluding arbitration.

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The Supreme Court's Decision in *Concepcion*

- *AT&T Mobility LLC v. Concepcion*, No. 09-893, 131 S. Ct. 1740 (Apr. 27, 2011)
  - Majority opinion (5-4) holds California's *Discover Bank* rule is preempted by the FAA.
  - Section 2 of the FAA provides that arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."
  - Arbitration agreements cannot be invalidated by defenses that apply only to arbitration or that derive meaning from the fact that an agreement to arbitrate is at issue.

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The *CompuCredit* Opinion

- *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)
  - The Supreme Court examined whether the Credit Repair Organizations Act (CROA) precluded enforcement of an arbitration agreement.
  - If the statute is "silent" on whether Congress intended to override the FAA, then the FAA "requires courts to enforce agreements to arbitrate according to their terms…even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'"

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Muriithi v. Shuttle Express, Inc., No. 11-1445, 2013 WL 1287859 (4th Cir. Apr. 1, 2013)

- District court denied the motion to compel arbitration of individual FLSA and state wage and hour claims after holding that arbitration clause was unenforceable based on three provisions of the franchise agreement it found to be unconscionable.
- The Fourth Circuit reversed after concluding that *Concepcion* “plainly prohibited application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement under these circumstances.”

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Second Circuit: Vindication of Statutory Rights

- Vindication of statutory rights: where party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive
- Question emerging from *Concepcion* was whether theory survives
- Effort by plaintiffs to play down their damages but play up their costs, such as nonrecoverable expert fees

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Vindication of Statutory Rights: *Amex III* *In re Am. Express Merchs.' Litig.*, 667 F.3d 204 (2d Cir. 2012)

- Second Circuit affirmed its prior decisions denying arbitration of individual in commercial arbitration, holding *Concepcion* did not alter its analysis
- Interpreted *Concepcion* and *Stolt-Nielsen* for principle that parties cannot be forced to arbitrate in class arbitration unless agreed to do so, not that arbitration agreements with class waivers are per se enforceable
  - The court did not hold class action waivers in arbitration agreements to be per se unenforceable, but rather "that each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.'" (citations omitted).

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Vindication of Statutory Rights

- *Raniere v. Citi Mortg.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011)
  - District court denied motion to compel arbitration of individual claims, holding that collective action waivers are per se unenforceable
  - Appealed to Second Circuit; decision pending
- *Sutherland v. Ernst & Young, LLP*, 768 F. Supp. 2d 547 (S.D.N.Y. 2011)
  - Low-level accountant alleging misclassification; claimed very low damages and high attorneys' fees and expert fees
  - Court declined to enforce arbitration agreement with class action waiver based largely on discretionary recovery of fees
  - Appealed to Second Circuit; decision pending

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Vindication of Statutory Rights: Litigation Considerations

- Calculate damages based on plaintiff's allegations in complaint
- Account for all damages: liquidated damages, interest, commission payments, "deductions," etc.
- For misclassification cases, lock plaintiff in on hours worked
- Consider agreeing to pay filing fees and expert fees if case proceeds to arbitration, plaintiff prevails, and ruling relies on expert
- Challenge affidavits regarding attorneys' fees and need for expert
- Consider requesting limited discovery and hearing on expenses, damages, and financial ability to afford arbitration

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Chen-Oster v. Goldman, Sachs & Co., 710 F.3d 483 (2d Cir. 2013)

- Plaintiffs, who sued on behalf of a putative class, alleged that Goldman engaged in a continuing pattern and practice of discrimination based on sex. Because at least one plaintiff signed an employment agreement with an arbitration clause, Goldman moved to compel arbitration of individual claims.
- The district court denied the motion to compel because the agreement's preclusion of class arbitration would make it impossible to arbitrate a Title VII pattern-or-practice claim, which the court saw as a waiver of a substantive right.
- The Second Circuit reversed, holding that there is no substantive right to bring a pattern-or-practice claim under Title VII. The court explained that pattern-or-practice referred to a method of proof and not to a freestanding cause of action.

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In re D.R. Horton, Inc. 375 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012)

- In *D.R. Horton* decision, issued on January 3, 2012, the NLRB held that class and collective action waivers violate the NLRA regardless of whether they inhibit employees from filing unfair labor practice charges.
- The NLRB explicitly limited its decision to situations in which a class and collective action waiver was required as a condition of employment.
- The decision applies only to employees covered by the NLRA - not supervisors, managers, or independent contractors.
- The NLRB reserved judgment as to whether its holding would apply where a waiver:
  (1) allowed an employee to bring a class and collective action in arbitration but not in court; and/or
  (2) was not a required condition of employment.

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NLRB Post - *D.R. Horton*: NLRB Complaint Where Arbitration Agreement Had Opt-Out

- *24 Hour Fitness USA Inc.*, NLRB No. 20-CA-35419
- On April 30, 2012, NLRB issued complaint alleging that inclusion of opt-out provision in mandatory arbitration agreement did not prevent agreement from interfering with employee's NLRA Section 8(a)(1) rights.
- Seeking administrative order requiring company to cease and desist from policy and notify courts and arbitral forums that it will no longer oppose "the seeking of collective or class action type relief."
- In November 2012, an ALJ ruled that 24 Hour Fitness committed unfair labor practices by maintaining and enforcing a mandatory arbitration agreement for new hires that waived participation in class/collective action lawsuits or arbitrations and prohibiting employees from discussing claims with co-workers.
- Appealed the NLRB ruling and exceptions based on *Noel Canning*. Decision pending.

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Class/Collective Action Waivers: Elements of an Effective Arbitration Agreement

- Waiver conspicuously and clearly displayed in writing.
- No shortening of statute of limitations or imposition of fees greater than those of bringing court action.
- Mutually binding (on employer as well as employees).
- No carve-out for employer-only claims.
- No preclusion of filing charges with administrative agencies.
- Employer modification of agreement is prospective only and requires advance notice to employees.
- Signed acknowledgment of employee's agreement to arbitrate.
- Consideration other than employment/continued employment.
- Class/collective actions proceed in court if waiver unenforceable.

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Drafting Considerations: Vindication of Statutory Rights Issues

- Do not limit the remedies available to the employee in arbitration vs. available remedies in court
- Consider paying all forum/arbitration fees in excess of amount of court filing fee
- Consider agreement to pay costs of plaintiff’s expert witness where plaintiff prevails and expert’s evidence admitted and relied upon by arbitrator
- Consider requiring that low-dollar individual claims be pursued in small claims, rather than in arbitration

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Parting Thoughts

- Employers have had success enforcing their arbitration agreements with class/collective action waivers, e.g. *Muriithi*
- Second Circuit is the epicenter for many of the challenges that remain
- Upcoming rulings in *AmEx*, *Raniere*, *Sutherland*, and *D.R. Horton* could mean we will be having a very different conversation on this issue next year

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Developments in Independent Contractor Litigation, Legislation, and Government Enforcement

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What's New on the Independent Contractor (IC) Front?

- More **$$$** than ever devoted to IC misclassification
- Misclassification surveys on the horizon
- Affordable Care Act (ACA) misclassification penalties looming
- New agency partnerships, information-sharing arrangements, and enforcement avenues
- IRS Voluntary Classification Settlement Program (VCSP)
- Litigation developments
- Legislative developments

Enhanced Funding for Misclassification Initiative

- 2014 fiscal year budget illustrates administration's intention to continue its crackdown on misclassification
  - $14 million allocated to combat misclassification
    - *$10 million in grants to states to identify misclassification and recover unpaid taxes*
    - *$4 million for Wage and Hour Division personnel to investigate misclassification*
- Expect Secretary of Labor nominee Thomas Perez to continue the initiative – led similar efforts in Maryland
- DOL intends to start targeting new industries

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Worker Misclassification Surveys

- Federal Surveys
  - Ongoing two-year study regarding the prevalence of worker misclassifications – final report due in September 2013
  - Proposed $2 million, 10,000-worker survey scheduled to commence in August 2013, which includes:
    - *A phone survey of randomly selected workers*
    - *Employer interviews inquiring about worker classifications*
- State Survey – Massachusetts
  - Ongoing study to identify extent of “employment fraud” by industry category and tabulate amount lost in unpaid taxes

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“Right to Know” Regulations

- DOL has been pushing “right to know” regulations since 2010
- Would amend FLSA to require periodic disclosures regarding:
  - Employment status (employee/IC)
  - Exempt status
  - How pay is computed
  - Whether any deductions are applied
  - Rights to challenge classifications
- NY and CA have adopted similar laws. NC has bill pending
- Expect more states to follow suit and renewed federal implementation efforts in 2014

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Affordable Care Act
Raising the Stakes of Misclassification

- Starting in 2014, ACA will impose penalties on "large employers" that misclassify workers and consequently fail to offer a minimum level of health insurance coverage
  - A misclassification finding can result in being deemed a "large employer" and expose the company to penalties
    - *"Failure to Offer" penalties = $2,000/year multiplied by total number of full-time employees minus 30, if misclassification results in a failure to offer coverage to 95%*
    - *"Insufficient Coverage" penalties = $3,000/year for each misclassified full-time worker who actually obtains subsidized exchange coverage because the employer coverage is either unaffordable or does not provide minimum value*

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Information-Sharing Programs: QETP Program and IRS/DOL Partnership

- Questionable Employment Tax Practices (QETP) Program
  - May 10 – John Tuzynski, IRS Chief of Employment Tax Policy, says IRS plans to pursue misclassification cases under QETP
  - QETP audits are expected to start in the next 8-10 months
  - IRS collecting cases through its whistleblower program
- IRS/DOL joint initiative to combat misclassification
  - DOL to refer to the IRS any wage and hour investigation information "and other data" that the DOL believes raises employment tax misclassification issues
  - IRS to share DOL employment tax referrals with state and municipal taxing agencies under existing agreements

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Information-Sharing Programs: Partnerships Between the DOL and States

- Fourteen states have signed Memorandums of Understanding with the DOL regarding worker misclassification
  - California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah, and Washington
  - Facilitates coordination and exchange of information between the agencies
  - Allows for joint investigations and cross-referrals if one agency finds a violation of the other’s statutes
  - Starting to see more joint activity and referrals

IRS VCSP

- Allows employers to voluntarily reclassify workers treated as independent contractors prospectively in exchange for immunity for the past
  - Must reclassify all workers of the same class or type
  - Must opt to participate prior to agency audit
  - Payments are nominal as compared to actual liability
    - *10% of employment tax liability for most recent tax year at reduced rates and no penalties or interest*
  - IRS does not share VCSP participant info with DOL/states
  - VCSP TEEP – deadline is June 30, 2013

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Litigation Developments: The DOL (Finally) Lost One

- *Gate Guard Servs. LP v. Solis* (S.D.Tex. Feb. 19, 2013)
  - DOL Investigator determined that Gate Guard misclassified workers as independent contractors
  - DOL demanded immediate compliance and payment of $6 million in back wages
  - Gate Guard filed declaratory judgment action seeking a determination that workers were properly classified before the DOL filed its enforcement action (actions were consolidated)
  - Court granted summary judgment to Gate Guard, holding that workers were ICs, nullifying the DOL determination
  - Broke DOL's unbeaten streak in misclassification cases

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Litigation Developments

- More big misclassification settlements and consent judgments
  - $1 million consent judgment for class of 77 cable installers (5/13)
  - $8 million settlement in exotic dancer case (4/13)
  - $700,000 settlement in delivery driver case (4/13)
  - $1.3 million kgb USA consent judgment (2/13)
  - $1.25 million staffing company settlement (1/13)
- Mixed bag on class certification at federal level
  - U.S. Open umpires – SDNY granted certification (4/13)
  - Government contractor consultants – NDCA granted cert. (4/13)
  - Delivery drivers – EDPA decertified class (3/13). D. Mass. denied cert. (4/13)

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Litigation Developments: State Court Decisions

- *Taylor v. E. Connection Operating, Inc.* (Mass. 5/17/13)
  - Misclassification case holding that Massachusetts wage statutes applied to individuals working exclusively in New York
    - *Lesson regarding choice of law provisions in IC agreements*
- *Thomas v. Meyer Assocs.* (N.Y. 4/18/13)
  - Granted class certification for class of stockbrokers asserting NY minimum wage, overtime and wage deduction claims, finding issues of fact as to IC status under "exercise of control" test
- *Prof. Career Ctr. v. Comm'r. of Labor* (N.Y. 4/18/13)
  - Instructors held to be employees despite well-drafted independent contractor agreement

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Legislative Developments: Pending State Legislation

- **Connecticut** (HB151) would relax ABC test for truck drivers to allow for IC status even when the driver works for a single company
- **New Jersey** (A1578) would create a presumption that port and parcel delivery truck drivers are employees; criminal and administrative penalties and private right of action
- **New York** (S2556-13) would provide NYSDOL greater oversight over IC relationships; require compensation notices to ICs; allow DOL to collect unpaid IC wages
- **North Carolina** (H.B. 826) would require written notice to workers of employment status at the time of hire and when any material change; fines for IC misclassification; defines "employee" using common law rules

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New IC Statutes – Maine
5 Mandatory and 7 Additional Factors

- Mandatory Factors – Worker must . . .
  1. Have the essential right to control the means and progress of the work except as to final results;
  2. Be customarily engaged in an independently established trade, occupation, profession or business;
  3. Have the opportunity for profit and loss as a result of the services being performed;
  4. Hire and pay his/her assistants, if any, and supervise the details of his/her assistants' work; and
  5. Make services available to client or customer community even if the right is voluntarily not exercised or temporarily restricted.

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New IC Statutes – Maine
7 Additional Factors (Need 3 of 7)

1. Have substantive investment in facilities, tools, instruments, and materials, and knowledge used to complete the work;
2. Not be required to work exclusively for service recipient;
3. Be responsible for satisfactory completion of work and may be held contractually responsible for failure to complete ;
4. Have a contract defining the relationship and give contractual rights in the event it is terminated prior to completion of the work;
5. Have a payment arrangement that is based on factors directly related to the work performed and not solely on the amount of time expended;
6. Perform work outside the usual course of the business for which the service is performed; or
7. Have been determined to be an IC by the federal Internal Revenue Service.

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New IC Statutes – New Hampshire 7-Point Test (Must Meet All 7)

1. Has or has applied for FEIN or SSN or has agreed in writing to carry out responsibilities imposed under NH wage laws
2. Has control and discretion over means and manner of performance - result of the work is the primary element bargained for
3. Has control over time when work is performed. Does not prohibit an agreement as to completion schedule, range of hours, and maximum number of hours
4. Hires and pays assistants, if any, and supervises the details of employee-assistants' work
5. Holds self out to be in business for him/herself, or is registered with state as a business and has continuing or recurring business liability or obligations
6. Is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete work
7. Not required to work exclusively for the employer

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Test Soup
Increasing Number of IC Tests

- Economic Realities Test (Title VII, ADEA, ADA, FLSA, FMLA)
- Right to Control Test (majority of states)
- Exercise of Control Test (minority of states, including NY)
- ABC Test (a growing number of states)
- Modified ABC Test (Massachusetts minimum wage law)
- IRS 3-Factor Test (modified 20-factor test)
- Common Law Test (ERISA)
- Entrepreneurial Test (NLRA)
- State-specific multifactor tests – on the rise

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“Off the Clock” Risks in the Age of Mobile Devices

Potential “Off the Clock” Work in the Age of Mobile Devices

- **Workplace technology** that may extend the compensable workday and generate evidence of hours potentially worked
  - BlackBerry®
  - Cell phone
  - Laptop computer
  - VPN or other tool providing employer network access from home
  - PDA
  - Voicemail access
  - iPhone®
  - GPS and other “tracking” software
- Some surveys have found that the average professional spends **50 minutes a day** sending emails **after leaving work**

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Risky Technology

- **Data that workplace technology generates**
  - **Record** of number, time, and duration of calls
    - *E.g., calls at 7:00 a.m. and 10:00 p.m.*
    - *E.g., two hours of calls per week*
  - **Record** of number, time, and length of emails
  - **Record** of time spent driving, traveling, or riding
  - **Record** of time spent on computer at work (after hours) and at home
    - *E.g., logged on for an additional 10 hours per week*
  - **Record** of time spent checking messages remotely
  - **Record** of number of times beeped/paged while "on call"

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What Are Hours Worked? (What Is Compensable Time?)

- All time from the start of the first principal activity of the day until the end of the last principal activity of the day, excluding "bona fide" meal periods
- **Principal activities** = the "activities an employee is employed to perform," including any activities that are integral and indispensable to performing the principal activities
  - **Work at home** can be compensable, just like work in the office
  - **Administrative** paperwork (e.g., timesheets) can be "work"
    - ***Planning*** *for the next day*
    - ***Calling in*** *or* ***checking email***
    - ***Computer logon/logoff time***

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Continuous Workday Rule

- **If:** an employee conducts a principal activity at home
- **Then:** not only is that activity compensable, but all activities thereafter, whether principal or not (e.g., driving to work or first appointment) may be compensable
- **Likewise:** a principal activity performed at home at the end of the day may continue the workday, which may make everything before that time (e.g., driving home) compensable
- **Thus:** knowing what is a principal activity is important (e.g., checking email or voicemail, computer work, paperwork)
- **However:** just because an employee conducts work at home does not mean that it is necessarily a principal activity such that the continuous workday rule takes effect

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Kuebel v. Black & Decker, Inc. 643 F.3d 352 (2d Cir. 2011)

- Retail specialist claimed he was not paid for all commute time between his home and job site and for overtime from off-the-clock activities performed at home, including
  - syncing his PDA
  - reading and responding to company emails
  - checking voicemail
  - printing and reviewing sales reports
  - organizing point-of-purchase materials
  - making display signs
  - taking online training courses
  - loading and unloading his car

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Kuebel v. Black & Decker, Inc. 643 F.3d 352 (2d Cir. 2011)

- Court held:
  - (1) because Kuebel had flexibility to perform work at home at any time and was not required to perform those duties immediately after arriving at home or immediately preceding morning commute,
  - (2) triable issue as to whether employer knew or should have known Kuebel was working overtime where he allegedly complained to his supervisor about uncompensated overtime
- General rule is that ordinary home-to-jobsite travel is noncompensable

Dooley v. Liberty Mut. Ins. Co. 307 F. Supp. 2d 234 (D. Mass. 2004)

- Collective action brought by auto damage appraisers who were nonexempt and <u>already</u> paid for work at home, including
  - **Beginning of the day:** starting laptop computers, opening necessary software, checking email and voicemail, setting voicemail greetings, reviewing assignments, mapping routes, and loading supplies into cars
  - **End of the day:** checking email and voicemail; calling Liberty employees, body shops, parts suppliers, insureds, and claimants; doing estimates or appraisals; faxing paperwork; sending photos to Liberty; and downloading and reviewing the next day's assignments
- Appraisers sought compensation for time spent driving to the first appraisal site and home from the last appraisal site

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Dooley v. Liberty Mut. Ins. Co. 307 F. Supp. 2d 234 (D. Mass. 2004)

- *Dooley* court found that the activities done at home were "principal activities" that began and ended the workday
- As a result, the commuting time was compensable for employees who did work at home before and after the commute
- **Hypothetical:** Employee checks email for 10 minutes at 7:00 a.m., then eats breakfast and exercises before work; same employee checks email for 10 minutes at 10:00 p.m., after dinner and family time
- **Question:** How long is the employee's workday?

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Augustus v. ACSSS (L. A. Cnty. Super. Ct. 2012)

- Court granted summary judgment for plaintiffs and awarded $89 million judgment to class of 15,000 security guards for missed rest breaks based on the employer's requirement that guards keep their cell phones or pagers on during breaks – and therefore were denied rest breaks under California law
- Court said: "if you are on call, you are not on a break" – must be relieved of all duty to constitute an actual break
- Consider: non - *de minimis* time shown as having occurred during lunch or other breaks could be argued to transform a break or meal into working time

De Minimis Time, Even Spent on Principal Activities, Is Not Compensable

- When the amount of theoretically compensable work is so negligible and difficult to track as to be *de minimis,* it is not compensable
  - To determine whether an activity is *de minimis*, a court may consider
    - *Administrative difficulty of recording the time*
    - *Aggregate size of the claim*
    - *Regularity of claimants' performance of the work*

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De Minimis Time, Even Spent on Principal Activities, Is Not Compensable

- **Hypothetical:** Two to three minutes of work every day for 100 employees
- **Question:** Is the time *de minimis*?
- **Hypothetical:** One employee works between one and 30 minutes every week (the time varies significantly)
- **Question:** Is the time *de minimis*?

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"Suffer" "Permit to Work"

- The FLSA defines "work hours" to include not only work that an employer directs, but where an employer **"suffers"** or **"permits"** an employee to work
  - Time worked (no matter where) must be paid, if the employer **knows** or **has reason to know** that the work was performed
  - Employers should use "reasonable diligence" to be aware of time worked
  - There is no FLSA violation where the employee deliberately prevents the employer from learning of uncompensated work
  - But, if the employer's actions **hinder or prevent truthful reports** or **encourage "off the clock" work**, the **employer** cannot disclaim knowledge

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“Suffer” “Permit to Work”

- What is **“reasonable diligence”** in terms of monitoring for off-the-clock or other compensable time?
- What obligation does an employer have to:
  - Affirmatively/proactively **review records** that show phone, BlackBerry, or computer usage, before or after work hours?
  - **Keep records** of such usage, and for how long?
- What is an employer obligated to do if such **records** show additional compensable time?

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Litigation Risks of Remote Work and Providing Remote Work Tools

- **Off-the-Clock Work Claims** by Nonexempt Employees
  - Time spent using BlackBerry devices, cell phones, and laptop computers for **remote "work"** (if not *de minimis*) is likely compensable
  - Even if the employer prohibits such work, it should use **reasonable diligence** to monitor whether such work is occurring, and must compensate accordingly
  - Employers should keep **accurate records** of that time, and compensate for that time
  - Such off-site work may trigger the **continuous workday rule** and potentially create more compensable time

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Minimize Risk: Establish Limitations

- Establish policies and practices to limit the potential adverse effects of technology
  - Consider limiting remote work devices (BlackBerry, cell phone, laptop) only to exempt personnel
  - If nonexempt personnel need short-term remote access, consider a signed acknowledgment that, among other things, provides that:
    - *The remote work tool may not be used for business outside scheduled work hours, except at the express direction and authorization of a supervisor*
    - *Each employee must record and report all time (except perhaps* de minimis *time) spent performing business activities*
    - *At any time management may require that the remote work tool be returned*

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Minimize Risk: Establish Limitations

- Establish and communicate policies (including work limitations) for exempt and nonexempt employees
- Options include:
  - Define the **compensable workday** and other compensable time
  - Require or encourage **leaving work at the workplace**
  - **Refuse** remote access to email for **nonexempt** employees
  - **Establish limits** for time that can be spent checking emails and voicemails during nonwork hours
  - Require **reporting** of time spent in excess of limits

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Minimize Risk: Monitor Compliance

- Monitor compliance with policies and limitations
- Options include:
  - Consider having **annual acknowledgment** forms signed by employees
  - **Audit** a representative sample of email and voicemail logins and compare the sample to pay records
  - **Audit** other records of time spent using electronic devices (text messages, VPN usage, etc.)

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Minimize Risk: Monitor Compliance

- Records retention
  - Identify workplace technology that is generating evidence of hours potentially worked
  - Establish policies for retention/destruction of records showing time using electronic devices
  - Ensure that records are kept consistent with the policies and any preservation obligations related to litigation

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Minimize Risk: Monitor Compliance

- Some ways to use reasonable diligence to ensure compliance:
  - **Require managers** to confirm in writing that they have no knowledge of off-the-clock work
  - **Train managers** on company policies so that they do not encourage or ignore off-the-clock work
  - **Discipline managers** who permit off-the-clock work
  - **Conduct periodic audits** of remote tool records compared against time reports; advise employees/managers of audits to encourage accurate time reporting/recording

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Minimize Risk: Compensate for Remote Work Time

- Compensate for remote and nontraditional working time consistent with the law
  - Do not simply accept benefits of work done in violation of the rules. If the work has already been done contrary to the rules, **pay the employee**, if warranted
    - *Then enforce policies with disciplinary measures, if appropriate*
  - Where hours are reported and paid, take care in calculating the **regular rate** for overtime
    - *For instance, be sure to include bonuses and commissions, if required by law*

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Update on California Wage and Hour Laws

California Legislative Update

- Wage Statement Statute Amended Effective 1/1/2013 (SB 1255 and AB 2674)
  - Employers are required to furnish to employees and keep a copy of wage statements for at least three years at the place of employment or a central location in California.
  - This new law requires that the "copy" be a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows **all** of the information required by Labor Code Section 226(a).
  - Employers are required to provide copies of or an opportunity to inspect wage statements within **21 days** of a **written or oral** request**.**

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Wage Statements
SB 1255 and AB 2674

- Make sure you retain exact copies of wage statements given to employees.
  - For example, wage statements must contain the name and address of the legal entity that is the employer, but computer-generated copies of wage statements retained by the employer sometimes do **not** have this information and therefore will not be compliant with the new law
- Make sure that your wage statements exactly comply with every single one of California's unique wage statement requirements
  - Includes the obligation to list actual hours worked by nonexempt employees (not 86.67 hours) and the beginning and ending dates of the pay period
  - There are significant penalties for failure to provide compliant wage statements

Wage Statements
SB 1255 and AB 2674

- Penalties are imposed only if the employee suffers injury as a result of knowing and intentional failure by the employer to comply with wage statement requirements.
- New law states that an employee is deemed to suffer injury if the employer fails to provide a wage statement at all, or if the employer fails to provide accurate and complete information and the employee cannot promptly and easily determine from the wage statement alone most (but not all) of the required information.
- New law also clarifies the meaning of a knowing and intentional failure.

New Commission Plan Requirements

Cal. Labor Code § 2751

- Effective January 1, 2013, California has significant new commission plan requirements.
- Commission plans must be in writing and acknowledged by employees.
- Employers should confirm that any commissioned employees have current and compliant commission agreements signed by January 1, 2013.

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Commission Plans: Complying with Cal. Labor Code § 2751

- Requirements apply "where the contemplated method of payment of the employee involves commissions."
  - Must be in writing.
  - Must "set forth the method by which the commissions shall be computed and paid."
  - Employer must sign.
  - Employer must give signed copy to employee and obtain a signed acknowledgment of receipt.
  - If term of plan expires and parties continue to work, all existing terms remain in effect until plan is superseded or employment is terminated.

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Commission Plans: Complying with Cal. Labor Code § 2751

- Applicability
  - Section 2751 applies only to “commissions.”
  - Defines “commissions” by citation to Section 204.1:
    - *“Commission wages are compensation paid to any person for services rendered in the sale of such employer’s property or services and based proportionately upon the amount or value thereof.”*
  - Can be a percentage (5% of sales) or fixed amount ($150 per sale).
  - Excludes “[t]emporary, variable incentive payments that increase, but do not decrease, payment under the written contract.”

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Commission Plans: Complying with Cal. Labor Code § 2751

- Applicability
  - Will Section 2751 apply to incentive pay even if it is not strictly a "commission" (e.g., quota-based plans)? *Cf. Muldrow v. Surrex Solutions Corp.*, 202 Cal. App. 4th 1232 (2012), *review granted* Apr. 2012.
  - To avoid disputes, employers may decide to comply with Section 2751 even if incentive pay is not technically a "commission."

Commission Plans: Complying with Cal. Labor Code § 2751

- Changes in the Commission Plan
  - Update agreements in advance, if possible.
  - If the contract expires without a new signed agreement, the terms of the old agreement could remain in force unless the employer expressly says otherwise.
    - *"In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party."*

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Commission Plans: Complying with Cal. Labor Code § 2751

- Changes in the Commission Plan
  - If the employee refuses to sign the new plan, the employer has the option to (i) fire the employee, (ii) stop paying any commission, or (iii) move forward under the old agreement.
  - If there is a time gap between plans (e.g., the plan for fiscal year 2014 is not yet completed at the time the plan for fiscal year 2013 is scheduled to end):
    - *Expressly state that the plan expires on a certain date, e.g., December 21, 2012, or at the end of the applicable performance period.*
    - *State that after the expiration period, commissions will be earned according to the terms of the fiscal year 2013 sales plan, and no commissions will accrue until that plan has been issued and all conditions of that plan have been satisfied.*

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Commission Plans: Complying with Cal. Labor Code § 2751

- Hard-Copy Signatures
  - Add signature and date lines to commission plans
  - Incorporate acknowledgment language (e.g., "I acknowledge that I have received a fully executed copy of this Plan.")
- Electronic Signatures
  - Prudent to comply with Uniform Electronic Transaction Act (UETA)

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Recent Court Decisions and Potential Implications

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Case Update

- Offers of Judgment
- Damages in Class Actions
- Removal Under CAFA
- Successor Liability Under the FLSA
- Interns Under the FLSA
- Class Communications

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Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)

- Background facts:
  - Symczyk brought a section 216(b) collective action
  - Genesis made a Rule 68 offer of judgment
  - Symczyk ignored the offer
  - Genesis moved to dismiss
  - District court found that no other individual had joined the collective action and the offer had satisfied Symczyk's claims
  - Declared moot and dismissed
  - Third Circuit reversed – individual claim was moot, but Symczyk's collective action was not

Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)

- Court's holding:
  - Straightforward application of mootness principles
    - *Symczyk conceded her claim was moot*
  - Suit became moot when individual claim became moot
  - Collective allegations cannot save suit once individual claim becomes moot
  - Distinguished cases finding
    - *Class action not mooted by individual claim* ***after*** *Rule 23 class is certified*
    - *Not "inherently transitory" class action claim*
    - *Individual had no "continuing economic interest"*

Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)

- Impact on future litigation
  - Declined to rule on whether unaccepted offer would moot a class claim
  - Limited by the "mootness" concession
  - Circuit split on the issue
- Kagan Dissent
  - "Feel free to relegate the majority's decision to the furthest reaches of your mind. The situation it addresses should never again arise."
- Significance – drew distinctions between FLSA section 216(b) and Rule 23 actions
  - Defendants will use it going forward – *e.g.*, *Bilbao v. Bros. Produce, Inc.*, No. 1320535, 2013 WL 1914406 (S.D. Fla. May 8, 2013)
  - Plaintiffs will file hybrid multiplaintiff lawsuits with consents attached

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Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

- Antitrust class action
- Alleged Comcast strategy of “swapping” “clusters” violated the Sherman Act
- Alleged four theories of damage, but district court only accepted one: practice deterred entry of new competitors to a clustered market (overbuilder deterrence)
- Damage expert’s analysis did not isolate damages among the four separate theories

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Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

- District court certified class on the basis of proof of (1) antitrust impact and (2) Damages measurable on a classwide basis through a “common methodology”
- Third Circuit affirmed
- Supreme Court (same majority as in *Genesis*) reversed
- Class was improperly certified

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

- District courts must undertake rigorous analyses in determining whether putative classes meet the predominance criterion
- The certification analysis will frequently overlap with the merits
  - Error to refuse to entertain arguments about the damage model because they were pertinent to the merits
- Predominance in damages class action is more demanding
- Damage model that does not bridge differences between theories of liability is invalid to prove class damages measurable classwide
  - Cannot show Rule 23(b)(3) predominance
  - Individual damages will overwhelm questions common to the class

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Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

- Implications:
  - Continuing trend of the Supreme Court to require rigorous analysis by the courts when certifying class actions
    - *Seems to be a raising of the bar that plaintiffs must jump*
    - *Possible acknowledgment that class certification is the whole game*
  - Suggests a *Daubert*-like analysis may be required for class damage experts
    - *Most disappointed that the Court did not elaborate*
    - *Does not specifically state full-blown hearing required*
  - Clarifies that inability to prove damages classwide is an impediment to certification

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Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013)

- Under CAFA, federal district courts have original jurisdiction over classes
  - Minimum level of diversity
  - Controversy exceeds $5 million, aggregated
- Plaintiff in Arkansas stipulated that class would seek less than $5 million in damages
- Case remanded to state court because amount in controversy fell below CAFA threshold

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Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013)

- Eighth Circuit declined to hear appeal
- Supreme Court: Stipulation does not defeat federal jurisdiction under CAFA
  - Stipulation cannot bind members of proposed class
  - CAFA does not forbid federal court from considering impact of nonbinding stipulation
  - Stipulations that have been accepted in removal context legally bind all plaintiffs

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Federal Standard for Successor Liability Applies to FLSA

- *Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763 (7th Cir. 2013)
- Posner opinion
- Federal common law on successor liability applies to FLSA as it does to other federal statutes (e.g., Title VII and NLRA)
- Purchased assets “free and clear of all liabilities” from receivership
- Different decision under Wisconsin law
  – Successor liability limited to situations in which buyer agrees to assume seller’s liabilities

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Federal Standard for Successor Liability Applies to FLSA

- *Teed* facts:
  - Acquired assets of $22 million
  - Continued the operations
  - Kept same facility
  - Employed many of same employees
  - Retained company's name
- Federal standard: Liable even when successor disclaims liability when acquiring assets unless there is good reason to withhold such liability
  - Court found none were present

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Intern Class Certification Denied

- Increase in number of class actions brought by interns
- Supreme Court has held that suffer or permit to work cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction

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Intern Class Certification Denied

- Result (at least partly) from the DOL Fact Sheet
  - "For profit" interns are most likely employees unless six part test applies:
    - *The internship is similar to training that would be given in an educational environment;*
    - *The internship experience is for the benefit of the intern;*
    - *The intern does not displace regular employees, but works under close supervision;*
    - *The employer derives no immediate advantage from the activities of the intern and may actually be impeded;*
    - *The intern is not necessarily entitled to a job; and*
    - *The employer and the intern understand that the intern is not entitled to wages.*

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Intern Class Certification Denied

- *Wang v. Hearst Corp*., No. 12CV793, 2013 WL 1903787 (S.D.N.Y. May 8, 2013)
  - Unpaid interns at *Harper's Bazaar* and *Cosmopolitan*
  - Brought under FLSA and NY Labor Law
  - Granted conditional certification
  - Court found only a companywide policy of classifying as unpaid interns
  - Class must do more than raise common questions; it must have the ability to yield common answers
  - No uniform policy on duties of unpaid interns across defendant's numerous magazines

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Class Communications by Defendant/Employer Held Improper

- *Quezada v. Schneider Logistics Transloading & Distribution*, No. CV122188, 2013 WL 1296761 (C.D. Cal. Mar. 25, 2013)
  - Court finds employer's communications with current employees and putative class members inappropriate
  - 106 sworn declarations
  - Meetings held in manager's office during working hours
  - Employees ordered to report over loudspeaker
  - Lawyers conducted the interviews

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Class Communications by Defendant/Employer Held Improper

- Lawyers explained the following:
  - *Participation in interview was voluntary*
  - *Signing a declaration was voluntary*
  - *Declaration would be truthful and accurate*
  - *No retaliation*
  - *Employee was a potential member of a class*
  - *Lawyers represented the company*
  - *Employee could consult with his or her own attorney*
- Only five employees did not participate in interviews
- Did not tell the employees that the declarations would be used in the lawsuit
- Plaintiffs argued conduct was unethical and coercive

Class Communications by Defendant/Employer Held Improper

- Employer has right to investigate case and can communicate with putative class members
  - Communication cannot be misleading or coercive
  - Factors considered – whether employer adequately informed employees about:
    - *Details underlying the lawsuit*
    - *Nature and purpose of communications*
    - *Fact that the lawyer represents the employer*
- Employer failed to notify employees of the nature and purpose of communications – never told employees the interviews were used to gather evidence to be used in the lawsuit
  - Told it was an “internal investigation”
- Interviews were also coercive – summoned to meetings over the loudspeaker; only six employees declined to sign declarations

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Presenters

Joel Allen
Dallas
214.466.4106
joel.allen@morganlewis.com

Melissa Rodriguez
New York
212.309.6394
mcrodriguez@morganlewis.com

Eric Meckley
San Francisco
415.442.1013
emeckley@morganlewis.com

Sean Lynch
Princeton
609.919.6611
slynch@morganlewis.com

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