

ACI's 22nd National Forum on

WAGE & HOUR CLAIMS AND CLASS ACTIONS












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Sessions include:

- » Federal and state initiatives, audits, litigation and settlements: preparing for and responding to new priorities, enhanced enforcement efforts, and aggressive investigations by the U.S. DOL & state equivalents, and fighting a wage & hour issue on two fronts (government investigation and private class action)
- » Developments in private class action certification, obtaining decertification, and hybrid claims: managing and defending against FLSA collective actions and state law class actions, including California class claims under PAGA
- » The changed landscape for arbitrating wage cases, and the latest on class action waiver enforceability
- » Proposed FLSA minimum wage increases and Obama directives regarding “paycheck fairness”
- » Exempt employee determinations and misclassification of workers: spotlight on Obama’s proposed FLSA revisions to white collar exemption requirements, an overview of the latest exemption developments by key industry, and defending against the latest misclassification claims (including independent contractor and “volunteer vs. intern”)
- » Healthcare reform litigation risks: Affordable Care Act nuances and responding to claims for additional penalties arising from “employee” vs. “independent contractor” classifications
- » Donning & doffing post-Sandifer and the current status of the “de minimis” defense, and the latest on other pre/post shift activities with a spotlight on security screenings
- » Recent litigation trends in regular rate of pay, bonuses, commissions and overtime
- » California developments in suitable seating and piece rate work
- » Defending and managing the latest off-the-clock claims involving the continuous work day, use of smartphones/mobile devices outside of scheduled hours, working remotely, and alternative working arrangements

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The wage and hour landscape continues to evolve at a blistering pace, with the potential for damaging claims at an all-time high. Given the complexity of state and federal laws regarding classification of workers and overtime pay, the increased number of displaced employees in the current economy, and the recent enhancement of DOL enforcement efforts, it is no wonder why wage and hour litigation is the fastest growing type of class action today.



That is why it is essential that employers and their counsel be fully prepared for and ready to defend against and manage the latest claims and class actions. Come join your colleagues and clients at the nation's premier wage and hour forum and hone your skills and strategies needed to keep pace with this rapidly changing area of law, manage and defend against new and innovative claims, and prepare for emerging regulations and evolving enforcement priorities.

American Conference Institute's **22nd National Forum on Wage & Hour Claims and Class Actions** will provide you with an unparalleled opportunity to convene with expert in-house counsel from *Bank of America, Macy's, Citigroup, Best Buy, Wells Fargo, Boehringer Ingelheim, The Hartford, Wells Fargo, Century Link, Royal Bank of Scotland, Masco Corporation, Family Dollar Stores, Advance Auto Parts, PSEG Services, Walmart, The Dolan Company, Marsh & McLennan, Florida Power & Light, Western Union, FedEx, Fox Group, DirecTV and more*, as well as renowned federal and state judges, and leading outside counsel from around the nation, who will provide you with expert advice, insider strategies, and comprehensive updates on:

- Federal and state initiatives, audits, litigation and settlements: preparing for and responding to new priorities, enhanced enforcement efforts, and aggressive investigations by the U.S. DOL & state equivalents, and fighting a wage & hour issue on two fronts (government investigation and private class action)
- Developments in private class action certification, obtaining decertification, and hybrid claims: managing and defending against FLSA collective actions and state law class actions, including California class claims under PAGA
- Arbitrating wage and hour cases given the changing legal landscape, and the latest on the enforceability of class action waivers in arbitration agreements
- Assessing the legal implications of proposed FLSA minimum wage increases and Obama directives regarding "paycheck fairness"
- Exempt employee determinations and misclassification of workers: spotlight on Obama's proposed FLSA revisions to white collar exemption requirements, an overview of the latest exemption developments by key industry, and defending against the latest misclassification claims (including independent contractor and "volunteer vs. intern")
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Resolution Economics is a market leader in applying statistical and economic analysis to class action employment matters.

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For more than 30 years, **Welch Consulting** has assisted clients in class action matters involving employment practices and complex business litigation. Rigorous analyses with the highest standards of accuracy, clarity and punctuality make Welch Consulting the top choice for the nation's preeminent law firms and corporations throughout the US.



ERS Group has provided statistical analyses and expert testimony for over 250 wage & hour matters for private employers and government agencies. These engagements have involved employees in the hotel, restaurant, finance, insurance, retail, IT, pharmaceutical and manufacturing industries, as well as employees of federal, state, and municipal governments.

Day One – Monday, September 29, 2014

7:15 Registration and Continental Breakfast

8:00 **Co-Chairs' Welcome Remarks**

Cheryl D. Orr
Drinker Biddle & Reath LLP

Jay J. Price
Bank of America

Toni P. Douaihy
Macy's, Inc.

8:05 **In-House Insights on Wage & Hour Litigation Management: Responding to Enhanced Enforcement; Compliance Strategies; Selecting and Retaining Law Firms and Distribution of Legal Spend in Today's Environment; and More**

Panel 1: 8:05–9:05

Jay J. Price
Assistant General Counsel
Bank of America

Toni P. Douaihy
Vice President and Assistant General
Counsel
Macy's, Inc.

Philip I. Weis
Director & Senior Employment Counsel
Boehringer Ingelheim
Pharmaceuticals, Inc.

Stephen B. Harris
Vice President, Corporate Chief
Compliance Officer
The Hartford

Kristen H. Albertson
Associate General Counsel
Walmart Stores, Inc.

Nancy Reynolds
Counsel, Global Employment Law
Labor and Benefits Group
Western Union

Christopher J. Yost
Managing Director – Litigation
FedEx Express Legal Department

**Panel 2: 9:05–10:05
(break 10:05–10:10)**

Keith James
Corporate Employment Counsel
Masco Corporation

Mary Thomas
Senior Director, Legal
Best Buy

Gina Casias
Senior Corporate Counsel
HR Legal Support
Century Link

Reginald Johnson
Divisional Vice President
Divisional Counsel
Family Dollar Stores, Inc.

Andrew H. Smith
Director and Associate General Counsel
Citigroup

Tim Lykowski
Senior Vice President,
Employment Litigation
Fox Group Legal Department

Panel 3: 10:10–11:05

Nicole A. Groves
Staff Attorney – Employment
Advance Auto Parts

Joseph F. Accardo Jr.
General Labor & Employment Counsel
PSEG Services Corporation

Renee Jackson
General Counsel
The Dolan Company

Miles R. Afsbarnik
Senior Vice President, National Claims
Director, Professional Risk Group
Wells Fargo Insurance

Neil S. Rosolinsky
Head of Employment Law/Employee
Relations, Americas
The Royal Bank of Scotland

Ellen Malasky
Managing Attorney
Florida Power & Light Company

T. Warren Jackson
Senior Vice President, Associate General
Counsel & Chief Ethics Officer
DirecTV

Co-Moderators of the 3 Panels:

Cheryl D. Orr
Drinker Biddle & Reath LLP

Mandana Massoumi
Manatt, Phelps & Phillips, LLP

- Common mistakes and pitfalls in wage & hour compliance
- New risk areas
- Employment agreements that reduce exposure to claims and keep workers in compliance
- Internal Audit and assessment: Policies, practices, classifications
- The latest misclassification issues with a spotlight on intern vs. employee classifications
- Management training
- Employee training
- Develop and disseminate response plan
- Engage field personnel
- Factors to consider when deciding whether to hire outside counsel

Media and Association Partners:



11:05 **Federal and State Initiatives, Audits, Litigation and Settlements: Preparing For and Responding to New Priorities, Enhanced Enforcement Efforts, and Aggressive Investigations by the U.S. DOL & State Equivalents, and Fighting a Wage & Hour Issue on Two Fronts (Government Investigation and Private Class Action)**

Alexander J. Passantino

Seyfarth Shaw
(former Acting Administrator of the U.S. Department of Labor's Wage and Hour Division)

R. Brian Dixon

Little Mendelson PC

Mark J. Neuberger

Foley & Lardner LLP

- Recent developments in legislation on misclassification and penalties for misclassification, independent contractor classification and restricting use of independent contractors
- Stepped-up federal and state government audits and litigation seeking back wages, penalties, and attorney fees and costs
- U.S. Department of Labor's Enforcement of the Wage & Hour Laws and recovery of back pay awards to misclassified workers, and additional penalties
- Emerging areas of focus for the DOL's Wage and Hour Division, including scrutiny of independent contractor and "volunteer vs. intern" classifications
- The newest developments in resolving claims by the Wage and Hour Division
 - Tips, strategies and best practices for negotiating informal and formal settlements with DOL counsel
 - Demands for liquidated damages
 - Limited releases in DOL-supervised settlements
- DOL amicus briefing
- New state initiatives and enforcement regarding employee misclassification
- Government misclassification audits and settlements: Preparing for comprehensive federal and state integrated audits as coordination efforts improve among and across federal and state agencies
- Targeted investigations: Which industries are attracting increased scrutiny by the DOL and why?
 - Vulnerable Workers and Worker Protection Strategies: Agricultural Workers/MSPA
 - Fissured Industries: construction, landscaping, reforestation, food processing/retailing, hospitality, eating & drinking, janitorial, home health care
- Handling parallel civil and government investigations
- Handling derivative lawsuits stemming from a government fine/settlement
- Combatting follow-on class action suits: practical strategies for keeping these suits at bay
- Minimizing the impact of a government investigation on a potential jury verdict

12:00 **Developments and Nuances in Private Class Action Certification, Obtaining Decertification, and Hybrid Claims: Managing and Defending Against FLSA Collective Actions and State Law Class Actions, Including California Class Claims Under PAGA**

Hossein Borhani, Ph.D.

ERS Group

Jeffrey E. Webb

Ropes & Gray LLP

Linda Alderdice

Holland & Knight LLP

- Recent developments in wage-hour class and collective action treatment after *Dukes* and *Comcast*
- Strategies for winning and defeating certification motions
- Rulings on class treatment in executive exemption actions
- Rulings on class treatment in off-the-clock actions
- Hybrid federal and state law class actions
- Rule 68 Offers of Judgment
- CAFA Removal Jurisdiction
- Class Member Communications
- Attorney Fees
- PAGA – Examining the latest wave of wage-hour class actions to hit California employers and understanding the implications of California's Private Attorneys General Act in the context of class actions
- How to avoid getting caught in the PAGA wave
- Understanding and complying with the technical provisions of California wage-hour laws, and avoiding the common pitfalls of running a multi-state business

1:00 **Networking Luncheon for Speakers and Delegates**

Sponsored by: **Drinker Biddle**

2:00 **Exempt Employee Determinations and Misclassification of Workers: Spotlight on Obama's Proposed FLSA Revisions to White Collar Exemption Requirements, an Overview of The Latest Exemption Developments By Key Industry, and Defending Against the Latest Misclassification Claims (Including Independent Contractor and "Volunteer vs. Intern")**

Robert Crandall, MBA

Resolution Economics

Scott J. Witlin

Barnes & Thornburg LLP

Lawrence Peikes

Wiggin and Dana LLP

Ellen Kearns

Constangy Brooks & Smith LLP

Changes on the Horizon for White Collar Exemptions

- Examining the potential implications of the Obama Administration's proposed comprehensive changes to the FLSA's "white-collar exemptions" (executive, administrative and professional employee exemptions)
- What changes are on the horizon for these FLSA regulations? Where is the DOL in the process?

- What minimum salary requirements are being proposed? What changes to the duties tests are being proposed, and what will the implications be for employers and their counsel?
- What industries are likely to experience the greatest impact from these proposed changes?
- Assessing what if any organizational and/or pay practice changes employers will need to take to achieve business objectives and minimize litigation risks as the rulemaking process progresses

Determining the Exemption of Executive, Administrative, Professional and Outside Sales Employees in the Most Heavily Affected and Targeted Industries; and the Latest Strategies in Defeating Claims that Employers Have Misclassified Workers as “Exempt” Employees

- Healthcare industry professionals
 - Spotlight on home healthcare professionals and other off-site employees
 - DOL focus on “Adult Foster Care” and “Shared Living Arrangements”
- Transportation industry
 - Recent implications of Motor Carrier Act exemption on “mixed fleet” companies
- Restaurant and hospitality industry
- Retail employees
- IT and technical professionals

Avoiding and Defending Against the Latest Misclassification Claims and Class Suits Including Independent Contractor and “Volunteer vs. Intern” Classifications

- New categories of employees raising class claims based on independent contractor misclassification
- Recent spotlight on unpaid internships and rise in class claims based on employer misclassification of interns as “volunteers”
 - Understanding the obligations imposed on employers by DOL Fact Sheet No 71 for classifying “paid interns”
 - Tips, strategies and best practices for avoiding and defending against claims and class suits based on misclassification of interns as “volunteers”
- What’s the latest key case law on the federal and state level and what are the latest strategies in defeating claims that employers have misclassified workers as “independent contractors” or “volunteers?”
- Staying on top of recent changes and nuances in Federal DOL and state rules governing classification
- State law technicalities, including wage statement violations, timing of pay requirements, deductions and reimbursements
- Litigating state law technicalities when operating a multi-state business

3:10 **Assessing the Legal Implications of Proposed FLSA Minimum Wage Increases and Obama Directives Regarding “Paycheck Fairness”**

Christopher M. Trebilcock
Miller Canfield P.L.C.

Adam J. Karr
O’Melveny & Myers LLP

- Addressing the anticipated impact on employers and their counsel of proposed and forthcoming increases in the FLSA minimum wage across various states and key industries
- What are the potential sources of litigation that employers can expect to face as a result of these minimum wage increases, and how to best avoid and defend against such lawsuits?

- Implications of the Federal Contract Minimum Wage Order
 - What type of employers will be affected; what will be required of them; and avoiding and defending lawsuits stemming from these new policies
- What employers and their counsel should be on the look-out for in the face of the proposed Paycheck Fairness Act
- What types of claims are the plaintiffs’ bar bringing to test these new “equal pay” policies (and/or what kinds of claims can be expected on the horizon)?
- What employers should be doing to prepare; how their counsel can stay ahead of the curve; and tips and best practices for litigators in defeating these anticipated equal pay claims

3:50 Afternoon Break

3:55 **Donning & Doffing Post-Sandifer and the Current Status of the “De Minimis” Defense, and the Latest on Other Pre/Post Shift Activities With a Spotlight on Security Screenings**

Ted Anderson, Ph.D.
Welch Consulting

Andrew S. Rosenman
Mayer Brown LLP

Catherine A. Conway
Gibson, Dunn & Crutcher LLP

- Current status/treatment of the “de minimis” defense under the Fair Labor Standards Act post-Sandifer: what questions did the Supreme Court leave open regarding whether the de minimis defense is still viable, especially in a non-unionized setting?
- Examining developments in the law among lower courts on this issue
- Defense strategies for defeating donning and doffing claims in the face of remaining ambiguities
- The latest class claims being brought based on wages owed for pre-post shift activities
- Spotlight on class claims alleging that time spent in pre- or post-shift security screenings is compensable
 - An examination of the latest cases
 - What is the Supreme Court saying about this?

4:50 **Healthcare Reform Litigation Risks: Affordable Care Act Nuances and Responding to Claims for Additional Penalties Arising From “Employee” vs. “Independent Contractor” Classifications**

Mark E. Brossman
Schulte Roth & Zabel LLP

- Mitigating the wage risk and potential liability for employers arising from the ACA
- The misclassification issue and the connection to ACA resulting penalties if an employer’s workers purchased insurance on a state or federal insurance exchange
- Offering health insurance to independent contractors?
 - What’s the latest on penalties for not offering coverage to a misclassified independent contractor who later buys coverage on an exchange
- Litigation implications of ACA’s Whistleblower Provision

5:20 **The Use of Statistical Sampling When Defending Against Wage and Hour Class Actions in California**

Daniel J. Slottje, Ph.D.
FTI Consulting, Inc.

Andrew Livingston
Orrick Herrington &
Sutcliffe, LLP

Additional Speaker TBA. Check back at:
AmericanConference.com/WageHourLA

- Degree to which you can use statistical sampling as proof for certification of class claims
- Use of statistical experts in class and collective wage-and-hour litigation in the state of California
- Use of statistical samples to establish classwide liability
- Use of representative testimony and statistical evidence in claims involving improper classification, denial of overtime, and meal and rest break infractions in violation of the California Labor Code
- Statistical methods to analyze class homogeneity, the importance of defining populations correctly, and when is sampling appropriate

6:20 **Conference Adjourns**

Day Two: Tuesday September 30, 2014

7:30 Continental Breakfast

8:00 **Views from the Bench: What Works and What Doesn't in the Courtroom, Why Parties Succeed and Don't Succeed in Wage & Hour Litigation, Novel Trial and Case Management Strategies, Examples of Bad Lawyering, Judicial Perspectives on Class Certification, and More**

Hon. Shira A. Scheindlin
U.S. Dist. Ct., S.D. NY

Hon. William V. Gallo
U.S. Dist. Ct., S.D. Cal.

Hon. Fernando J. Gaitan, Jr.
U.S. Dist. Ct., W.D. Mo.

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Hon. Anthony J. Mohr
Calif. Sup. Ct., LA Co.

Hon. Lorenzo F. Garcia
U.S. Dist. Ct., D. N.M.

Moderators of Panel:

Scott J. Witlin
Barnes & Thornburg LLP

Paul J. Lukas
Nichols Kaster, PLLP

9:45 Morning Break

9:50 **Defending and Managing the Latest Off-the-Clock Claims Involving the Continuous Work Day, Use of Smartphones/Mobile Devices Outside of Scheduled Hours, Working Remotely, and Alternative Working Arrangements**

Theodora Lee
Littler Mendelson PC

Heather M. Sager
Vedder Price

- Smartphones/Mobile Devices/Email and Beyond
- Latest FLSA and state wage & hour case law involving:
 - mobile devices and emails (BlackBerry, smartphones, VPN)
 - Telephone calls (texts): How are text messages interpreted?; identifying business versus personal calls and texts?; employee to employee calls
 - Employees giving email and/or cell phone to customers or potential customers
 - Computer network log-in data
 - VPN or Virtual Desktop
 - Transaction data
 - GPS Data / Work order data
 - Work assignment upload and downloading data
- Innovative defense strategies to claims involving uncompensated, work-related use of smartphones and other mobile devices by non-exempt employees outside their working hours
 - how to defeat the similarly situated requirement of the collective action certification process
 - winning the issue of whether putative class members are similarly situated for purposes of the class and collective action certification process
 - using cases involving on-call time claims as guidance

10:30 **Arbitrating Wage and Hour Cases Given the Changing Legal Landscape, and the Latest on the Enforceability of Class Action Waivers in Arbitration Agreements**

Raphael Lee
Senior Employment Counsel
Marsh & McLennan Companies, Inc.

Matthew Sonne
Sheppard Mullin Richter & Hampton LLP

D. Michael Reilly
Lane Powell PC

- Arbitrability of wage and hour claims
- Arbitration agreements: Advising clients on key provisions to insert/omit from arbitration agreements
- Assessing the conflicting standards regarding the enforceability of class action waivers in arbitration agreements: How have the courts been treating this issue?
 - Theories for limiting agreements to arbitrate and nonenforcement
- California's position on arbitration agreements under *Iskanian v. CLS Transportation* and whether an arbitration agreement may permissibly override the statutory right to bring claims under PAGA
- Practical Considerations when Arbitrating Wage and Hour Cases
 - Can one plaintiff in a class implement an arbitration agreement during pending litigation?
 - How will the arbitration be governed?
 - Opt-in/opt-out and the challenges of a collective wage case being heard as a class action
 - What do the AAA Rules state? Do other arbitration providers set forth rules different than those of the AAA?
 - When does silence become an "implicit agreement?"
 - Does a court or arbitrator determine whether a case will proceed on an individual or class action basis?

11:25 **Recent Litigation Trends in Regular Rate of Pay, Bonuses, Commissions and Overtime**

David Grant
BakerHostetler

Hardy R. Murphy
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

The Impact of Bonuses/Commissions on Regular Rate-of-Pay and Overtime

- Recent litigation involving errors in calculating regular rate-of-pay and overtime
- Properly factoring in the value of bonuses, commissions, incentive pay, shift differentials and/or retroactive pay for hourly employees who work overtime
- Factoring in non-discretionary bonuses and commissions when computing regular rate-of-pay and overtime pay
- Implementing the bonus or commission structure that is right for your company
- Tips and best practices for avoiding such violations and defending against such claims

Calculating Retroactive Overtime for Misclassified Employees

- “Time and a Half Methodology” vs. “Fluctuating Work Week (Half-Time) Methodology?”
- Recent Court rulings and rationales for applying one method over the other
- Why/how/when employers benefit from use of the Fluctuating Work Week method
- Properly assessing when and how to use the FWW method
- The importance of obtaining and documenting the employee’s understanding of, and agreement to the FWW method
- What is the DOL’s view on this?

12:05 **California Developments in Suitable Seating and Piece Rate Work**

Todd B. Scherwin
Fisher & Phillips LLP

Daniel J. Venditti
Weil Gotshal & Manges LLP

- Suitable Seating – When does an employee have the right to sit down during work? Taking a look at the latest class claims and rulings on this issue in California
- What is the scope of the California “suitable seating” provision?
 - Who is entitled?
 - What is deemed “suitable?”

- Must employees request a seat in order to be entitled to one?
- What industries are being targeted for suitable seating class actions?
- “Piece-Rate” Work: Calculating Wage and Overtime of Piece-Rate Employees
- What qualifies as “piece-rate” work?
- What industries most commonly utilize “piece-rate” workers
- How to properly calculate wage and overtime pay of a piece-rate employee?
- Avoiding unnecessary violations – understanding the technical requirements of paying a piece-rate employee

12:45 **Views from the Plaintiffs’ Bar: Adapting Your Defense Strategies to New and Innovative Techniques and Tactics**

Paul J. Lukas
Nichols Kaster, PLLP

Justin M. Swartz
Outten & Golden LLP

Sunshine R. Fellows
Carlson Lynch Ltd.

J. Nelson Thomas
Thomas & Solomon LLP

- Perspective on Dukes and Concepcion and their impact on wage and hour cases
 - How the plaintiffs’ bar has adapted
 - Examining progeny of these cases
 - circumvent or overcome Dukes and AT&T Mobility
- Perspective on the recent Supreme Court decisions in Comcast, AMEX, Oxford and Genesis Healthcare
- Assessing the latest trends in wage and hour claims and class and collective actions
- Views on employee certifications of time worked
- Emerging wage & hour states, industries, claims
- How plaintiffs’ counsel make use of jury research
- Methods that the plaintiffs’ bar utilizes in efforts to find classes, and restrictions that courts impose on such methods
- What makes a claim attractive or unattractive to the plaintiffs’ bar?

1:45 **Conference Ends**

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