## **CHAPTER 1**

# An Overview of Wage and Hour Litigation and Its Defense

§ 1.01 § 1.02	Defense O	of Modern Wage and Hour Litigation	1-1 1-5 1-6		
§ 1.03	The Sources of Law				
		cedural Law The Collective Action Procedures	1-6		
	[a]	of the Fair Labor Standards Act	1-7		
	rь1		1-/		
	[b]	Procedure 23	1-8		
	[-1		_		
	[c]	State Law Class Actions	1-9		
	[d]	The Class Action Fairness Act	1-10		
		ostantive Law	1-10		
	[a]	The Fair Labor Standards Act of			
		1938 and the Portal-to-Portal	1 10		
	n.ı	Act of 1947	1-10		
	[b]		1 12		
	[6]	Contract Act	1-12 1-12		
	[c]	State Wage and Hour Laws	1-12		
	[d]		1 12		
e 1 04	Looking E	Wage Ordinances	1-13		
§ 1.04	Looking F	orward	1-15		
		CHAPTER 2			
		CHAITER 2			
	The Ge	nesis of a Wage and Hour Lawsuit			
§ 2.01	Introduction	on	2-1		
§ 2.02		Labor Standards Act	2-3		
3		vate Rights of Action	2-3		
		Single-Plaintiff Actions	2-3		
	[b]		2-3		
	[c]		2-4		
		ency Actions	2-5		

xvi	WAGE & HOUR LITIGATION	
§ 2.03	State Law[1] Rights of Action Under State Law	2-6
	Compared to Rights Under the FLSA [2] Rule 23 and How It Differs from	2-6
	Section 216(b)	2-8
	"Class" Actions	2-9
	CHAPTER 3	
	Receipt of a Wage and Hour Complaint	
§ 3.01	Initial Case Assessment	3-2
	[1] Document Preservation	3-2
	[2] Limiting the Class Definition	3-3
	[3] Early Settlement Assessment	3-3
	[4] Pursuing Settlement with Named Plaintiffs	
	and Putative Class Members	3-4
	[5] Determining Opposing Counsel's Class	
	Action Experience and Predilections	3-6
§ 3.02	Removal to Federal Court	3-7
O	[1] Factors to Consider in Deciding Whether	
	to Remove	3-7
	[a] Judicial Assignment Preferences	3-7
	[b] Differing Jury Pools and Differing	
	Trial Procedures	3-7
	[c] The Right to a Jury Trial	3-7
	[d] Additional Considerations in	5 /
	FLSA/State Class Action	
	"Hybrid" Cases	3-9
	[2] Grounds for Removal	3-10
	. ,	3-10
	[a] Traditional Grounds for Removal: Federal Question and Diversity	
	Tomin disalism	3-10
		3-10
	[b] Removal Under the Class Action Fairness Act of 2005	2 11
		3-11
	[i] Requirements for CAFA  Jurisdiction	2 11
		3-11
	[ii] Who Can Remove, When to	
	Remove and the Implications	2 12
	of Removal	3-12
	[iii] The Burden of Proof	3-13
	[iv] The Local Controversy and	2.16
0.2.02	Home State Exceptions	3-16
§ 3.03	Affirmative Defenses	3-17
	[1] Portal-to-Portal Act Affirmative Defenses	2 1-
	for FLSA Claims	3-17
	[a] Statute of Limitations	3-17

	TABLE OF CONTENTS	xvii
S 2.04	[b] Good Faith Defenses Under the Portal-to-Portal Act [i] The Section 10 Absolute Defense [ii] The Section 11 Discretionary Defense [c] Waiver of an Employee's Right to Sue Under FLSA [d] Equitable Estoppel [2] Other Defenses for FLSA Claims [a] Preliminary and Postliminary Work [b] De Minimis Defense [c] Set-Off. [d] Unclean Hands [e] Personal Jurisdiction	3-19 3-19 3-20 3-22 3-23 3-24 3-24 3-24.2 3-24.3
§ 3.04	Motions to Dismiss Wage and Hour Complaints  [1] Twombly and Iqbal Motions to Dismiss  [2] Applying the Twombly Standard to Wage and Hour Class or Collective Actions	3-25 3-25 3-27
	CHAPTER 4  Defending FLSA Collective Actions— The Motion for Conditional Certification	
\$ 4.01	Conditional Certification Overview	4-2
§ 4.01	[1] The Supreme Court's Decision in <i>Hoffmann-La Roche</i>	4-2
§ 4.02	[2] "Similarly Situated" Defined  Certification Standards  [1] The Two-Step Lusardi Approach  [2] Alternatives to the Lusardi Approach  [a] The Fifth Circuit's Swales  Approach  The Sinth Circuit's Clark Approach	4-3 4-6 4-7 4-18
§ 4.03	[b] The Sixth Circuit's <i>Clark</i> Approach [c] The <i>Sushan</i> Approach	4-22 4-22.1
	Certification	4-25 4-26 4-30 4-32
§ 4.04	Evaluating the Conditional Certification Motion  [1] Merits of Plaintiffs' Claims  [2] Uniform Company Policy, Plan, or Scheme  [3] Job Duties and Other Employment	4-38 4-38 4-41
	Characteristics	4-53
	Members	4-60

xviii	WAGE & HOUR LITIGATION	
	[5] Other Considerations: Individualized Defenses, Manageability, and Fairness Factors [a] Defenses [b] Manageability [c] Federal Rule of Civil Procedure 23	4-64 4-65 6-67
	Factors	4-69
§ 4.05	Factors	4-73 4-75
8 4.03	[1] Personal Jurisdiction	4-75
	[2] Application of Arbitration Agreements [3] Communications with Putative Opt-In	4-77
	Plaintiffs	4-78
	CHAPTER 5	
	The Order on the Motion for Conditional Certification	
§ 5.01 § 5.02	Introduction	5-2
	Certification	5-4
	Denial of Conditional Certification [2] Impact on Discovery and Subsequent Efforts to Obtain Conditional	5-4
	Certification	5-6.1
	Denial of Conditional Certification [a] Corrections Based on Clerical	5-7
	Mistake, Oversight or Omission	5-8
	[b] Motion for Reconsideration	5-8 5-9
	[c] Appeals	3-9
	Certification	5-9
	Interlocutory Appeal [4] Renewed Motion for Conditional	5-10
	Certification	5-11
§ 5.03	Order Granting Conditional Certification and	5 12
	Approving Court-Facilitated Notice	5-13
	[1] Introduction	5-13 5-13
	[3] Substance of the Order	5-15
	[4] Basis for Reconsideration	5-18
	[5] Interlocutory Appeal	5-19
§ 5.04	Substance and Administration of the Collective	
	Action Notice	5-20

		TABLE OF CONTENTS	X1X
	[1] [2]	Typical Contents of the Notice Drafting and Negotiating the Notice to	5-20
		Limit Its Negative Impact	5-21
		Obligations and Potential Costs) [b] Include Vigorous Anti-Retaliation	5-22
		Language	5-22.1
		Claims Asserted in the Case [d] Avoid the Appearance of Judicial	5-23
		Imprimatur of the Notice	5-23
		[e] Limit the Response Period	5-24
	[3]	Limit Plaintiffs' Contact with Putative Class Members Outside of the	
		Notice Process	5-25
		Notice Process	5-25
	[4]	of the Case	5-26
	ניין	Coordinate and Distribute the Notice	5-29
		CHAPTER 6	
		Decertification	
§ 6.01		rally	6-1
§ 6.02		ining Decertification	6-5
	[1]	"Similarly Situated" Three-Factor Test [a] Disparate Factual and Employment	6-5
		Settings	6-7
		[b] Disparate Defenses	6-11
	[2]	Considerations	6-13
		Certification and Liability	6-15
	[3]	Common Practice or Policy	6-17
§ 6.03		ther to Move to Decertify	6-20.1
§ 6.04 § 6.05	Proce	ng of the Decertification Motionedural Issues and Defense Strategy After	6-21
	De	ecertification	6-22

## CHAPTER 7

# Defending Rule 23 State Law Wage and Hour Class Actions

§ 7.01	Introduction	7-2
Ü	[1] Class Actions in Federal Court	7-3
	[a] Prerequisites of Rule 23(a)	7-3
	[b] Rule 23(b)(2)	7-4
	[c] Rule 23(b)(3)	7-5
	[2] Opt-Out Class Actions Brought	
	in State Court	7-6
§ 7.02	Initial Considerations	7-7
·	[1] Possible Removal	7-7
	[2] Challenges to the Pleadings	7-8
	[a] Motions to Dismiss	7-8
	[b] Motions to Strike Class Allegations	7-10
	[3] Evaluating Exposure	7-13
§ 7.03	Class Certification Discovery	7-15
	[1] Propounding Discovery on the Plaintiff	7-15
	[2] Taking Plaintiff's Deposition	7-16
	[3] Plaintiff's Discovery	7-16
	[4] Challenging Overbroad Class Discovery	7-17
§ 7.04	Challenging the Representative Plaintiff's	
	Claims Via Summary Judgment	7-21
§ 7.05	Gathering Evidence to Defeat Class Certification	7-25
	[1] Declaration Gathering	7-25
	[a] Ethical Considerations in	
	Communicating with Putative	
	Class Members	7-26
	[b] Logistical Considerations in	
	Obtaining Declarations	7-27
	[2] Depositions of Putative Class Members	7-29
§ 7.06	Affirmatively Moving for Denial of Class	
	Certification Under Rule 23	7-30.2
§ 7.07	Opposing Class Certification	7-30.4
	[1] Rule 23 Requirements	7-30.4
	[a] Rule 23(a)(1): Numerosity	7-30.4
	[b] Rule 23(a)(2): Commonality	7-33
	[c] Rule 23(a)(3): Typicality	7-38
	[d] Rule 23(a)(4): Adequacy of	
	Representation	7-39
	[e] Rule 23(b)(3): Predominance and	
	Superiority	7-41
	[f] Ascertainability	7-50
	[g] State Certification Rules	
	Similar to Rule 23	7-51
	[2] Level of Court Analysis Concerning	
	Rule 23 Certification	7-54

	TABLE OF CONTENTS	xxi
§ 7.08	Use of Experts	7-56
o .	[1] Role in Employment Class Actions	7-56
	[2] Analysis of Expert Evidence	7-56
§ 7.09	Rule 23 Notice to Class Members	7-60
Ü	[1] Permitted Notice Under Rule 23(b)(1)	
	or 23(b)(2)	7-60
	[2] Differences Between FLSA "Opt-In"  Notice and Rule 23 "Opt-Out" Notice	
	Under Rule 23(c)(2)(B)	7-61
	[3] Content of Notice	7-62
	[4] Costs	7-63
§ 7.10	Rule 23(f) Interlocutory Appeals of Unfavorable	7-03
y 7.10	Class Certification Rulings	7-64
§ 7.11	Decertification of Certified Rule 23 Class	7-66
8 /.11	[1] Grounds for Granting Certification No	, 00
	Longer Exist or Never Existed	7-66
	[2] Courts' Ongoing Duty to Ensure Rule 23	
	Requirements Met	7-67
	[3] Strategies to Position a Case for	
	Decertification	7-68
	CHAPTER 8	
	Discovery Issues in Class and Collective Actions	
	Discovery issues in class and concerve rectons	
§ 8.01	Generally	8-2
§ 8.02	Discovery Identifying Potential Class or	
	Collective Action Claims and Defenses	8-3
	[1] Industry Practices and Other Litigation	
	Trends	8-3
	[2] Administrative Agency Investigations	8-4
§ 8.03	Discovery During Litigation of Class and	
	Collective Actions	8-5
	[1] Prior to Certification	8-5
	[a] Purpose	8-5
	[b] Disclosure of Names and	0.5
	Addresses	8-5
	[c] Scope of Class-Based Discovery Prior to Certification	0 0
		8-8 8-8
		8-9
	[ii] Rule 23 Class Actions [d] Discovery Related to Individual	0-9
	Putative Class Members Prior	
	to Certification	8-10
	[e] The Scope of an Employer's	0-10
	Discovery	8-12
	[i] Discovery of DOL	0-12
	Investigations by	
	Employers	8-12
	2.mprojeto	5 12

xxii	WAGE & HOUR LITIGATION	
	[ii] Discovery of Employees'	
	Immigration Status	8-13
0.004	[iii] Written Discovery	8-14
§ 8.04	After Certification	8-17
	[1] Purpose	8-17
	[a] Discovery Aimed at the Named Plaintiff	8-17
	[b] Discovery Directed to Individual Opt-In Plaintiffs	8-18
	[c] Discovery Directed to Other	
	Witnesses	8-22
	[d] Summary Judgment	8-23
	[e] Decertification	8-25
	[i] Section 216(b) Collective Actions	8-25
	[ii] Rule 23 Class Actions	8-29
	[f] Trial	8-31
	[i] Bifurcation	8-31
	[ii] Representative Evidence	8-32
	[iii] Common Issues for Trial	8-32
	Unique California Class Issues	
§ 9.01 § 9.02	Introduction	9-2
8 7.02	Rest Requirement	9-4
	[1] Statutory Requirements for Meal Breaks	9-4
	[2] Statutory Requirements for Rest Breaks	9-5
	[3] Penalties for Non-Compliance	9-7
	[4] Recordkeeping	9-8
	[5] Debate Over Whether One-Hour Payment	0.0
	Is a "Penalty"	9-9 9-10.1
	<ul><li>[6] Meaning of "Provide" a Meal Period</li><li>[7] Limits on IWC's Power to Alter Labor</li></ul>	9-10.1
	Code Meal Period Rules	9-13
	[8] AB 569: CBA Exemptions from Meal	
	Periods for Certain Industries	9-14.1
	[9] Day of Rest Requirement	9-14.1
§ 9.03	Reimbursement of Employee Expenses	9-14.3
	[1] The Duty to Reimburse Expenses Under Labor Code Section 2802	0.14.2
		9-14.3
	[2] Reimbursement for Uniforms Under the Wage Orders	9-15
§ 9.04	[RESERVED]	9-13
0	[For coverage of Unlawful Commission	7 11
	Chargebacks see Ch. 24A]	9-17

		TABLE OF CONTENTS	xxiii
§ 9.05	Out o	of State Payroll Checks	9-18
	[1]	Nature of Violation	9-18
	[2]	Direct Deposit	9-25
	[3]	Penalties	9-25
§ 9.06	Waiti	ing Time Penalties, California Labor Code	
	Se	ection 203	9-26
	[1]	Generally	9-26
	[2]	Good Faith Dispute Affirmative Defense	9-27
	[3]	Fixed Term and Temporary Employment	
		Assignments for a Fixed Term	9-28
§ 9.07	Dual	Purpose Remedies: Split Shift Premium	
		d Reporting Time Pay	9-31
	[1]	Split Shift Premium Generally	9-31
	[2]	Reporting Time Pay Generally	9-31
	[3]	Is There a Private Right of Action?	9-33
§ 9.08		zed Wage Statement Claims, California	
		abor Code Section 226	9-35
	[1]	Wage Statement Requirements, California	
		Labor Code Section 226(a)	9-35
	[2]	The Remedy, California Labor Code	
		Section 226(e)	9-37
§ 9.09	Calif	ornia Labor Code Private Attorneys	
·		eneral Act	9-42
	[1]	General Scope of the Law	9-42
	[2]	Arbitration and Class Waiver Issues	9-45
	[3]	Scope of the "Civil Penalty" Provisions	9-48
	[4]	Pursuing PAGA Claims Collectively	
		Without Class Certification	9-49
	[5]	Removability of PAGA Claims to	
		Federal Court	9-50
	[6]	Release of PAGA Claims Through	
	[-1	Class Settlement	9-50.2
	[7]	Wage Order Claims	9-50.4
§ 9.10		ir Competition Claims, Business & Professions	,
3		ode Section 17200	9-51
	[1]	Former Law—Pre-Proposition 64	9-51
	[2]	Reform of the Law—Passage of	,
	[-]	Proposition 64	9-52
	[3]	Proposition 64's Restrictions on UCL	
	[ ]	Class Actions	9-53
	[4]	Trial of Equitable Claims Eliminating	, 55
	Γ.1	Right to a Jury	9_54

## **CHAPTER 10**

# **Defending Hybrid Cases**

§ 10.01				10-2
§ 10.02	Potential Advantages for Plaintiffs Under State			
			d Hour Laws	10-3
	[1]		ate Law Class Is an "Opt-Out" Class,	
			pically with a High Participation	10.0
	507		ate	10-3
	[2]		Laws May Provide Longer	40.4
	507		mitations Periods	10-4
	[3]		s May Have More Advantageous	40.5
	5.43		ubstantive Laws	10-5
	[4]		Law Remedies Sometimes Differ	10.6
0.10.00	** 1		om Those Available Under the FLSA	10-6
§ 10.03	-		ion 216(b) and Rule 23 Actions	10-7
	[1]		edural Issues in Defending Hybrid	
			ctions	10-7
		[a]	Forum Choice	10-7
		[b]	Whether to Oppose FLSA	100
			Conditional Certification	10-8
	[2]		Employer's Best Arguments Against	10-9
			Rule 23 Class Certification	
		[a]	No Numerosity	10-9
		[b]	No Superiority	10-14
			[i] A State Law Class Action Is	
			Not Superior to an FLSA	
			Collective Action	10-14
			[ii] Collective and Class Action	
			Devices Inherently	
			Conflict	10-19
			[iii] Collective and Class Actions	
			in the Same Case Are	
			Confusing	10-20
		[c]	Dual Certification Violates the Rules	
			Enabling Act	10-23
		[d]	The FLSA Preempts State Law	
			Wage and Hour Class Actions	10-26
		[e]	Certification of a State Law	
			Class Action Creates	
			Impermissible Supplemental	
			Jurisdiction	10-28.1
	[3]		n Should an Employer Oppose	
		Cl	lass Certification	10-31

	CHAPTER 11	
	Defending ERISA Claims in Wage and Hour Actions	
§ 11.01	Introduction: ERISA for Wage and Hour	11 1
§ 11.02	Lawyers ERISA Provisions and Claims in Wage and	11-1
	Hour Cases	11-4
	[1] ERISA Fiduciary Duties	11-4
	[a] Statutory Provisions	11-4
	in FLSA Lawsuits	11-4
§ 11.03	and Claims	11-6
	and Recordkeeping Claims	11-8
§ 11.04	Cases Allowing ERISA Claims	11-11
	CHAPTER 12	
	<b>Defending the Employer Against Multiple Cases at the Same Time</b>	
§ 12.01	Introduction	12-1
§ 12.02	Consolidation of Cases in the Same Jurisdiction Under Section 1404 and Federal Rule of	
	Civil Procedure 42	12-3
	[1] Overview	12-3
	[a] Text and History of Section 1404	12-3
	[b] Section 1404(a) Considerations [c] Examples of Section 1404(a)	12-3
	Transfers	12-4
	[d] Section 1404(b) Considerations [2] Applicability of Federal Rule of Civil	12-6
§ 12.03	Procedure 42	12-7
	Section 1407	12-8
	Litigation	12-8
	Pursuant to Section 1407	12-10
§ 12.04	the Consolidated Cases  The Advantages and Disadvantages of  Consolidated Proceedings Under	12-11
	Consolidated Proceedings Under Section 1404 or Section 1407	12-15

XXV

xxvi		V	VAGE	& HOUR LITIGATION	
	[1]	The 1	Potentia	al Advantages of	
	[2]			ation	12-15
	[2]			al Disadvantages of ation	12-16
§ 12.05	Form			on May Not Always Be	12 10
	Ne	ecessary	/ · · · · ·		12-18
			(	CHAPTER 13	
		Li		on Hold Notices and ment Preservation	
§ 13.01	Intro	duction			13-2
§ 13.02				ve	13-4
	[1]	Trigg	gering t	he Duty to Preserve	13-4
	[2]			of the Duty to Preserve	13-5
	[3]			e Duty to Preserve	13-7
	[4]			lity and Opportunities to	12.0
	F. 6.7			Preservation Obligations	13-9
§ 13.03	[5] Draft			oncompliance	13-10
	No	otice		chanics and Format of a	13-13
	[1]			1 Hold Notice	13-13
	[2]			Custodians of Potentially	15 15
	r_1			Information	13-14
		[a]		rvisors or Managers of the	
			Pla	aintiff(s)	13-15
		[b]		tial Plaintiffs	13-15
		[c]		an Resources and Payroll	
				rsonnel	13-16
		[d]		or Management	13-16
		[e]		mation Technology and	
				ecords Management	12.16
		Γ£Ί		rsonnel	13-16
	Г21	[f]	ina th	Parties	13-17
	[3]			tice	13-18
		[a]		rally	13-18
		[b]	Over	time Cases.	13-19
		[o]	[i]	Exemption Cases	13-19
			[ii]	Non-Exempt Overtime Cases	13-20
		[c]		num Wage Cases	13-20
		[d]		and Rest Break Cases	13-21
		[e]		oles of Cases Based on Industry	
				pe and Worker Status	13-21
			[i]	Over-the-Road Drivers	13-21
			[ii]	Independent Contractors	13-22
			[iii]	Call Centers	13-22

			TABLE OF CONTENTS	xxvii
	[4]		ification of Information Repositories	
		an	d Formats	13-22
	[5]		itoring Compliance/Enforcement	13-25
		[a]	Tracking Distribution and	
			Acknowledgment of	
			Compliance	13-25
		[b]	Sending Reminder Litigation	
		[-]	Hold Notices	13-25
		[c]	Updating the Litigation Hold	13-26
		[d]	Establishing Enterprise Preservation	
		[4]	Protocols	13-27
			CHAPTED 14	
			CHAPTER 14	
			Arbitration Agreements	
§ 14.01			ersus Arbitration: Basic	
			es	14-2
§ 14.02			Authorities	14-5
	[1]		Labor Standards Act	14-5
	[2]		ral Arbitration Act	14-5
	[3]		ntial Legislation: the "FAIR Act"	14-6
	[4]	State	Law	14-6.1
		[a]	State Arbitration Statutes	14-6.1
		[b]	State Common Law	14-7
	[5]		ral Forums	14-8
§ 14.03	Classw	ride A	rbitration and Other Arbitration	
	Issu	es		14-9
	[1]	Class	Action Waivers in the	
		Er	nployment Context	14-9
	[2]	Enfo	rcement of Class Action Waivers:	
		Aı	n Overview	14-11
		[a]	Does the FAA Apply to Most	
			Employment Agreements at All?	14-11
		[b]	Discover Bank and State	
			Unconscionability Doctrine	14-11
		[c]	Effective Vindication Exception	
			and Italian Colors	14-12
		[d]	Section 7 of the NLRA	
			and the Supreme Court's	
			Decision in Epic Systems	14-13
	[3]	Arbit	ration Issues Post Epic Systems	14-15
		[a]	Formation	14-17
		[b]	The Continued Unconscionability	
			Debate After AT&T Mobility	14-23
		[c]	PAGA Actions	14-32
		[d]	Agency Enforcement Actions	14-35
		[e]	Transportation Workers	14-35
		r-1		

xxviii	WAGE & HOUR LITIGATION			
	[4] Whether Arbitration Can Proceed on a Classwide Basis Where			
	the Agreement Is Silent	14-42		
	and Collective Employment Actions [a] Plaintiffs Who Are Not	14-46		
	Bound by an Arbitration Agreement	14-46		
	of Lawsuit	14-48		
	of Arbitration Agreements [d] "Reverse" Forum Selection Clauses	14-49 14-50		
	CHAPTER 15			
	Strategic Considerations in Moving for Summary Judgment			
§ 15.01	Introduction	15-2		
§ 15.02	Early Considerations in Motion Planning	15-3		
	[1] Cost	15-3		
	[2] Impact of Order on Class	15-3		
	[3] Timing	15-3		
§ 15.03	Target of Motion	15-4		
	Plaintiff	15-4		
	Impacting the Class	15-5		
	Judgment	15-6		
	[4] Eliminating Overlapping Litigation [5] Motion for Summary Judgment on	15-6		
	Damages	15-6		
	Classwide Damages  [b] Liquidated or Punitive Damages/Three-Year Willful	15-6		
	Violations Limitations Period	15-7		
§ 15.04	Timing	15-8		
Ü	[1] Moving for Summary Judgment Before Class Certification	15-8		
	[2] Moving for Summary Judgment Against			
	the Class	15-9		
	[3] Mediation with Summary Judgment	15.0		
8 15 05	Pending	15-9		
§ 15.05	Evidentiary/Discovery Issues on Summary Judgment Motions	15-10		

	TABLE OF CONTENTS	xxix
	[1] Evidence in Support of Summary	
	Judgment	15-10
	Judgment/Adjudication	15-10
§ 15.06	Cross-Motions for Summary Judgment	15-11
	CHAPTER 16	
	Wage and Hour Collective Action Trials	
§ 16.01	Introduction	16-2
3	[1] Wage and Hour Collective Action Trials Are Often Perceived as Being	
	Unpredictable	16-2
	[2] Wage and Hour Collective Action Cases May Actually Be More Amenable to	
	Defense Verdicts	16-2
§ 16.02	The Employer's Defense Themes	16-5
	[1] The Jury Should Not Feel the Need to	16.5
	Be "Righting Wrongs"	16-5
	There Are No Classwide Wrongs	16-5
§ 16.03	Presenting Contrary Evidence from Other	
	Employees and Related Jury Instructions	16-10
§ 16.04	Gathering Evidence That Will Be Effective at	16.10
	Trial in Collective Action Cases	16-12
	[1] Identify Current and Former Employees Who Will Be the "Employer	
	Representatives" to Refute the Claims	
	of the Class Representatives	16-12
	[2] The Value of Using Videotaped	
	Depositions at Trial	16-13
§ 16.05	The Employer's Presentation of Evidence at Trial	16-16
	[1] The Jury Should Be Convinced That Any	
	Harm Was Due to the Plaintiffs' Own Failure to Follow the Employer's	
	Policies	16-16
	[2] Use of the Plaintiffs' Own Statements	10 10
	Regarding Job Duties in	
	Misclassification Cases	16-17
	[3] Time Card Issues	16-18
§ 16.06	[4] Union Issues  The Employer's Strategies for Effectively	16-20
	Presenting Witnesses	16-21
	[1] The Use of Class Member Testimony	16-21
	[2] The Use of Testimony from the Class	
	Representatives That Contains Unrealistic Estimates of Damages	16-22
	Omeansite Estimates of Damages	10-22

xxx	WAGE & HOUR LITIGATION	
	[3] The Use of Testimony from the	
	Employer's Managers and Human	
	Resources Officers	16-22
	[4] Avoid Calling Too Many Defense	
	Witnesses	16-23
	[5] The Use of Expert Testimony	16-24
§ 16.07	The Employer's Preparation for Trial	16-27
	[1] The Plaintiffs Should Be Required to	
	Prepare a Trial Plan	16-27
	[2] The Employer Should Conduct a Mock	
	Trial or Focus Group Presentation	16-28
	[3] The Use of Electronic or Video	16.00
0.16.00	Evidence	16-29
§ 16.08	The Employer's Closing Argument	16-31
	CHAPTER 17	
	Civil Remedies	
§ 17.01	Overview of Calculation of Unpaid Overtime	17-1
§ 17.02	Calculation of Unpaid Overtime in	
	Misclassification Cases Involving	
	Salaried Employees	17-4
§ 17.03	Liquidated Damages	17-8
§ 17.04	Statute of Limitations	17-12
§ 17.05	Attorneys' Fees and Costs	17-14.2
§ 17.06	Offers of Judgment	17-15
§ 17.07	Individual Liability	17-23
	[1] Determining Who Is an "Employer" for	
	the Purpose of Individual Liability	17-23
	[2] The Fact-Specific Nature of This	
	Analysis Generally Prevents Dismissal	
	Through a Motion to Dismiss or	15.04
	Summary Judgment Motion	17-24
	[3] Rationale for Naming Individual as	17.05
0 17 00	Defendant	17-25
§ 17.08	Successor Liability	17-26
	CHAPTER 18	
	Settlement/Mediation	
§ 18.01	Introduction—Reasons for Settling	18-2
§ 18.02	Conducting an Exposure Analysis	18-4
	[1] Hours Worked	18-4
	[2] Regular Rate	18-5
	[3] Method of Calculating Overtime:	
	1.5 or 0.5?	18-5
	[4] Statute of Limitations	18-6

	TABLE OF CONTENTS	XXX
	[5] Liquidated Damages	18-6
	[6] Punitive Damages	18-6
	[7] Attorneys' Fees and Costs	18-7
	[8] Class Actions and Collective Actions	18-7
	[a] Class Size	18-7
	[b] Discount Factors	18-8
§ 18.03	How to Settle	18-9
	<ul><li>[1] Special Rules for FLSA Claims</li><li>[2] Initial Considerations in Negotiating Settlements in Class and Collective</li></ul>	18-9
	Actions	18-14
	[a] Dividing Settlement Proceeds	
	Among Plaintiffs	18-14
	[i] Generally	18-14
	[ii] Reversions in California [b] How Many Plaintiffs Must	18-15
	Participate in the Settlement?	18-16
	[c] "Blow Up" Clauses	18-17
	[d] Negotiating Attorneys' Fees	18-17
	[e] Payroll Taxes	18-20
	[f] Confidentiality	18-20.1
	[3] Settlement Through a Mediator	18-21
	[a] Generally	18-21
	[b] California Mediation Privilege	18-22
	[4] Obtaining Court Approval	18-22
	[5] Scope of the Settlement	18-26
	[6] Agreeing to Certify a Settlement Class	18-26.1
	[7] "Holdout" Class Members	18-26.2
§ 18.04	Related Issues	18-26.3
3	[1] Payments Made Under the Supervision	
	of the DOL	18-26.3
	<ul><li>[2] Remedial Actions During Litigation</li><li>[3] Using the All Writs Act to Preclude</li></ul>	18-29
	Initiation of Related Suits	18-30
	CHAPTER 19	
En	forcement Actions Filed by U.S. Secretary of La	bor
§ 19.01	Introduction	19-1
§ 19.02	Section 16(c) Civil Enforcement Action Over	
0 10 02	Unpaid Overtime or Minimum Wages	19-3
§ 19.03	Genesis of FLSA Section 16(c) Enforcement	10.4
\$ 10.04	Actions	19-4 19-6
§ 19.04	Special Considerations	
	[1] Discovery Issues	19-6 19-9
	[2] Use of Representative Testimony	19-9

## **CHAPTER 20**

# White Collar Exemptions

§ 20.01	Introduc	tion	20-3
§ 20.02		cutive Exemption	20-5
		The Executive Exemption Under	
		the FLSA	20-5
	[s	a] Management Duties	20-5
		[i] The Amount of Time Spent	
		on Management Activities	20-6
		[ii] The Relative Importance of	
		the Management	
		Activities	20-7
		[iii] The Employee's Relative	
		Freedom from Direct	
		Supervision	20-9
		[iv] The Relationship Between the	_0 >
		Employee's Salary and the	
		Wages Paid to Other	
		Employees Who Perform	
		Non-Management Activities	
		That the Employee Also	
		Performs	20-10
	Γ	b] A Customarily Recognized	20 10
	L	Department or Subdivision	20-11
	Γ	c] Directing the Work of at Least	20 11
	Ľ	Two or More Full-Time	
		Employees	20-11
		[i] Directing Work	20-12
		[ii] Two or More Employees	20-12
		[iii] Customarily and Regularly	20-13
	Γ	d] Hiring/Firing Authority	20-14
		The Executive Exemption Under	20 14
	[2] 1	State Law	20-16
	Г	a Differences Between State and	20 10
	Ľ	Federal Law	20-16
	Γ	b] California Law	20-17
§ 20.03	_	ninistrative Exemption	20-19
8 20.03		FLSA	20-19
	_	a General Overview	20-19
	_	b] Primary Duty Is Office or	20-19
	L	Non-Manual Work Directly	
		Related to the Management or	
		General Business Operations of	
		the Employer	20-19
	Г	c] Exercise of Discretion and	20-19
	L		20-26
	г	Independent Judgment	
	L	d] Matters of Significance	20-29

	TABLE OF CONTENTS	xxxiii
	[2] Different State Law	
	Approaches—California	20-31
§ 20.04	The Professional Exemption	20-35
	the FLSA	20-35
	[a] Learned Professionals	20-35
	[i] Work Requiring Advanced	
	Knowledge	20-35
	[ii] Field of Science or Learning	20-36
	[iii] Customarily Acquired by a Prolonged Course of	
	Specialized Intellectual	
	Instruction	20-36
	[iv] Application to Specific	20-30
	Professions	20-37
	[b] Creative Professionals	20-38.1
	[2] The Professional Exemptions Under	20 00.1
	State Law—California	20-39
§ 20.05	The Computer Employee Exemption	20-41
v	[1] The Computer Exemption Under	
	the FLSA	20-41
	[2] The Computer Exemption Under	
	State Law	20-43
	[a] California Law	20-43
	[b] Other State Law Approaches	20-44
§ 20.06	The Outside Sales Exemption	20-45
	[1] The Outside Sales Exemption	20.45
	Under the FLSA	20-45
	[a] "Making Sales" or "Obtaining Orders"	20-45
	"Obtaining Orders"	20-43
	[b] Customarily and Regularly Engaged Away from the Employer's Place	
	of Business	20-48
	[2] The Outside Sales Exemption Under	20 40
	State Law	20-49
	[a] States That Follow Federal Law	20-49
	[b] California Law	20-50
§ 20.07	Highly Compensated Employee Exemption	20-51
v	[1] Under the FLSA	20-51
	[2] State Approaches to the Highly	
	Compensated Employee Exemption	20-52.2
§ 20.08	The Salary Level and Salary Basis Tests	20-52.4
§ 20.09	Deductions from Pay	20-53
	[1] Generally	20-53
	[2] Deductions for Disciplinary Reasons	20-53
	[a] Penalties Imposed in Good Faith	
	for Infractions of Safety Rules	20.53
	of Major Significance	20-53

xxxiv	WAGE & HOUR LITIGATION	
	[b] Full-Day Disciplinary Suspensions of Less Than a Week	20-54
	[3] Deductions for Personal Absences	20-54
	<ul><li>[4] Deductions for Sickness or Disability</li><li>[5] Deductions Taken Pursuant to the Family</li></ul>	20-55
	and Medical Leave Act	20-55
§ 20.10 § 20.11	Deductions from Vacation or Leave Banks Responses to Downturns in Business: Reductions	20-57
	in Pay and Furloughs	20-58
	[1] Salary Reductions	20-58
§ 20.12	[2] Furloughs	20-59 20-61
§ 20.12 § 20.13	The Effect of Salary Basis Violations and	
	Potential Exposure	20-63
	[1] Actual Deductions	20-63
	[2] Violations of the Salary Basis Test in the	20.74
	Absence of Actual Deductions [3] Safe Harbor for Employers Who Make	20-64
	[3] Safe Harbor for Employers Who Make Impermissible Deductions	20-66
	CHAPTER 21	
	N. Will G.B. E	
	Non-White Collar Exemptions	
§ 21.01	Generally	21-1
§ 21.02	Section 7(i) "Commissioned Employees"	21-3
	Minimum Wage	21-3
	[2] One-Half of Compensation Is Commission	21-3
c 21 02	[3] Work in a Retail or Service Establishment	21-6
§ 21.03	The Motor Carrier Act Exemption	21-10
	[1] The Employee Is Employed by a Motor Carrier or a Motor Private Carrier	21-10
	[2] The Employee's Job Duties Satisfy the	21 10
	MCA Exemption	21-11
	[a] Drivers, Driver's Helpers, Loaders	
	or Mechanics	21-11
	[b] Interstate Commerce Within the	
	Meaning of the MCA	21-12
	[i] Crossing State Lines in	
	Interstate Commerce	21 12
	Under the MCA	21-12
	[ii] Purely Intrastate Transportation as Interstate Commerce	
	Under the MCA	21-13
	[c] Small Vehicle Exception to the	21-13
	Motor Carrier Act	21-16

	CHAPTER 22		
	Independent Contractors and Joint Employers		
§ 22.01 § 22.02	Introduction	22-1	
8 22.02	Under the FLSA	22-3	
	Realities Test	22-3	
	[a] Regulatory Guidance	22-3	
	[b] Judicially Developed Tests	22-6	
	[2] Application of the Economic Realities Factors	22-9	
	[a] Control	22-11	
	[b] Profit or Loss	22-11	
	[c] Investment.	22-13	
	[d] Skill	22-15	
	[e] Permanence	22-16	
	[f] Integration	22-16	
	[g] Dependence	22-17	
	[h] Other Considerations	22-19	
	[3] Standard of Review	22-20	
§ 22.03	Defending Independent Contractor Cases State Law Tests		
§ 22.04			
§ 22.05			
	[1] DOL Joint Employment Regulations	22-34	
	[2] Joint Employment Analysis in the Courts [a] Multiple Articulations of the	22-36	
	Economic Reality Test	22-38	
	[b] Related Entities	22-48	
	[3] Joint Employment Under State Wage	22 10	
	and Hour Laws	22-53	
	CHAPTER 23		
	Was the Employee Paid for All Time "Worked"?		
§ 23.01	Background	23-1	
§ 23.01	Pre-Shift and Post-Shift Activities	23-5	
3 -2.0-	[1] Travel and Commuting Time	23-6	
	[a] Federal Principles	23-6	
	[b] California and Other State Laws	23-9	
	[2] Preparing for and Concluding Work	23-11	
	[3] Waiting Time	23-21	
§ 23.03	Meal and Rest Breaks		
	[1] When Is a Meal Break Compensable Under		
	Federal Law?	23-22.1	

XXXV

xxxvi	WAGE & HOUR LITIGATION			
	[2]	State Law Claims for Denial of		
		Meal and Rest Breaks	23-24	
		[a] California	23-24	
		[i] Meal Breaks	23-24	
		[ii] Rest Breaks	23-27	
		[b] Other State Statutes	23-27	
	[3]	Breach of Contract Claims for Denial of		
		Meal and Rest Periods	23-29	
§ 23.04	Work	During "Off Hours"	23-31	
	[1]	Applying the Continuous Workday		
		Analysis in the Modern Workplace	23-33	
	[2]	On Call Time	23-36	
§ 23.05	Speci	ial Defenses	23-38	
	[1]	The <i>De Minimis</i> Doctrine	23-38	
	[2]	Gap Time	23-46	
	[3]	Interns, Trainees, and Student-Athletes	23-48	
		CHAPTER 24		
		The Regular Rate		
§ 24.01	The l	Regular Rate of Pay	24-2	
§ 24.01 § 24.02		tory Exclusions from the Regular Rate	24-7	
y 24.02	[1]	Gifts	24-8	
	[2]	Payments for Occasional Periods	2.0	
	[-]	When No Work Is Performed	24-9	
	[3]	Payments/Reimbursements for Expenses	,	
	[- ]	Incurred for the Employee's Benefit	24-11	
	[4]	"Other Similar Payments"—"Show Up"		
		and "Call Back" Payments	24-13	
	[5]	Discretionary Bonus Payments	24-16	
	[6]	Payments Pursuant to a Bona Fide		
		Profit-Sharing Plan, Trust, Thrift		
		or Savings Plan	24-16.2	
		[a] Bona Fide Thrift or Savings Plan	24-16.2	
		[b] Bona Fide Profit Sharing Plan or		
		Profit Sharing Trust	24-16.2	
	[7]	Benefit Payments	24-16.2	
	[8]	Exclusions That May Also Serve as a		
		Credit Against Overtime Obligations	24-16.4	
		[a] Generally	24-16.4	
		[b] Premium Pay for Hours Outside		
		the Regular Workday or		
		Workweek	24-18	
		[c] Premium Pay for Work on		
		Special Days	24-20	
	[9]	Stock Options, Stock Appreciation Rights		
		and Employee Stock Purchase		
		Programs	24-21	

	TABLE OF CONTENTS	xxxvii
§ 24.03	How to Calculate the Regular Rate	24-22
·	[1] Hourly Employees	24-22.1
	[2] Hourly Rate Employees Receiving	
	Additional Remuneration	24-23
	[3] Piecework Employees	24-24
	[4] Day Rates and Job Rates	24-25
	[5] Calculating the Regular Rate for	24.26
	Semi-Monthly or Monthly Salary Pay	24-26
	[6] Salaried Employees Working a Fixed	24.27
	Workweek	24-27
	[7] Salaried Employees Working a Fluctuating Workweek	24-28
	[a] Fluctuating Workweek Method	24-28
	[b] The Rainey Method	24-28
	[8] Guaranteed Pay for Fluctuating Hours	24 33
	(Belo Plans)	24-33
	[9] Overtime for Dual Function Employees	
	Working at Two or More Rates	24-36
	[a] Weighted Average Approach	24-36
	[b] Section 7(g) Approach	24-37
	CHAPTER 24A  Defending Incentive Compensation Claims	
	Detending Incentive Compensation Claims	
§ 24A.01	Introduction	24A-1
3	[1] Overtime Miscalculation Claims	24A-1
	[2] State Law Claims for Unpaid Incentive	
	Compensation	24A-3
§ 24A.02	California—Unlawful Commission Chargebacks	24A-6
	[1] Nature of the Violation	24A-6
	[2] The Steinhebel Case Approves Certain	
	Charge-back Plans	24A-9
	[3] Further Development of the Law Since	• • • •
	Steinhebel	24A-9
	CHAPTER 25	
	Minimum Wage	
e 25.01	Introduction	25 1
§ 25.01 § 25.02	Introduction	25-1 25-3
8 23.02	[1] FLSA Requirements	25-3 25-3
	[2] Differing State Law Approaches	25-3 25-3
§ 25.03	Commissions	25-5 25-5
§ 25.03 § 25.04	Piece Rates	25-3 25-7
χ 23.0 <del>1</del>	1 1000 134103	25-1

xxxviii		WAGE & HOUR LITIGATION	
§ 25.05	Under	Credit and Tip Pooling Arrangements the FLSA and Corresponding State	25.0
		Variations	25-8
	[a	-	25-8
	[b		25-11
	[2] T	Non-Tipped Positions ip Pooling Arrangements Under	25-13
		the FLSActions Alleging Tips Were Diverted to	25-18.1
		Coworkers Who Did Not Earn Them ctions Alleging "Agents" of Management	25-22
		Wrongfully Took Tips	25-24
	[3] V	Credit and Tip Pooling Arrangements	25-26
		CHAPTER 26	
		<b>Deductions from Wages</b>	
§ 26.01		ns from Wages Under Federal Law	26-2
		enerally	26-2
		Lodging or Other Facilities	26-5
	[a		26-5
	[b		26-6
	[c		26-6
	[d	-	26-7
	[e		26-7
	[f		26-7
	[3] O		26-8
		to a Court Order	26-8
	[b		26-8
	[c		26-8
	[4] G	enerally Impermissible Deductions	26-9
	[a		26-9
	[b	Employee Debts	26-9
	[c		26-10
§ 26.02		ns from Wages Under State Law	26-11
	[1] St	tate Law Limitations Generally	26-12
	[a		26-12
	[b		26-14
	[c		26-14
	[d		26-14
	[e		26-15

		26-16		
	[2]	[f] Calif	Purchase of Goods or Supplies	26-16
		[a]	Recovery of Loans, Advances and	
			Wage Overpayments	26-17
		[b]	Shortages and Other Business	
			Losses	26-20
		[c]	Photographs and Bonds	26-21
		[d]	Medical or Physical Examinations	26-22
		[e]	No Coercion by Employer	26-22
			CHAPTER 27	
Contr	actors l Rela	: the S ted Ac	ndards Applicable to Certain Govern Service Contract Act, the Davis-Bacot ets, the Copeland Act, and the Contra Hours and Safety Standards Act	n Act
§ 27.01			Contract Act	27-4
	[1]		erage Under the Service Contract Act	27-5 27-5
		[a]	General	21-3
			"Furnish Services"	27-6
			[ii] Contract Performed Through Use of "Service	27 0
			Employees"	27-6
		[b]	Statutory Exemptions from SCA	
			Coverage	27-7
		[c]	Regulatory and Administrative Limitations, Variances and	
			Exemptions	27-8
			<ul><li>[i] Maintenance Contracts</li><li>[ii] Commercial Services</li></ul>	27-9
			Contracts	27-10
			[iii] Example of Other Types of Contracts Without SCA	
	507	_	Coverage	27-12
	[2]		s Related to Wage Determinations	25.12
			nder the SCA	27-13
			General	27-13
		[b]	"Prevailing in the Locality" Wage	27 14
		[a]	Determinations	27-14
		[c]	Collective Bargaining Agreement/Successorship Wage	
			Determinations	27-14
			[i] Substantial Variance	27-14
			[ii] Arm's-Length Negotiations	27-17
		[d]	Discharging Wage and Fringe Benefit	2/1/
		[~]	Obligations	27-19
			5	

xxxix

			[i]	Meeting the Wage			
				Requirements	27-20		
			[ii]	Furnishing Fringe Benefits	27-20		
			[iii]	Furnishing Equivalent			
				Benefits	27-25		
			[iv]	Temporary and Part-Time			
			. ,	Employees	27-26		
			[v]	Offsets Not Permitted	27-26		
	[3]	Postir	ng and	Recordkeeping	27-26		
	[4]		Investigations and Enforcement				
		[a]	Cont	ract Review and Stipulations	27-28		
		[b]	Subc	ontractors	27-28		
		[c]	Rem	edies, Penalties and Sanctions	27-28		
			[i]	Withholding	27-28		
			[ii]	Debarment	27-29		
§ 27.02				Act and Related Acts	27-30		
	[1]		_	nd Application of the			
				acon Act and Related Acts	27-31		
		[a]		s-Bacon Act Coverage	27-31		
			[i]	Contract to Which the Federal			
				Government or the District			
			· · · · ·	of Columbia Is a Party	27-31		
			[ii]	Contract for Construction	27-31		
			[iii]	Construction of a Public			
				Building or Public Work of			
				the United States or the	27.22		
		F1. T	D:	District of Columbia	27-32		
		[b]		s-Bacon Related Acts	27.22		
		Fa1		overage to the	27-33		
		[c]		ication Issues Common to the avis-Bacon Act and Davis-Bacon			
				elated Acts	27-34		
					27-34		
			[i]	Determining the Workers to Whom the Prevailing Wage			
				Requirements Apply	27-34		
			[ii]	Site of Work	27-34		
	[2]	Davis		n Wage Determinations	27-30		
	[2]	[a]		eral Wage Determinations	27-37		
		[b]		ect Wage Determinations	27-38		
		[c]		ormances	27-38		
		رحا	[i]	Apprentices and Trainees	27-39		
			[ii]	Helpers	27-40		
			[iii]	Welders	27-40		
		[d]		Practice	27-40		
		[e]		ge Benefits	27-41		
	[3]			ing and Posting Requirements	27-42		
	[4]			ns/Administrative Procedures	27-42		
		[a]	_	holding	27-43		
		[b]		rment	27-44		

		T	ABLE	OF CONTENTS	xli		
		[c]	Heari	ngs	27-44		
	[5]	State 1		ling Wage Laws	27-44		
		[a]	Introd	luction	27-44		
		[b]	Califo	ornia's Prevailing Wage Laws	27-45		
			[i]	Overview	27-45		
			[ii]	Application of the California			
				Prevailing Wage Laws	27-45		
			[iii]	Determining Prevailing Wage;			
				Payment Obligations	27-47		
			[iv]	Payroll Records	27-48		
			[v]	Enforcement	27-48		
		[c]	Illino	is Prevailing Wage Act	27-48.2		
			[i]	Overview	27-48.2		
			[ii]	Covered Projects	27-48.2		
			[iii]	Prevailing Rate	27-48.3		
			[iv]	Notice of Prevailing Rate	27-48.4		
			[v]	Recordkeeping	27-48.4		
			[vi]	Enforcement	27-48.5		
			[vii]	ERISA Preemption	27-48.6		
			[viii]	Whistleblower Protection	27-48.6		
		[d]		achusetts Prevailing			
				age Laws	27-48.7		
			[i]	Overview	27-48.7		
			[ii]	Covered Projects	27-48.7		
			[iii]	Prevailing Wage Time	27-48.9		
			[iv]	Prevailing Rates	27-48.9		
			[v]	Benefits Credits	27-48.10		
			[vi]	Recordkeeping	27-48.11		
			[vii]	Enforcement	27-48.11		
§ 27.03				Hours and Safety Standards	27-49		
		Act and the Copeland "Anti-Kickback" Act					
	[1]	[1] The Contract Work Hours and Safety Standards Act					
		27-49					
	[2]						
		Co			27-50		
		[a]		ly Compliance Statement	27-51		
		[b]		ssible Payroll Deductions	27-51		
§ 27.04				Labor Standards Clauses	27-54		
§ 27.05				-Bacon Act Labor Standards			
	Clau	ses			27-62		
INDEX					I-1		