CHAPTER 1

An Overview of Wage and Hour Litigation and Its Defense

Chapter Contents

§ 1.01 Overview of Modern Wage and Hour Litigation

Unlike the several other publications in the marketplace that examine wage and hour litigation as a subpart of a more general review of the Fair Labor Standards Act of 1938 (FLSA or the Act) or of class action employment litigation, this book provides a comprehensive and specifically tailored discussion of the defense of collective and class action wage and hour litigation, from the filing of the complaint to a lawsuit's ultimate disposition, whether by trial, settlement or dismissal. It is a resource for the experienced practitioner, as well as for those beginning to develop an interest, or a need to practice, in this robust field of law.

Although Congress enacted the FLSA in 1938, wage and hour litigation has proliferated most notably since the late 1990s. The number of putative collective actions filed under the FLSA in federal courts has increased from a handful each year to several thousand. Indeed, in 2000, only 1,860 FLSA cases were commenced in federal district courts. In 2010, 7,028 such cases were filed.[1] This does not include the many hundreds of state court actions filed in California and around the country.

The phenomenal upward trend, which began in California, has been indiscriminate in its reach into jurisdictions across the nation. Florida initially experienced the most remarkable growth in the number of putative collective FLSA actions filed in federal courts. New York, New Jersey, Illinois, Texas, Pennsylvania, Alabama and others followed soon after. At the time of this writing, almost every other state in the country had seen a plaintiffs' bar newly attuned to the potential of obtaining a benchmark recovery of damages and attorneys' fees in a collective or class action wage and hour case.

There are multiple reasons for this explosion. First, the FLSA and many of its regulations—particularly those governing the white collar exemptions—were written in the 1930s and 1940s for a manufacturing economy, and several areas have not been updated in a material way. This mismatch between the law and the economy is a trap for many employers. Second, unlike in most discrimination cases, a plaintiff's attorney does not have to prove employer intent in order to obtain back pay. Third, unlike in traditional class actions, an FLSA plaintiff faces a standard for conditional collective action certification that is termed by many courts to be "lenient." Fourth, the FLSA provides for generous remedies. An employer must pay a prevailing plaintiff's attorneys' fees, and it is presumed that any back wage award will be doubled to provide for liquidated damages. The plaintiffs' bar's interest in state law wage and hour class actions has followed suit for many similar reasons. Of late, the issues presented in these federal and state law cases have become more complicated, the counsel who file them more sophisticated, and the courts that determine them more experienced.[1]

For introductory purposes, a wage and hour lawsuit most broadly defined is any case asserting that one or more workers have not been fully compensated for their labor in accordance with legal requirements. Specific claims take many forms, and commonly include charges that, pursuant to the FLSA or state laws, employees were not paid for all compensable time devoted to the job, were underpaid due to an incorrect calculation of the hourly rate for overtime pay, or were misclassified as employees exempt from overtime. Additional varieties of misclassification cases assert that workers categorized as non-employees, such as independent contractors or volunteers, were in fact legal employees of the defendant and should have been treated as subject to one or more wage and hour laws. In states with legislation establishing a further layer of wage and hour regulation, state-specific claims, such

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[1] See Statistical Tables for the Federal Judiciary, available at http://www.uscourts.gov/statistics/StatisticalTablesForTheFederalJudiciary.aspx (last visited June 17, 2011).

as denial of meal and rest periods and failure to comply with pay requirements, also form a significant part of the litigation landscape.

By far the most commonly asserted causes of action are those created by the minimum wage and overtime requirements of the federal FLSA, and the parallel or supplemental minimum wage and overtime provisions of certain individual states. In the abstract, wage and hour litigation can find root in a relative diversity of state and federal statutes, or even common law causes of action such as breach of contract, fraud and promissory estoppel. In practice, however, the latter type of claims, when pleaded, are usually included in the complaint in an effort to expand the statute of limitations under state laws and are pleaded along with and are derivative of the primary statutory causes of action.

From this basic foundation of substantive law, a dynamic and complex area of contemporary legal practice has emerged. The stakes, intensity and prominence of the field have been amplified by the reality that, as commonly as not, wage and hour claims are filed pursuant to collective or class action procedures, and seek to pursue remedies on behalf of anywhere from a handful to tens of thousands of employees in a single case. Since even *single-plaintiff* wage and hour disputes sometimes carry potential exposure in the six figures, it should be unsurprising that a substantial and growing number of *class* and *collective* actions seek amounts rising into the tens and even hundreds of millions of dollars. Even those cases regarded as modest by experienced practitioners at the frontlines of these battles will involve sums substantially in excess of those typical of routine, non-wage and hour employment litigation.

At the extreme end, between 2007 and 2010, ten separate wage and hour cases settled on a classwide or collective basis for more than $50 million.[2] An additional eighteen cases have seen settlements falling between $20 million and $50 million.[3] Yet more representative of practical wage and hour litigation today are the countless mid-value cases filed each year seeking amounts generally in the seven- to low-eight-figure range, or, less often, in the six-figure range. The vast majority of these cases will be litigated in relative obscurity, drawing little or no publicity, through their ultimate dismissal, settlement or, less frequently, verdict. Nonetheless, these cases constitute the core of modern wage and hour practice, and have become one of the largest and fastest-growing segments of federal and state court dockets throughout the country.

The importance of these controversies to employers is evident from the raw dollar amounts in question and from the attendant business disruption and employee relations issues, both of which can be significant. In effect, wage and hour litigation places the affected portion of the employer's workforce at the center of the factual and legal battleground. As a case approaches certification and sometimes before, the litigation will draw numerous contacts with

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[2] "Recent Trends in Wage and Hour Settlements," White Paper, NERA Economic Consulting (March 27, 2011).

[3] *Id.*

the workers, from direct contact from counsel on both sides during declaration efforts, to formal notice correspondence from the court, to surveys received from retained consultants, to, increasingly, even individualized class member[4] discovery. The relief sought often introduces additional disruption, particularly when reclassification of workers to hourly status is at issue, a change that is often unwelcome by affected employees despite the potential economic benefits of such status under the law (e.g., entitlement to overtime). Raising the stakes further for the defendant, such claims are among the few common categories of litigation for which clients typically have no insurance coverage. Nearly all employment practices liability policies covering employers contain specific exclusions for wage and hour liabilities.[5]

It is against this backdrop that cases are fought, won and lost according to the complex and distinctive rules that courts have developed and applied to this unique variety of litigation. This text details and analyzes the procedural law, substantive law and practical considerations that guide, define and determine the litigation and outcome of wage and hour cases in modern practice.

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[4] As is made clear throughout this book, collective actions and class actions are not synonymous. Nevertheless, we, like many courts and practitioners, use the term "class" to describe multi-claimant cases generally or "class members" to describe those claimants. This should not be read to reflect any doubt that Section 216(b) collective actions are not the same as Rule 23 class actions.

[5] When other claims that are covered by employment practices liability insurance are included in a wage and hour complaint (such as certain tort, discrimination or retaliation claims), there may be insurance coverage available for defense costs and indemnity for the non-wage and hour claims.

§ 1.02 Defense Orientation

This treatise is written from a defense perspective. It strives to retain objectivity, however, and its extensive review of the law will be a useful resource for attorneys representing plaintiffs in these matters as well as those representing employers. Because of the defense orientation, however, many considerations of specific concern to plaintiffs' wage and hour lawyers, such as strategic, tactical and ethical considerations of unique relevance to the plaintiffs' bar, are not covered, and guidance into those matters should be sought separately. In-house counsel or others engaged in counseling and advice work, outside the scope of litigation, may also find the discussion and examination of substantive law useful. Trends and experiences from litigation provide critical insight into which sources of legal risk are the most frequent bases for litigation and how items of potential latent exposure are likely to play out if litigated. Nonetheless, this book is first and foremost intended to provide advanced guidance, tactics and strategies for the defense practitioner, and thereby update, supplement, extend and, in many instances, advance existing resources of general applicability in this area.

§ 1.03 The Sources of Law

Effective defense of wage and hour claims requires a refined understanding of commonly applied procedural and substantive law in this area.

Procedurally, the generally applicable Federal Rules of Civil Procedure remain of central importance and are discussed as appropriate throughout this text. Particular attention, however, is warranted as to the FLSA's collective action procedure provided for in Title 29, Section 216(b) of the United States Code[1] and the class action procedures contained in Federal Rule of Civil Procedure 23 (Rule 23). The former is both unique and critical to most FLSA litigation, and the latter is of equal importance to class action procedures brought in federal court under state substantive law or under federal laws other than the FLSA. The application of Rule 23 in the wage and hour context has generated distinct and sometimes peculiar results, and wage and hour law under Rule 23 can in some ways be seen as a separate subset of the jurisprudence. As to state procedures, a specific state-by-state review of class action rules in the forty-eight states permitting the mechanism is beyond the scope of the text, but as a broad and general statement, state rules often mimic Rule 23, and this treatise addresses and discusses specific points of distinction in state law where useful and appropriate.

As to substantive sources of law, the wage and hour field has grown from being a small domain of the greater employment law universe, to being so diverse and complex as to constitute a specialty in its own right, with increasing numbers of attorneys dedicating their practices exclusively or primarily to this field. Substantive law begins with the FLSA, but also includes the Davis-Bacon Act and Service Contract Act, other federal laws, and the patchwork of individual state laws instituting additional layers of wage and hour regulation for employers in those states. Increasingly, local regulation by individual municipalities, such as through so-called "Living Wage Ordinances," is also at issue.

The sources of procedural and substantive law with the strongest relevance to wage and hour practice are introduced in more detail below.

[1]—Procedural Law

Procedurally, a large number of wage and hour cases are filed as collective actions under the FLSA's Section 216(b), as amended by the Portal-to-Portal Act of 1947, or, in cases involving state law claims, as putative class actions pursuant to Rule 23. There also exists a subcategory of cases that seek simultaneous treatment under both sets of procedures, giving rise to

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[1] The FLSA can be cited by reference to the provisions of the United States Code—Title 29, Sections 201 to 219—in which the FLSA is codified, or by reference to the provisions of the Act itself. Thus, for example, 29 U.S.C. § 216(b) can also be cited as FLSA § 16(b). Both forms of citation are accurate, and both are used regularly and interchangeably by practitioners and the courts. Therefore, this book uses both citation forms.

what are referred to as "hybrid" or "combined" actions.[2] Section 216(b) collective actions differ from Rule 23 class actions in a number of respects. Most important, Section 216(b) allows individual employees to participate in a group action *only if* they file a consent form with the court presiding over the action indicating their desire to participate. This is unlike a Rule 23 class action that includes all members of a class unless they elect to opt out.[3]

In 1947, Congress amended the FLSA by enacting the Portal-to-Portal Act to, among other things, stem the increasing number of "representative" wage and hour actions being filed by agents or representatives on behalf of employees pursuant to Section 216(b) as it was written and enforced at the time.[4] Prior to the Portal-to-Portal Act amendments, FLSA actions could be filed by an employee, a labor union or another agent on behalf of employees who were unaware that an action had been filed to prosecute their rights under the Act. With the amendments, Congress allowed only the U.S. Secretary of Labor to litigate on behalf of such employees as their representative, without any further action being taken by the employees.[5] Any employee who wished to pursue his or her rights in private litigation would now be required to affirmatively opt in to the litigation by filing a consent to opt in.[6] By amending the FLSA in this way, Congress created a group action mechanism that differs from the Rule 23 representative class action, which allows a single representative or several representatives to proceed on behalf of class members who may never become aware of the litigation that will affect their rights, and who may never have filed suit in the first instance.[7]

[a]—The Collective Action Procedures of the Fair Labor Standards Act

The collective action procedures of Section 216(b) are one of the defining aspects of litigation under the FLSA. In a conditionally certified collective action, multiple opt-in plaintiffs are able to join the lawsuit brought by one or more "similarly situated" named plaintiffs and proceed simultaneously

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[2] For a discussion of hybrid actions, see Chapter 10 *infra*.

[3] Fed. R. Civ. P. 23(b)(1) and 23(b)(2).

[4] Prior to 1947, the FLSA did not require an employee to file a written consent to join an action under the Act. Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 173, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). "In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added." *Id*. (citing 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell). Congress amended the FLSA to free employers of the burden of representative actions, and to ensure that claims could be brought only by those employees who might have a stake in the litigation. *Id*., 493 U.S. at 173.

[5] 29 U.S.C. § 216(c).

[6] 29 U.S.C. § 256.

[7] The Age Discrimination in Employment Act and the Equal Pay Act also must be brought as collective, rather than class, actions.

against an employer for back wages, including overtime, and other relief under the FLSA.

As the law has developed during the past ten to fifteen years, virtually all courts apply a two-stage process to collective action certification. In the first stage, called the "initial" or "conditional" certification, the court determines whether the class should be certified solely for the purpose of sending notice to potential opt-in plaintiffs to advise them that the lawsuit is pending and of their right to join. At this initial stage, the named plaintiff is required to establish only that the workers to receive notice are "similarly situated" with regard to the issues in the case. At the second stage of collective action certification, the court will confirm or decertify the original conditional certification order, and make a conclusive determination as to the ability of the case to proceed as a collective action (subject to being revisited before, during or even after trial).[8]

Collective action opt-in procedures generate opt-in rates that are typically in the range of 10 to 20%, and tend to be higher in unionized workforces. Of course, the morale, sophistication and engagement of the alleged collective group must be analyzed individually in each case to develop more precise estimates of likely participation should a case be certified.

By contrast, although the standard for conditional certification of a collective action is more lenient than the standard for traditional class certification, collective action treatment is nonetheless viewed generally as more favorable to the employer than treatment under Rule 23. The most important reason is that collective actions proceed on an "opt-in" basis, rather than using the "opt-out" procedures that are most commonly applied under Rule 23 and in most state courts.[9] Although the reasons may be debated, certified wage and hour class actions that proceed on an "opt-out" basis typically see participation rates in excess of 90%. This is most commonly attributed to the fact that many class members disregard or do not understand the complex notices that they receive.

[b]—Federal Rule of Civil Procedure 23

As discussed above, wage and hour plaintiffs also frequently invoke Rule 23 class action procedures available for state law causes of action. Many

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[8] See, e.g.:

Fifth Circuit: Johnson v. Big Lots Stores, Inc., 561 F. Supp.2d 567 (E.D. La. 2008) (decertifying FLSA collective action after trial).

Seventh Circuit: Espenscheid v. DirectSat USA, LLC, 2011 U.S. Dist. LEXIS 56062(W.D. Wis. May 23, 2011) (decertifying hybrid collective/class action two weeks prior to the trial date).

[9] A contrary view held by some practitioners is that a Rule 23 framework would be more beneficial to employers. This is because the lenient standard applied to conditional certification means that there is a significant likelihood of a substantial number of opt-in plaintiffs and, even if a case later is decertified when a heightened certification standard is applied by a court following discovery, the presence of hundreds or thousands of former opt-in plaintiffs who may join an existing or new case as named plaintiffs can result in substantial litigation expense for companies and lead to inconsistent results.

cases are filed as "hybrids" seeking certification under Rule 23 for state claims and as a collective action for FLSA claims.[10]

Although often analyzed as a single provision, Rule 23 in fact provides for three separate mechanisms for the certification of a class. Rule 23(b)(1) allows certification when the potential for inconsistent judgments, which would establish varying and contradictory standards of conduct for the defendant, is present. Certification under that rule can also be sought when, for practical reasons, adjudications with regard to one class member would be "dispositive of the interests of the other individuals not party to the individual adjudications, or would substantially impair or impede their ability to protect their interests." The second provision, Rule 23(b)(2), is applied most naturally in cases in which injunctive or equitable forms of relief predominate, and where a defendant has acted or refused to act on grounds generally applicable to the class. Rule 23(b)(3) is applied to suits seeking monetary damages, and requires a plaintiff to establish that common issues predominate over individual issues, and that a class action is the superior means of adjudicating the dispute. Class certification in wage and hour matters is most commonly sought under Rule 23(b)(3), sometimes along with Rule 23(b)(2), although Rule 23(b)(1) certification requests also arise from time to time.

Under each provision, a class can be certified only when requirements of numerosity, adequacy of representation, typicality and commonality are met.[11]

[c]—State Law Class Actions

Wage and hour litigation is also a mainstay of modern state court dockets, and is one of the most frequent sources of complex litigation in states such as California, Illinois, Massachusetts and New York. With the exception of Mississippi and Virginia, all states have procedural rules permitting class litigation, although not all have substantive state law under which wage-related litigation is likely to be viable.[12] Most states' class action procedural laws are derived from federal Rule 23 (or one of its former versions), although some states have procedures with roots in statutes or judicial decisions predating the emergence of the federal rule. Even in states with procedures that predate the federal rule, over time the state procedures generally have transitioned towards harmony with the federal procedures. In California, for instance, state courts will take guidance from federal case law to assist in addressing novel or ambiguous issues of state procedural law.[13]

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[10] Unique issues pertaining to the defense of these hybrid actions are addressed in Chapter 10 *infra*.

[11] These requirements are discussed in further detail throughout the text, including in Chapter 7 *infra*.

[12] FLSA claims also may be brought in state courts, but as a practical matter the vast majority of cases are initially filed in, or else promptly removed to, federal court on the basis of federal question jurisdiction.

[13] See, e.g., Caro v. Procter & Gamble Co., 18 Cal. App.4th 644, 22 Cal. Rptr.2d 419 (1993).

[d]—The Class Action Fairness Act

In 2005, Congress passed the Class Action Fairness Act (CAFA),[14] which, beyond traditional diversity and federal subject matter jurisdiction, has created an additional layer of federal jurisdictional law with relevance to wage and hour class actions. The Act grants the federal courts both original and removal jurisdiction over cases satisfying minimal diversity requirements and involving more than 100 putative class members and an amount in controversy in excess of $5 million. This jurisdiction is subject to the "Local Controversy Exception."[15] For the defense practitioner, CAFA has the most obvious implications near the outset of litigation filed in state court, when the defendant is making a determination as to its ability to remove the matter to federal court, but is increasingly being used by plaintiffs' counsel as an alternative to supplemental jurisdiction for including state law claims in their federal complaint.

[2]—Substantive Law

[a]—The Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947

The FLSA is the first and primary source of comprehensive, national wage and hour regulation in the United States. The Act establishes minimum compensation and hours of work standards that today apply to the majority of the United States workforce. Major exceptions to these requirements include carve-outs for salaried white collar workers employed in qualified executive, administrative and professional roles, as well as individuals employed as outside salespersons. Additionally, a small number of organizations, including qualifying religious institutions and certain small enterprises not deemed to be engaged in interstate commerce, are outside the Act's purview.[16]

The FLSA has been subject to several amendments over the years. The earliest of these amendments was the Portal-to-Portal Act of 1947,[17] which modified and further defined the measurement of "hours worked" under the Act, and introduced the now-familiar opt-in collective action mechanism for FLSA litigation. The 1949 amendment to the Act raised the applicable minimum wage from forty cents to seventy-five cents per hour, extended child labor coverage, and for the first time introduced and defined the concept of "regular rate of pay" to further refine the method of calculating overtime payments. In 1955, the Act was amended again to raise the minimum wage, this time to the breakthrough rate of one dollar per hour. The 1961 amendments expanded the coverage of the Act, introducing the concept of enterprise coverage and making coverage automatic for schools, hospitals, nursing homes and certain similar institutions.

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[14] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

[15] For detailed discussion, see § 3.02[2] *infra*.

[16] The Act does *not* apply to workweeks in which all of an employee's services are performed outside the United States or its territories. 29 U.S.C. § 213(f).

[17] Portal-to-Portal Act of 1947, 29 U.S.C. § 253(a).

In 1963, the Equal Pay Act[18] was passed, which amended the FLSA to make it illegal to pay workers different amounts on the basis of their sex. As a practical matter, the Equal Pay Act, which is now within the primary enforcement authority of the Equal Employment Opportunity Commission (EEOC) rather than the U.S. Department of Labor (DOL), is considered for nearly all purposes to fall within the subdomain of anti-discrimination laws, and therefore is not addressed in detail in this text.

Amendments in 1966, 1974 and 1977 incrementally increased the minimum wage, and expanded coverage to certain farm workers, state and local government employees, and domestic workers, while also eliminating exemptions for certain workers in the hotel and restaurant industries and other retail and service establishments. Amendments in 1985 and 1989 similarly expanded coverage and raised the minimum wage. In 1990, a separate exemption was added for computer professional employees.

The most recent substantive amendment to the wage and hour requirements of the Act became law in 1996, and permitted payment of one-half the minimum wage for qualifying tipped employees, while increasing the minimum wage to $5.15 per hour. The minimum wage was increased again in 2007, which created an incremental increase plan that culminated in the current $7.25 per hour national minimum wage, which came into effect on July 24, 2009.

In addition to the legislative text as amended, modern practice under the Act is guided by extensive regulations, administrative interpretations and case law that have been issued in the seventy-three years since its inception. The most recent regulatory amendments were the changes to the overtime regulations during the second Bush administration, which took effect on August 23, 2004. While these amendments sought primarily to clarify existing law, they were viewed by many labor advocates as lessening the threshold requirements for employers to prove the applicability of white collar exemptions to particular employees.[19]

Today the mainstay components of the Act, including the provisions for minimum wage and the established forty-hour workweek, enjoy broad public support, and there is no reason to believe Congress will modify these core provisions at any point in the foreseeable future. While practice continues to evolve under the Act due to the changing political and economic landscape of the United States, the Act has been, is and will continue to be the cornerstone of wage and hour litigation in the country. Equally clear is that litigation and controversies under the Act are here to stay. Challenges will continue to emerge as courts and litigants grapple with the task of determining how to apply the FLSA's mandates to a modern workforce that shares little in common with that which existed at the time of the Act's passage.[20]

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[18] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

[19] For a discussion of the white collar exemptions generally, see Chapter 20 *infra*.

[20] As described in Chapter 11 *infra*, claims under the Employee Retirement Income Security Act of 1974 (ERISA) may come within the broad umbrella of wage

[b]—The Davis-Bacon Act and Service Contract Act

In addition to the FLSA, the Davis-Bacon Act of 1931 (DBA) remains in effect and continues as a source of disputes regarding worker compensation.[21] As amended, the DBA applies exclusively to workers employed on federal contracts with a value in excess of $2,000. The DBA mandates minimum compensation standards, based on prevailing rates, for workers assigned to these federal contracts. Despite the passage of the generally applicable FLSA seven years later, controversies under the DBA remain an active segment of wage and hour disputes due to the heightened substantive rights it provides for covered workers.

Further, the McNamara-O'Hara Service Contract Act of 1965[22] (SCA) establishes minimum compensation standards and safety requirements for protecting the health of employees performing work for contractors and subcontractors on "service contracts" entered into with the federal government.] The standards include minimum monetary wages and fringe benefits and notice of those to affected employees. The SCA requires that contractors performing work on federal contracts be made aware of the terms that will govern their bids for and performance on federal government business.[23] The SCA's fundamental purpose is to impose obligations upon those favored with government business by precluding the use of the purchasing power of the federal government in the unfair depression of wages and standards of employment.[24]

[c]—State Wage and Hour Laws

Many states also have their own statutory and regulatory requirements for wage payments. Among these are the states that have enacted minimum wage requirements above the federal minimum wage, and states such as California and Alaska that impose daily overtime requirements for some or all industries when workers' hours exceed a specified number of hours in a

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and hour lawsuits when they are premised on allegations that a regulated plan's administrator has failed to keep accurate records of hours worked or compensation earned by an employee, resulting in errors in plan eligibility determinations and/or benefits calculations.

[21] The Davis-Bacon Act, 40 U.S. C. § 276a *et seq*., was not the first federal law addressing the payment of workers in private industry, having been predated by the Adamson Act of 1916, which set an eight-hour workday applicable to many workers in the railroad industry. The Supreme Court upheld the Adamson Act's constitutionality in Wilson v. New, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755 (1917).

[22] Service Contract Act of 1965, as amended by Pub. L. No. 92-473, 86 Stat. 789, effective October 9, 1972, Pub. L. No. 93-57, 87 Stat. 140, effective July 6, 1973, and Pub. L. No. 94-489, 90 Stat. 2358, effective October 13, 1976. As discussed in more detail in Chapter 27 *infra*, the SCA has been recently recodified.

[23] See Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507, 63 S.Ct. 339, 87 L.Ed. 424 (1943).

[24] See H.R. Rep. No. 948, 89th Cong., 1st Sess. 2-3 (1965); S. Rep. No. 798, 89th Cong., 1st Sess. 3-4 (1965). Both the DBA and SCA are covered in detail in Chapter 27 *infra*.

day (generally eight, although twelve in Colorado, and ten in Oregon for those industries that are affected). In some cases, states have fashioned additional or alternative remedies for employees who establish wage and hour violations, such as enhanced statute of limitations periods or the availability of punitive or liquidated damages beyond those provided by the FLSA.[25] Laws in some states also exist on a broad range of specific topics ranging from the familiar to the peculiar, such as requirements for employees to be provided meal and/or rest breaks, provisions governing the information to be provided on pay statements, and the permissible banks on which paychecks may be drawn.

Most noteworthy among these requirements are the extensive wage and hour regulations of the State of California. Unique California procedural issues—including the Private Attorneys General Act (PAGA), which allows plaintiffs to sue for civil penalties previously enforceable only by the state Labor Commission—are addressed in Chapter 9. Substantive requirements of California law, such as differences in the state's overtime exemption requirements, and standards requiring meal and rest breaks to be provided to employees, are addressed throughout the text as they arise.

[d]—Local Regulations and Living Wage Ordinances

In addition to state and federal wage laws, a small but growing number of municipalities have enacted an additional level of wage-related regulation. These regulations mostly are of two types: (1) laws of general effect that apply to all employment within the municipality; and (2) so-called "living wage ordinances" that apply only to a subset of workers, typically those who perform work on municipal contracts or who are employed in a particular geographic portion of the municipality, such as an airport.

With regard to laws of general effect, the most common variety establishes a minimum wage that is higher than the minimum wage otherwise applicable in the jurisdiction. This is the case in Santa Fe and Albuquerque, New Mexico, both of which have enacted minimum wages in excess of the statewide rate. To date, there has been no substantial litigation regarding these requirements. The City and County of San Francisco, California has enacted more detailed requirements, including a health care contribution component (which can instead be met by the payment of a higher base wage), which have been litigated and upheld.[26]

At this time, more than seventy municipalities have enacted one form or another of a living wage ordinance or heightened minimum wage. Although

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[25] The harshest state law expanding the availability of multiple damages is in Massachusetts. For violations of that state's wage and hour laws occurring on and after July 12, 2008, treble damages automatically are assessed without any available defense, subject only to an inevitable constitutional challenge. An Act Further Regulating Employee Compensation, 2008 Mass. Acts ch. 80.

[26] Golden Gate Restaurant Ass'n v. City & County of San Francisco, 546 F.3d 639 (9th Cir. 2008), *rehearing denied* 558 F.3d 1000 (9th Cir. 2009), *writ of certiorari denied* 130 S.Ct. 3497 (2010).

litigation involving these ordinances remains limited, there has been at least one reported appellate case. In 2008, the Court of Appeal for the State of California upheld the City of Hayward's living wage ordinance to a challenge against its extra-territorial application.[27] Demonstrating an increasingly common feature of such ordinances, the City of Hayward's living wage law was upheld despite extending to workers who performed work outside the city (but who were assigned to City of Hayward contracts).

Because of the tremendous local variance in these ordinances, their relatively short history, and the limited reported litigation to date, no generally applicable treatment is possible to address issues specific to the defense of cases under living wage ordinances. Nonetheless, as litigation in this area increases, primarily in state courts, the strategy and tactics discussed in this text will lend insight into the defense of living wage litigation.

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[27] Amaral v. Cintas Corp. No. 2, 163 Cal. App.4th 1157, 78 Cal. Rptr.3d 572 (2008).

§ 1.04 Looking Forward

Absent exceptional congressional action at the federal and state levels, it is unlikely that the surge of wage and hour litigation experienced in the past decade will subside any time soon. While the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[1] may eventually alter the litigation landscape in favor of arbitration of individual wage and hour claims, the ultimate impact of that decision is as yet uncertain.

What remains certain, however, is that plaintiffs' attorneys will be increasingly creative and sophisticated in the claims they bring and strategies they adopt as they become more experienced litigating these cases. Also certain is that legal developments through court decisions, as well as agency rulemaking, opinions and enforcement actions, will continue to challenge employers and expose them to enormous risks.

Within this environment, employers will require experienced and capable wage and hour counsel to defend their interests and reduce the possibility of a catastrophic litigation result. The purpose and intent of this book is to be a valuable resource for in-house and outside counsel—whether veterans or new to the field—who are responsible for filling that role.

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[1] AT&T Mobility LLC v. Concepcion, __ U.S. __, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). For further discussion of the *Concepcion* decision, see Chapter 14 *infra*.