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# Avoiding and Mitigating Wage and Hour Claims

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Wednesday, Oct. 28  
2:30–3:30 p.m.






American Staffing Association

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American Staffing Association



James Nicholas, Esq., Member  
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC  
Chair, Wage and Hour Class Action Practice

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## What We're Going to Cover

- Litigation Activity
- Working Time and "Hours Worked"
- Overtime and Wage Payment Issues
- Overtime Exemptions
- Employee Classifications: "Employee" vs. Independent Contractor
- Class Actions
- Audits & Recent DOL Enforcement Actions Against Staffing Companies

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## Litigation Activity

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## Wage and Hour Issues Lawsuits Are On the Rise

- In 2014, the 10 largest wage and hour settlements totaled over \$215 million.
- A record number of FLSA lawsuits were filed in 2014 – more than 8,000 (a 438% increase over the number of lawsuits filed in 2000).
  - Virtually all FLSA wage and hour lawsuits are filed as collective actions.
- Class action litigation on the rise:
  - On average, companies paid \$5.3 million to resolve a wage and hour class action case.
  - In 2014, the median settlement value was \$2.4 million.
- Wage and hour claims are the prime litigation risk facing employers today.

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## Why Should Staffing Companies Care About Wage and Hour Exposure?

Violations can result in substantial fines.

Unlike with other employment laws (Title VII, ADA, ADEA), all employers, regardless of size or workforce, are subject to wage and hour regulations.

Compliance is the only way to avoid liability and mitigate against legal exposure.

Federal and state officials have made enforcing wage and hour regulations a major priority and have recently brought enforcement lawsuits against staffing companies.

The federal government has authority to audit employers to ensure compliance.




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## Staffing Companies Need to be on High Alert: Recent Collective/Class Action Lawsuits

Plaintiffs have targeted staffing companies in recent wage and hour class actions:

### **Maxim Healthcare Services (S.D. Tex. 2012)**

- Paid \$12.3 million to settle three separate class and collective action lawsuits alleging that it violated the FLSA by misclassifying its recruiters as exempt from overtime.

### **Haukland v. Think Resources (S.D. Cal. 2015):**

- Engineering staffing agency paid \$1.25 million to settle claims that it failed to pay overtime.

### **Bolton v. U.S. Nursing Corp. (N.D. Cal. 2013):**

- Replacement nurse staffing agency paid \$1.77 million to settle claims that it failed to compensate nurses for travel time and automatic meal period deductions.

### **Perry v. Arise Virtual Solutions (N.D. Cal. 2013):**

- Arise Virtual Solutions paid \$1.24 million to settle misclassification claims.

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## Working Time and "Hours Worked"

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## Working Time

- FLSA: Employees must be paid for all hours worked.
  - Hours worked include time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace.
  - Pre- and post-shift activities that are "integral and indispensable" to an employee's principal activities must be compensated.
  - To qualify as integral and indispensable, an activity must be:
    - (1) Necessary to the principal work performed; and
    - (2) Done predominately for the employer's benefit.

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## What Constitutes "Hours Worked"

- **Waiting Time**

- Time spent waiting for work is compensable if it is spent "primarily for the benefit of the employer."

- **On-Call Time**

- An employee who is required to remain on call on the employer's premises or close to the premises and cannot use the time effectively for his own purposes is "working" and must be compensated for that time.

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## What Constitutes "Hours Worked"



- **Rest Periods and Meal Periods**

- Rest periods must be counted as hours worked and are therefore compensable.
- If a rest period is a bona fide meal period (i.e., the employee is completely relieved of work duties for at least 30 minutes), it is not work time, and does not have to be compensated.

- **Preparatory and Concluding Activities**

- Employees must be compensated for preparatory and concluding activities where those activities "are an integral and indispensable part of the employees' principal activities."

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## What Constitutes "Hours Worked"

- **Travel Time**

- An employee does not have to be compensated for commuting time to and from his or her regular place of employment.
- When an employee drives to the airport to take a flight for work, the employer is not required to pay the employee for time spent driving to the airport, but may be required to pay for the time spent on the airplane traveling to the day's assignment.
- Case-by-case basis for other situations.

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## What Constitutes "Hours Worked"

- **Donning and doffing clothes and protective gear**
  - Whether time spent donning and doffing protective gear and clothes is compensable depends upon whether the clothes or protective gear are integral and indispensable to the employee's work.
- **Time spent in security screenings**
  - Not compensable unless the screenings are integral and indispensable to the duties the employee was employed to perform.

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## *Integrity Staffing Solutions v. Busk* (U.S. Supreme Court, 2014)

Integrity Staffing Solutions provided warehouse staffing to Amazon.com. Employers required employees to pass through a security screening – which took approximately 25 minutes – at the end of each shift.

Unanimous holding: time spent waiting for and undergoing the security screenings was not compensable.

- Screenings were not the principal activity that the employees were employed to perform.
- Screenings were not "integral and indispensable" to the employees' duties as warehouse workers.
- The screenings could have been eliminated altogether without impairing the employees' ability to complete the work.
- Screenings were not tied to the productive work the employees were employed to perform.

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## Wage and Hour Issues

- Federal Standards
- Two (and a half) Areas of Concern:
  - (1) Minimum Wage
    - Federal = \$7.25/hour for "non-exempt" employees.
    - States vary (e.g., California and Massachusetts = \$9/hour; New York = \$8.75/hour).
  - (2) Overtime – "Non-Exempt" employees must be paid at least 1.5 times their regular hourly rate of pay for all hours worked over 40 in a work week.
  - (2.5) Some states, unlike the FLSA, also mandate the timely payment of wages, which creates additional exposure for employers.

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## Overtime and Wage Payment Issues

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## Calculating the Regular Rate of Pay: FLSA

### FLSA:

- Total pay in any work week (including incentive-based pay, such as commissions, bonuses, etc.), divided by total number of hours worked in that work week.
- California also follows this approach.

### Massachusetts:

- Total weekly earnings **excluding incentive-based pay (commissions, bonuses, etc.)**, divided by total number of hours worked.
- If an employee's payment is 100% commission based, the employee must be paid at least the equivalent of the minimum wage for the first 40 hours, and time and one-half of the minimum wage for all hours worked over 40 in that workweek.

### New York:

- Total weekly pay **excluding expenses, discretionary bonuses, gifts, payments when no work is performed (e.g., holidays, illness, vacations)**, divided by total number of hours worked.

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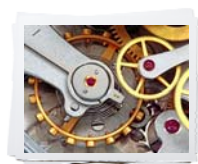
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## Overtime Exemptions

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## FLSA Classifications & Exemptions

- Executive employees
- Administrative employees
- Learned professionals
- Computer employees
- Highly compensated employees

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## Salary Basis and Duties Test

- Most employees must meet both the salary basis and duties test to be exempt.
- "Salary basis" means employee is paid same amount per pay period regardless of the quality or quantity of work performed.
- "Magic number" is \$23,660 per year.
  - This is going to change.
  - DOL recently published proposed amendment to FLSA regulations.
  - Increase salary amount to the 40th percentile of earnings for full-time salaried workers
  - Automatic accelerators. By 2016, the salary level would be at or near \$50,440 (more than double current threshold).

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## Duties Test: Executive Exemption




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### Duties Test: Administrative Exemption

- Employee's primary duties are office or non-manual work that is directly related to the management or operations of the business; and
- Employee regularly exercises discretion and independent judgment on significant matters.
- Most mistakes are made here – great deal of "gray area."

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### Duties Test: Learned Professional Exemption

- The employee's primary duty must be to perform work requiring advanced knowledge.
  - Predominantly intellectual in character and which requires the consistent exercise of discretion and judgment.
- The advanced knowledge must be in a field of science or learning,
  - Law, medicine, nursing, accounting, actuarial computation, engineering, education, etc.
- The advanced knowledge must be acquired by a prolonged course of specialized intellectual instruction.

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### Computer Professional Exemption



Employee is paid on a salary basis of at least \$455 per week; or, if hourly, at least \$27.63/hour;

Employee is a computer systems analyst, computer programmer, software engineer, or other skilled worker in the computer field; and

Employee's duties involve:

- |  |   |  |
|--|---|--|
| (1) applying systems analysis techniques and procedures; | (2) designing, developing or analyzing computer systems or programs; or | (3) designing, testing or modifying or machine operating programs. |
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## Highly Compensated Employee Exemption

- Employee is exempt if:
  - Employee's primary duty is performing office or non-manual work.
  - Employee receives a total annual compensation of at least \$100,000.
    - This is changes as well. New rule would raise threshold to \$122,000 per year.
  - Employee regularly performs any one or more of the exempt duties of an executive, administrative, or professional employee.

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## Employee Classifications: "Employee" vs. Independent Contractor

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## Independent Contractor or Employee?

- Why do employers use independent contractors?
- Companies enjoy greater flexibility and may save money because they typically don't provide benefits or overtime compensation to individuals who are not employees.
- Workers may prefer classification because less is taken out in taxes.
- Government disfavors misclassification.
  - Loses tax revenue when workers are classified as independent contractors.

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## Employee Classification: The Basics

- There is no universal definition of "Employee."
- The standards vary across state and federal statutes affecting taxes, discrimination, pay and benefits.
- Common law agency test (followed by IRS):
  - Assesses numerous factors to see whether the relationship is predominately:
    - One in which the worker maintains his independence, free of close supervision and direction by the company that has engaged him (independent contractor), or,
    - One in which the worker is subject to the close supervision and direction typical of employment relationships (employee).

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## Employee Classification: The Basics

States use various other standards.

California	Massachusetts (Presumption of Employment)	New York
<input type="checkbox"/> "Control of Details Test" – Employer-employee relationship exists if the person to whom the service is being provided controls the manner and means of accomplishing the desired result.	<input type="checkbox"/> An individual performing any service is an employee unless: <ul style="list-style-type: none"> <li>• The individual is free from control and direction in connection with the performance of the service; and</li> <li>• The service is performed outside the usual course of the employer's business; and</li> <li>• The individual is customarily engaged in an independently established trade, occupation, profession, or business.</li> </ul>	<input type="checkbox"/> "Direction-and-Control Test" <ul style="list-style-type: none"> <li>• Employer-employee relationship exists if employer exercises control of either (1) the results produced by the worker (if identical control over the results is insufficient) or (2) the means used to achieve the results.</li> </ul>

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## Class Actions

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## Penalties for Wage & Hour Violations

- If you get it wrong, the penalties can be severe.
- FLSA: liquidated damages; attorneys' fees; court costs.
- California: back pay; multiplying civil penalties; attorneys' fees; possible criminal sanctions.
- Massachusetts: penalties vary based on whether there was "willful intent" and based on the number of offenses:
  - Fines can be levied up to \$50,000 per offense.
  - Violators can receive up to two years of imprisonment.
  - Individual liability for corporate officers.
- New York: double damages; civil penalties for each infraction; attorneys' fees.

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## Statute of Limitations for Wage and Hour Actions

- FLSA: Two-year SOL
- If a plaintiff successfully demonstrates that the employer "willfully" violated the FLSA, then the SOL may be extended for an additional year.
- SOLs vary by state - examples:
  - California - Three-year SOL (but this can be extended to four years if the Plaintiff also files a claim under Cal. Bus. & Prof. Code § 17200).
  - Massachusetts - Two-year SOL for minimum wage and overtime violations and three-year SOL for failure to pay wages.
  - New York - Six-year SOL.

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## Class/Collective Actions

### Class Claims Under the FLSA - A "Collective Action"

- **Class representative must demonstrate that he is similarly situated with other employees for purposes of the alleged wage and hour violations.**
- **Requires a showing that a group of employees were "subject to a single decision, policy, or plan that violated the law."**
- **Fairly low threshold.**

### Opt-In Basis

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## Common Class Claims

- Misclassification/Overtime:
  - Exempt vs. Non-Exempt.
  - Independent Contractor vs. Employee.
  - Misclassification results in overtime violations.
- Minimum Wage Violations
  - Prevalent mostly in "tipping" cases.
- Failure to Pay Wages
  - Off the clock work.

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## States a Breeding Ground for Wage and Hour Class Claims

- Many states have plaintiff-friendly wage and hour laws:
  - E.g., mandatory treble damages, mandatory attorneys' fees and costs, 2-year statutory look-back for overtime/minimum wage claims, etc.
  - Given potentially large class sizes, the potential damages in these cases are staggering, and plaintiffs' lawyers are actively soliciting plaintiffs for wage and hour class/collective actions.

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## Employees Have Options

Example:

Massachusetts company staffs out computer consultants (1099s) in 8 states.

Company has 100 such consultants in MA, and an additional 200 consultants in the other 7 states.

One of the Massachusetts consultants brings a hybrid Massachusetts class action/HSA collective action claim asserting (i) claims under Massachusetts overtime law for the 100 MA consultants, and (ii) overtime claims under the FLSA for the other 200 consultants.

Employer is now exposed to both MA and FLSA damages if found to have violated state and federal wage and hour law.

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## Enforcement: Recent Emphasis on Remedying Misclassification

- In September 2011, DOL and IRS signed a Memo of Understanding enabling the agencies to share information in implementing federal and state wage and hour laws.
  - Seven states sign on as well to coordinate enforcement efforts.
- Secretary of Labor Thomas Perez:
  - Announced that the DOL will be targeting employee misclassification; views employee misclassification as "workplace fraud."

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## Recent Emphasis on Remedying Misclassification

- Federal Department of Labor and State Enforcement Agencies Have Broad Investigatory Powers:

Can demand timekeeping records, payroll records, personnel files, handbooks and personnel policies, and tax records from employer.

Records from past three years are subject to governmental review.

Empowered to interview employees of targeted employer and question employees on wage payment practices and classification issues.

Burdensome process – Investigations can last up to a year before closure, and can result in significant back pay awards and civil penalties.

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## Audits & Recent DOL Enforcement Actions Against Staffing Companies

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## Audits

- Federal DOL has authority to audit employers to ensure wage and hour compliance.
- Government auditors generally seek the following information:
  - I. Names and addresses of corporate officers;
  - II. Payroll records for all current and former employees and contractors;
  - III. Time-keeping records for current and former employees and contractors;
  - IV. W-2s and 1099s for all employees and contractors; and
  - V. List of exempt employees and nature of exemption.




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## Audits

- Typically on-site audits, which last several days and even weeks depending on size of the workforce and volume of related documentation to be reviewed.
- Remedies imposed by DOL:
  - Injunctive relief;
  - Civil penalties (\$1,100 per violation);
  - Restitution to employees; and
  - Potential criminal penalties (\$10,000 criminal fine or up to six years imprisonment for "willful" violations).

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## Recent DOL Enforcement Actions Against Staffing Companies

- The Department of Labor is targeting staffing companies with its enforcement initiatives:

July 2015:	2015:	2013:
<ul style="list-style-type: none"> <li>• DOL sued Caring First Inc. for three years of back wages and liquidated damages, alleging that it misclassified certain employees as independent contractors.</li> </ul>	<ul style="list-style-type: none"> <li>• Six staffing agencies agreed to pay \$3.5 million in back wages to settle DOL investigation into unlawful "per diem" payments.</li> </ul>	<ul style="list-style-type: none"> <li>• Hulco Inc. paid \$2 million in back wages to settle DOL investigation into failure to pay overtime and failure to maintain accurate records of employees' wages and actual hours worked.</li> </ul>

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## Mitigating Wage and Hour Risk

- Be proactive!
  - Self-Audit wage and hour practices.
  - Review job classifications, overtime policies, regular rate and overtime calculations, and 1099 classifications.
  - Time-Keeping Policies and recording of time.
- Address contractual gaps with clients
  - There is joint and several liability for wage and hour violations as between staffing companies and their clients.
  - How is liability apportioned in staffing agreements?
  - Indemnification/duty to defend rights and obligations.
- EPLI Coverage

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## Mitigating Wage and Hour Risk

- Review of Overtime Policies:
  - Non-exempt employees shall receive time and one half their regular rate of pay for hours over 40 worked in a single work week.
    - Over 8 in a day in CA.
  - Define "work week."
  - Require that employees obtain prior approval (from staffing company or client, depending on nature of arrangement).
    - Cannot refuse to pay overtime for failing to obtain prior approval
  - Exclude certain time (meal breaks, pre- and post-shift).
  - Explain reporting procedure.
  - Penalties for falsifying time-keeping records.

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## Mitigating Wage and Hour Risk

- Review of Break Policies:




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## Mitigating Wage and Hour Risk

- Review of Pre- and Post-Shift Work Policies:
  - Limits/prohibitions on smart phone and email usage.
  - Establish start and stop times.
  - Instruction that employees are not to begin any work or work-related functions until beginning of shift and must cease all work at end of shift unless specifically instructed to perform duties by management.
  - All time spent working before and after shift must be recorded as working time.
  - Penalties for non-compliance.

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## Questions?



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American Staffing Association

Thank you for attending this  
Staffing World 2015 workshop



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