

American Conference Institute's 7th National Advanced Forum on

# WAGE & HOUR

## CLAIMS AND CLASS ACTIONS

May 19 & 20, 2009 | New York Marriott Marquis | New York, NY

### With In-House Insights From:

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### Hear from seasoned judges:

**Hon. Leonard D. Wexler**  
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Eastern District of New York

**Hon. Anthony Mohr**  
Superior Court Judge, Los Angeles, CA

**Hon. Richard Kramer**  
Superior Court Judge  
Complex Litigation Department, San Francisco, CA

**Hon. Arthur J. Boylan**  
US Magistrate Judge, District of Minnesota  
(St. Paul, MN)

Add value with the intensive  
pre-conference workshop:

FUNDAMENTALS OF WAGE AND HOUR LAW

May 18, 2009 3- 2:00 - 5:00 p.m.

### Get practical, expert advice from top private practice attorneys, in-house counsel, judges and others on:

- The latest on exemption claims, independent contractor misclassifications, donning/doffing, overtime and other hot areas of wage and hour litigation
- New targets: blackberries, tip pooling, and industries where the plaintiff bar is particularly active or looking at opportunities
- Stepped up DOL enforcement: what's coming down the pike under an Obama administration?
- Conditional certification/decertification: applying recent rulings, grounds and results to your current cases
- Key developments in the most critical states: a roundup of what to watch out for in MN, MA, CA and NY
- Making the call whether to settle: assessing damages, settlement structure, administration and more

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## Record-breaking settlements. Record numbers of class actions. President Obama on the record saying wage and hour enforcement will be a priority...

You've no doubt heard that recently, Wal-Mart agreed to pay in the range of half a billion dollars – between \$350 million and \$640 million – to settle over 60 wage and hour claims against the company. It's reported to be the largest wage and hour settlement ever, dwarfing other recent – yet substantial – awards in the headlines: UPS: \$87 million; IBM: \$65 million.

Plus, the sheer number of wage and hour claims and class actions across the country is staggering. Wage and hour class actions are the leading type of class action nationwide – by a large margin of 3-1 against other types of class actions.

And, with President Obama indicating he will make wage and hour enforcement a priority, it's clear that preventing, managing and defending these claims will continue to be a red-hot issue for companies across the US.

In this environment, ACI's Annual **Wage and Hour Claims and Class Actions** conference is your best opportunity to convene with top private practice lawyers, in-house counsel, judges and others, to get expert advice, insider strategies and comprehensive updates on all the latest developments.

Attend and get valuable, practical information on:

- Practical steps in-house counsel should take to ensure existing exemptions aren't destroyed by lack of (enforcement of) corporate policies
- Strongest arguments for and against certification, in exempt/non-exempt cases, off-the-clock cases, and in other situations
- Targeted investigations: industries of most interest to the DOL
- Identifying – and resolving – the unique issues that may arise when litigating hybrid lawsuits
- Defendant communications to plaintiffs and co-workers about the case: what's ethical/appropriate and what's not?

Take this opportunity to learn from the best and bring ideas back from the conference that you can really use. Spaces go quickly every year – so register now by calling 1-888-224-2480, or by visiting us online at [www.americanconference.com/wageandhour](http://www.americanconference.com/wageandhour)

We look forward to seeing you in New York in May.



ALUMNI

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- Instantly access thousands of free presentations, PowerPoint's and other event resources - Online!
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- Join a live Industry Chat in progress
- Earn Forum points towards free conferences & workshops

Expand your Network at [www.my-aci.com](http://www.my-aci.com)

*This conference is a terrific opportunity for lawyers on both sides to convene for great panel discussions, containing very timely and practical information. Even though I am highly experienced in this area of law, I always learn something I can really use in my cases.*

- Cathy Conway, Partner, Akin Gump

*ACI does such a wonderful job with this popular annual event – I enjoy participating. It's a unique event, with top lawyers from both sides, in-house counsel and judges on the faculty each year, covering the most important issues and new trends in wage and hour litigation.*

- David Borgen, Partner  
Goldstein, Demchak, Baller, Borgen & Dardarian

*I attended the first ACI wage-hour conference in San Francisco in 2006 and have been delighted to return regularly since then. ACI puts together a program that is far and away the best wage-hour program in the country because it brings plaintiff and defense lawyers together for lively debate. This program is particularly valuable for in-house lawyers interested in best defensive practices and better understanding the creativity of plaintiffs' lawyers.*

- Vann Vogel, Deputy General Counsel  
Labor and Employment, Verizon Wireless

TUESDAY, MAY 19, 2009

8:00 **Registration Desk Opens  
and Continental Breakfast Served** 

9:00 **Co-Chairs' Opening Remarks**

*Adam Klein*

Outten & Golden, (New York, NY)

*Edward W. Bergmann*

Partner, Seyfarth Shaw (Chicago, IL)

9:15 **Point/Counterpoint: Plaintiff and Defense Lawyers Analyze  
the Newest Claims and What's Coming Down the Pike**

*J. Nelson Thomas*

Partner, Dolin, Thomas & Solomon LLP (Rochester, NY)

*Mark Thierman*

Thierman Law Firm (Reno, NV)

*Edward W. Bergmann*

Partner, Seyfarth Shaw (Chicago, IL)

*Matthew W. Lampe*

Partner, Jones Day (New York, NY)

*This special panel composed of top defense and plaintiff wage and hour lawyers will give you their take on where they are setting their sights and why, and what they think the most significant trends are going down the road. Prepare for the next round of claims based on their analysis of key areas, including:*

- Blackberry® claims
- Tip pooling cases: where are we now and what's next?
- Donning and doffing: from special workwear to the computer terminal
- Accounting firms, financial institutions: recent cases and what they mean
- Bars, restaurants and smaller employees: more suits?
- Other new areas ripe for misclassification and overtime litigation claims

10:30 **Coffee Break** 

10:45 **Exempt Status for Grey-Area Employees:  
Steps for Ensuring Employees are Not Misclassified**

*Robert P. Davis*

Partner, Mayer, Brown, Rowe & Maw LLP (Washington, DC)

*Robert V. Schmitz*

Vice President and Associate General Counsel

Hyatt Hotels Corporation (Chicago)

- Determining exempt executive, administrative, professional and outside sales status under the FLSA
  - a look at industries currently most affected and why
  - survey of recent critical cases
- Technical workers: navigating the sometimes murky waters of computer worker exemptions and learned/administrative exemptions
- Pharma sales staff cases: status on appeal and effect going forward
- Steps in-house counsel should take to ensure existing exemptions aren't destroyed by lack of (enforcement of) corporate policies

11:45 **Winning the Certification Battle and Using Dispositive  
Motions To Best Advantage**

*Joseph M. Sellers*

Partner, Cohen, Milstein, Sellers & Toll, PLLC (Washington, DC)

*Stephen P. Sonnenberg*

Paul Hastings (New York, NY)

- Conditional certification/decertification of cases: surveying recent rulings, grounds and results and applying them to your current cases
- Circumstances where conditional certification can be advantageous for defendants
- Strongest arguments for/against certification:
  - in exempt/non-exempt cases
  - off-the-clock cases
- Critical timing for certification:
  - which dispositive motions should precede or follow certification motions?
- Strategic use of demurrers and motions to strike: latest developments
- Trying the case early as opposed to settling it early: analyzing the criteria for making the call
- Motions for sanctions: are they getting out of hand?
- Examples of successful strategies and tactics for both plaintiff and defense

12:45 **Networking Luncheon for  
Delegates and Speakers** 

2:00 **Working With the Department of Labor in a Time of Change**

*Paul DeCamp*

Jackson Lewis LLP, Former Administrator

Wage and Hour Division, US Department of Labor (New York, NY)

*Douglas Weiner*

Epstein Becker & Green, PC

Former Senior Trial Attorney, US Department of Labor (New York, NY)

- Stepped up DOL enforcement: what's coming down the pike under an Obama administration?
- Targeted investigations: which industries are of most interest to the DOL currently and why?
- What to expect during an agency audit
- Fines and penalties: what's the range for various types of conduct?
- Top 10 mistakes employers make – and how to avoid them

3:15 **Afternoon Refreshment Break**

3:30 **Key Developments in States To Watch Out For:  
NY, MN, CA, MA**

*David Borgen*

Partner, Goldstein, Demchak, Baller, Borgen & Dardarian (Oakland, CA)

*Ellen C. Kearns*

Partner, Foley & Lardner LLP (Boston, MA)

*Gregg A. Gilman*

Davis & Gilbert LLP, (New York, NY)

*Paul Lukas*

Nichols Kaster & Anderson (Minneapolis, MN)

**New York**

- Tracking critical recent changes to NY state wage and hour law and their impact
- The *Pachter* decision's effect on commission and deferred compensation arrangements under New York law (and in contrast with the FLSA)

**Minnesota**

- *Milner v. Farmers Ins. Exchange*: a new era for use of the MFLSA?
- Charting the rise of state class actions under the MFLSA
- Penalties for individual violations under state law after the *Wal-Mart* settlement

## Massachusetts

- Massachusetts' new treble damages provision and resulting state wage and hour claims
- Payment of wages upon termination under Massachusetts' *Payment of Wages Act*
- Compliance with "Blue laws" and avoiding common misconceptions about pay periods under MA law

## California

- Developing standards for class certification of wage & hour claims in state court
- Highlights of meal and rest period claims pending before the state Supreme Court
- The future of the state law administrative employee exemption
- Changes in the rules governing the classification of employees in computer-related jobs

### 4:45 Independent Contractors: Avoiding a Common – And Costly – FLSA Classification Issue

Joel M. Cohn

Akin Gump (Washington, DC)

Marc Zamsky

Executive Vice President, Hudson Legal (Philadelphia, PA)

- Impact of *Fed Ex* case and other recent decisions on classification suits to date
- Status of *Independent Contractor Proper Classification Act* of 2007 and other legislative efforts concerning independent contractors
- Which industries are particularly problematic with respect to improper classification and what should employers be particularly mindful of?
- DOL and IRS criteria for making the contractor v. employee call: potential conflicts?

### 5:30 Day One Concludes

WEDNESDAY, MAY 20, 2009

### 8:00 Continental Breakfast

### 9:00 Co-Chairs' Opening Remarks

### 9:15 Litigating the Wage & Hour Class Action: FLSA, Rule 23 and Hybrids

Michael DiMattia

McGuire Woods (New York, NY)

Shannon Liss-Riordan

Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, PC (Boston, MA)

- How has the *Class Action Fairness Act* impacted how plaintiffs use the FLSA and related state law claims?
- In what situations have wage and hour cases have been moved to federal court as a result of the new legislation?
- Identifying unique issues that may arise when litigating hybrid lawsuits
- Supplemental jurisdiction over state law claims
- Good faith defenses to wage and hour claims – and plaintiff responses

### 10:15 Coffee Break

### 10:30 Making the Call Whether to Settle: Assessing Damages, Settlement Structure, Administration and More

Lee Schreter

Littler Mendelson (Atlanta, GA)

Glenn P. Felton

Senior Vice President and Deputy General Counsel  
Unum Provident Corporation (Chattanooga, TN)

Adam Klein

Outten & Golden LLP (New York, NY)

- Approaches to calculating damages:
  - fluctuating work week method
  - straight time and a half?
  - how far back?
  - what forensic evidence to use?
- Structuring the settlement: what elements are critical? What are the pitfalls to avoid?
- What red flags will lead judges to not approve a settlement?
- How plaintiff and defense counsel can work together to get settlement approval
- Settlement administration:
  - what are the tax ramifications where employers cut checks and forward to administrator v. working from a fund
  - how does the checks v. funds reimbursement affect the likelihood of a workers' comp audit seeking additional compensation premiums based on the settlement?
  - additional key administration considerations that can affect how settlement can/should be structured
- Obtaining positive outcomes when using mediation in wage and hour cases
- Making the call to go to trial rather than settle: as trials become more common, what are the tipping points?

### 11:45 Ensuring Ethical Conduct When Litigating/Settling Wage and Hour Claims

Jennifer Trulock

Baker Botts (Dallas, TX)

Maureen Hernandez Sutton (*invited*)

General Attorney, AT&T Advertising Solutions (Atlanta, GA)

- Obtaining pre-certification information for the putative class
- *Ex parte* communications: what's appropriate and ethical?
- Solicitation of clients: complying with state requirements
- Solicitation v. obligations to let potential plaintiffs know statute of limitations is running: how do you draw the line?
- Opinion letters declaring websites/letters to potential plaintiffs are compliant: how useful are they?
- Defendant communications to plaintiffs and co-workers about the case: what's appropriate and what's not?

### 12:45 Networking Luncheon for Delegates and Speakers

### 2:00 Judges Speak Out on Wage and Hour and Class Action Litigation

Hon. Richard Kramer

Superior Court Judge, Complex Litigation Department  
(San Francisco, CA)

Hon. Anthony Mohr

Superior Court Judge, (Los Angeles, CA)

Hon. Leonard D. Wexler

United States District Court, Eastern District of New York

Hon. Arthur J. Boylan

US Magistrate Judge, District of Minnesota (St. Paul, MN)

Moderator TBD

- Mistakes lawyers commonly make when litigating wage and hour claims – and how to avoid them
- How the court can help the parties – and how the parties can help the court
- The effects of CAFA and the Attorney General CAFA notice of settlement provision
- Managing the mega-case: judicial administration of large class actions
- Noteworthy trends in wage and hour and class action litigation: what are the judges seeing?
- Q and A with audience

ETHICS

3:15 Networking Refreshment Break

3:30 Best Practices for Preventing and Defending Against Wage and Hour Claims and Class/Collective Actions

*Vann Vogel*  
Deputy General Counsel  
Labor & Employment  
Verizon Wireless  
(Basking Ridge, NJ)

*Virginia Pagliery*  
General Counsel - Litigation  
MasTec, Inc.  
(Coral Gables, FL)

*Jack Johnson*  
Associate General Counsel  
Barclays Bank Inc.  
(New York, NY)

*Matt Pesnell*  
Senior Counsel  
Labor and Employment  
Georgia-Pacific Corporation  
(Atlanta, GA)

*Moderator TBD*

*In this valuable panel, get the views of in-house counsel on the front lines at leading organizations. Find out what they are doing internally to prevent and manage these claims, as well as what they expect from outside counsel. Join a great discussion with plenty of opportunities for Q & A.*

4:45 Q&A Wrap-Up and Conference Concludes

## CONTINUING LEGAL EDUCATION CREDITS



Accreditation will be sought in those jurisdictions requested by the registrants which have continuing education requirements. This course is identified as nontransitional for the purposes of CLE accreditation.

ACI certifies that the activity has been approved for CLE credit by the **New York State Continuing Legal Education Board** in the amount of **11.0** hours. An additional **3.25** credit hours will apply to workshop participation.

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ACI has a dedicated team which processes requests for state approval. Please note that event accreditation varies by state and ACI will make every effort to process your request.

## PRE-CONFERENCE WORKSHOP

May 18, 2009 | 2:00 – 5:15 p.m.  
(registration opens at 1:30 p.m.)

### Fundamentals of Wage and Hour Law

*Lee Schreter*  
Littler Mendelson (Atlanta, GA)

*J. Nelson Thomas*  
Partner, Dolin, Thomas & Solomon LLP (Rochester, NY)

*Back by popular demand, this workshop is your best source of detailed information and practical analysis of the intricacies of wage and hour law. With all the rules, exemptions, definitions and exceptions counsel must apply in navigating this complex area of law, it can get extremely difficult for counsel, especially those new to wage and hour. The FLSA is one of the most complex federal statutes, and additionally, a number of states provide for additional requirements about which both employers and workers need to be aware. Here's your best opportunity to get clarity and a firm grasp of the nuts and bolts of wage and hour law, from seasoned practitioners. Topics will include:*

- Overview of relevant federal legislation
- Practical effects of the new DOL regulations under the FLSA
- The relevant regulators and their roles:
  - scope of authority
  - types of actions taken and typical orders/penalties
- Exempt v. non-exempt employees
- Ensuring compliance under the federal labor codes when compensating salaried and commissioned employees
  - the salary basis test
  - determining hours worked
  - regular rate of pay v. bonuses, commissions, tips, etc.
  - weekly overtime calculation
  - special rules for inside salespersons
- Record keeping requirements
- Common problems with meal and rest periods – and how to deal with them
- Preparing for and responding to DOL audits
- Settlement of wage and hour claims: who is involved and what is the process?

*Every year, this workshop generates new discussions and examines new areas of concern. Whether you are new to the area or just need a comprehensive refresher, this workshop will give you the tools you need to get the most out of the two conference days that follow.*

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**Wendy Tyler**  
Group Leader & Business Development Executive  
American Conference Institute

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American Conference Institute's 7<sup>th</sup> National Advanced Forum on

# WAGE & HOUR

## CLAIMS AND CLASS ACTIONS

May 19 & 20, 2009 | New York Marriott Marquis | New York, NY

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### FUNDAMENTALS OF WAGE AND HOUR LAW

May 18, 2009

2:00 - 5:00 p.m.

#### Registration Fee

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#### Payment Policy

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#### Cancellation and Refund Policy

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