Chapter 1
Wage and Hour Legal Context

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1.1 Introduction

Compliance with wage and hour laws within the USA requires familiarity with many different statutes and regulations. In addition to federal requirements, many states and even some local municipalities have additional wage and hour requirements that also must be followed by companies with employees in those jurisdictions. Government enforcement agencies at the federal and state level also release publications to clarify their positions and interpretations of wage and hour requirements. In addition, numerous court decisions over the years have impacted the way in which these laws and regulations are interpreted in the court system. As a result, understanding an employer's wage and hour obligations requires navigating a complicated and evolving legal landscape. In this chapter, we provide an overview of the legal landscape to help clarify employers' wage and hour obligations.

We also note that the issues which fall within the realm of "wage and hour" are quite broad and include issues such as child labor, minimum wage, and even administrative issues such as recordkeeping requirements. This book is intended for internal and external organizational consultants, experts, and human resources (HR) practitioners, and we therefore focus our attention on issues that are frequently litigated and can be addressed using systematic methods from industrial/organizational (I/O) psychology or related disciplines.

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1.2 Fair Labor Standards Act

Federal wage and hour laws in the USA are based primarily on the Fair Labor Standards Act (FLSA), which can be found in Title 29 of the United States Code.[1] Enacted during the Great Depression in 1938, the FLSA provides workers with certain protections such as minimum wages, overtime pay, and child labor standards.[2] President Franklin D. Roosevelt, who signed the Act into law, stated that "[e]xcept perhaps for the Social Security Act, [the FLSA] is the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country."[3]

In addition to creating a Wage and hour Division (WHD) within the US Department of Labor (DOL) to administer and enforce the FLSA with respect to private employers and certain government agencies,[4] the FLSA granted the DOL authority to promulgate regulations to define certain aspects of the FLSA. Those regulations can be found in Title 29 of the US Code of Federal Regulations.[5] Together with the FLSA, DOL regulations establish employers' legal obligations at the federal level.

While the original version of the FLSA only applied to about one-fifth of the labor force,[6] today the FLSA applies to nearly all US workers. In 2009, the DOL estimated that over 130 million US workers were covered by the FLSA.[7] Coverage under the FLSA is determined by considering whether an employer or employee falls within the broad definitions set forth in the statute.[8] However, as discussed throughout this book, one of the challenges in studying wage and hour compliance is applying existing statutes and regulations—some of which have been around for nearly 80 years—to the modern workforce.

The FLSA and associated DOL regulations include four basic requirements for employers. First, employers are required to pay covered non-exempt employees no less than $7.25 per/h, which is the federal minimum wage effective July 24, 2009.[9] Second, the FLSA requires employers to pay non-exempt employees an overtime rate of at least one and one-half times the regular rate of pay for all hours worked in excess of 40 h per workweek.[10] Third, the FLSA and federal regulations forbid

[1] 29 U.S.C. §§ 201–219. The statute can be accessed online at https://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf

[2] Grossman (n.d.).

[3] Pederson (2006).

[4] US Department of Labor (2016a).

[5] 29 C.F.R. §§ 500–899. This section of the Code of Federal Regulations can be accessed online at https://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

[6] *See* Grossman (n.d.).

[7] US Department of Labor (2009).

[8] US Department of Labor (2009).

[9] 29 U.S.C. § 206; US Department of Labor (n.d.a).

[10] 29 U.S.C. § 207.

"oppressive child labor," restricting children under the age of 18 from being employed in certain "hazardous" jobs, such as coal mining or working with power machines, and limiting the hours children under the age of 16 are allowed to work.[11] Fourth, employers must maintain specific employment records related to wages and hours, such as the employee's name, age and address, hours worked each day and week, regular hourly pay rate, weekly earnings, deductions, and total wages paid each pay period.[12] The DOL regulations also include several sections that provide specific guidance on topics related to these four main requirements, such as who is covered by the FLSA,[13] what should be considered hours worked,[14] how the "regular rate of pay" should be calculated,[15] and what defines a workweek.[16]

1.3 State and Local Wage and Hour Laws

Many states also have their own wage and hour laws, which may be the same as, or more expansive than, the FLSA.[17] When federal and state laws differ, the more restrictive and employee-friendly law controls.[18] Therefore, employers must be familiar and compliant with wage and hour requirements within all states in which they have employees. State laws may set more restrictive thresholds for protections than the FLSA, like higher minimum wages, or may have requirements that are not even covered by the FLSA, such as meal and rest break laws.

In recent years, wage and hour lawsuits have been on the rise. Indeed, in 2016, wage and hour lawsuits surged across the country, which suggests that employers need to be familiar with state wage and hour laws and regulations and kept abreast of new developments in the law. Due to the unique legal landscape in California, wage and hour laws for employees in this state are discussed later in this chapter.

In addition to federal- and state-level requirements, many local municipalities have recently begun adopting their own wage and hour laws for companies operating within their jurisdiction.[19] For example, a growing number of cities and counties have passed minimum wage laws that are higher than the state and federal minimum wage.[20] Several cities, including Chicago, Los Angeles, New York City, Philadelphia, San Diego, San Francisco, and Seattle, also have laws requiring private employers

[11] 29 U.S.C. § 212; 29 C.F.R. § 570; US Department of Labor (2013).

[12] 29 U.S.C. § 211; 29 C.F.R. § 516; US Department of Labor (2008a).

[13] 29 C.F.R. § 541.

[14] 29 C.F.R. § 785.

[15] 29 C.F.R. § 778.

[16] 29 C.F.R. § 778.

[17] For links to specific state laws, *see* US Department of Labor (n.d.b) available at https://www.dol.gov/whd/state/state.htm

[18] 29 U.S.C. § 218(a).

[19] *See*, *e.g.*, Department of Industrial Relations (2016).

[20] *See* UC Berkeley Labor Center (2017).

to provide paid sick leave to their employees.[21] Additionally, while only a handful of states have laws mandating paid family leave (which provides benefits to employees who need to take time off work to care for a seriously ill family member or to bond with their newborn or newly adopted child),[22] cities such as San Francisco are beginning to implement their own local paid family leave laws that go beyond state and federal requirements.[23] The vast number of state and local wage and hour laws creates a significant compliance challenge for employers who operate in different locations throughout the country. As a result, large employers, like national retail chains, must stay up to date with new laws in every city and state in which they operate in order to ensure compliance with this ever-changing legal landscape.

1.4 Exemptions from the FLSA

While nearly all US workers are covered by the FLSA, there are employees who are exempted by the Act. One of the most commonly disputed wage and hour issues in the past few decades has been the proper classification of employees as "exempt" or "non-exempt" from FLSA (or state law) protections. Some employees are exempt from the FLSA's overtime pay provisions, and others are exempt from both the overtime pay and minimum wage provisions. To qualify for an exemption, an employee must meet several specific criteria and have been classified by their employer as "exempt." Employees who are exempt from the FLSA's overtime and minimum wage protections and are paid a fixed salary, regardless of the number of hours they work. These "salaried" employees are thought to make enough money that FLSA protections are unnecessary, whereas non-exempt, hly employees are considered to be more vulnerable to wage and hour abuse by their employers.

"Misclassification" occurs when an employer classifies an employee as exempt even though the employee does not meet all the criteria required to fall within an exemption. When an employee is misclassified in violation of federal or state laws, he or she is denied protections such as overtime pay. Employees who believe they have been misclassified as exempt can notify their employer or initiate litigation in an attempt to recover monetary damages. However, misclassification lawsuits can be expensive for both parties, regardless of the outcome. While a majority of misclassification lawsuits settle prior to a decision on the merits, it is not uncommon for settlements involving large classes of employees to exceed $10 million. Perhaps the most well-known misclassification case that advanced to trial is *Bell v. Farmers Insurance Exchange*, in which a class of plaintiffs were awarded over $90 million in damages when the court determined that insurance claims adjusters were non-exempt administrative employees entitled to overtime pay.

[21] National Partnership for Women and Families (2017).

[22] National Conference of State Legislatures (2016).

[23] City and County of San Francisco Office of Labor Standards Enforcement (n.d.).

Table 1.1 Summary of exemption criteria for the "white-collar" exemptions[a]

Exemption (federal regulation)	Criteria (must meet all)
Executive (29 C.F.R. § 541.100)	1. Paid a salary of $455 or more per week 2. Primary duty is management of the enterprise, department, or subdivision 3. Manages at least two or more full-time employees 4. Has the authority to hire or fire others (or whose recommendations are given particular weight)
Administrative (29 C.F.R. § 541.200)	1. Paid a salary of $455 or more per week 2. Primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers 3. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
Professional (29 C.F.R. § 541.300)	1. Paid a salary of $455 or more per week 2. Primary duty meets one of the following criteria: (a) Primary duty is work requiring advanced knowledge (i.e., "learned professional") (b) Primary duty is work requiring invention, imagination, originality, or talent in an artistic or creative field (i.e., "creative professional")

[a]This table is a summary of the criteria specified in the federal regulations. See 29 C.F.R. § 541

The DOL regulations define the criteria that must be met for an employee to be classified as exempt from the FLSA.[24] The three most common exemptions are the executive, administrative, and professional exemptions, which have become known collectively as the "white-collar" or "EAP" exemptions. These exemptions apply to white-collar workers, such as those employees in management or highly skilled positions. Other exemptions outlined in the regulations include computer professionals,[25] outside salespeople,[26] and "highly compensated" employees.[27] While the specific requirements of each exemption differ, all exemptions, under the FLSA and state laws, are based on two broad requirements: (1) the amount and method of compensation the employee receives (known as the "salary test") and (2) the employee's job duties (known as the "duties test"). Table 1.1 summarizes the criteria for the FLSA's so-called white-collar exemptions. Some states have "salary test" and "duties test" requirements that are more stringent than the FLSA.

An evaluation of exempt status requires a detailed understanding of the work that employees perform. This assessment requires precise measurements of the amount of time employees actually spend performing the various types of work described in the exemption criteria. In addition, the level of authority and discretion that employees exercise related to matters of significance is also a relevant factor that can be

[24] 29 C.F.R. § 541; *see also* US Department of Labor (2008b).

[25] 29 C.F.R. § 541.400.

[26] 29 C.F.R. § 541.500.

[27] 29 C.F.R. § 541.601.

studied. These evaluations, which are discussed in Chap. 3, typically involve the use of observational methods, self-report questionnaires, or structured interviewing techniques to collect detailed information regarding factors relevant to one or more of the exemptions.

1.4.1 Proposed Revisions to Exemption Criteria

Although the criteria listed in Table 1.1 are accurate as of the time this chapter was written, the DOL recently undertook an effort to revise regulations that define exemption criteria. This action was initiated by President Obama's 2014 directive to the Secretary of Labor to "modernize and streamline" the white-collar exemption criteria.[28] In response, the DOL released a final rule that would increase the minimum salary threshold for the white-collar exemptions from $455 per week ($23,660 per year) to $913 per week ($47,476 per year) and included an automatic mechanism for increasing the salary threshold every 3 years.[29] The final rule was scheduled to go into effect on December 1, 2016.

However, on September 20, 2016, numerous states jointly filed a lawsuit against the DOL challenging the constitutionality of the new overtime rule.[30] On November 22, 2016, a few weeks after Donald Trump won the presidential election and a few days before the final rule was scheduled to go into effect, a Texas federal judge granted a nationwide preliminary injunction which prevented the DOL from implementing or enforcing the rule.[31] On August 31, 2017, the same judge permanently blocked the rule, reasoning, in part, that the proposed salary level in the final rule was so high that it essentially rendered the duties test irrelevant because nearly all employees who meet the new salary test would also meet the duties test. The diminished role of the duties test was found to be inconsistent with the intent of the FLSA.

The DOL under the Trump Administration issued a request for information (RFI) in July 2017 to assist the department in preparing a new proposal to revise the FLSA regulations.[32] Based on the DOL's announcement of its fall regulatory agenda, there may be a new overtime rule proposed in October 2018. Indications are that the DOL will propose an increase in the salary level but at a level lower than what was previously proposed. It is unknown whether changes to the duties test will also be proposed.

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[28] Executive Office of the President (2014).

[29] US Department of Labor (2016b).

[30] *Nevada v. US Dep't of Labor*.

[31] *Nevada v. US Dep't of Labor*; *see also* US Department of Labor (2017a).

[32] US Department of Labor (2017b).

1.5 Independent Contractors

In order for FLSA protections to apply to a worker, he or she must be an "employee" of the employer. Under the FLSA, the term "employ" has been defined broadly as "suffer or permit to work," meaning that the employer directs the work or allows the work to take place.[33] In contrast, workers who are classified as "independent contractors" are, by definition, self-employed and therefore *not* employees of the company for whom they perform work. Therefore, these independent contractors are not protected by any of the FLSA provisions, including minimum wage and overtime pay. In addition to the loss of FLSA protections, employees misclassified as independent contractors do not receive employee-type benefits such as family and medical leave and unemployment compensation insurance. Misclassification also results in financial losses to the federal government and state governments in the form of lower tax revenues and less contributions to unemployment insurance and workers' compensation funds.[34]

In recent years, classification of workers as independent contractors has faced increased scrutiny, and legal disputes have arisen as a consequence. The DOL has described the misclassification of employees as independent contractors as "one of the most serious problems facing affected workers, employers and the entire economy."[35] As a result, the WHD has worked with the US Internal Revenue Service (IRS) and 37 states by sharing information and coordinating enforcement to reduce misclassification of employees as independent contractors.[36] In the last few years of the Obama Administration, the DOL was particularly active in this area. For example, in 2015, the DOL issued an Administrative Interpretation that narrowly defined an independent contractor and concluded that "most workers are employees"; however, this guidance was withdrawn by the Trump Administration's DOL on June 7, 2017.[37]

Individual plaintiffs can file lawsuits against employers that they believe misclassified them as independent contractors. Unlike a government enforcement action, these public lawsuits can take an extensive amount of time, require significantly more disclosure of documents and deposition testimony, and can result in unwanted stories in the press. Misclassification lawsuits are often brought against well-known companies as class or collective actions with a large number of plaintiffs. In the end, damages and settlements can be high, especially for start-up companies that are pushing the boundaries of what it means to be an employee in today's virtual world.[38] With the rise of the virtual economy, the proper classification of workers becomes even more challenging.

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[33] US Department of Labor (2014).

[34] US Department of Labor (n.d.c).

[35] US Department of Labor (n.d.c).

[36] US Department of Labor (n.d.c).

[37] US Department of Labor (2017c); US Department of Labor (2017d).

[38] *See*, *e.g.*, *O'Connor v. Uber Technologies, Inc. et al.*

While many workers bring lawsuits to gain "employee" status under the FLSA, others seek to maintain their flexibility as independent workers. Many workers welcome being free of the restrictions and rigidity that come with being an employee. As independent contractors, they often operate as their own small business owners, with the freedom to manage their days, goals, and hours as they see fit.

To determine whether a worker is properly classified as an independent contractor, there are various factors that should be considered, and no one factor is dispositive. For example, the DOL previously used a multi-factor "economic realities test" that assesses whether a worker is truly in business for himself or herself or is economically dependent on the employer (i.e., independent contractor vs. employee). Other federal agencies, such as the IRS, along with some state agencies, like the California Employment Development Department, have published separate guidance on how to determine whether a worker is an employee or independent contractor. In addition, each year state and federal courts issue decisions in independent contractor misclassification cases. These decisions shape the way the law is interpreted and applied. The relevant factors from these sources, along with methods for evaluating them, are discussed in more detail in Chap. 4.

Evaluation of most independent contractor criteria requires a detailed understanding of the work performed by the worker and the degree and nature of the interaction between the worker and the company. In many cases this involves collecting data from multiple sources, including company leadership, the workers themselves, and the internal employees who serve as points of contact for the workers.

1.6 Off the Clock Work

The FLSA requires employees to be paid a minimum wage for all hours worked and be paid at the overtime rate (e.g., one and a half times the regular rate of pay) for all hours worked over 40 in a workweek.[39] In some states, including Alaska, California, and Nevada, overtime may have to be paid for hours worked in excess of 8 h during any workday.[40] The terms "hours worked" or "compensable time" are defined by the DOL as the time an employee must be on duty, on the employer's premises, at any other prescribed place of work, or any additional time the employee is allowed (i.e., suffered or permitted) to work.[41]

The number of hours worked by non-exempt employees is typically tracked using a time card system in which employees record the time they began and finished working each shift. Employees are often said to be "on the clock" between the time they clock in for their shift and the time they clock out at the end of their shift,

[39] 29 U.S.C. §§ 206–207 (2012).

[40] Alaska Stat. §§ 23.10.050–23.10.150 (2016); Cal. Lab. Code § 510 (2016); Nev. Rev. Stat. § 608.018 (2016).

[41] US Department of Labor (2008c); *see also* US Department of Labor (2008d).

that is, the time for which they are being paid. The time before or after an employee's shift is referred to as off the clock. When employees are performing compensable work during a time for which they are not being paid, they are said to be performing "off the clock work," which may result in the employee initiating litigation to recover unpaid wages and overtime.

Off the clock work can occur in a variety of ways. Some of the more common allegations include employees starting work before clocking in, clocking out before finishing work, performing work from home but not reporting the time (including phone calls or emails), working through unpaid meal breaks, donning or doffing required uniforms or equipment before or after their shift, time shaving (i.e., paying employees for fewer h than actually worked), or improper time clock "rounding" practices. Employers can be liable for significant damages for not paying all time worked.

Evaluating off the clock claims often involves understanding not only *what* activities performed by employees but also *when* the work is performed. When faced with allegations that an employee worked off the clock, employers must compare the amount of time the employee worked to the amount of time for which the employee was paid. While this comparison is a simple task conceptually, it is often challenging in practice. The primary cause of difficulty is that time worked is rarely recorded separately from paid time. When an employee alleges that the time worked is not equal to the paid time, the challenge is to generate reliable data that shows the actual time worked. Chapter 5 provides discussion of some existing sources of data that may be useful for this purpose, along with some methods for collecting data to estimate the amount of time actually worked.

1.6.1 De Minimis

For both employers and employees, it can be impractical to record off the clock time worked if it is of an insignificant or "de minimis" value. The DOL has acknowledged in regulations that when there are "uncertain and indefinite periods of time involved of only a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities," that time can be considered de minimis and does not need to be compensated for by the employer.[42] However, an employer cannot arbitrarily fail to count any portion of an employee's regular working time, even if it only amounts to $1 per week, because in the aggregate this practice could encourage abuse.[43] The DOL further explains that, for purposes of recording or computing time, employers may round to the nearest 5 min, one tenth, or one quarter of an hour, so long as that process does not result in the "failure to compensate the employees properly for all of the time they have actually

[42] 29 C.F.R. § 785.47 (2016); *see also Anderson v. Mt. Clemens Pottery Co.*

[43] *Addison v. Huron Stevedoring Corp.*

worked" over a period of time.[44] The Supreme Court of California is currently grappling with how to apply the FLSA's de minimis doctrine to claims for unpaid wages under the California Labor Code.[45]

1.7 Meal and Rest Breaks

Although there are no federal requirements establishing meal and rest breaks, many states provide employees with these added protections. Some states, such as Florida and Texas, do not mandate that employers provide minimum meal or rest breaks to employees who work shifts of a certain length, but others require that employers provide up to an hour of break time to employees who work an 8-h shift. For example, employees in states such as California, Colorado, Massachusetts, Nebraska, Nevada, Tennessee, and Washington are entitled to a 30-min unpaid meal break when they work a shift ranging between 5 and 8 h, depending on the state.[46] In addition, employees in states such as California, Colorado, Kentucky, Nevada, Oregon, and Washington are entitled to two paid 10-min rest breaks in an 8-h shift.[47] In other states, employees are entitled to meal and rest breaks of different lengths (e.g., West Virginia, Illinois) or the break requirements depend on the particular circumstances (e.g., Kentucky, Maine) or industry (e.g., New York, Massachusetts).

Litigation arises when employees allege that they did not receive the meal and/or rest breaks to which they were legally entitled, or the break they received was shorter than the minimum break required. Another potential for non-compliance is when employees are interrupted to perform work tasks during their breaks or have certain activities restricted during their break, making them not relieved of all duties, as required by many states. Evaluating these issues can be done in a variety of ways, including analysis of existing time clock data or other sources of electronic data, designing and administering self-report surveys to collect information from employees about meal and rest break compliance, or conducting observational studies to determine the length of breaks actually taken and whether compensable work was performed during breaks. The strategies for evaluating meal and rest break compliance are discussed in Chap. 6.

[44] US Department of Labor (2008e).

[45] Green (2016); *Troester v. Starbucks Corp.*

[46] US Department of Labor (2017e); HR360 (2017).

[47] US Department of Labor (2017f).

1.8 Special Wage and Hour Issues in California

Due to the highly restrictive nature and unique requirements of California's wage and hour laws, many resources on wage and hour laws discuss California's laws separately from other states. Historically, more wage and hour lawsuits have been filed in California than any other state, and the range of protections for California employees is far broader than other states. Two of the most impactful differences in California are the "job duties" test for exempt employees and the California Fair Pay Act (which went into effect on January 1, 2016),[48] both of which are significantly more restrictive than their federal equivalents. The job duties test is discussed in more detail in Chap. 3, and issues of pay equity legislation are covered in Chap. 9.

California's wage and hour laws are contained in two sets of regulations: the California Labor Code[49] and the Industrial Welfare Commission (IWC) Wage Orders.[50] The Department of Labor Standards Enforcement (DLSE) is the enforcement agency for California's wage and hour laws. The DLSE interprets laws and creates guidelines for companies to ensure compliance with the law. As part of its responsibilities, the DLSE publishes and regularly revises the Enforcement Policies and Interpretations Manual,[51] which summarizes the agency's policies and interpretations of wage and hour laws and regulations. It also regularly publishes opinion letters to clarify the agency's perspective on various issues.[52]

Minor compliance or technical errors, like a missed meal break or omitted information on a pay stub, can result in significant financial consequences for employers. Passed in 2004, the Private Attorneys General Act (PAGA) provides employees the power to sue their employers on behalf of themselves, other employees, and the State of California for violations of the California Labor Code. PAGA lawsuits increased by more than 400% from 2005 to 2013, and an excess of 6,000 PAGA notices are received by the State of California each year.[53] Because PAGA permits plaintiffs to recover legal costs and attorneys' fees if they prevail, plaintiffs' attorneys have been able to use it as a vehicle to file a wave of wage and hour lawsuits against California employers. For example, obscure labor laws, like the requirement

[48] The California Fair Pay Act prohibits California employers from paying their employees less than employees of the opposite sex for "substantially similar" work unless the employer can show that the pay gap is justified by a factor other than sex, such as seniority, merit, a system that measures production, or differences in education, training, or experience (Department of Industrial Relations, 2017). Effective January 1, 2017, the Act was expanded to cover unequal pay as to race and ethnicity. *See* Wage Equality Act of 2016.

[49] *See* Cal. Lab. Code, available at http://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=LAB&tocTitle=+Labor+Code+-+LAB

[50] *See* Cal. Code Regs., available at https://www.dir.ca.gov/IWC/WageOrderIndustries.htm

[51] Division of Labor Standards Enforcement (2017).

[52] The opinion letters are available online at https://www.dir.ca.gov/dlse/OpinionLettersbySubject.htm

[53] Saltsman (2017).

for employers to provide "suitable seats" to employees when "the nature of the work reasonably permits,"[54] have recently brought multimillion dollar lawsuits against large employers in California.[55] Chapter 7 provides the latest legal updates on suitable seating requirements in California along with some methods that can be used to evaluate relevant criteria.

1.9 Class Certification

The vast majority of high-profile wage and hour lawsuits are brought as class or collective actions. In these cases, the named plaintiffs seek to represent a group of other current or former employees who they allege have common claims or are similarly situated. Before a case can proceed as a class or collective action, it must be "certified," that is, the court must decide whether the claims of all class members are similar enough that they can be resolved on a class-wide basis. Plaintiffs argue in favor of class certification, while employers generally want to defeat the creation of a class of plaintiffs. A certified class creates much greater financial exposure for the employer and typically settles before trial because employers are motivated to resolve the case to avoid the risk of large monetary awards if unsuccessful. While cases that are not certified can proceed as individual plaintiff cases, many plaintiffs choose not to pursue them further because of the high cost of litigation, uncertain outcome, and relatively small financial awards, even if they prevail in the end. As a result, many cases are won or lost at the class certification stage and before the issue of liability is litigated. Wage and hour classes can be certified under two legal processes: Section 216(b) of the FLSA[56] and Rule 23 of the Federal Rules of Civil Procedure ("Rule 23").[57] The certification standards under these two processes differ, and therefore each one will be discussed separately.

Multi-plaintiff FLSA cases are certified under Section 216(b) of the FLSA. If certified, the case is called a collective action. Current and former employees must actively opt in to the collective action to join the lawsuit. The certification standard for FLSA classes is whether the putative collective action members are "similarly situated."[58] While the FLSA does not define "similarly situated" nor does it establish a process for certifying a collective action, courts generally apply a two-stage process in certifying a collective action under Section 216(b). The first stage is the "notice stage" where the case is first "conditionally certified" based on a lenient standard for the purpose of sending notice of the action to potential opt-in

[54] I.W.C. Wage Order 7-2001 § 14.

[55] *See*, *e.g.*, Lee (2017).

[56] 29 U.S.C. § 216(b).

[57] Fed. R. Civ. P. 23, available at https://www.federalrulesofcivilprocedure.org/frcp/title-iv-parties/rule-23-class-actions/

[58] 29 U.S.C. § 216(b).

plaintiffs.[59] In the second stage, after all evidence has been presented, the court determines whether the case should proceed to trial as a collective action. A more stringent standard is applied at the second stage and is where evidence from experts is considered.

While FLSA collective actions must proceed in federal court, class actions under state wage and hour laws may be filed in either federal or state court. Although states have their own criteria for certifying class actions,[60] many states, including California,[61] look to Rule 23 of the Federal Rules of Civil Procedure for guidance in the certification process. The most significant difference between class actions brought under Rule 23 and collective actions brought under Section 216(b) is that, in a class action, class members are generally bound by the judgment or settlement unless they choose to "opt out," whereas in a collective action, individuals who want to be part of the class must "opt in" to participate and be bound by the judgment. Given that inactivity does not preclude an individual from being a part of the Rule 23 class, the size and value of class actions tend to be much higher than collective actions.

In contrast to the FLSA's "similarly situated" requirement, Rule 23 sets forth four basic prerequisites for a class action: (1) numerosity, (2) typicality, (3) commonality, and (4) adequacy of representation.[62] In addition to these four requirements, a class action must satisfy one of the three requirements of Rule 23(b), which for class claims seeking damages (such as unpaid overtime), the analysis involves whether common questions predominate and a class action is superior to individual actions.[63] In a well-known decision that impacts wage and hour class actions, *Wal-Mart Stores, Inc. v. Dukes*, the US Supreme Court made it clear that plaintiffs must not merely plead the existence of the Rule 23 requirements but rather must prove them, thereby requiring courts to perform a "rigorous" analysis to determine whether the Rule 23(a) prerequisites are satisfied. In the *Wal-Mart* case which involved allegations of systemic gender discrimination, the Supreme Court articulated that commonality in a Rule 23 class action "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[64] Simply put, it is not whether a well-crafted class action complaint includes allegations that raise *common questions* but whether a class-wide proceeding will generate *common answers*.[65] The plaintiffs in *Wal-Mart* could not point to any specific employment policy or practice of class-wide application (such as an inherently biased testing procedure) that directly affected women across different stores. Therefore, the Supreme Court held that commonality was lacking because plaintiffs could not demonstrate that they had all suffered the same injury and not merely a violation of their rights under

[59] *See, e.g.*, *Hoffman-La Roche, Inc. v. Sperling* (vesting district courts with the authority and discretion "to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs").

[60] *See*, *e.g.*, Cal. Code of Civ. Pro. § 382.

[61] *Vasquez v. Superior Court*.

[62] Fed. R. Civ. P. 23(a).

[63] Fed. R. Civ. P. 23(b)(3).

[64] *Wal-Mart Stores, Inc. v. Dukes* (quoting *Gen. Tel. Co. of Sw. v. Falcon*).

[65] *Wal-Mart Stores, Inc. v. Dukes*.

the same law. As a result, the *Wal-Mart* decision set a higher bar for plaintiffs to certify a class in employment and wage and hour cases.

The "similarly situated" criterion under Section 216(b) and "commonality" criterion under Rule 23 are generally where methods from I/O psychology (or other related disciplines) are most directly applicable. Both criteria require plaintiffs to show similarity in the claims for putative collective action or class action members. For example, this similarity may be shown when a uniformly implemented company policy resulted in employees working off the clock or all employees within a job title performing the same duties in the same way and spending the majority of their work time performing non-exempt work. Thus, I/O methods are useful to evaluate certification under both processes because the underlying issue is the degree of variability between putative class members on factors such as the tasks employees actually perform and the time spent on those tasks. The goal of the evaluation is to determine whether the members of the putative class do in fact vary from person to person with respect to the issues in the case to the extent that class certification is inappropriate because their claims cannot be resolved on a class-wide basis.

1.10 Trends in Wage and Hour Litigation

From 2000 to 2015, the number of wage and hour lawsuits filed in federal court increased by approximately 358%.[66] During this time period, there have also been high volumes of wage and hour cases in state courts. While federal filings decreased for the first time in 2016, it was still the second-highest number of wage and hour cases ever filed.[67] Additionally, wage and hour settlement values increased significantly in 2016, up to $695.5 million from $463.6 million in 2015 for the top ten largest settlements.[68]

At least one commentator attributed the surge in wage and hour litigation to the decline of union-related litigation.[69] Another possible factor is that, under the Obama Administration, the DOL and Equal Employment Opportunity Commission (EEOC) were widely considered to be pro-employee and they placed a greater focus on wage and hour issues, which contributed to increased filings.[70] While wage and hour enforcement is expected to be less aggressive under the Trump Administration, a more employer-friendly DOL may result in "litigation gaps" that are filled in by private lawsuits or increased enforcement at the state level. Because these wage and hour litigation trends are likely to continue, it is essential for employees to know their rights and for employers to understand the myriad of current laws and regulations that impact their businesses.

[66] DePillis (2015).

[67] Teachout (2017).

[68] Ramirez (2017).

[69] *See* DePillis (2015).

[70] *See* Ramirez (2017).

1.11 Conclusion

This chapter provided the legal background for each of the issues discussed in this book. Each topic covers an area of wage and hour compliance that is frequently litigated and also addressed using methods from I/O psychology such as job analysis. Chapter 2 provides the foundation for the methods that are regularly used to address these issues. The remaining chapters each address a specific wage and hour issue, which includes a description of the issue and methods for evaluating compliance.

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