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# The Pay Microscope – Is Your Company Ready for Close-Up Scrutiny?

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# Employee Pay Class Actions Are Big News Involving Big Money

Elizabeth (“Betsy”) Rader  
Associate Counsel  
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# Private Pay Equity Suits

## ***ABC News***

Monday, May 17, 2010

### **Jury Finds Novartis Liable for \$250M in Female Discrimination Complaints**

**Settlement totaling \$175 Million approved by Court  
November 30, 2010**



## Private Wage and Hour Suits

Aon pays \$10.5 million to settle wage-and-hour lawsuit.

Baxter misclassification class action settles for \$2.6 million.

Kaiser settles misclassification case for \$2.91 million.



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## Rekhter, et al. v. Washington Department of Social and Health Services

- 3 week trial for claims of 22,000 home health care workers
- Record \$57 Million Wage & Hour Verdict against State of Washington Department



# DOL Estimates 70% of Companies Violate Wage and Hour Laws

*So plaintiffs' attorneys are shooting fish in a barrel!*





## The Multiplier Effect under FLSA

- E.g., \$100 annual mistake in pay
- E.g., 10,000 employees
- Multiply by two for liquidated damages
- Multiply by two or three years of back pay  
(depending on “willfullness”)
- Add plaintiffs’ attorney fees

**Minor mistakes add up to Millions of Dollars**



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## This Past Year's Biggest News: Supreme Court Agrees to Hear Wal-Mart Appeal

December 6, 2010 New York Times

*“The Supreme Court on Monday agreed to hear an appeal in the biggest employment discrimination case in the nation’s history, one claiming that Wal-Mart Stores had discriminated against hundreds of thousands of women in pay and promotion. **The lawsuit seeks back pay that could amount to billions of dollars.**”*





## Plaintiffs' Claims in *Dukes v. Wal-Mart*

- Subjective pay and promotion decisions based on gender disproportionately favored men and had a disparate impact on women
- Damages sought included back pay for all 1.5 million members of the class



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## *Sigh of Relief:* Supreme Court overturns the Ninth Circuit, ruling in favor of Wal-Mart

June 20, 2011

“The crux of this case is commonality....The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s ‘policy’ of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.”



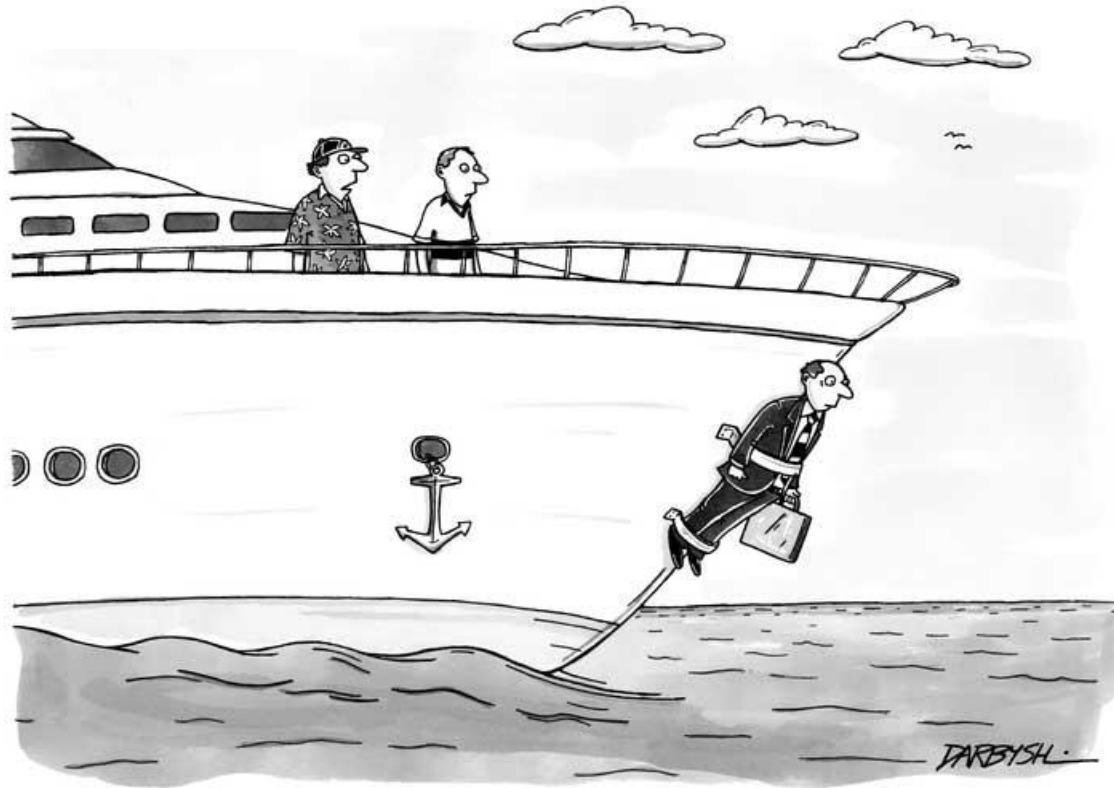
## What might create commonality?

Supreme Court pointed out that its prior decision in *Falcon* set forth two ways to “bridge the gap” for class action commonality:

- “First, if the employer ‘used a biased testing procedure to evaluate applicants for employment and incumbent employees....’”
- “Second, ‘[s]ignificant proof that an employer operated under a general policy of discrimination....’”



# How to Avoid a Class Action?



*"It's supposed to ward off frivolous lawsuits."*



## Examine Uniform Practices

- Pre-Employment Tests
- Promotion Policies
- Employee Classifications  
(exempt/non-exempt and independent contractor/employee)
- Auto-deducts for Lunch Breaks
- Off-the-clock Work
- Doffing and Donning



## Practical Pointers for In-house Counsel

- Update your policies/procedures
- Communicate the policies to employees and document the communication
- Have a hotline for complaints of violations, and *respond* to complaints
- TRAIN your managers and document that training has occurred
- Audit whether policies are being effectively implemented
- Revisit these topics regularly Pay Audit



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# What's the Deal With the DOL?

Maryrose Maness  
SVP & Chief Employment and  
Corporate Infrastructure Counsel  
Warner Music Group



## Recent Wage & Hour Activity

- The Wage & Hour Division (WHD)
  - Began 2009 with 731 investigators
  - Ended the fiscal year with 894 investigators
  - Completed nearly 25,000 compliance actions
  - Collected more than \$172,600,000 in back wages for more than 219,000 workers nationwide





## The WHD 2011 Budget

- Funding to maintain staffing at the 2001 levels
- Plan to hire more than 350 new employees, including 177 investigators and enforcement personnel
- More targeted investigations
- Meaningful compliance assistance
- New initiatives



## The Misclassification Initiative

- Strengthen and coordinate efforts to enforce labor violations that result from the misclassification of employees as independent contractors
- \$12 million and 90 FTE will support field investigator training activities and an additional 4,700 investigations



## The Misclassification Initiative

- Investigations will be directed to specific industries including:
  - Construction
  - Child care
  - Home health care
  - Grocery stores
  - Janitorial
  - Business services
  - Poultry and meat processing
  - Landscaping



## Payroll Fraud Prevention Act

- Bill to amend the FLSA of 1938, currently pending before the US Senate
- Intended to prevent misclassification of employees as independent contractors
- Employers required to keep accurate records as to the classification of each employee
- Employees would have to be explicitly notified of their classification and directed to a DOL website for information about employee rights
- Penalties ranging up to \$5K per employee
- Triple damages for willful violations



## DOL Industry Enforcement Initiatives

- Agricultural Industry
  - Beginning in South Florida
  - Continuing up the East Coast
  - More than 20 investigations already conducted
  - Recovering \$670,770 in back wages for about 590 workers
  - Assessing more than \$128,850 in penalties

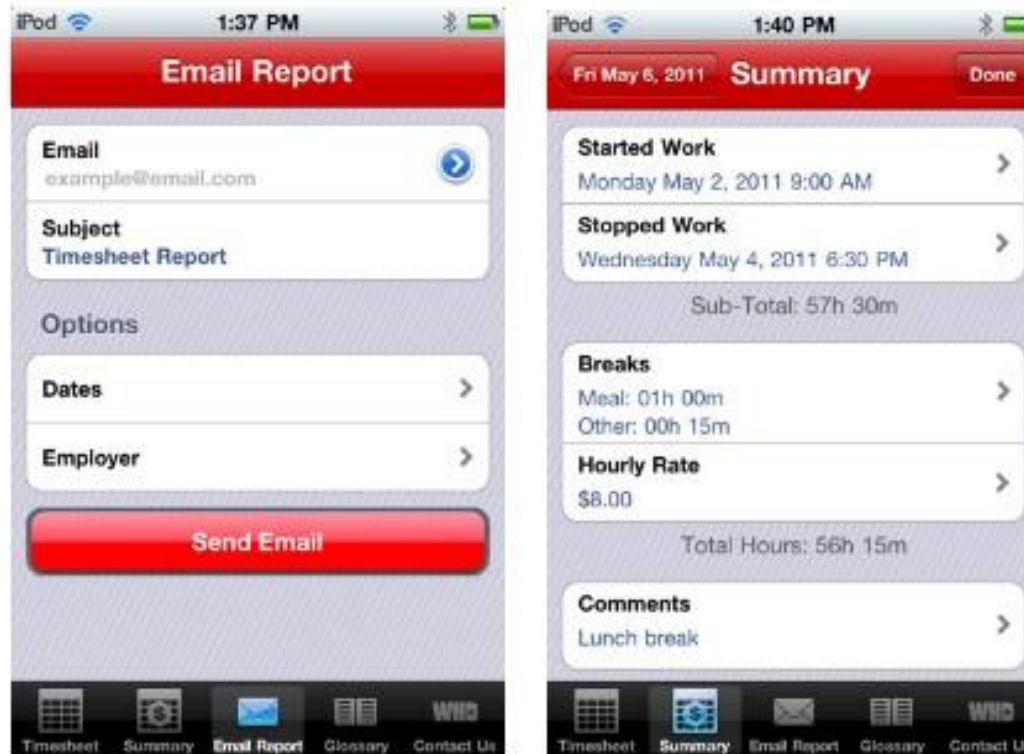


# DOL Industry Enforcement Initiatives

- Health Care Industry
  - DOL increased budget and added hundreds of field workers
  - Issues include:
    - Exemption misclassification
    - Independent contractors
    - Travel time (during the workday)
    - Meal period violations
    - Off the clock work



# DOL Smartphone App



*Screenshots from the DOL - Timesheet app*



## DOL Smartphone App

- A timesheet to help employees independently track the hours they work and determine the wages they are owed
- Good for breaktime tracking
- Can annotate work-related information and view summaries
- Compatible with iPhone and iTouch
- Does not help with state variations





## DOL Smartphone App

- Future improvements include:
  - Compatibility with Android/Blackberry
  - Addition of other features, such as tips, commissions, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest
- Available in English and Spanish
- DOL has a printable work hours calendar
- Both can be downloaded at: <http://www.dol.gov/whd>



## DOL Settlements

- Lenny's
  - \$5.1 million settlement for minimum wage and overtime violations affecting over 800 workers
  - Largest recorded settlement for workers in the history of DOL
- Farmers Insurance
  - \$1.5 million settlement covering overtime back wages for 3,459 employees for pre-shift work
  - An average of 30 minutes turning on work stations, logging into the company phone system, and initiating software application necessary to begin their call-center duties



## DOL Investigations: Triggers

- Reason for investigation not typically disclosed
- Complaints from current or former employees
  - Improper classification as exempt from overtime
  - No compensation for preliminary or postliminary work
  - Required to work off the clock
  - Improperly docking the pay of exempt employees
- All complaints are confidential
  - Name of worker and nature of complaint may not be disclosed
  - Whether a complaint exists may not be disclosed



## DOL Investigations: Triggers

- Target low-wage industries
  - High rates of violations
  - Egregious violations
  - Employment of vulnerable workers
  - Rapid changes in an industry (growth or decline)
  - Specific geographic area



## DOL Investigations: The Process

- Audit Notice
  - Investigator not required to previously announce the scheduling of an investigation
  - Investigator will often advise an employer prior to opening an investigation
  - Request a postponement in producing records so you can obtain advice from outside counsel



## DOL Investigations: The Process

- Audit can expand to other current employees and former employees
- Interviews with employees in private
  - Sometimes employees may be interviewed at their home, by mail or by telephone
- Meet with employer to discuss violations and remedies
  - Payment of back wages
  - May ask employer to compute the amounts due



## DOL Investigations: Preparation

- Give careful thought at outset as to employer's point of contact with the agency
- Form an internal team
  - Representatives from legal, HR, payroll, tax, and outside counsel
- Conduct an immediate self-audit
  - Review your time and payroll records
  - Conduct interviews with department heads and managers to obtain background information
- Review company records to determine if a prior audit has been conducted



## DOL Investigations: Preparation

- Communication strategy
- Resolve any errors found
  - Make payments toward back wages
  - Obtain acknowledgment forms from employees for hours worked
- Schedule conference call with the auditor in advance of meeting
  - Confirm scope and audit period
- Consider setting aside reserves and issuing a litigation hold
- Consider whether there are any fraud or penalty issues





## DOL Investigations: Penalties

- Unpaid wages & additional equal amount in liquidated damages
  - Unless good faith defense
  - Either employee may file suit or Secretary of Labor may file suit on behalf of employee
- Attorney's fees and costs
- DOL may seek a federal injunction to restrain you from committing future violations



## DOL Investigations: Penalties

- DOL may impose civil penalties of up to \$1,000 per violation per employee
- Criminal prosecution for known, willful violations
  - Violators fined up to \$10,000
  - Second conviction may result in a prison sentence
  - Right to appeal the penalty within 15 days of notification



## DOL Investigations: Practice Tips

- Respond in a timely manner to requests by agency whenever possible
- Do not volunteer any information
- It may be advantageous to let investigators conduct interviews at the workplace rather than with those off-site who may exaggerate
- Be prepared to rebut allegations
- Operate from assumption that investigators are pro-worker
- Consider submitting a letter setting forth employer's factual and legal position



## DOL Investigations: Practice Tips

- Determine agency's position before settling case
  - Willful violations
  - Supporting imposition of civil money penalties
- May be able to negotiate over any back wages findings
- Consider seeking a meeting with investigator's supervisor if outcome not acceptable
- Think long and hard before taking a matter to litigation
- Consider beyond agency litigation



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# Pay Disparity and Regulatory Agencies

What to expect when the regulators come calling

Archangela DeSilva  
Associate General Counsel  
Spectra Energy Group



## Regulatory Agencies

- Federal agencies have been actively pursuing the Obama Administration's equal pay agenda
- The Lilly Ledbetter Act was signed into law on January 29, 2009
- The EEOC's Compliance Manual provides: "Payment of compensation is actionable if it is affected by either a discriminatory compensation decision or some other discriminatory practice . . . each time wages, benefits, or other compensation is paid, resulting in whole or part from such discriminatory decision or practice. "



## Regulatory Agencies

- The Paycheck Fairness Act, which passed the House but not the Senate, provides that an employer with pay disparity can only rely on a “bona fide factor other than sex, such as education, training or experience.”
- It further limits the bona fide factor defense to a factor which is job-related, consistent with business necessity and provides
  - “Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such [pay]differential and that the employer has refused to adopt such alternative practice.”



## Regulatory Agencies

- The OFCCP is also pursuing an equal pay regulatory agenda
- In January 2011, the OFCCP published a notice that it was rescinding its Interpretative Standards on Systemic Discrimination and its Voluntary Guidelines for Self-Evaluation of Compensation Practices because they limited its ability to investigate, analyze and identify compensation discrimination
- The OFCCP wants to be able to use other statistical and non-statistical analyses besides multiple regression analysis, depending on the facts of the case





## Regulatory Agencies

- An example of the OFCCP's aggressive enforcement approach is the United Space Alliance case
  - OFCCP sought additional individualized pay data from United Space Alliance as part of a desk audit
  - When United Space Alliance refused to provide the requested data, OFCCP brought an administrative action to compel production
  - After the ALJ ordered United Space Alliance to produce the requested data, United Space Alliance filed suit in District Court challenging the order under the Administrative Procedure Act and the Fourth Amendment
  - The parties have stipulated that OFCCP will not seek enforcement of the ALJ order before October 11, 2011



## Regulatory Agencies

- OFCCP is narrowing what it considers acceptable pay disparity
  - 2 or 2 test for further pay audit; will seek additional information if there is a pay differential greater than 2% or \$2000
  - Consent Decree with AstraZeneca for \$250,000 was based on \$1700 annual average pay disparity between male and female sales specialists
  - OFCCP Federal Register notice proposes new pay data be provided in connection with compliance evaluations



## Regulatory Agencies

- OFCCP Director Patricia Shiu blogged about lessons learned from the AstraZeneca case
  - the need for strong enforcement to solve the gender pay gap
  - the need for good data from employers
  - the need for better regulations regarding pay secrecy
  - and the need to educate workers about their rights and employers about their obligations



## Pay Audits

- What about self-audits?
- Federal contractors and subcontractors covered by Executive Order 11246 are required to conduct self-audit of their pay practices under 41 C.F.R. 60-2.17(b)(3).
- The Lilly Ledbetter Act makes every new paycheck a new cause of action under the Equal Pay Act.



## Pay Audits

- Do consult with counsel
- Do determine that action will be taken to correct any disparities discovered as a result of such audit
- Do conduct the audit under the supervision and direction of counsel in order to protect the audit under attorney-client privilege
- Do review all pay policies, practices, handbooks and any other written documentation in order to be sure the actual practices and the written documentation are aligned



## Pay Audits

- Do designate a person with the responsibility for insuring compliance with pay policies and procedures
- Do implement consequences for noncompliance
- Do monitor pay practices to determine any disparate results and correct as appropriate
- Do review documentation concerning pay actions to be sure the decisions made are supported by performance reviews, disciplinary records and other personnel documents



## Pay Audits

- Do provide data to counsel for transmission to any statistical expert
  - Consider evaluating data on the basis of minority sub-groups
  - Use the 2 or 2 test to identify potential problem areas
  - Review documentation to determine whether pay disparities are based on bona fide business factors
- Do consult with counsel to determine problem areas and corrective measures
- Do keep all data and reports privileged and confidential