

# Wage and Hour

Wage and hour (W&H) exposure is an often misunderstood and frequently underinsured risk. Naturally, a business seeking protection from the catastrophic exposure of W&H violations may look into purchasing Employment Practices Liability (EPL) insurance. However, to their dismay, W&H violations are largely excluded in EPL policies.

What is W&H? It is commonly — and incorrectly — assumed that W&H claims are restricted to either misclassification of exempt/nonexempt employment status or failure to pay overtime. However, W&H liability also includes allegations such as underpayment of overtime, not paying overtime, miscalculating wages, refusing breaks, expecting employees to work off the clock, not paying employees regularly, refusing to pay exempt employees for absences, and following federal minimum wage guidelines when state guidelines warrant higher pay.

When the Department of Labor's Fair Labor Standards Act (FLSA) was passed in 1938, wage and hour claims were born. The law defined which employees were to receive overtime pay (nonexempt) and which were not (exempt). Since that time, W&H claims have risen steadily, with sharp increases starting in 1993 and increasing year over year.

## Recent Claims and Settlement Activity

Multi-plaintiff wage and hour lawsuits are expensive, and they pose a substantial threat to employers today.

- ▶ The number of W&H cases increased 28% in 2015, marking a continued upward trend, with a 58% rise in cases from 2013 to 2015.<sup>1</sup>

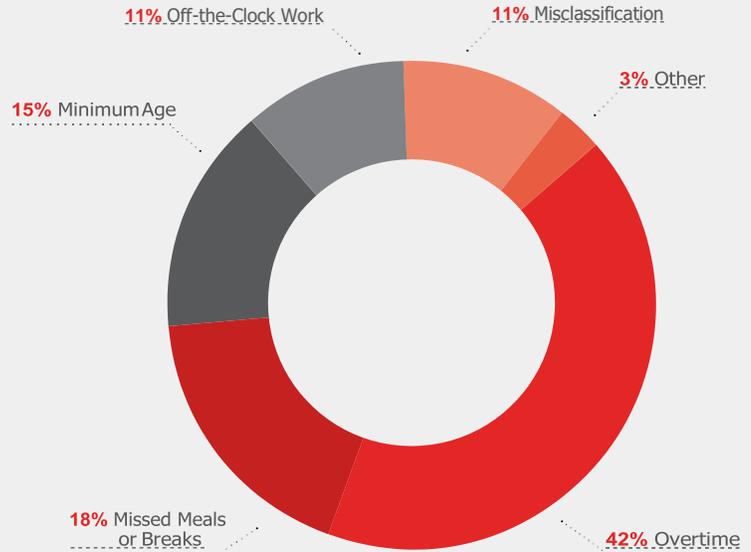
## Sample EPL policy FLSA exclusion

Based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in any way involving any actual or alleged violations of any federal, state, local or foreign wage and hour laws, whether statutory or common law, including without limitation, the Fair Labor Standards Act, including any amendments thereto.

- ▶ Federal court cases filed under the Fair Labor Standards Act (FLSA) in 2015 numbered 8,954. For context, that number is up from 6,793 in 2011, 4,021 in 2005, and 888 in 1990.<sup>2</sup>
- ▶ Some estimates put average settlements between \$1.9 million and \$6.9 million. NERA's overall median settlement amount from 2007-2015 was \$2.2 million.<sup>3</sup>
- ▶ Notable recent settlements include: Brinker Restaurant Corp for \$56.5 million involving 108,000 workers, City of Los Angeles for \$26 million involving 1,074 trash truck drivers alleging they were refused breaks, and Walgreens Co. for \$23 million involving 40,000 workers alleging they were denied overtime and breaks over 7 years.<sup>4</sup>

## MOST COMMON ALLEGATIONS IN WAGE AND HOUR CASES

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Source: NERA

## PLACEMENT CONSIDERATIONS

For the most part, the insurance marketplace has not seen new entrants in the W&H coverage space. Existing carriers have reduced their offerings, including restricted coverage and terms.

### Small to Mid-Sized Businesses

For small and mid-sized employers, generally coverage has been restricted to sublimited defense costs only, with no indemnity for judgments or settlements and even that restricted offering may be unavailable in certain regions and for certain classes of business, such as healthcare, restaurants, and franchisee business.

Currently, the defense costs only sublimits range from \$50,000 to \$150,000 to the small and middle markets. In a small number of cases, employers may be able to negotiate an option to \$250,000. However, carriers have begun pulling back in light of increased focus on W&H legislation and attention from the plaintiff's bar.

In states where the risk is higher, those limits are tightened even further, or not offered. With more than 20 percent of W&H claim cases costing employers over \$1 million and 50 percent costing over \$100,000<sup>5</sup>, the pressure on premiums and availability will continue in the near future.

### Large Businesses

Overseas, with roughly \$100 million in capacity, options for standalone or blended W&H and EPL coverage is still available, though mostly reserved for the Fortune 500 or larger companies. The Bermuda and London markets continue to quote coverage with large retentions and heavy premiums. For smaller companies, standalone W&H is simply not available at an affordable rate.

## Other Solutions

Prevention is always the best line of defense. Therefore, beyond insurance, employers can reduce their risks in a few ways:

- Employers can assess the risk within the company, starting with the State and Local Government Self-Assessment Tool from the U. S. Department of Labor’s Wage and Hour Division
- Review exempt/nonexempt employee classifications regularly and update/revise job descriptions
- Enact policies that prohibit employees from working when off the clock
- Review managerial practices to ensure that supervisors are discouraging work after hours
- Understand the state wage and hour laws, as well as what changes are happening federally
- Consult with outside counsel to assist in navigating the wage and hour field

## BOTTOM LINE

Coverage, while difficult to come by, is available. More often, the right relationship with a wholesale broker that has connections and industry expertise, like CRC Group, can make the difference when it comes to navigating this complex marketplace.

## Endnotes

1. Advisen Ltd., “A Guide to Emerging Wage & Hour Exposures,” <http://www.advisenltd.com/wp-content/uploads/2015/11/emerging-wage-hour-exposures-2015-11-29.pdf>
2. TheDayShift, <http://dayshift.com/2016/01/04/flsa-minimum-wage-overtime-lawsuits-set-new-record-in-2015-filing-growth-continues/1352/>
3. Nera Economic Consulting, Trends in Wage and Hour Settlements: 2015 Update, [http://www.nera.com/content/dam/nera/publications/2015/PUB\\_Wage\\_and\\_Hour\\_Settlements\\_0715.pdf](http://www.nera.com/content/dam/nera/publications/2015/PUB_Wage_and_Hour_Settlements_0715.pdf)
4. Nera Economic Consulting, Trends in Wage and Hour Settlements: 2015 Update, [http://www.nera.com/content/dam/nera/publications/2015/PUB\\_Wage\\_and\\_Hour\\_Settlements\\_0715.pdf](http://www.nera.com/content/dam/nera/publications/2015/PUB_Wage_and_Hour_Settlements_0715.pdf)
5. Advisen Ltd. “A Guide to Emerging Wage & Hour Exposures,” <http://www.advisenltd.com/wp-content/uploads/2015/11/emerging-wage-hour-exposures-2015-11-29.pdf>

xiii The New York Times, “Illegal in Massachusetts: Asking your Salary in a Job Interview” [http://www.nytimes.com/2016/08/03/business/dealbook/wage-gap-massachusetts-law-salary-history.html?\\_r=0](http://www.nytimes.com/2016/08/03/business/dealbook/wage-gap-massachusetts-law-salary-history.html?_r=0)