REPRINT

CD corporate disputes

WAGE-AND-HOUR LITIGATION

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EXPERT FORUM

WAGE-AND-HOUR LITIGATION

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Johanna Tejada, a manager with StoneTurn, has more than 10 years of experience in quantitative analysis in business consulting. She applies her industrial organisation and microeconomics expertise to the fields of labour and employment and antitrust.

CD: Why does wage-and-hour litigation remain resilient even when other employment disputes rise or fall?

Boedeker: Wage-and-hour litigation remains resilient because it is driven by recurring, measurable and often systemic workplace practices. Unlike some employment claims that depend heavily on individual intent or isolated events, wage-and-hour claims often arise from payroll systems, timekeeping rules, meal and rest break practices, overtime classifications, rounding, off-the-clock work, regular-rate calculations and reimbursement policies. These practices apply across large groups of employees, making them eligible for class, collective and Private Attorneys General Act (PAGA)-style litigation. In the US, PAGA is a California statute that allows aggrieved employees to file lawsuits on behalf of the state to recover civil penalties for labour code violations. Even when economic conditions or enforcement priorities change, employers must continuously process time and pay, creating repeated avenues for interpretation. In addition, small per-employee underpayments can aggregate into significant exposure when applied across many workers and pay periods. This combination of objective records, recurring conduct, statutory penalties and group-wide impact helps explain why wage-and-hour litigation remains a durable and active area.

Olson: The maths drives wage-and-hour litigation. A 15 cent per hour timekeeping error is not worth any individual worker hiring a lawyer, but multiply it across a workforce of 2000 over three years, with potential liquidated damages and attorney fees, and you may have a case in the six or seven figures. The Fair Labor Standards Act (FLSA) and its state equivalents were built for collective action enforcement, and the plaintiffs' bar has developed expertise in identifying the systemic practices that support certification of a large group of current and former employees. That combination – a legal 'mass action' process designed for aggregation of claims as a result of one worker's allegations and a bar that knows how to use it – produces a continuing stream of litigation that leverages a potential large-scale result tied to sometimes 'technical' violations of wage-and-hour requirements.

CD: What wage-and-hour issues are currently most likely to escalate into class or collective actions?

Olson: Cases tend to gain traction when there is a uniform employer practice applied across a large group. Right now, timekeeping systems that were not redesigned when work went remote are generating off the clock claims: employees logging in early or staying on after the clock stops. Tip credit and tip pooling disputes are active, particularly in

the seven states that have eliminated the tip credit entirely: Alaska, California, Minnesota, Montana, Nevada, Oregon and Washington. In each of these states, employers must pay tipped employees the full applicable state minimum wage before tips are counted. Multistate hospitality and food service employers who apply a single compensation model across locations are among the most exposed. Rounding and auto-deduction policies are recurring targets because they are by definition uniform, and courts have consistently treated them as the kind of common practice that supports class treatment. Employers who have not gone back and looked at how their systems handle time in a distributed work environment are carrying exposure they probably have not quantified. And, finally, alleged misclassification of workers as independent contractors on a 'group-wide' basis continues to drive wage-and-hour litigation, especially in certain states with ABC tests that determine independent contractor status.

Tejada: The issues most likely to escalate are those tied to common policies or centralised systems affecting many employees. Claims involving timekeeping platforms, payroll coding, scheduling systems or uniform company policies are especially likely to support class or collective treatment because they could be evaluated across groups of workers. Common examples include overtime misclassification, automatic meal-period deductions, rounding and time-shaving practices, regular-rate calculation errors, unreimbursed business expenses, and failure to properly account for pre- or post-shift activities. These claims are especially litigation-prone because the alleged violation is not limited to one supervisor or one employee; it often reflects a repeatable rule, system setting or pay practice. In California, meal and rest break, wage statement, waiting-time penalty and PAGA theories can further increase exposure when the same issue recurs across pay periods.

"The rise of hybrid work has complicated wage-and-hour compliance because many labour laws consider home and office equally. This has expanded the settings in which compensable time disputes arise."

Johanna Tejada, StoneTurn

CD: How are state level wage-and-hour laws influencing litigation strategy nationwide?

Boedeker: State-level wage-and-hour laws dictate the minimum wage, overtime thresholds, break times and pay frequencies for employees within a specific jurisdiction. When state laws offer greater protections than federal standards, such as a higher minimum wage, the state laws take precedence. State-level wage-and-hour laws are increasingly shaping litigation strategy because they often provide broader remedies, longer limitations periods, stricter technical requirements or more plaintiff-friendly enforcement mechanisms than federal law. California remains especially influential because PAGA allows representative claims based on repeated Labor Code violations, but other states are also expanding wage protections and enforcement tools. As a result, wage-and-hour strategy is not just driven by the FLSA. Employers with multistate workforces must assess exposure state by state, while plaintiffs often structure claims around the jurisdictions, subclasses and statutory penalties that create the greatest leverage.

Olson: Multistate employers know that FLSA compliance is an incomplete focus in certain states, including California, New York and Illinois.

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> *Stefan Boedeker, StoneTurn*

Each of those states imposes its own requirements on overtime, meal and rest breaks, independent contractor status definitions, and pay frequency that go well beyond federal law, and state claims are commonly brought alongside federal ones, which affects damages calculations and venue decisions. Some states, like California and New York, have strengthened wage theft statutes with fee-shifting and penalty provisions that make even a modest underlying claim expensive to resolve. Where your employees are located will shape litigation strategy. A practice that is fully FLSA-compliant can still

generate significant monetary exposure under certain state laws.

CD: How has remote and hybrid work reshaped compensable time and off the clock claims?

Olson: The physical boundaries that used to define the workday are less visible in most remote and hybrid work relationships. When people work from home, the line between on the clock and off blurs in ways that are hard to monitor and harder to defend. Logging into systems before officially starting, answering messages after hours, handling brief tasks that would have been invisible in an office, while taking time off for personal or family time intermittently throughout the workday creates new challenges for employers and employees. Under the FLSA's suffer-or-permit standard, if an employer knows or should know that an employee is working, that time is generally compensable. Authorisation is not the determining factor. However, the employer's actual or constructive knowledge is. A written policy prohibiting unauthorised overtime, paired with genuine managerial enforcement and a credible reporting mechanism, can limit liability even when off the clock work occurs, because courts have held that an employer who takes reasonable steps to prevent unauthorised work is not required to pay for work it had no reason to know was happening. Employers who have that infrastructure in place are in a materially better position than those relying on policy language alone.

Tejada: The rise of hybrid work has complicated wage-and-hour compliance because many labour laws consider home and office equally. This has expanded the settings in which compensable time disputes arise. Instead of focusing only on activity at a worksite, litigation now often examines log-in time, system boot-up time, after-hours emails or messages, work performed during unpaid breaks, travel between locations, home-office setup and whether managers knew or should have known that employees were working outside recorded hours. These claims can become significant when digital records, such as VPN logs, timekeeping entries, chat activity or productivity software, suggest a mismatch between hours worked and hours paid. Remote work also makes boundaries less clear: tasks before or after a shift may become recurring unpaid work across many employees. As a result, employers face greater pressure to define compensable work, train supervisors and ensure timekeeping systems capture all work performed.

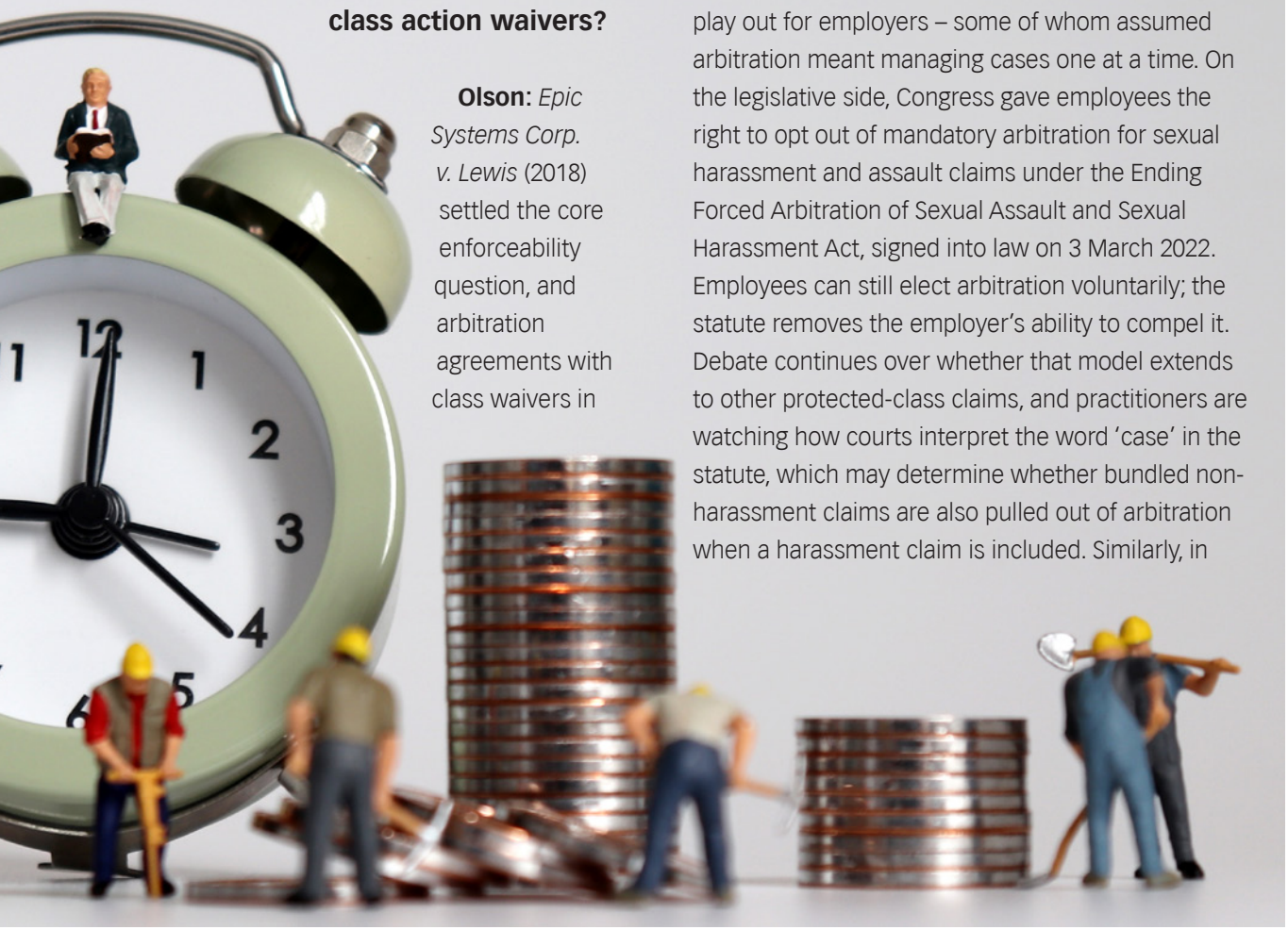
CD: What litigation risks continue to arise from worker classification and independent contractor models?

Boedeker: Worker classification determines whether a worker is an employee or an independent contractor. The main difference is that employees receive minimum wage, overtime pay and other benefits under the FLSA. Independent contractors lack these protections and are generally responsible for their own taxes and equipment. Worker classification remains a major litigation risk because it determines whether workers are entitled to overtime, minimum wage, meal and rest breaks, expense reimbursement, payroll taxes, unemployment insurance, workers' compensation and other statutory protections. Independent contractor models are especially vulnerable when workers are economically dependent on the company, perform core business functions, follow company-controlled schedules or procedures, use company systems or lack meaningful entrepreneurial opportunity. Plaintiffs may also combine wage claims with tax, benefits, record-keeping and reimbursement theories, increasing exposure. Multistate employers face added risk because classification tests vary by jurisdiction, with some states applying stricter standards than federal law.

Olson: Classification exposure has been building for years and the regulatory picture is still unsettled. The Department of Labor's (DOL's) 2024 rule reinstated an economic reality test that weighted multiple factors in ways that pushed more workers toward employee status. The current administration has since proposed a 2026 rule to rescind that standard and restore a modified version of the 2021 framework, which elevated control and opportunity as the two core classification factors and was generally regarded as a more balanced and certain test. The comment period on the DOL's 2026 proposed regulation closed on 28 April 2026. The net effect of this back and forth is that classification decisions employers made under one regulatory regime may be tested under a different one, and the direction of any given cycle is not predictable. Organisations that treated the 2021 or 2024 standards as settled answers should be conducting fresh reviews regardless of which framework ultimately takes effect. Several states go further regardless of where federal rules land. For example, California, Massachusetts and New Jersey apply ABC tests that presume employment unless employers can satisfy all three ABC prongs. Any business using contractors for work central to what it actually does should be conducting regular classification audits. Misclassification findings tend to bring back pay, overtime, benefits liability and tax exposure together,

often with state penalty multipliers on top of those calculations.

CD: How are plaintiffs and employers adjusting their strategies around arbitration and class action waivers?



Olson: *Epic Systems Corp. v. Lewis* (2018) settled the core enforceability question, and arbitration agreements with class waivers in the context of wage-and-hour claims are now widespread. What has evolved is how both sides approach them. On the employee side, coordinated individual arbitration filings have emerged as a way to pursue claims at scale and practitioners are watching closely how the per-filing cost structures play out for employers – some of whom assumed arbitration meant managing cases one at a time. On the legislative side, Congress gave employees the right to opt out of mandatory arbitration for sexual harassment and assault claims under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, signed into law on 3 March 2022. Employees can still elect arbitration voluntarily; the statute removes the employer's ability to compel it. Debate continues over whether that model extends to other protected-class claims, and practitioners are watching how courts interpret the word 'case' in the statute, which may determine whether bundled non-harassment claims are also pulled out of arbitration when a harassment claim is included. Similarly, in

California, for example, litigation continues over whether such an agreement bars a worker from filing a 'representative-only' PAGA lawsuit. When structuring their agreements, employers need to think carefully about fee structures, carve outs and the practical economics of volume before treating arbitration as a complete answer.

Tejada: Plaintiffs and employers are increasingly treating arbitration agreements as a central strategic issue, not just a procedural defence. Employers continue to use arbitration provisions and class action waivers to limit class or collective exposure, but plaintiffs often challenge enforceability based on notice, consent, unconscionability, carve outs, delegation clauses or failure to follow arbitration rules. Plaintiffs may also pursue representative or public-enforcement theories where available, file coordinated individual arbitrations or focus on claims that fall outside the waiver. Employers, in turn, are revising agreements to address mass arbitration risk, clarify covered claims, update opt-out procedures and ensure consistent rollout and record-keeping. As a result, arbitration strategy now affects case valuation, forum selection, settlement leverage and whether disputes proceed individually, collectively or through representative mechanisms. One frequent criticism of class action waivers is that they often restrict legal leverage, making it difficult to pursue low-value claims, like small overcharges, because the cost of an individual arbitration outweighs the potential recovery, and thus favour businesses by effectively limiting massive corporate liability by avoiding large, unpredictable jury verdicts.

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> *Camille A. Olson, Seyfarth Shaw LLP*

CD: Looking ahead, where are organisations most likely to underestimate wage-and-hour exposure?

Boedeker: Organisations often underestimate exposure when minor, recurring pay issues scale across large workforces. In fact, the need to strictly adhere to often complex federal and state laws can turn minor systematic miscalculations into

potentially devastating financial liability. Common blind spots include remote-work timekeeping, off the clock work and improper regular-rate calculations. Routine system settings, such as automated rounding, auto-deductions or bonus coding, and digital footprints like VPN or chat logs can prove systemic violations over many pay periods. Multistate employers face heightened risk when applying national policies to jurisdictions with unique state-level requirements for wage statements or reimbursements. Additionally, the adoption of AI-driven productivity monitoring introduces new compensable time risks. Algorithms tracking active versus idle time may inadvertently exclude periods where employees are engaged to wait. These automated systems create a single point of failure that can trigger company-wide collective actions. Ultimately, the greatest exposure stems from routine practices that appear minor until aggregated across employees and statutory penalty frameworks.

Olson: Organisations often treat compliance as a project with a completion date. Employers fix what they found in the last audit and move on. But the workforce changes, state laws evolve and expand employer obligations, and internal practices may drift, usually without triggering a fresh review. A few areas worth watching include timekeeping tools that edit or round time entries in ways that have not been examined against the suffer-or-permit standard, acquired workforces where wage-and-hour due diligence got skipped or rushed, worker classification – especially around evolving business practices and laws – and exempt classifications that were defensible when everyone worked in an office but may look different now that duties have shifted under hybrid arrangements. The FLSA duties tests have not changed, but the facts on the ground have. Organisations should consider building in regular review cycles to ensure that they are adjusting their policies and practices before a compliance gap is exposed in litigation. CD