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THE **HOSPITALITY LAW**
CONFERENCE

FOCUSING ON LEGAL, SAFETY & SECURITY SOLUTIONS

FEBRUARY 10th - 12th, 2014

VEXING ISSUES IN FLSA CLAIMS

-Sherril M. Colombo & Bruno W. Katz-

Full-service and leading defense litigation law firm with 25 offices in the United States

**Ranks among the top 100 law firms identified by *The American Lawyer* and included in the top 50 of *The National Law Journal*'s survey of the nation's largest law firms
Hospitality Practice Group is nationwide and multi-disciplined**



- **Sherril M. Colombo, Partner-Miami**
 - Board-certified specialist in labor and employment law
 - Chair of the Executive Council for the Labor & Employment Law Section of the Florida Bar
 - President-elect of the Miami-Dade Chapter of the Florida Association of Women Lawyers



- **Bruno W. Katz, Partner-San Diego**
 - Litigation experience includes labor and employment, professional liability, corporate litigation and complex, multi-party litigation.
 - Preferred counsel for the California Restaurant Association
 - CAPT, U.S. Navy Reserves-Litigation Practice Group Leader

FAIR LABOR STANDARDS ACT (FLSA)

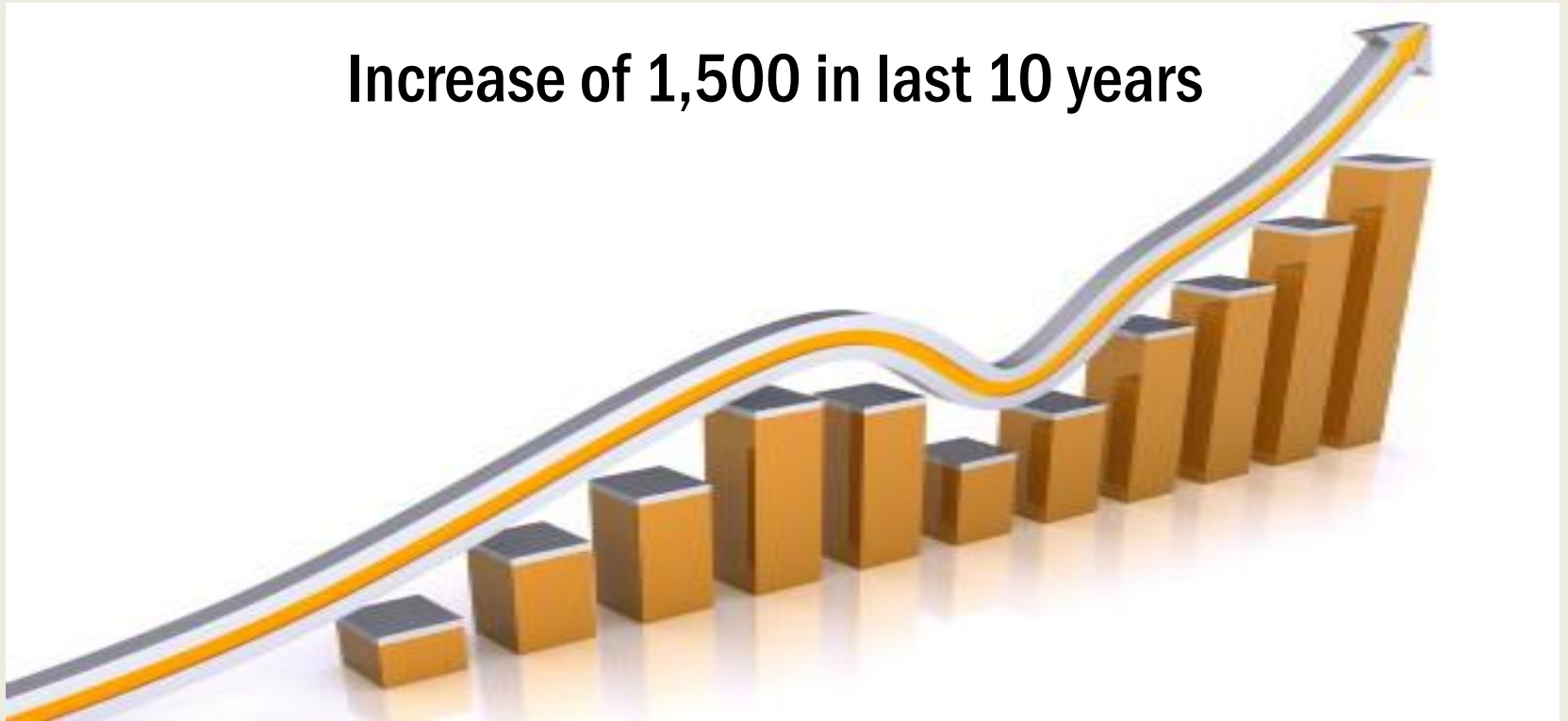
- National workweek and overtime
- National minimum wage (\$7.25)
- Exemption from Overtime
- Prohibit “Oppressive Child Labor”

WARNING: States can implement more onerous standards.

GROWTH OF FLSA LAWSUITS

FLSA Filings Exceed 7,000

Increase of 1,500 in last 10 years



WHY INCREASE IN FLSA LITIGATION?

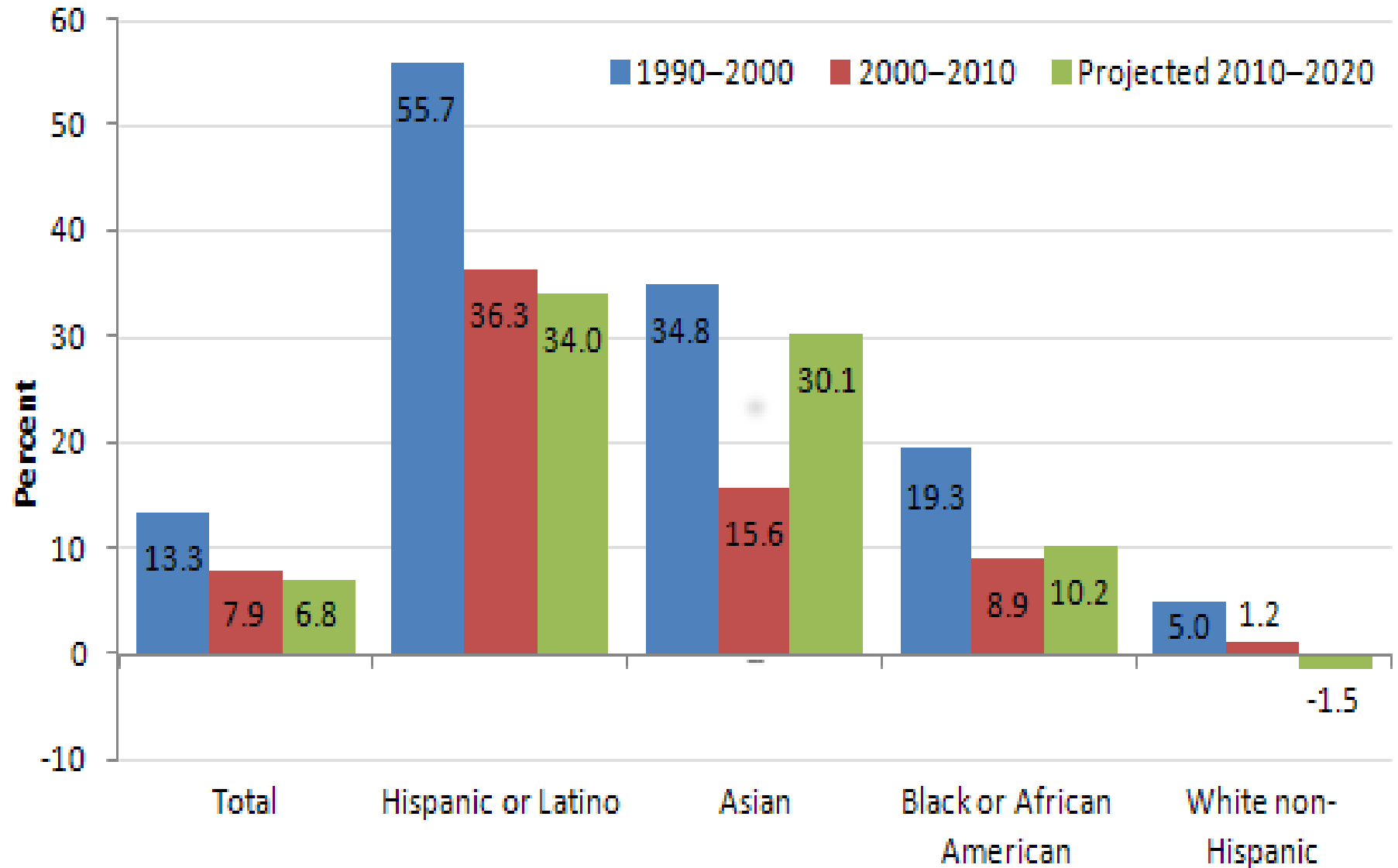
- **Not Exempt From Overtime**
- **Technical nature of the statutes – employers don't understand them**
- **Focus of labor organizations**
- **Lenient class requirements**
- **Lenient evidentiary requirements**

DEPARTMENT OF LABOR

- **The Department of Labor (DOL) is gearing up for an aggressive enforcement agenda and has endorsed an increase in resources to investigate wage and hour claims.**



Percent change in civilian labor force by race and ethnicity, 1990 to 2000, 2000 to 2010, and projected 2010 to 2020



Source: U.S. Bureau of Labor Statistics

TIPPED EMPLOYEES UNDER FLSA

- **Not Exempt from Overtime**
- **“Customarily and Regularly” Receive More than \$30 per Month in Tips**
- **Employer May Not Share in Tips**
- **Employee Cannot Consent to Employer Sharing**

WHAT IS A TIP CREDIT?

- **Allows Employer to Pay Less than Federal Minimum Wage on the Assumption that the Employee will Make up the Difference in Tips**
- **Prior Notification Must be Given to Employees Employer May Not Share in Tips**
- **Employee Must be Allowed to Retain All Tips, except when a Valid Tip Pooling Arrangement exists.**

WHAT IS A TIP POOLING?

- **FLSA Allows Tip Pooling – contributing tips to a general pool that is shared among other employees who customarily and regularly receive tips.**
-29 U.S.C. § 203(m); 29 C.F.R. § 531.54

REQUIREMENT FOR VALID TIP POOL?

- Participating employees are engaged in an occupation in which the employee customarily and regularly receives more than \$30-a-month in tips.
- Occupations that typically meet the requirement - waiters and waitresses, bellhops, buspersons, service bartenders and counter personnel.
- Gray areas include hosts, hostesses, seaters, coffee servers, Maitre D's, among others .
- Customer interaction and work that is likely to be tipped are factors.
- But no explicit requirement in the tip credit provision that employees participating in the tip pool interact directly with customers. 29 U.S.C. § 203 (m).

REQUIREMENT FOR VALID TIP POOL?

- Only those tips that are in excess of tips used for the tip credit may be contributed to the pool (the employee cannot be required to pay any part of the tips the employer is counting towards the minimum wage into a tip pool).
- Tipped employees cannot be required to contribute a greater percentage of their tips than is customary and reasonable
- Management can require employees to participate in the tip pool, but must inform the employees of the FLSA's tip pooling provisions.
- Employers are not permitted to share in the pool, including owners, managers, or supervisors.

TIP POOLING CASES/SETTLEMENT

Schmidt v. Smith & Wollensky

- Class certification was granted to tipped workers
- Employees allege the employer did not comply with the FLSA tip credit in that the employer required servers to share tips with expeditors, dishwashers, silver polishers and coffee makers and included a manager in the tip pool

TIP POOLING CASES/SETTLEMENT

- **\$3.1 million settlement by Sparks Steak House paid to its waiters to settle a tip pool lawsuit.**
- **Nobu settles waiters' lawsuit for \$2.5 million. Two waiters sued on behalf of hundreds of workers at three Nobu restaurants claiming they were forced to share tips with management and the restaurant did not pay overtime claims.**
- **Hard Rock workers claim tips were shared with order expeditors in the kitchen. Case is brought under Florida's Minimum Wage law.**
- **Hard Rock was also sued under the FLSA for alleged tip pooling violations – allegations are that the wait staff was paid an hourly rate less than the federal minimum wage and employees had to pay a portion of their tips to non-wait staff.**

TIP POOLING-HOURLY WAGE

Cumbie v. Woody Woo, Inc. (Ninth Cir. 2010)

ISSUE: Does FLSA allow tip pooling arrangements when no tip credit was taken?

Yes-Key: The employer paid the servers an hourly wage equal to, or more than, the state minimum wage so it was not taking the tip credit; thus enabling it to include “customarily” non-tipped staffers in the pool

However, DOL issue 2011 regulations that stated such arrangements are not permitted involving employees who do not customarily receive tips. Enforcement commences in 2012.

SO . . .

TIP POOLING-HOURLY WAGE

Oregon Rest. And Lodging Assn. v. Solis (Dist Ct. Oregon 2013)

ISSUE: Did DOL regulations exceed authority with its tip pooling regulations?

-YES-Section 203(m) of FLSA only imposes conditions on employers that take a tip credit.

DOL plans to APPEAL

SERVICE CHARGE

- Under the FLSA, a mandatory service charge is not a "tip" because customers are not given the discretion to determine whether to pay it or how much to provide to the server.
- The owner may retain the service charge, and decide whether to distribute some, or any, to an employee as long as the employee earns at least the minimum wage for all hours worked.

TIP – WAGES?

AS OF JANUARY 1, 2014, IRS RULE CLARIFY:

- Tip-not subject to tax withholding if customer:
 - 1) free from compulsion
 - 2) unrestricted right to determine amount
 - 3) payment not subject to negotiation or dictated by employer policy
 - 4) customer can dictate recipient

AUTOMATIC GRATUITIES – WAGES!

AS OF JANUARY 1, 2014, IRS RULE SAYS:

- **Mandatory Service Charges are subject to tax withholding because customer:**
 - 1) not free from compulsion
 - 2) no unrestricted right to determine amount
 - 3) payment not subject to negotiation or dictated by employer policy
 - 4) customer cannot dictate recipient

SERVICE CHARGE AS WAGES

- **Must be included in employee's regular rate of pay**
- **Changes overtime calculation (some states like California daily overtime)**
- **Higher risk of underpayment of wages to employee**

OPTION AS TO SERVICE CHARGES

- Indicate “suggested gratuity” on customer’s receipt
- Charge sales tax on all service charges
- Eliminate all service charges and automatic gratuities
- **NEED TO CONSULT TAX ADVISOR OR ATTORNEY TO DETERMINE PROPER METHOD OF TAXING**

MISCLASSIFICATION OF EXEMPT

- **Definition: Covered employees under the FLSA who are exempt from overtime, minimum wage and record-keeping requirements.**
- **White Collar Exemptions – executive, administrative, professional and highly compensated workers.**
- **Salary Basis – paid the full salary for any week in which the employee performs any work, regardless of the number of days/hours worked.**

EXECUTIVE EXEMPTION

- Salary is at least \$455 per week;
- Primary duty is managing the business or a customarily recognized department or subdivision of the business;
- Customarily and regularly direct the work of at least two other full time employees or their equivalent and
- Must have authority to hire and fire or the recommendation relating to hiring, firing, advancement, promotion or other change of status must be given particular weight.

ADMINISTRATIVE EXEMPTION

- Salary is at least \$455 per week;
- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and
- Primary duties include the exercise of discretion and independent judgment with respect to matters of significance (i.e. human resources managers, accountants, purchasing agents, team leaders)

PROFESSIONAL EXEMPTION

- Salary is at least \$455 per week;
- Primary duty is the performance of work requiring advanced knowledge predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning (i.e. law, medicine, accounting, engineering, architecture, **chefs with academic degree in culinary arts**); and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

HIGHLY COMPENSATED EXEMPTION

- **Receives compensation of at least \$100,000 per year;**
- **Salary at least \$455 per week;**
- **Primary duty involves office or non-manual work and**
- **Customarily and regularly performs at least one of the exempt duties or responsibilities of an executive, administrative or professional employee.**

INDEPENDENT CONTRACTORS

- **Self-employed worker hired to perform services for another company**
- **Controls the manner and means of the services performed**
- **Responsible for his/her own taxes**

LEASED EMPLOYEE

- **Worker paid by an employee leasing company (e.g., temp agency, PEO) to perform services for a client of the leasing company**
- **May be common law employees of the client company**
- **May be common law employees of leasing and client companies under “joint employment”**

TEMPORARY EMPLOYEE

- **Worker performing services for company on short-term basis, often working on particular project**
- **Temporary employee may be independent contractor, a leased employee or regular (short-term employee)**

CONTRACTOR OR EMPLOYEE?

- An Independent Contractor, (1099 contractor) is considered “self-employed” and not an employee of a business.
- The 3 common factors recognized by the IRS for classifying as an IC are:
 - 1) Does the employer control or have the right to control what the worker does or how they do their job?
 - 2) Are the financial aspects of the job (expenses, how the worker is paid, who pays for the tools) determined by the employer or the worker?
 - 3) Employment benefits – does the worker receive vacation, insurance, pension, etc – and will the relationship continue after the work is performed?

FEDS CRACKDOWN ON INDEPENDENT CONTRACTORS

- **\$7 billion in lost employment tax revenue over next 10 years**
- **Federal budget proposes increased spending on DOL**
- **General Accounting Office study found 30% or more of businesses misclassify workers as independent**
- **U.S. Bureau of Labor Statistics estimates there were 10.3 million workers treated as independent contractors in 2009**

MISCLASSIFICATION AND THE PARADE HORRIBLES

- **Federal Tax Liability for Misclassification (unintentional) and (intentional)**
- **Applicable state and local taxes/penalties**
- **Wage and Hour Issues including attorneys' fees**
- **Work-Related Expenses**
- **Health, Pension and Other Employee Benefits**

INDEPENDENT CONTRACTOR MISCLASSIFICATION LAW

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Payroll Fraud Prevention Act Proposed:

- Expand FLSA to include non-employees
- Create new federal labor offense
- Notice to all workers as to classification given-directing them to DOL website
- Penalties \$1,000 up to \$5,000
- Stronger presumption in favor of employee
- Elimination of “safe harbor” in Section 530 Revenue Act of 1978

OTHER ISSUES

- **On-call Issues**
- **Don and Doffing Issues**
- **Split Shifts/Piece Meal Work**
- **Child Labor Laws**

PREVENTION STRATEGIES

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DEFENSE STRATEGIES

- **Work week**



by Work week

- **Person**



by Person

- **Individual claims not appropriate for class or collective action**



PREVENTION

- **Assess exposure and turn off the spigot of potential damages**
 - **Isolate and eliminate practices considered to be suspect**



PREVENTION

Routine Internal & External Audits

**Audit not just to legal requirements
but to plaintiffs' allegations and
"evidence"**

**Require employee sign-off and
certification**

PREVENTION

**Employee training & interviews as
part of audits**

Don't keep employees in the dark

**Enforce wage & hour practices
with disciplinary action if
necessary**

PREVENTION

Create a culture of compliance

**Managers and supervisors must
be held accountable for
compliance**

**HR and Finance must drive
compliance together**

THE END RESULT

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BENEFITS OF PREVENTION

- **Productivity is Higher**
- **Morale is Higher**
- **Business Success is Higher**
- **Liability is Lower**

THE ADDITIONAL BOTTOM LINE!

LEADERSHIP IS THE KEY

Perfect Employee Communications Become Essential



**THANK YOU
FOR ATTENDING!**