

HOSPITALITYLAWYER.COM PRESENTS
**THE 2010 HOSPITALITY LAW
CONFERENCE**
FOCUSING ON WORLDWIDE LEGAL, SAFETY & SECURITY SOLUTIONS
FEBRUARY 3-5, 2010 • HOUSTON, TEXAS

Wage & Hour Class Action Update By Bruno Katz

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- **Bruno W. Katz-Shareholder**
- **Named as one of the Top 20 Lawyers under 40 in the State of California in 2003**
- **Active Member of California Hotel & Lodging Association and California Restaurant Association**
- **Member of Global Alliance of Hospitality Attorneys**
- **Frequent Lecturer on employment practices, liability issues and other risk management matters**

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How Do I Sue Thee?
Let Me Count The Ways!
Sexual Harassment
Negligence
Liability
Wrongful Termination
OSHA
RICO
MEAL BREAKS

Overtime Violations
Discrimination

Wage & Hour

Family & Medical Leave
Intentional Infliction of Emotional Distress
Uniforms
Wrongsful or Abusive Discharge
Retaliation

BREACH OF CONTRACT

Exempt/ Non-Exempt
Racial Discrimination

ADA

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Minimum Wage

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Recent FLSA Wage-Hour Settlements and Verdicts

Farmers Insurance:	\$220 million for 2,400 workers
Albertsons:	\$37 million for 80,000 workers
Rite Aid:	\$25 million for 3,000 workers
Bank of America:	\$22 million for 6,000 workers
Coca-Cola:	\$20 million for 1,500 workers
Shoney's:	\$18 million for 20,000 workers
UPS:	\$18 million for 6,000 workers
Taco Bell:	\$13 million for 3,000 workers

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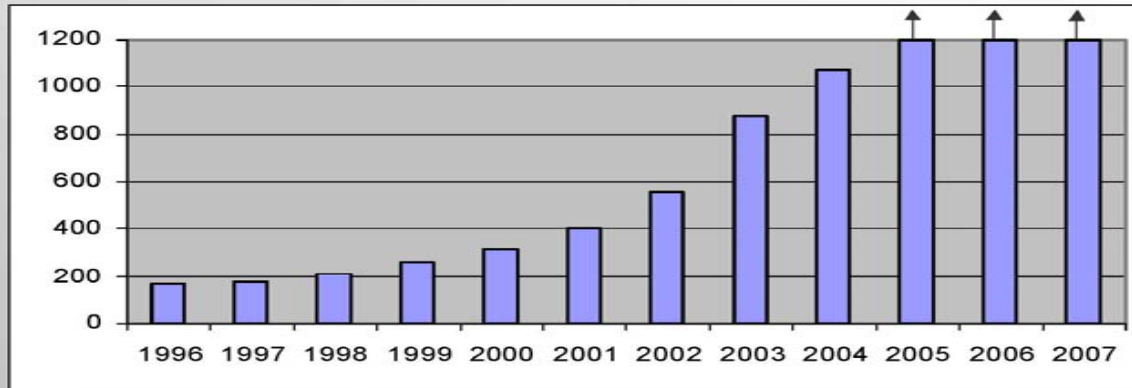
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New FLSA Collective Actions Filed Since 1996



Why the Increase in FLSA Litigation?

- Highly lucrative for plaintiff's bar
- Liquidated damages, punitive damages and huge attorney fees
- Technical nature of the statutes – employers don't understand them
- Focus of labor organizations
- Lenient class requirements
- Lenient evidentiary requirements

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Class Action Procedural Issues



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FRCP Rule 23 vs. FLSA 216(b)

Class Action

FRCP Rule 23 is opt-out

Collective Action

FLSA 216(b) is opt-in

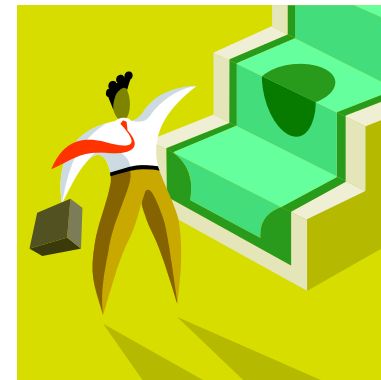
FRCP Rule 23 Requires

- **Numerosity**
- **Commonality**
- **Typicality**
- **Adequacy**

FSLA Section 216(b)

2-step certification process:

- **Conditional Certification & Notice**
 - “similarly situated”
- **Decertification**
 - Burden on defendant after discovery



Statutes of Limitations

- **Rule 23 tolled for all putative class members when complaint filed**
- **Sec. 216(b) not tolled until individual opt-in filed**
- **2 year limit period under FLSA, 3 if willful violation**
- **Some states have longer periods e.g. 6 in NY, 4 in CA if willful**

State & Local Laws

WARNING: State & local laws may be different and afford more protection for employees. National employers need to adjust their local policies to comply.

Banquet Service Charge

In Massachusetts (by statute) and New York (by case law), no portion of the service charge may be distributed outside the non-supervisory employees performing the service.

No 7(i) Commissioned-Employee Exemption in California, Hawaii & Nevada.

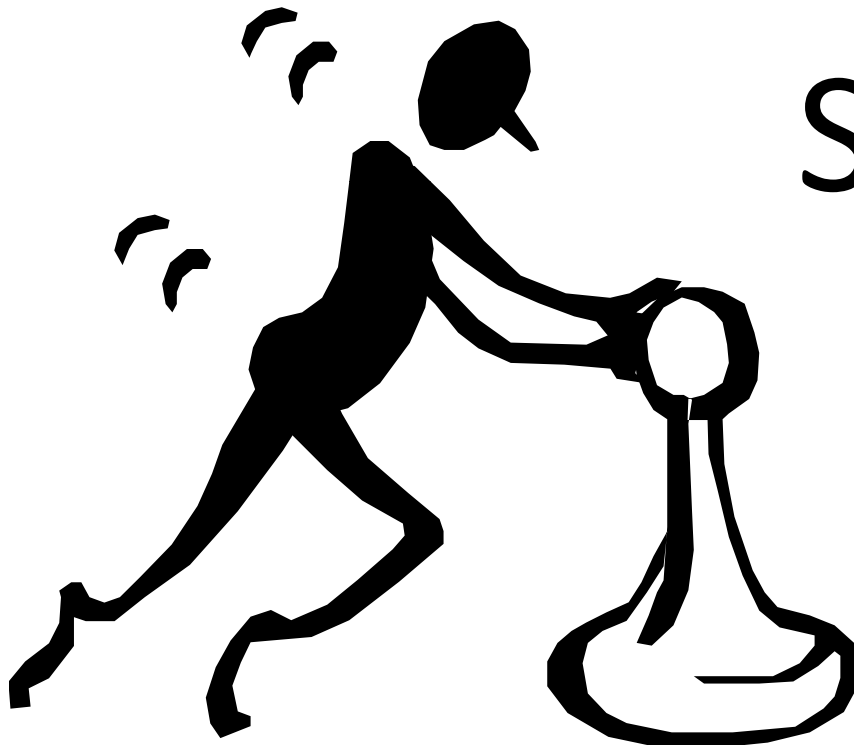
CALIFORNIA MEAL BREAKS

- » 30 minutes for every 5 hours worked
- » Must start between the 3rd and 5th hours
- » Must be uninterrupted



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Defense Strategies



Defense Strategies

- **Work week**



by Work week

- **Person**



by Person

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

Defense Strategies

**What do you do when served with
a putative class action
complaint?**



Defense Strategies

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



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Defense Strategies

- **Secure the workplace**
 - Document & information preservation
 - Communication strategy to employees
 - Avoid retaliation claims

Defense Strategies

- Obtain affidavits of current and former employees and other evidence of compliance



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Defense Strategies

Hire Experts Early



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Defense Strategies

- **Attack credibility & efficacy of class representatives' claims and evidence**



Defense Strategies

Offsets to plaintiffs' claims



- Wage & Hour Enforcement Officers will tell you that there are **PLUSES** or **MINUSES**

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Defense Strategies

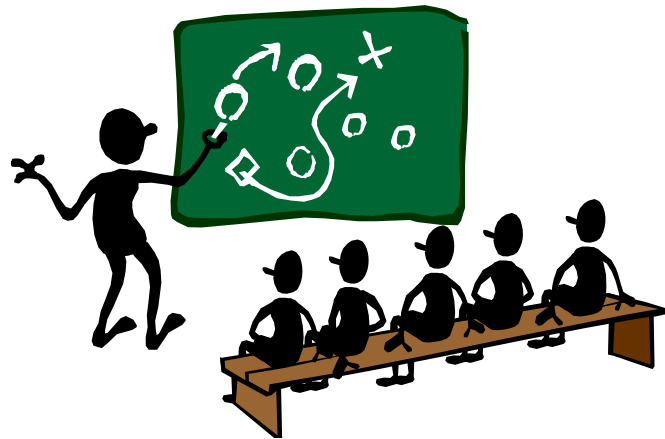
- **Plaintiffs' lawyer conduct**

Champerty & Barratry



Defense Strategies

**Determine strategy and tactics early
and then implement**



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Prevention

equals

AUDIT

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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**

PREVENTION

Compliance plan, including audits, should be synergized with your other practices, procedures & policies



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Prevent

Strategize



Control

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THE END RESULT



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CASES TO WATCH 2010

Brinker Restaurant Corp. v. Superior Court;
Brinkley v. Public Storage, Inc. (California
Supreme Court)

-ISSUE: Does Requirement For Employers To
Provide Meal and Rest breaks mean must
ensure breaks actually taken?

CASES TO WATCH 2010

[Sullivan v. Oracle](#) (California Supreme Court)

-ISSUE: Does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state employees such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week?

CASES TO WATCH 2010

[Whalen et al v. JPMorgan Chase & Co](#)

(Second Circuit Court of Appeals)

-ISSUE: What is the breadth of the language of the 2004 Department of Labor revisions to the FLSA administrative exemption?

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Questions

