

FLSA Litigation (including collective actions)



Edwin Sullivan
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3557
ed@osattorneys.com

Board Certified -- Labor and
Employment Law -- Texas Board
of Legal Specialization



Purpose of FLSA?

- Depression era
Statute meant to regulate hours of work
- Eliminate substandard pay through minimum wage requirements



Covered Employers?

- 2 or more employees who handle goods in interstate commerce; and
- Have gross annual sales of at least \$500,000



Covered Employees?

- In general, an employee is any individual who is “suffered” or “permitted” to work for an employer
- Does not include bona fide independent contractors, volunteers, and trainees



Common Lawsuits

- **Misclassification Cases.** Employee claims that employer improperly classified him (a) as exempt; or (b) an independent contractor
- **Off-the-clock Cases.** Employee claims that employer did not pay him for all of his hours worked.

Statute Of Limitations

- 2 years
- If a cause of action arises out of a “willful violation,” then 3 years

Damages?

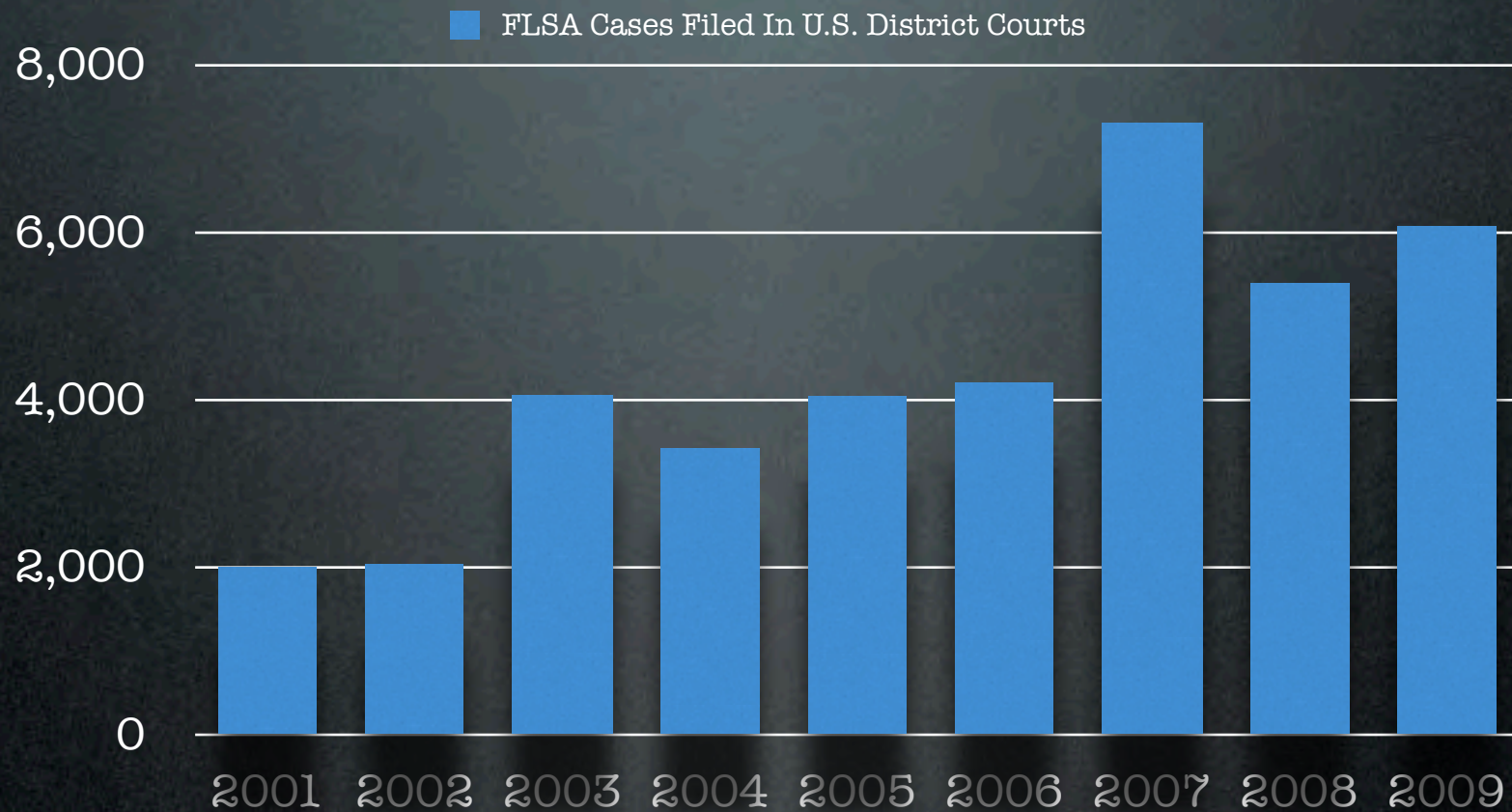


- Unpaid wages
- Liquidated damages in an amount equal to unpaid wages
- Reasonable attorneys' fees

Burdens?

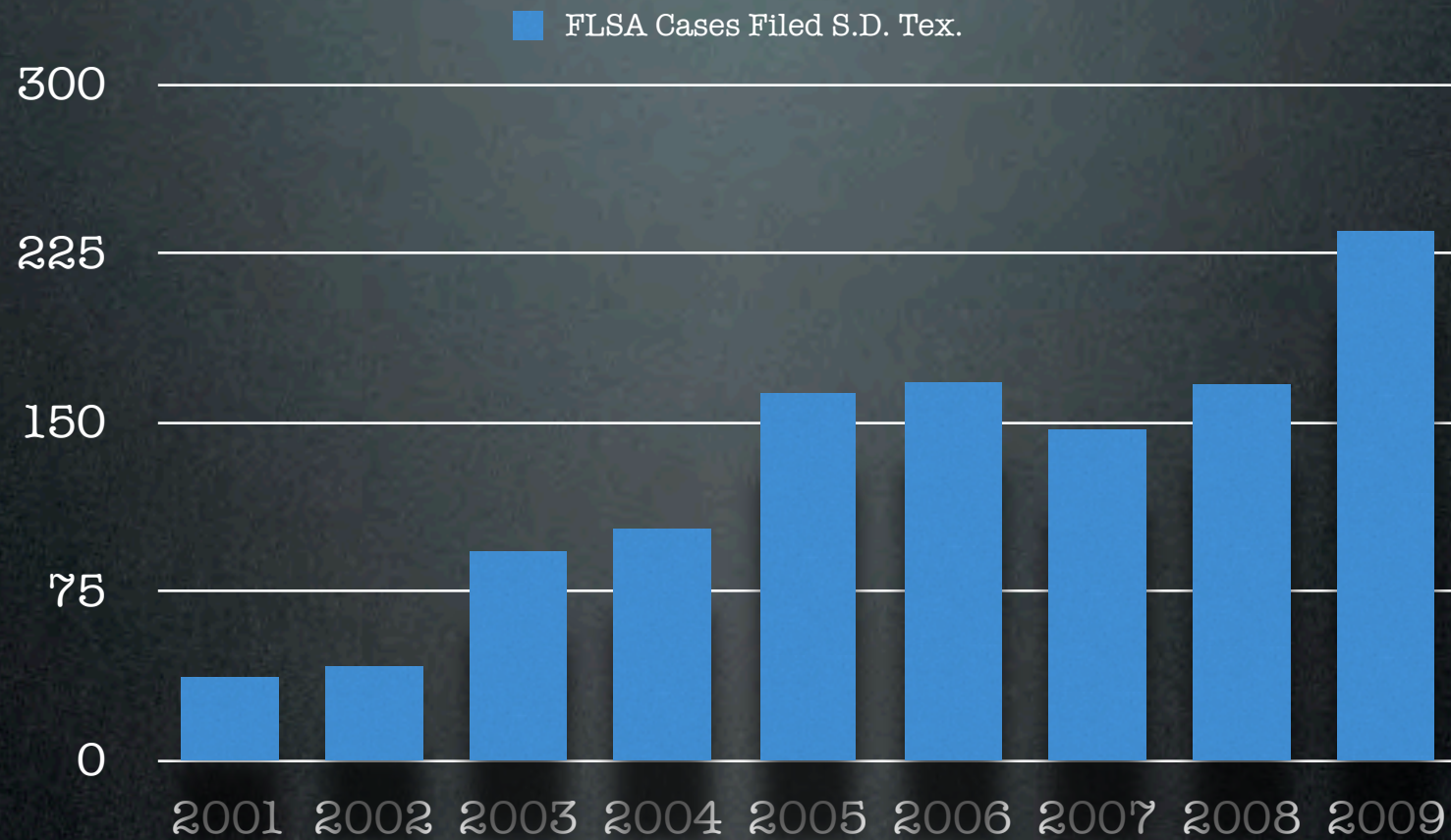
- **For Non-Exempt Employees** - Employer must keep track of hours worked
- **For Exempt Employees** - Employer must plead and prove entitlement to an exemption

The Great Overtime Discovery



Source: Administrative Office of the U.S. Courts

The Great Overtime Discovery



Source: PACER

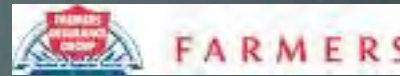
Settlements And Verdicts



\$10 Million



\$7 Million



\$210 million



\$25 Million



\$30 Million



\$8 Million



Great Atlantic &
Pacific Tea Co.
\$3 Million



\$25 Million



\$18 Million



\$1 Million



\$135 million



Pacific Bell:
\$35 Million



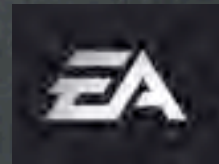
\$20 Million



\$5.1 million



\$89 million



\$14.9 million



\$18 million

March 21, 2008



- \$110 million verdict
- Previously had an \$18 million verdict

Litigation Points

- This is an employee friendly statute
- Plaintiff does not have to prove intent
- Defense lawyers must evaluate liability early and advise client of potential risks



Employer Must Pass 3 Tests To Claim Exemption

- **Salary Basis Test.** Employee receives a predetermined amount of compensation not reduced because of the quantity or quality of work
- **Salary Level Test.** Employee earns a minimum of \$23,660 annual salary (\$455 per week)
- **Duties Test.** Is the person actually working in a bona fide executive, administrative, professional, or outside sales capacity. **Job titles are irrelevant.**

Job Duties of Exempt Employees

- Executive
- Administrative
- Professional
- Outside Sales
- Highly Compensated Employees

Issues In Misclassification Cases

- Employers cannot rely on a job title
- Lawyers should drill down on the actual job duties
- CLIP



Executive Exemption

- Typical question. Does the employee have authority to hire/fire/change status of other employees (or does he/she have particular weight in helping make those decisions)
- CLIP



Administrative Exemption

- Trap for the unwary
 - Office or Non-Manual Work directly related to management of the enterprise
 - “Discretion and independent judgment with respect to matters of significance”
 - Are employees allowed to fail?
 - CLIP



Issues In “Off-the Clock” Cases

- “Pre-shift” and “Post-Shift” time - was the employee actually working?
- Did you keep track of the employee’s time?
- CLIP



Collective Actions?

- “An action ... may be maintained ... by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”
- “No employee shall be a party to any such action unless he gives his consent in writing to become such a party and such consent is filed in court in which such action is brought.”

29 U.S.C. § 216(b)

Collective Action vs. Rule 23

- Rule 23 is mostly opt-out. Collective actions are opt-in.
- Rule 23 has a preclusive effect. Collective actions do not.



Collective Action Phases

- **First Stage.** Notice and conditional certification (sometimes discovery is before - but not mandatory)
- **Second Stage.** Defense motion for decertification
- **Trial**

Stage One - Practically Speaking

- Some courts require less proof than others (declarations or affidavits)
- A minority of courts require Plaintiffs to satisfy Rule 23

Stage One - Similarly Situated?

- Are there similarly situated persons?
 - Job titles?
 - Job duties?
 - Single or Multiple Decisionmakers?
 - **“Factual nexus that binds the named plaintiffs and potential class members together as victims of a particular practice or policy?”**

Notice Contents

- Provide potential opt-in plaintiffs with neutral and complete information
- Courts should prevent misleading communications

Stage Two - Decertification

- Courts generally examine three factors
 - Commonality
 - Defenses to individual plaintiffs
 - Fairness and procedural considerations

Arbitration?

- There is a downside for employers to agree to arbitrate
- Now there are issues of class-wide arbitration in light of the Supreme Court's Stolt-Nielsen decision.

Settlement Issues

- Offers of Judgment
- Calculation of the Regular Rate of Pay

Questions?



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