



# Tips for Mitigating the Coming Wage & Hour Pandemic

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# Your presenter



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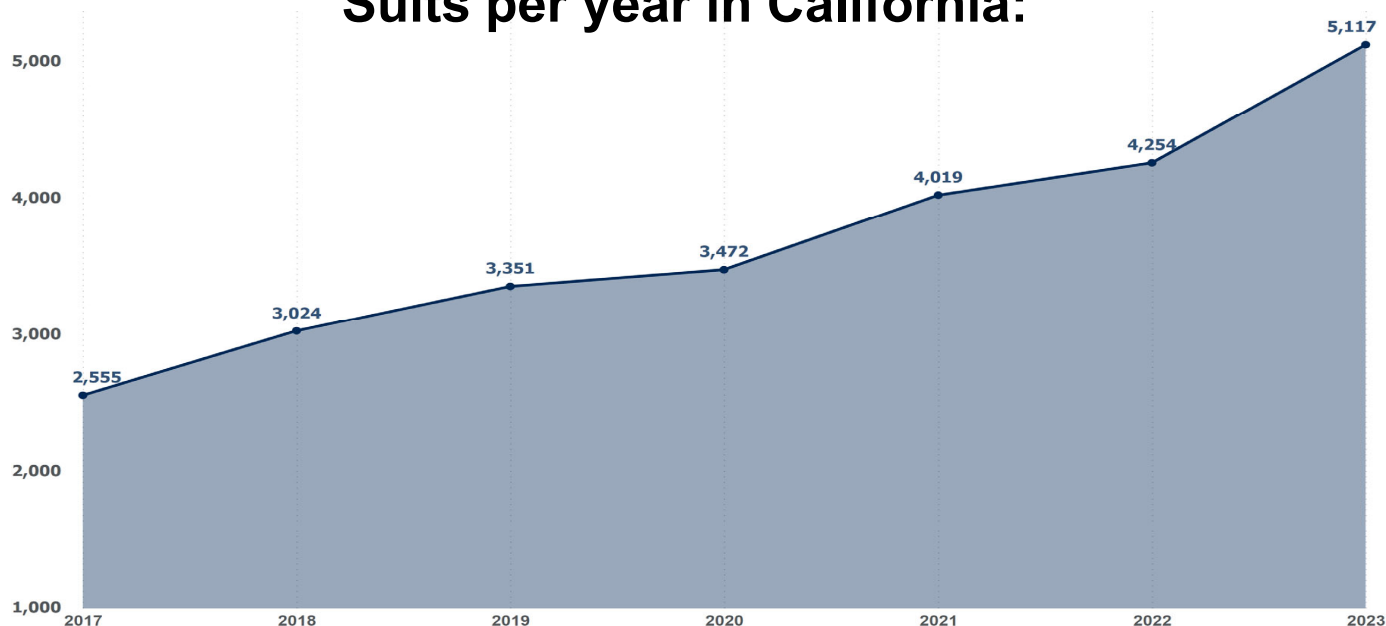
# California Style Wage & Hour Suits Are Coming



# What is a “California Style” Wage & Hour Suit?

- California plaintiffs’ attorneys crank out form complaints with armies of cheap junior lawyers.
- But they’ve running out of companies to sue.

Suits per year in California:



# **What is a “California Style” Wage & Hour Suit?**

- **Go East and North Young man!**
- **California plaintiffs’ firms are opening shop in other states, including Washington and Oregon.**
- **Before the last few years, we saw only a couple California firms bringing suits in Washington, and they were working through local firms.**
- **We’ve seen several new firms from California open up shop in Washington in the last six months.**



# What is a “California Style” Wage & Hour Suit?



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Verdicts and Settlements

**\$24 Million**  
Class Action Settlement

**\$21 Million**  
Defective Product Verdict

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# How Do These Lawyers Find Your Employees?

- **Employees who are angry go to plaintiffs' attorneys with wrongful termination claims.**
- **The plaintiffs' attorneys tell them, well we don't think you have much of a wrongful termination claim, but your employer has been rounding your hours incorrectly, so how would you like to be the lead plaintiff in a class action?**
- **In fact, the meritorious individual claims end up getting swept away, and plaintiffs who could settle individually for \$50,000 might end up with \$6,000 in class and class rep awards.**

# How Do These Lawyers Find Your Employees?

## **Re: Class Action/Representative Action Against Company Name, Inc.**

Thank you for agreeing to assist the law firm of LAW FIRM, PC (“Attorneys”) in the class action/representative action against COMPANY NAME, its owners, parent organizations, agents and subsidiaries (hereinafter “Defendant”) for potential recovery on behalf of yourself and other members of your class for wage and hour violations. This Agreement does NOT cover any claims of wrongful termination, discrimination, harassment, retaliation or other similar individual claims.

You have advised us that you were employed by Defendant and were subject to possible violations. We have advised you that based upon our experience in prosecuting class actions under relevant federal and state laws and our preliminary investigation into the facts and circumstances of this case, it is our opinion that a lawsuit may be meritorious. We will continue with our investigation. With your agreement to be named as a class representative in a complaint to be filed against Defendant you will have certain duties and responsibilities to the class. Certain of these duties are explained in greater detail in this letter and the attachment.

You have agreed to cooperate with Attorneys in this case and to comply with all reasonable requests for information. You also agree to provide us with copies of all relevant records and invoices and to participate in discovery in this action as necessary, by, among other things, answering interrogatories, producing documents



# What is a “California Style” Wage & Hour Suit?

- **Outrageous initial demand**
  - 5x+ maximum value at trial (including fees).
- **Demand for fees Plaintiffs’ counsel hasn’t even incurred!**
- **Leveraging the high cost of litigation in otherwise low value cases.**
  - Pay us \$400k because we can make you spend \$500k in fees, plus you’ll pay our fees.
- **If you don’t pay early, the price goes way up!**



# Class Action Settlements Topped \$40 Billion Again In 2024: New Report

By [Edward Segal](#), Senior Contributor. ⓘ Edward Segal is a PR expert who co...

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Jan 07, 2025, 06:28am EST

The largest settlements in 2024 occurred in ten major areas, according to the research project that examined 1,441 class action lawsuits:

- Product liability \$23.40 billion
- Antitrust \$8.41 billion
- Security fraud \$2.55 billion
- Consumer fraud \$2.44 billion
- Privacy \$1.94 billion
- Wage and hour \$614.55 million

# What Happens When You Don't Settle?

## PROVIDENCE HEALTH & SERVICES ORDERED TO PAY OVER \$229 MILLION IN LANDMARK WAGE VIOLATION VERDICT

**Jury finds systemic wage violations for more than 33,000 hourly employees in Washington state based on unlawful timeclock rounding and second meal period violations.**

SEATTLE, WA — The judgment in Bennett, et. al v. Providence Health & Services, was [entered in King County Superior Court today](#), the culmination of a two-week trial which took place late last month. Providence is ordered to pay more than 33,000 of its hourly employees more than \$229 million, exposing years of wage violations due to unlawful time rounding and meal period violations.

The jury awarded \$90.3 million for unpaid and missed second meal breaks, with an additional \$9.3 million for unpaid wages due to rounding. Just over \$1.3 million was deducted based on employees who knowingly waived their second meal breaks. The total damages were doubled due to the Court's [summary judgement ruling](#) in January of this year, which found Providence willfully committed these wage violations. Statutory interest brings the total owed to more than \$229 million.

## Let That Sink In...

- **The TOTAL amount ALL EMPLOYERS settled class action wage & hour cases for in 2024 was \$614.55 million, which is a lot.**
- **But, Providence Health & Services paid \$229 million PLUS their own attorney fees in a *single case!***
- **Should we take wage & hour class actions to trial?**
- **You do the math.**

# California Tactics Means Using This Math Against You.

- Many wage and hour cases are worth a lot less than \$1 million.
- You'll have to pay your attorneys six or seven figures to go to trial.
- If the plaintiff win even a small amount at trial, they can when a substantial amount in fees.

In a stunning development under the Fair Labor Standards Act (“FLSA”), the federal appellate court for Texas recently permitted prevailing employees to recover over \$50,000 dollars in attorney’s fees despite the fact that the overtime wages due to them totaled only approximately \$4,500 (Lucio-Cantu v. Vela).

In this decision, several former employees sued their employer claiming it failed to pay them overtime as required under the FLSA. The matter was tried to a jury and the jury awarded overtime wages to each of them. The amounts awarded to the three prevailing employees, however, were nominal: \$3,348.29, \$1,296.00, and \$52.50.



# California Tactics Mean Using This Math Against You

- **Plaintiffs' counsel takes the following position in mediation:**
  - Yeah, we'll probably only win \$100,000 at trial. But we can make you spend \$500,000 and if we win \$10,000, we'll win another \$100,000 at least in fee awards.
  - So, you should pay \$300,000 to settle (even though we've only done \$50,000 worth of legal work on this case).



# What Are Non-California Tactics?

**For at least some plaintiffs' attorneys:**

- **If you don't make me do much work, I'll cut you a good deal.**
- **Better to make \$100,000 working 50 hours (\$2,000/hr) than \$500,000 working 4,000 hours (\$125/hr).**



# What Are Wage & Hour Class Actions Actually About?

- **Federal Laws**
  - Minimum Wage
  - Overtime
  - Rounding
  - Donning and Doffing
  - Non-Discretionary Bonuses
  - Exempt / Independent Contractor Misclassification
    - See overtime; no hours records to defend with
- **State Laws**
  - Rest and Meal Breaks
  - Predictive Scheduling / Show Up Pay
  - Pay stub laws

# What Are Wage & Hour Class Actions Actually About?

- **Minimum Wage**
  - Outside sales/commission only misclassification
  - Getting tip credits wrong
- **Overtime**
  - Exempt misclassification
  - Independent contractor misclassification
  - Failure to include bonus in regular rate
- **Donning and Doffing**
  - Failure to pay employees for time to put on protective gear
- **Rounding**
  - Federal: to 15 minutes; Washington 1-7 down/8-14 up.

# What Are Wage & Hour Class Actions Actually About?

- **Independent Contractor Classification/FLSA Exempt Classification**
  - Super dangerous because you don't have any documentation to defend with.
  - Employees can claim any amount of hours they want, and you have to prove they didn't work what they claim.
- **Rest/M meal Breaks**
  - Big penalties for failure to comply.
  - One minute short means you owe the full 30 minutes of pay for the missed meal plus any time the employee worked, but wasn't paid for.
  - In Washington, you have to *ensure* the meal is taken. The employee deciding to skip the meal isn't a defense absent a formal waiver.
  - One manager who likes to interrupt meal breaks can mean big liability.



# **It's Nearly Impossible to Get This All Perfect**

- **Waiting lines at clock in stations.**
- **Employees doing a little work during lunch breaks (even voluntarily and on their own initiative in WA).**
- **One rogue manager interrupting breaks.**
- **One person in the accounting department failing to include non-discretionary bonuses in calculations.**

# Small Mistakes Can Mean Big Liability

## Example:

### Two-minute late lunches for 50 employees

50 employees making \$25 an hour are consistently 2 minutes late for lunch due to wrap up work.

- 2 minutes of pay plus 30 minutes for short lunch.
- Double damages for willful violations.
- Three-year statute of limitations

### Calculation:

- 225 lunches/year/employee X 3 years X 50 employees
  - 33,750 lunch violations
- \$13.33 per lunch
  - $33,750 \times \$13.33 = \$449,887.50$
- Double Damages Total = **\$899,775**

# Small Mistakes Can Mean Big Liability

## Example:

### Commissions not included in OT

- Employee makes an average of \$5,000 in commission per workweek and works 50 hours per week on average. Wrongly paid commission only.
- Regular rate:  $\$10,000 / 50 \text{ hours} = \$100$
- $\$100 \times 50 + \$100 \times 0.5 \times 10 = \$11,000$
- Which means you owe the employee another \$500 for EACH WEEK WORKED!
- If you have 10 misclassified salespeople, this means you owe  $\$500 \times 46 \text{ weeks worked} \times 10 \text{ employees} \times 3 \text{ years (statute of limitations)} \times 2x \text{ Damages} =$

**\$1,380,000**

## What's the Litigation Strategy?

- **Psychiatrists stop making money when their clients get better.**
- **Financial advisers don't make as much money off of simple, low fee strategies.**
- **Plumbers don't make money if you learn how to unclog your own toilet.**

**And ...**

- **Defense attorneys don't make as much money when their clients reach early settlements.**
  - **Clients are often primed to fight...**
  - **but they are rarely happy when they “win” at trial (cost, distraction, stress).**

# What's the Litigation Strategy?

- A “fight like heck” strategy is good for generating billable hours, but is usually bad for the employer’s bottom line.
- Numerous horror stories:
  - Employers hit with discovery sanctions for not producing class information.
  - Employers spend over \$1m in fees, plaintiff proves minimal damages, trial court awards another \$400,000 in fees to the plaintiff.
  - Employers simply lose at trial and owe seven figure judgments *on top* of their fees and plaintiff’s fees.
  - Caveat: you have to be careful about putting blood in the water. It’s about the next case, not just this one.
  - You want a strategy that lets opposing counsel know that you are prepared to fight if they push things too far.





# What's the Litigation Strategy?

## Your Math:

- **Trial**

- Liability + Your Fees + Their Fees. You almost never get a complete defense verdict.
- If you “win” (small plaintiff award), cost = Small Liability + Your Fees + Their Fees.
- *E.g.* \$10,000 + \$500,000 + \$300,000 = \$810,000.

- **Settlement**

- Cost of Settlement + Your Fees
- X + \$100,000 through mediation.

- **Solve for X**

- $X < \$710,000$
- But see “blood in the water” risk.

# What's the Litigation Strategy?

## Their Math

- **Trial**

- Liability + Their Fees. You almost never get a complete defense verdict.
- If they “lose” (small plaintiff award), cost = Small Liability + Their Fee Award.
- *E.g.* \$10,000 + \$300,000 = \$310,000.

- **Settlement**

- Value of Settlement

- **Solve for X**

- $X > \$310,000$
- But see opportunity cost plaintiff's counsel couldn't take on given the hours spent on your case.

# What's the Litigation Strategy?

**Should this case settle between \$310,000 and \$710,000?**

- **Employer**
  - Risk employer could lose big
  - Distraction to business
- **Plaintiff's counsel**
  - Value of this case vs. the value of the cases plaintiffs counsel cannot take on (opportunity cost).
  - Dollars per hour
  - How busy are plaintiffs' counsel?

# What's the Litigation Strategy?

## What can you do to affect this factors?

- **Declaration drive**
  - Get declarations from employees on issues that don't show up on timecards.
    - *E.g.* actually taking rest and meal breaks, just not clocking out.
  - Risk instigating plaintiff's counsel to engage in pre-certification discovery
  - You could learn bad facts you cannot plausibly deny
  - Lower risk of losing big if successful

# **What's the Litigation Strategy?**

**What can you do to affect this factors?**

- **Class certification arguments (tough in many states)**
  - Requires different policies applicable to different employees, or very substantially different working conditions affecting breaks or time tracking.
  - Hard to win in state court. Class action has to be basically unmanageable.
  - Might actually kill the case (but probably not)
  - Can always get new class representatives



# What's the Litigation Strategy?

## What can you do to affect this factors?

- **Not make opposing counsel do much work**
  - See prior slide on “some plaintiffs’ counsel”
  - Some attorneys are lazy, busy, or both.
  - If they can make a quick buck, they might cut you a deal (dollars/hour)
  - Doesn't work with all plaintiffs' attorneys

# **What's the Litigation Strategy?**

**What can you do to affect this factors?**

- **For issues that show up on time records, the numbers are what they are.**
  - **Maybe you can explain missed rest and meal breaks with GREAT declarations.**
  - **If you didn't calculate overtime correctly, you're just on the hook.**

## What's the Litigation Strategy?

So, what you're saying here is that once you've been sued, your hosed?!?



## **An Ounce of Prevention...**

**For the Wage & Hour Pandemic, you need a vaccine, there is no cure.**

- Once you've been sued, your wage & hour errors are largely baked in.**
- You can try to disqualify the lead plaintiff, but counsel will just find a new one.**
- You can try to fight certification, but it's hard. And if you split the class, plaintiffs' counsel can just find a second class rep.**

## **An Ounce of Prevention...**

### **What does a wage & hour vaccine look like?**

- **You need to fix all the wage & hour errors you can. But perfection is hard!**
  - Automatic payments for missed meal periods.
  - Audit overtime pay practices.
- **In some cases, it's not practical.**
  - How much does it cost to babysit ALL meal periods in Washington?
  - Are you going to lose talent if you are constantly nagging employees about rest periods?
- **You need to get creative in your preventative measures and develop your own legal bag of tricks**

## An Ounce of Prevention...

**What does a wage & hour vaccine look like?**

- You need your *own* legal bag of tricks:



## An Ounce of Prevention...

### What does a wage & hour vaccine look like?

- You need your *own* legal bag of tricks:
  - Arbitration agreement with class waivers.
    - The U.S. Supreme Court in *Epic Systems Corp. v. Lewis*, ruled that employers may include class-action waivers in their arbitration agreements with employees under the Federal Arbitration Act (“FAA”).
    - But state courts have been pushing back. FAA does not apply to “interstate commerce,” broadly interpreted. See, e.g., *Oakley v. Domino’s Pizza, LLC* (WA).
    - US Supreme Court has since clarified that the FAA's exemption applies to those who “at least play a direct and necessary role in the free flow of goods across borders.”



## **An Ounce of Prevention...**

### **What does a wage & hour vaccine look like?**

- **You need your *own* legal bag of tricks:**
  - **Weekly (or even daily) affirmations regarding rest and meal breaks.**
    - **This can be done as part of the clock out process (as long as the clock stops running *after* the affirmation process is done).**
    - **Not perfect, but makes it a lot harder for employees to claim the missed breaks.**

## **An Ounce of Prevention...**

### **What does a wage & hour vaccine look like?**

- **You need your *own* legal bag of tricks:**
  - **Meal waivers**
    - **Can be effective, but you cannot “one and done” at the beginning of employment.**
    - **More effective when combined with affirmations and done at least monthly.**
    - **Again, not a magic bullet, but can lower the settlement value of a case.**

## **An Ounce of Prevention...**

### **What does a wage & hour vaccine look like?**

- **You need your *own* legal bag of tricks:**
  - **Releases from all departing employees**
    - **Many employers have a general practice of offering severance in exchange for a release for all employees terminated without cause.**
    - **This can really help for high turnover employers.**
    - **You don't have to offer a ton of money!**

## **An Ounce of Prevention...**

### **What does a wage & hour vaccine look like?**

- **You need your *own* legal bag of tricks:**
  - **Regular releases from your *existing* employees.**
    - **What?!? But can't they sue me for what happens later?**
    - **Yes, but you are cutting back your liability significantly.**
    - ***E.g.* if you offer annual releases, you have, at most, 1 year versus 3 years of liability for wage & hour issues.**

# An Ounce of Prevention...

## Putting it all together:

- **Weekly rest and meal break affirmations.**
- **Annual wage & hour audits for all employees, including spot check interviews.**
- **Unconditional offers to pay all clear errors.**
- **Affirmation that employee is not aware of any wage & hour payment issues.**
- **Offer of an additional \$250 to each employee, *after* all errors have been fixed and after the employee has agreed there are no errors, in exchange for a release.**

## **An Ounce of Prevention...**

### **Some additional issues:**

- **Does your defense attorney have bad blood with the plaintiff's bar?**
  - If your defense counsel has been sanctioned for discovery issues in the past, plaintiffs' counsel will press their discovery rights, which increases fees.
- **Do you have good relationships with your employees?**
  - Employees who feel like they have been treated well are more likely to testify favorably and to agree to strategies that require their cooperation, such as individual settlements.
- **Does your counsel know your business well enough to customize this for you?**
  - The cure should not kill the business! They should be asking questions.

# Conclusion

- **At least 90% of the time, you cannot “win” in litigation.**
- **Instead, you must prepare to win before you are even sued.**
- **California tactics require creative and aggressive counter tactics, and they are largely things you must put in place before you are sued.**
- **Preventing litigation cannot be the primary focus of your business, but both the costs of litigation and settling, as well as the likelihood of being sued are going up.**
- **Now is the time put a plan in place to head off your own person wage & hour pandemic.**





## Questions

**If you have questions, you are welcome to follow-up directly with the presenters or call on your trusted Dorsey contact.**



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Aaron brings over two decades of experience to companies' quirkiest, thorniest, and most complex employment issues. Aaron also works with companies to develop policies and practices that are engines for business growth and that reflect the culture and values of the companies he represents. When Aaron's clients are faced with litigation, he aggressively pushes their cases forward to an efficient resolution.

Aaron advises businesses and provides litigation expertise on all employment related matters, from trade secret disputes and non-competition agreements to discrimination and harassment claims, under Oregon, Washington, and federal law. Aaron represents clients before the Oregon Bureau of Labor and Industries, the Washington Human Rights Commission, the Washington Department of Labor and Industries, and the federal Equal Employment Opportunity Commission.

Aaron represents companies in a wide variety of industries including, banking, financial services, computer software, semiconductor fabrication, retail, and medical supplies.



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**Date:** Friday, June 13<sup>th</sup>, 2025

**Time:** 10:00am – 11:00am (PST)

*\*Registration opening soon*



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