



# Why Acquiring a Company with Workers Can Get You Sued, and What You Can Do About It

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# Speakers

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# Agenda

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- 01** The Laws “In Play”
- 02** The Rise of the FLSA and Wage Hour Law
- 03** Types of Claims / Extent of Damages
- 04** Types of Companies At Risk and For What
- 05** Minimizing Risk
- 06** Staying Current



# The Laws “In Play”

# Labor Laws “In Play”

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- Employment Discrimination / Anti-Harassment
- Workers Compensation
- Worker Health and Safety Laws
- Immigration
- Labor Relations / Union vs. Non-Union
- Fair Labor Standards Act
- State wage-hour laws



# The Rise of the FLSA and Wage Hour Law





# Sources of Risk

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## The Government

- United States Department of Labor
  - Wage and Hour Division
- State Agencies
- Courts

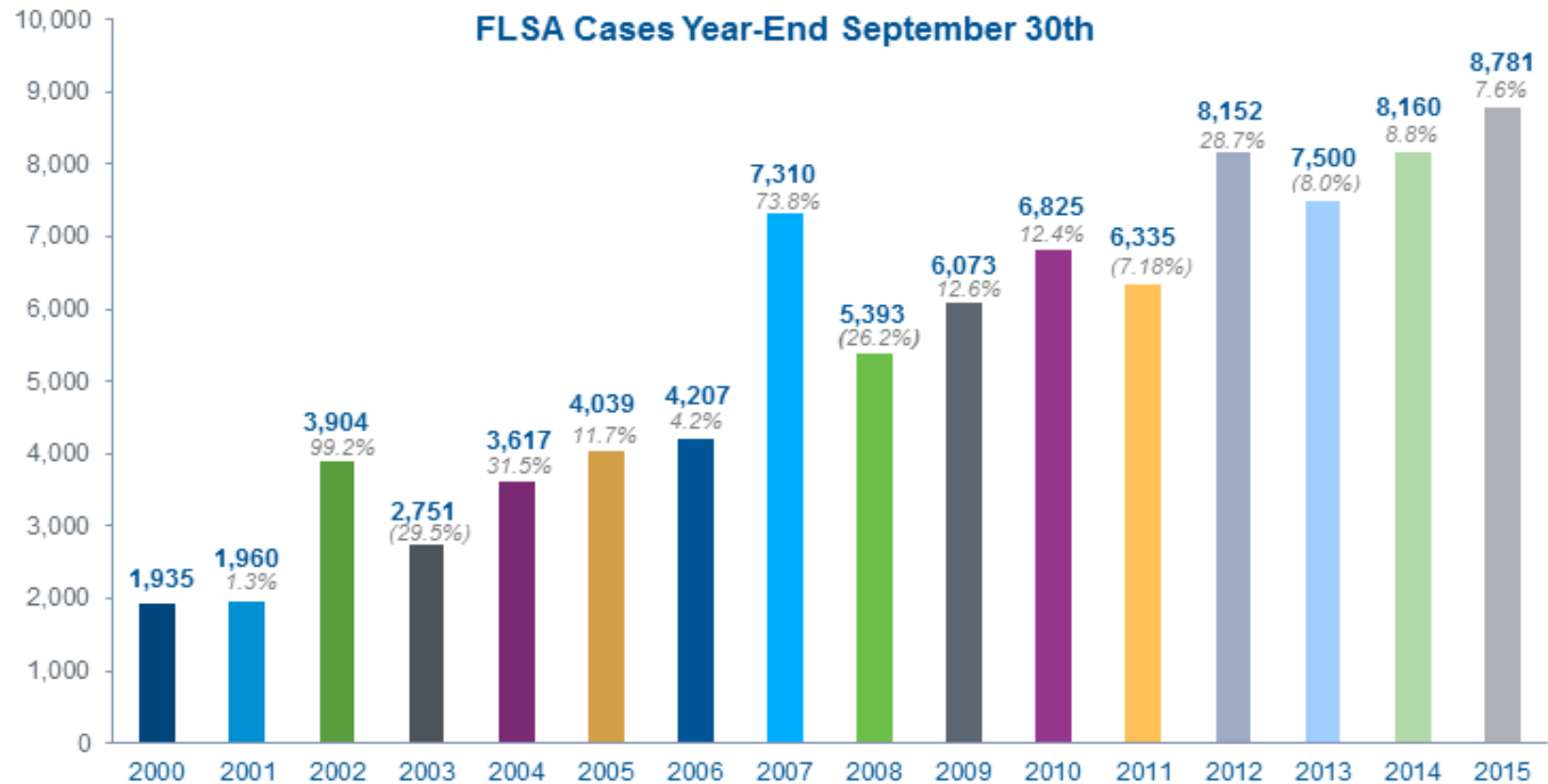
## Litigation

- Plaintiffs' Bar
- Lenient Standards
- High Exposure
- Attorneys' Fees



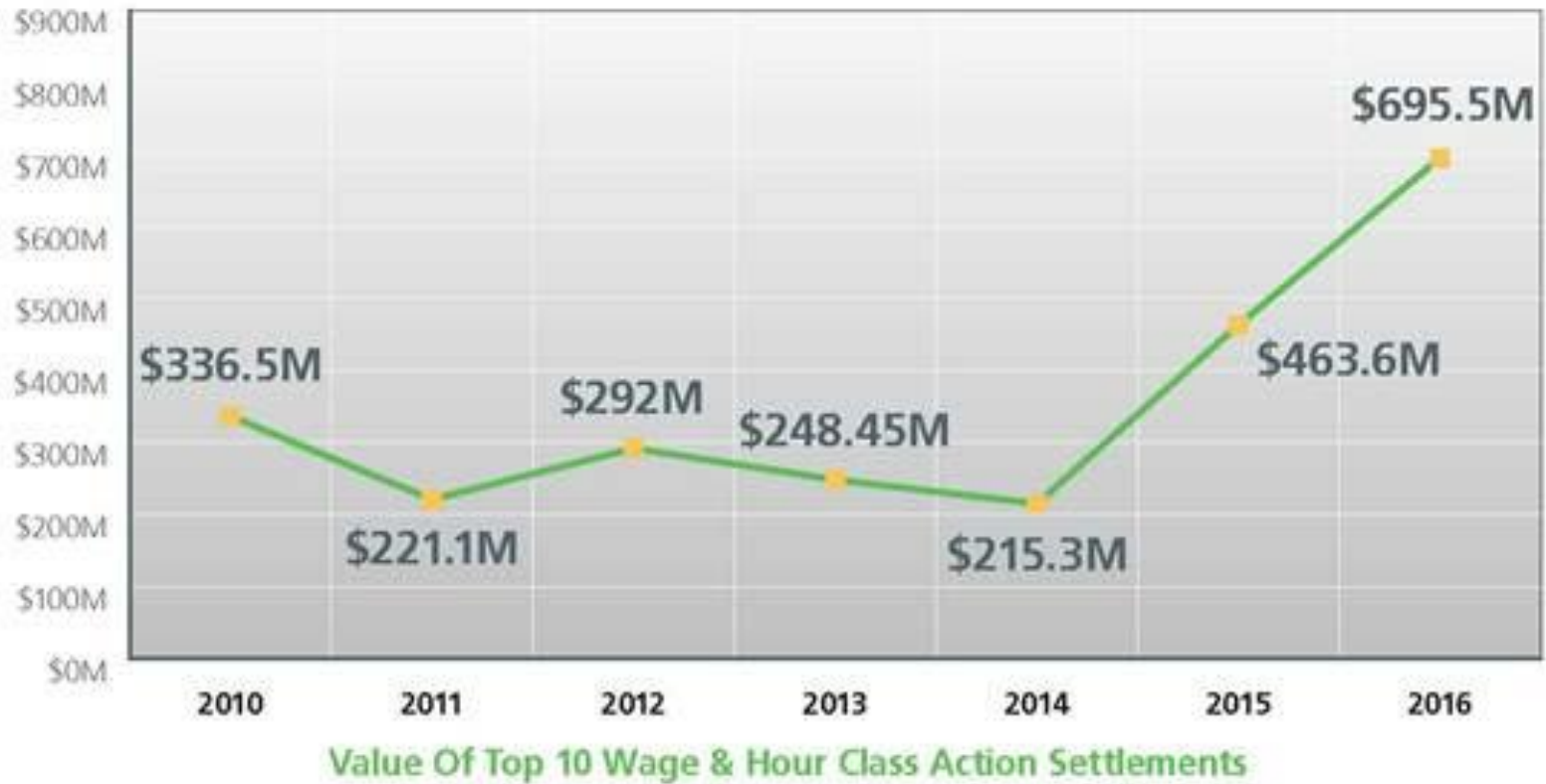


# FLSA Filings



Source: [www.uscourts.gov](http://www.uscourts.gov)

# FLSA Settlements



# Why So Many?



**2016 FLSA Conditional Certification Motions And Decertification Motions**

# Types of Claims / Extent of Damages

# Types of Claims

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Failure to pay overtime and/or employee benefits to workers classified as independent contractors

Misclassification of employees as “exempt” from overtime

Overtime claims  
(account for 40% of all claims)

Pay for work during meals or breaks, including penalties

Failure to pay for time worked before or after the work shift, including on mobile devices

Not including all compensation in the “regular rate”

# Penalties

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- Damages include back wages x 2 under federal law
- Plaintiff's attorneys fees
  - But never defendant's
- State law penalties more onerous
  - California wide-ranging penalties
  - Massachusetts treble damages
  - Illinois 2% per month



# Types of Companies at Risk and for What

# Restaurants and Hospitality

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## **Servers**

- Tip credit notice and duties
- Tip pools
- Service charges, including in hotels/banquets

## **Managers at all levels**

## **Fight for \$15 spin-off litigation**



# Retail

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**Managers and  
assistant managers**

**Off the clock  
claims**

**California meal and  
rest claims\***

# Companies with “tech” workers

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**IT employees and  
misclassification,  
especially at tech  
companies**

**Service technicians  
or engineers**

**“Knowledge  
workers”**

# Healthcare

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**Nurses and  
automatic  
deduction claims**

**Most home health  
aides newly subject  
to overtime  
requirements**

**Clinicians paid  
on a fee basis**

# Companies using non-employees

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## Vertical joint employment under Administrator Interpretation

- “Upstream” entities liable for “downstream” employers
- Parent/subsidiaries
- Franchisor/franchisees
  - Apparent authority
- May even be extended to private equity
  - But at least there is an employing entity

## Independent contractors increasingly considered employees under Administrator Interpretation and web of state laws

- No employing entity at all



# Minimizing Risks

# Due Diligence Requests

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## In General:

- Structure of human resources management Team
- Copies of budgets of outside labor and employment counsel
- Copies of audit letters
  - FLSA and wage and hour compliance matters
    - Copies of wage statements / Review of timekeeping systems
    - Identify job classifications and specifically those identified as FLSA “exempt” and furnish basis for claim
    - Company policies on “regular rates” of pay, timekeeping and overtime
    - Number / type of agency workers / independent contract workers

# Actions Pre-Closing

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## For Buyers:

- ✓ Asking the Right Questions – Operations and Financial Folks speaking
- ✓ Conduct a Wage and Hour Audit
- ✓ Determine the Risks and Follow the “Red Flags”
- ✓ Review financial modeling for potential cost increases and reserves, and free cash flow, especially when leveraged
- ✓ Engage State specific counsel
- ✓ Following litigation hold protocols
- ✓ Transaction Structuring to wall off liability

# Definitive Agreements

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- Retain strong audit and termination rights
- Guard against potential successor liability in indemnities to the extent you can contract around them.
- The definition of “losses” should not only include fines for noncompliance levied by enforcement bodies, but should also include all costs of bringing the target into compliance.
- Exceptions to baskets and caps
- Arbitration agreements with class waivers





# Staying Current

# Risk Caused By Uncertainty



## Overtime Exemption Rules

- Rules were to increase salary level on 12/1/16 for EAP employees from \$23,660 to \$47,476
- Court in Texas preliminarily stopped the rules
- On appeal
- Raised consciousness
- Workers now know FLSA

## A Captain at the Helm

- Puzder withdrew from nomination for Secretary of Labor
- Acosta is nominee
- Hearings to be held shortly
- No WHD Admin yet
- State/local legislation increased dramatically
- **Plaintiffs' bar active and sophisticated**

## A Changing Workforce

- Independent contractors
- Gig economy
- Remote workers



**Questions?**





**Thank You**