



Wage and Hour Coverage Finally Comes of Age

By Peter R. Taffae and Bob Bregman, CPCU, RPLU, MLIS

Employment practices liability insurance (EPLI) coverage has been available since the early 1990s. But not until last year did insurers finally begin to tackle the most daunting employment-related exposure of all: wage and hour claims. In fact, wage and hour claims are the single largest exposure for employers today and far exceed the dollar payouts resulting from discrimination claims as the leading source of payments to employee-plaintiffs.

Litigating wage and hour claims is extremely expensive. Oftentimes, the prevailing plaintiffs (both current and former employees) can recover double the actual damages, plus attorneys' fees. Multiplied damages, in part, account for many astronomical wage and hour awards and settlements. In fact, settlements in major wage and hour lawsuits against corporate defendants rose 44 percent between 2008 and 2009. More specifically, the top 10 cases in 2009 settled for a total of \$364 million, compared to \$253 million in 2008, according to Seyfarth Shaw, a leading labor law firm that represents employers.

Admittedly, the current scope of obtainable wage and hour coverage continues to be dwarfed by the magnitude of these exposures. But, for the first time, underwriters finally seem willing to address these claims, albeit in a limited fashion. This article begins by providing an overview of the nature of wage and hour claims. Next, it explains the scope of wage and hour coverage currently available in the market, analyzes a representative application for wage and hour coverage, and provides a list of insurers currently offering wage and hour

coverage endorsements (along with limits available). The article concludes with some advice to insureds and their representatives on how to manage the wage and hour exposure—even if they decide not to buy insurance coverage.

The Nature of the Wage and Hour Exposure

The Fair Labor Standards Act (FLSA), passed by Congress in 1938, is the source of the wage and hour claim exposure. Essentially, the law established two broad classifications of employees, as follows.

- ◆ **Exempt employees**, those ineligible for and thus “exempt” from receiving overtime, and
- ◆ **Nonexempt employees**, those not exempt and thus eligible to receive overtime pay.

The following five categories of employees are “exempt” from overtime pay.

1. Executives
2. Administrative personnel
3. Professionals
4. Computer-related employees
5. Outside sales employees

A detailed explanation of these classifications is beyond the scope of this article. To obtain such information, go to the U.S. Department of Labor's website at www.dol.gov/whd/flsa/index.htm.

Figure 1 "All Other" Sources of Wage and Hour Claims

- *Misclassifying* employees as independent contractors and not paying them overtime because independent contractors are ineligible for overtime pay.
- *Not properly paying employees for overtime*; i.e., not paying compensation for hours worked in excess of 8 hours in a given day or more than 40 hours in a week.
- *Miscalculating* the amount of wages owed (i.e., applying the wrong rate, crediting tips).
- Allowing employees to work "*off the clock*" (i.e., not paying for time spent for opening tasks or closing duties, before and after the official workday, or for time spent donning uniforms, attending seminars).
- Not allowing employees to take *meal or rest breaks*; notably, state laws require an unpaid 30-minute, uninterrupted meal period whenever the employee works 5 or more hours (with a second meal period for workdays of 10 hours or longer) and a paid 10-minute rest period for each 4 hours of work. This often occurs when the diligent employee works through his or her lunch period.
- Not paying employees on a *timely basis*.
- Not paying *all wages due and owing at the time of termination*; such delays could result in "waiting time" penalties so that the employee's wages continue to accrue each day he or she is paid late—up to 30 additional days.
- *Docking exempt employees'* salaries for absences.

Source: "Sources of Wage and Hour Litigation," by Katherine S. Catlos, Esq., Winter 2008 *EPLiC*, "What Are You Doing To Protect Your Company Against Wage and Hour Lawsuits?"

"All Other" Sources of Wage and Hour Litigation

The most pervasive misconception regarding wage and hour claims is that they are solely confined to "failure to pay overtime" situations based on "exempt" versus "nonexempt" misclassification. In fact, there are numerous *additional* causes of wage and hour claims, the nature of which are noted in Figure 1.

Wage and Hour Insurance Coverage

This section of the article will explain why a wage and hour coverage endorsement is needed and how the endorsement applies.

The Wage and Hour Exclusion in EPLI Policies

Simply stated, the need for a wage and hour coverage endorsement arises from the fact that

virtually *all* employment practices liability insurance (EPLI) policies exclude coverage for wage and hour claims. The text of a typical exclusion appears in Figure 2.

Defense Costs Also Excluded. As noted in Figure 2, the policy excludes "Loss" involving any wage and hour law. Importantly, based on the policy's definition of "loss," the wording of the exclusion precludes not only coverage for settlements and judgments, but, in addition, it eliminates coverage for the *defense costs* associated with wage and hour claims.

Accordingly, the need for a wage and hour coverage endorsement under an EPLI policy arises because virtually *all* EPLI policies contain an absolute (i.e., both defense and indemnity) exclusion of coverage for wage and hour claims, quite similar to the one noted in Figure 2. The effect of the endorsement is to remove this exclusion, so that coverage of wage and hour claims will be provided by the policy.

Figure 2 Representative Wage and Hour Exclusion

The Underwriters shall not be liable to make any payment for Loss in connection with or resulting from any Claim ... for an alleged violation of the responsibilities, duties or obligations imposed on an Insured under any Wage and Hour Law.

“Wage and Hour Law” means any federal, state or local law governing or relating to the payment of wages including the payment of overtime, on-call time, rest periods, minimum wages or the classification of employees for the purpose of determining employees’ eligibility for compensation or other benefits under such law(s) including any statutory or common law premised on such law.

“Loss” means money which an Insured is legally obligated to pay as a result of a Claim including compensatory damages, judgments (including prejudgment and post judgment interest awarded against an Insured on that part of any judgment paid by Underwriters), back pay, front pay, settlements, statutory attorney fees, Defense Costs and punitive, exemplary and multiple damages where insurable by law in the applicable jurisdiction most favoring coverage for punitive, exemplary or multiple damages.

Source: Beazley Insurance Company, Employment Practices Liability Insurance Policy, F00038 (04/2008 edition).

The Wage and Hour Coverage Endorsements

The standard wage and hour coverage endorsement contains the following features.

Coverage by Endorsement Only. Since virtually all of the policy forms in the market today exclude wage and hour claims, it should again be noted that *all* such coverage is provided by endorsement rather than within a regular EPLI policy form.

Availability of the Endorsement. Based on our experience in the current market, it appears that the endorsement is being offered as an “automatic” part of an EPLI policy, rather than as an add-on. In other words, insurers who provide the wage and hour endorsement include it in *all* of the policies they issue, rather than add it based on the insured’s request. Conversely, as respects those insurers who are not offering the endorsement, when approached about adding it, they all routinely decline to provide wage and hour coverage at *any* price.

Cost of the Endorsement. Somewhat surprisingly, our encounters in the marketplace indicate that insurers are not charging a specific premium for the endorsement. We say this

because in one situation, when attempting to negotiate a lower EPLI policy premium for an insured, I (Peter) asked whether the premium could be reduced by removing the endorsement, to which the underwriter replied, “No, we offer the endorsement as a ‘value added’ feature to make the policy better. Why would anyone want to remove it considering the additional protection it offers?”

\$100,000, \$150,000, or \$250,000 Sublimit. Depending on the particular insurer, in the current market, the endorsement affords coverage of wage and hour claims with a limit of \$100,000, \$150,000, or \$250,000.

Defense-Only Coverage. The endorsement is written so that it applies *only* to defense costs associated with wage and hour claims.

No Additional Limit of Insurance Created. As already noted, the endorsement provides a \$100,000, \$150,000, or a \$250,000 sublimit. Significantly, this sublimit applies *within*, not in addition to, the policy’s regular aggregate limit. For example, assume that the full \$250,000 sublimit is paid out under a wage and hour coverage endorsement to an EPLI policy, in conjunction with a claim. Also assume that the policy contained a \$1 million per claim/

aggregate limit. In this situation, \$750,000 (\$1 million less \$250,000) would remain to cover other types of claims under the policy.

Regular Deductible Applies. Wage and hour claims are subject to the policy's regular deductible. Assume a policy contained a \$25,000 deductible and afforded a \$150,000 sublimit to cover defense of wage and hour claims. Also assume that exactly \$150,000 was expended in defending a claim. In this situation, the insured would pay the \$25,000 deductible and the insurer would pay the remaining \$125,000. On the other hand, some underwriters will at times agree to provide wage and hour coverage (or provide higher limits), by means of a "split" retention/deductible approach, whereby an insured assumes a higher retention/deductible for wage and hour claims only. (We discuss this technique later in the article.)

Prior Acts Exclusion. The wage and hour coverage endorsement noted in Figure 3 (below), also contains an exclusion that precludes coverage of claims alleging violations of wage and hour laws, of which management was

aware, prior to the inception of the policy. The intent of this exclusion is to eliminate coverage for the so-called burning building, since the endorsement is designed to only cover claims that are purely fortuitous and unforeseen. Yet, it should be recognized that this is an unusual provision because only a minority of other underwriters' wage and hour coverage endorsements include a prior acts exclusion. One final caveat for both insureds and underwriters: given the long-tail nature of wage and hour claims, be very careful when either accepting or using prior acts exclusions.

No Audit Requirement. There is typically no requirement that the insured undergo an audit as a condition of obtaining coverage. Rather, insurers will agree to provide the endorsement solely on the basis of the insured's answers to questions on the application that pertain to its wage and hour compliance program (the nature of which is discussed in the next section of this article).

Figure 3 provides a representative wage and hour coverage endorsement.

Figure 3 Wage and Hour Coverage Endorsement

Wage and Hour Enhancement Endorsement

In consideration of the premium charged for the policy, it is hereby understood and agreed that:

1. Notwithstanding Section IV. EXCLUSIONS: WHAT IS NOT COVERED, E., we agree to provide Defense Costs coverage for Wage and Hour Claims.

For purposes of this endorsement, Wage and Hour Claim shall mean any Claim solely alleging violations of any federal, state or local law governing or related to the payment of wages including the payment of overtime, on-call time, rest periods, minimum wages or the classification of Employees for the purpose of determining Employees' eligibility for compensation under such law(s) (collectively referred to herein as "wage and hour laws").

Our maximum Total Aggregate Limit pursuant to this endorsement shall be USD 150,000 and shall only apply to Defense Costs ("the Wage and Hour Limit"). The Wage and Hour Limit shall be part of, and not in addition to, the Total Aggregate Limit identified in Item 4(b) of the Declarations. In no event shall the Wage and Hour Limit apply to Loss other than Defense Costs incurred in connection with Wage and Hour Claims and in no event shall we be obligated to pay more than the Limits of Liability identified in Items 4 (a) – 4 (b) of the Declarations.

continued

Figure 3 Wage and Hour Coverage Endorsement (cont.)

As respects coverage for Claims that allege violations of any Wage and Hour Law and also contain allegations of otherwise covered Insured Events, the USD 150,000 Wage and Hour Limit shall apply to those Defense Costs attributable solely to that portion of the Claim alleging violations of any Wage and Hour Law. Notwithstanding the provision of Section II. DEFENSE OF CLAIMS A., the Total Aggregate Limit stated in Item 4. (b) shall apply to Loss, including Defense Costs, attributable solely to that portion of such Claim alleging the covered Insured Events.

2. This policy does not cover any Wage and Hour Claim, or that portion of any Claim that alleges violations of any Wage and Hour Law if any Management Personnel was aware of the violations of the Wage and Hour Law by actual knowledge prior to the inception date in Item 2 of the Declarations.

All other terms and conditions of this Policy remain unchanged.

Source: Beazley Syndicate Thompson Heath and Bond (THB) Brokerage in London.

Analyzing an Application for Wage and Hour Coverage

The insured's answers to a supplemental wage and hour application allow the underwriter to develop an opinion about the insured's degree of exposure to potential claims. The questions the application contains all pertain to the specific types of exposures that normally give rise to wage and hour litigation. Based on the insured's answers, the insurer makes its decision as to whether to offer the coverage endorsement, on what terms, and at what price.

Figure 4, which is from Houston Casualty, depicts a representative application for wage and hour coverage and each of the 11 questions it contains are noted and analyzed below.

Question 1. Prior Claim Warranty Statement

This question asks whether, in the last 3 years, any current or former employee has made or threatened to make a claim for any violation of wage and hour laws, including but not limited to claims related to meal periods, rest periods, or unpaid overtime. If "yes," the applicant must describe the outcome of the claim and explain how the company has

changed its practices to prevent further claims (attaching an explanation, if required).

The purpose of this question is to inform the underwriter if and to what extent these prior claims have prompted operational changes. Typically, the underwriter will be seeking such changes, as a condition of offering coverage.

Question 2. Potential Claim Warranty Statement

This question asks if any manager, supervisor, shareholder, partner, or owner within the applicant's organization has knowledge of a *potential* violation of any wage and hour law that could result in a claim for any violation of wage and hour laws, including but not limited to claims related to meal periods, rest periods, or unpaid overtime.

This question is similar to Question 1, but instead of focusing on prior claims caused by known wage and hour act violations, it asks if any supervisor, manager, shareholder, partner, or owner is aware of any incidents or circumstances that have the *potential* to cause a claim in the future. The purpose of this question is to advise the applicant that the policy (if issued) will not cover such incidents if they result in future claims because the policy seeks to cover fortuitous events, rather than the so-called burning building.

**Figure 4
A Representative Wage and Hour Coverage Application**

Houston Casualty Companies/
U.S. Specialty Insurance Company

Employment Practices Liability Insurance Wage and Hour Supplemental Form

INFORMATION Name of Applicant Organization:	
Questions 1–6 apply to employers in ALL states (if you have employees in CA, NY or NJ, you must answer the additional questions for each state, below):	
1. In the last 3 years has any current or former employee made or threatened a claim for any violation of wage and hour laws, including but not limited to, claims related to meal periods, rest periods, or unpaid overtime? If “yes”, describe the outcome and how you have changed your practices to prevent further claims (attach explanation if needed). _____	<input type="checkbox"/> Yes <input type="checkbox"/> No
2. Does any manager, supervisor, shareholder, partner or owner within your organization have knowledge of a potential violation of any wage and hour law that could result in a claim for any violation of wage and hour laws, including but not limited to, claims related to meal periods, rest periods, or unpaid overtime?	<input type="checkbox"/> Yes <input type="checkbox"/> No
3. Are all of your full-time employees allowed to take a meal period of at least 30 minutes during which they are relieved of all duties?	<input type="checkbox"/> Yes <input type="checkbox"/> No
4. Do you utilize independent contractors (a.k.a. “1099 workers”)? If so, how many contractors in the past 12 months? _____	<input type="checkbox"/> Yes <input type="checkbox"/> No
5. Are all employees allowed to take a rest period of 10 minutes or more in the middle of each four (4) hour work period?	<input type="checkbox"/> Yes <input type="checkbox"/> No
6. Do all exempt supervisory employees: A. Have direct supervisory control over 2 or more employees? B. Have authority to hire and terminate employees or to recommend hiring or terminating?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No
Questions 7–9 apply only to employers with employees located in CALIFORNIA:	
7. Do any of your employees take “on-duty meal periods”?	<input type="checkbox"/> Yes <input type="checkbox"/> No
8. Do all salaried employees receive a salary of at least \$640 per week (i.e. two times the minimum wage) which is not subject to reduction based on the number of hours they work?	<input type="checkbox"/> Yes <input type="checkbox"/> No
9. Do all exempt supervisory employees spend at least 50% of their working time supervising employees?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Question 10 applies only to employers with employees located in NEW YORK:	
10. Do all salaried employees receive a salary of at least \$536.10 per week that is not subject to reduction based on the number of hours they work?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Question 11 applies only to employers with employees located in NEW JERSEY:	
11. Do all salaried employees receive a salary of at least \$400 per week that is not subject to reduction based on the number of hours they work?	<input type="checkbox"/> Yes <input type="checkbox"/> No

Question 3. Meal Breaks

This question asks if all of the company's full-time employees are allowed to take a meal period of at least 30 minutes during which they are relieved of all duties. This question is important because, as noted earlier, state laws generally require an unpaid 30-minute, uninterrupted meal period whenever the employee works 5 or more hours, with a second meal period for workdays of 10 hours or longer.

Question 4. Independent Contractors

This question asks whether the applicant utilizes independent contractors (a.k.a. "1099 workers") and, if so, the number of such contractors in the past 12 months? Here the underwriter will be looking for a high (e.g., 10 percent or more) percentage of independent contractors. Such a figure could indicate that the applicant is purposely misclassifying employees as independent contractors for the purposes of not having to pay overtime (and other benefits).

Question 5. Rest Breaks

This question asks if all employees are allowed to take a rest period of 10 minutes or more in the middle of each 4-hour work period. This question is important because, as noted earlier, state laws generally require a paid 10-minute rest period for each 4 hours of work.

Question 6. Supervisory Inquiry

This question asks whether all exempt supervisory employees (a) have direct supervisory control over two or more employees and (b) have authority to at least recommend hiring or terminating. This question is important, because according to the FLSA, unless a "supervisor" has control over a minimum of two employees and the authority to recommend hiring/firing, the supervisor cannot be classified as an "exempt" employee and is therefore eligible to receive overtime pay. Many wage and hour claims originate when so-called supervisors are designated as such and classified as "exempt" in an effort to avoid paying overtime—despite the fact

that they lack the types of authority noted within this question.

Question 7. On-Duty Meal Periods (CA)

This question asks if any of the applicant's employees take "on-duty meal periods." This question is similar to Question 3 and seeks to ascertain whether the applicant company provides such breaks. This is important because such meal periods are required by California law.

Question 8. Salaried Employee Pay Amounts (CA)

This question asks if all salaried employees receive a salary of at least \$640 per week (i.e., two times the minimum wage) that is not subject to reduction based on the number of hours they work. The question is important because in California, if an employee receives a salary of less than \$640 and/or that salary is subject to reduction based on the number of hours worked, that person cannot be classified as "exempt" and is thus eligible for overtime. The insurer asks this question because wage and hour claims have been made by employees in California who were classified as exempt (and were not paid overtime), despite the fact that their weekly salary was less than \$640 and/or was subject to wage reductions based on the number of hours worked.

Question 9. Supervisory Employee Job Duties (CA)

This question asks if all exempt supervisory employees spend at least 50 percent of their working time supervising other employees. This question is important because in California, if an employee spends less than half of his or her time supervising other employees, that person cannot be classified as "exempt" and is thus eligible for overtime. The insurer asks this question because wage and hour claims have been made by employees in California who were designated as supervisors and classified as exempt, despite the fact that they spent less than 50 percent of their working time supervising other employees.

Question 10. Salaried Employee Salary Amount (NY)

This question asks if all salaried employees receive a salary of at least \$536.10 per week that is not subject to reduction based on the number of hours they work. The question is similar to Question 8 above. It is important because in New York, if an employee receives a salary of less than \$536.10 and/or that salary is subject to reduction based on the number of hours worked, that person cannot be classified as “exempt” and is thus eligible for overtime.

Question 11. Salaried Employee Salary Amount (NJ)

This question asks if all salaried employees receive a salary of at least \$400 per week that is not subject to reduction based on the number of hours they work. The question is similar to Questions 8 and 10. It is important because in New Jersey, if an employee receives a salary of less than \$400 and/or that salary is subject to reduction based on the number of hours worked, that person cannot be classified as “exempt” and is thus eligible for overtime.

The Market for Wage and Hour Coverage

Based on our knowledge of the market, the following insurers are currently offering wage and hour coverage endorsements, with the limits noted. Again, it should be recognized that such limits apply to defense costs and not to indemnity payments.

Market	Limit
London	\$250,000
XL	\$150,000
RSUI	\$100,000
Carolina/Admiral	\$150,000
Scottsdale	\$150,000
USLI	\$100,000*
Houston Casualty	\$100,000
C.V. Starr	\$150,000

*Except in CA and FL

Where Do We Go from Here? Advice for Insureds and Their Agents/Brokers

Now that wage and hour coverage is available, EPLI buyers and their brokerage representatives are faced with the decision as to how they should proceed. Following are several recommendations.

Take a Look at Your Organization

Having reviewed the kinds of situations (noted earlier in this article) that are most likely to produce wage and hour claims, ask yourself: are any of these conditions present at our company? If so, or if you are uncertain as to whether there are any problematic areas, consider taking the next step.

Have a Wage and Hour Audit

Given both the frequency and magnitude of wage and hour claims over the past decade, a number of organizations have sprung up in recent years that specialize in auditing businesses to identify practices that have the potential to cause wage and hour claims. The most effective of these organizations are law firms; usually because identifying wage and hour exposures requires one to interpret the FLSA and state labor laws.

Considering the high risks associated with such claims, coupled with the often bewildering complexity of the applicable laws, the auditing fee will probably be money well spent. This is especially true if you are considering buying wage and hour coverage. If the audit identifies one or more potential problematic areas, you will be in a better position to take the kinds of preventive action that could avert an eventual claim.

Complete an Application, Obtain a Quotation

Even if you feel that your organization faces little or no risk of receiving a wage and hour claim, it still pays to complete an application for coverage. If you are already purchasing EPLI coverage, the additional time and effort required

to complete a Supplemental Wage and Hour application is minimal. In addition, simply going through the exercise of answering the questions requires you to look carefully at your company's payroll and employment practices and home in on possible trouble spots.

Make a Decision as to Purchasing the Coverage

Based on the look and feel of your company's operations, you might be pleasantly surprised to find that little or no additional premium is required to add \$100,000 or even \$250,000 (depending on the individual insurer) in defense coverage. This is especially true if you can present the results of a clean audit—coupled with a claim-free track record.

Be Prepared To Negotiate

Simply because the mainstream market remains limited as to policy limits and coverage of indemnity payments is no reason to assume that such ceilings represent all that can be obtained. Now that insurers have finally begun to dip their toes in the water, in return for offering an indemnity limit equal to or even approaching the regular EPL policy limit, consider requesting a separate, higher (i.e., "split") deductible for wage and hour claims.

For example, assume your EPL policy contains a \$2 million limit and a \$25,000 deductible. The insurer offers \$250,000 in defense coverage for wage and hour claims. In return for assuming

a separate \$100,000 wage and hour retention/deductible, try requesting a \$500,000 limit that also affords indemnity coverage. Or, ask the underwriter to consider a \$1 million limit (again, to include both defense and indemnity) in return for a \$250,000 retention/deductible.

If these retentions seem too high, consider the fact that currently, absent *any* wage and hour coverage, your "retentions" are theoretically unlimited. When viewed in that light, these high retention options will seem much more palatable. Although such attempts may not be successful at present, as underwriters' level of comfort with wage and hour coverage increases, an insured's willingness to assume larger so-called burning layers of this risk may eventually be helpful in obtaining higher coverage limits.

Concluding Thoughts: The Future of Wage and Hour Coverage

Although just a handful of insurers are now writing the coverage (and on an admittedly limited basis at that), to their credit, they have at least begun to get their feet wet. Accordingly, insurers can now start compiling loss and exposure data, the nature of which will allow them to feel more confident about the wage and hour risk.

In short, we predict that within 5 years, wage and hour coverage will be much more available, and perhaps readily available. Hopefully, by that time, insureds will be able to buy both *higher limits* (i.e., such as those matching the regular policy limit) and *broader coverage* (i.e., policies covering indemnity as well as defense). EPLiC

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