



Wage & Hour: The View From Both Sides of the Table

Presentation By:

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Introductions



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What We Will Cover

- FLSA Basics
- What's Going On In Washington, D.C.?
- FLSA National Trends
- FLSA Common Litigation Issues
- FLSA Noteworthy Decisions
- Final Thoughts



FLSA Basics

FLSA Basics: The Fundamentals



- The FLSA includes several exemptions from the Act's minimum wage and/or overtime requirements
- The law presumes employees are non-exempt *unless* they are covered by an exemption
 - Employer has the burden of proving the exemption
 - ***Employees are non-exempt...unless they aren't***
- Most exemptions include duties and pay requirements; the former can be a matter of interpretation

FLSA Basics:

Why the Focus on Compliance?

- Ambiguities in dated legislation create room for uncertainty or confusion in everyday application
- The nature of FLSA obligations can depend on duties performed by the employee, which can change and, even when constant, may be a matter of interpretation
- We want to pay employees properly and in accordance with the law



FLSA Basics:

But Compliance is Not Easy

- The Fair Labor Standards Act was enacted in 1938
 - Minimum Wage
 - Overtime
 - Child Labor
- Amended 44 Times
- Well Over 50 Statutory Exemptions
- Over 700 Pages of Regulatory Text
- 14-15 Public Chapters of Field Operations Handbook
- 350+ Opinion Letters Since 2000
- Does Not Preempt State Law
- Generally Cannot Be Overruled by CBA



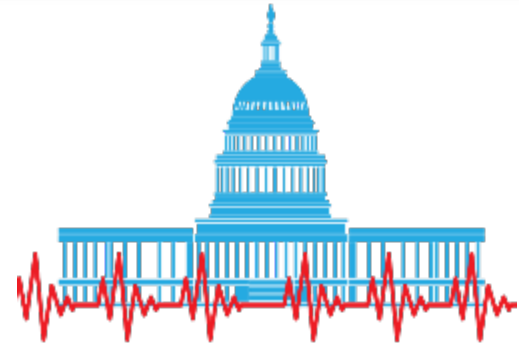


What's Going On In Washington, D.C.?

The Current State: WHD and DOL in D.C.

- Key Players:

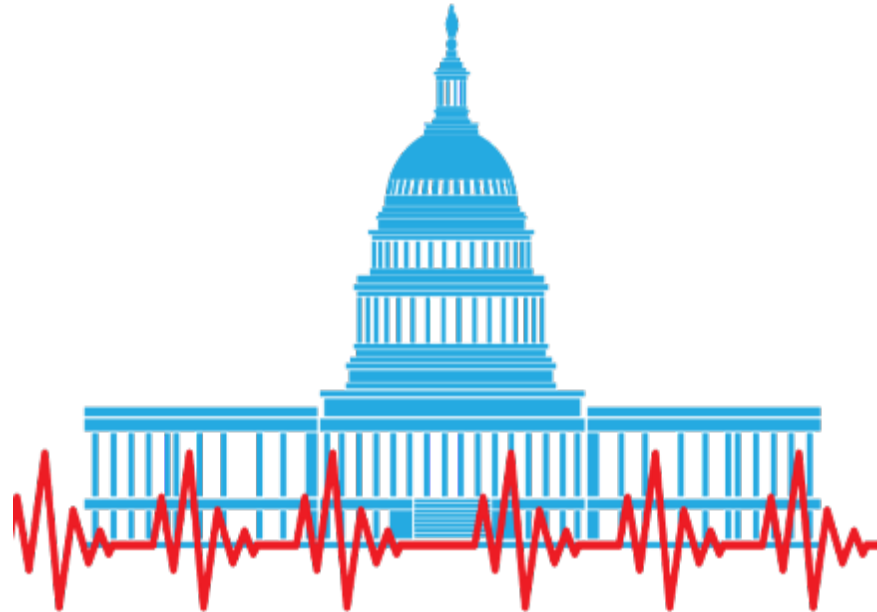
- Secretary of Labor: Alex Acosta
- Cheryl Stanton: Appointed to WHD Administrator
- Bryan Jarrett: Acting Administrator
- Katie O'Scannlain: Solicitor of Labor



- WHD rescinded the Administrator's Interpretations regarding independent contractor status & joint employment
- Reinstated a handful of opinion letters that prior administration had withdrawn
- Opened the door to opinion letter requests
- Signaled an eye towards self-assessments of FLSA compliance, with the PAID pilot initiative

The Current State: WHD and DOL in D.C.

- What happened to the 2016 FLSA exemption regulations?
- Fifth Circuit appeal
- Chipotle litigation
- What's next?



SCOTUS Wage & Hour Rulings 2018

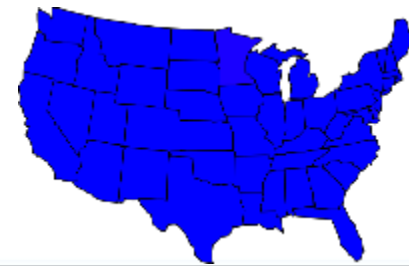
- *Encino Motorcars, LLC v. Navarro*
 - “A service advisor is obviously a salesman”
 - SCOTUS rejected the 9th Circuit’s principle that exemptions to the FLSA should be narrowly construed
 - “There is no reason to give [them] anything other than a fair (rather than a ‘narrow’) interpretation.”
- *Epic Systems Corp v. Lewis*
 - Argument on October 2, 2017 (still awaiting decision)
 - Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.





FLSA: National Trends

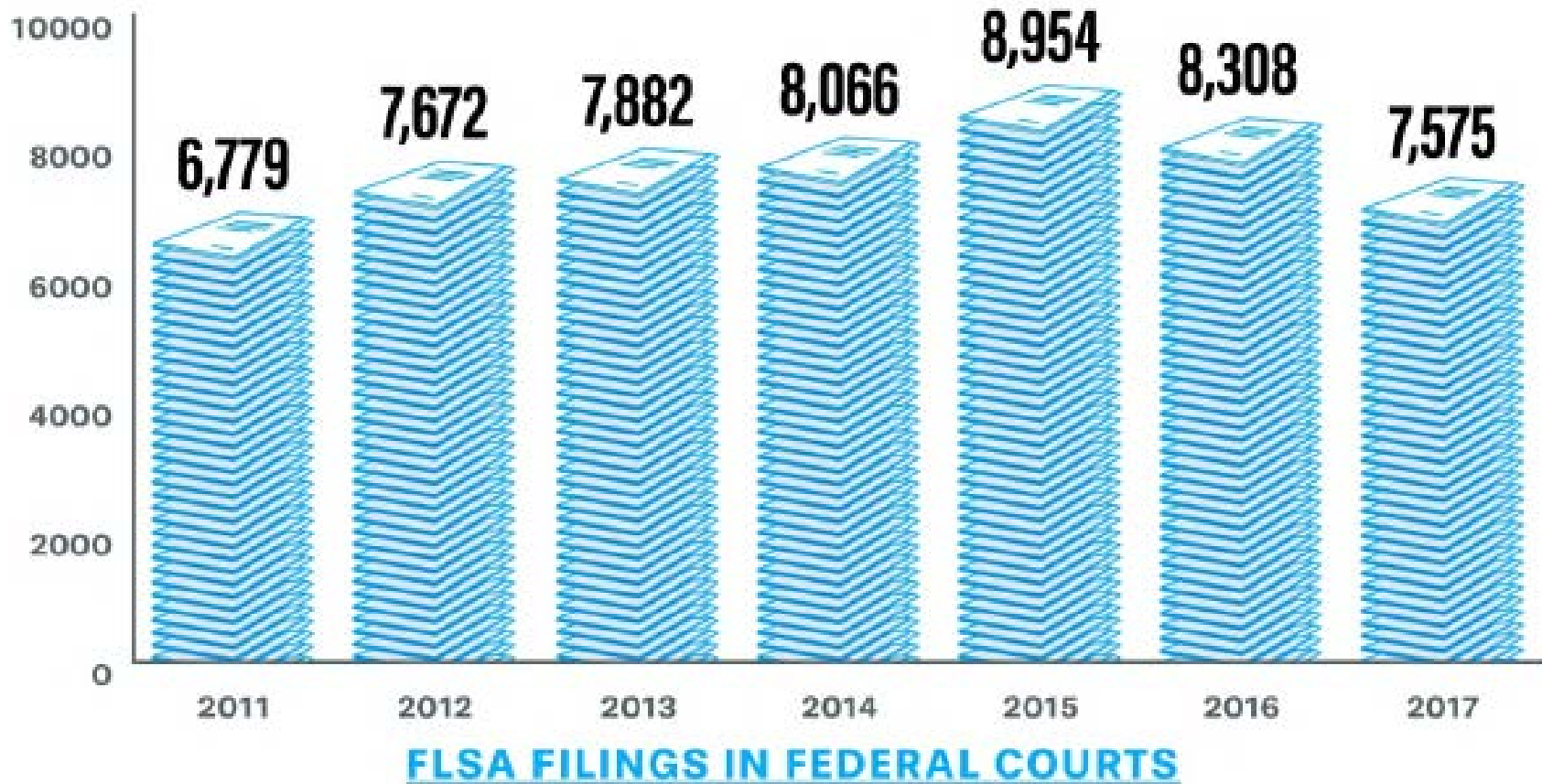
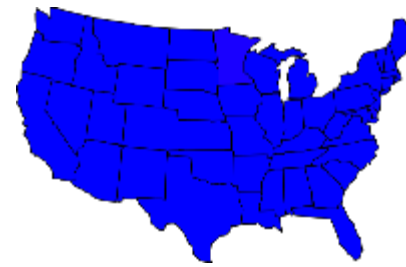
FLSA: National Trends



- Marginal reduction year-over-year in number of FLSA cases filed in federal court
- Meaningful cases continue to be filed across the country
- Courts, generally speaking, have become more sophisticated in their management of FLSA cases
- New discovery protocols made available for courts overseeing non-collective action FLSA cases

Hot Topic Cases	
Independent Contractor	Restaurant worker
“Sales”	Transportation / Logistics
Gig / Shared Economy	Managers

FLSA: National Trends

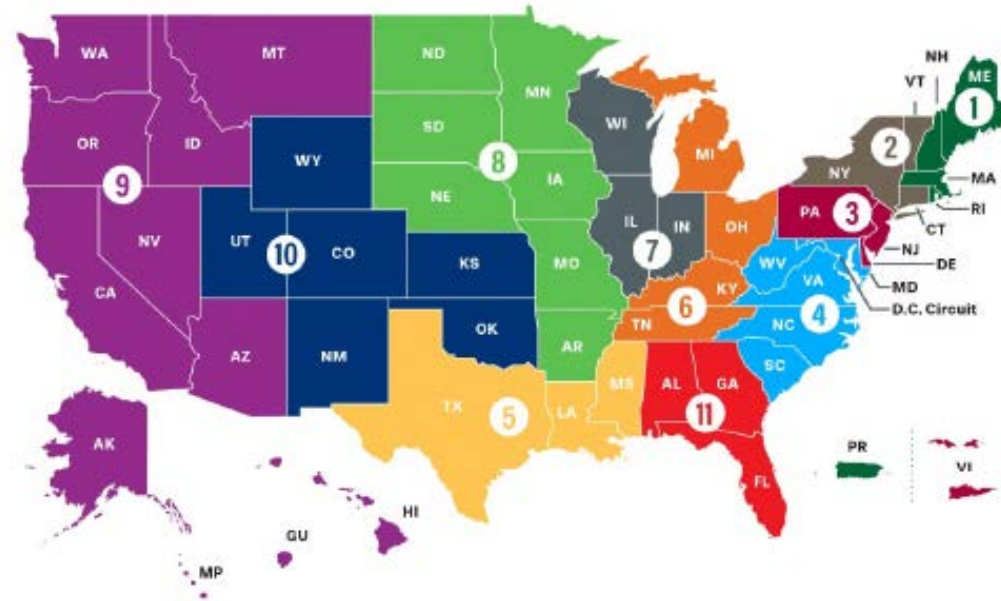




FLSA Class/ Collective Action: National Trends

FLSA: National Trends

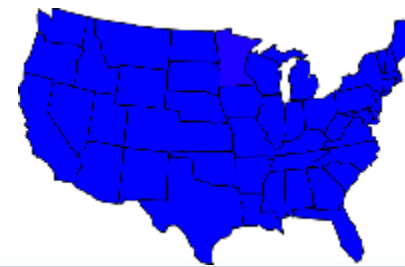
U.S. Courts Of Appeal - Analysis Of FLSA Certification Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Conditional Certification Motions Granted	6	33	4	12	25	21	17	8	25	10	8	1
Conditional Certification Motions Denied	2	6	2	1	5	5	7	4	23	1	7	0
Decertification Motions Granted	0	3	1	0	1	1	3	1	5	0	0	0
Decertification Motions Denied	0	3	0	0	2	0	1	2	2	0	0	0

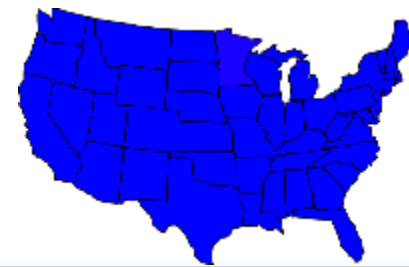
Total: 170 Conditional Certifications Granted / 63 Conditional Certifications Denied
 15 Decertification Motions Granted / 9 Decertification Motions Denied

FLSA: National Trends

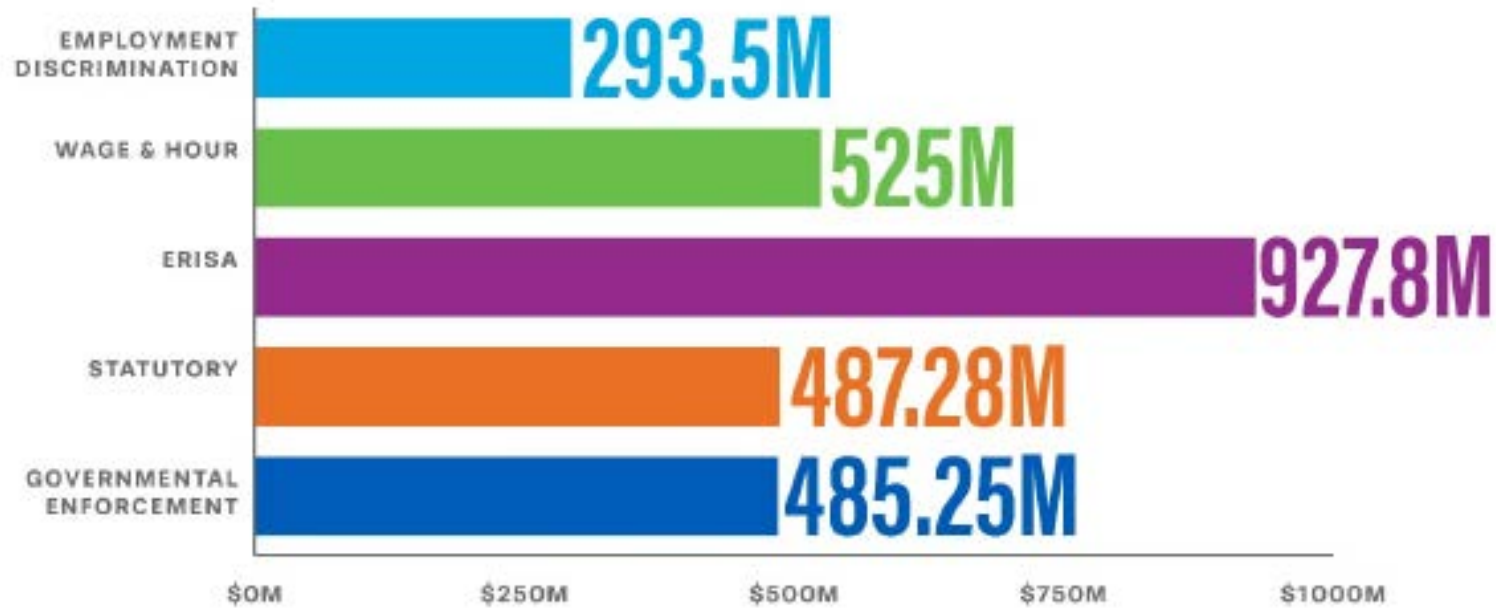


2014 - 2017 FLSA CONDITIONAL CERTIFICATION MOTIONS AND DECERTIFICATION MOTIONS

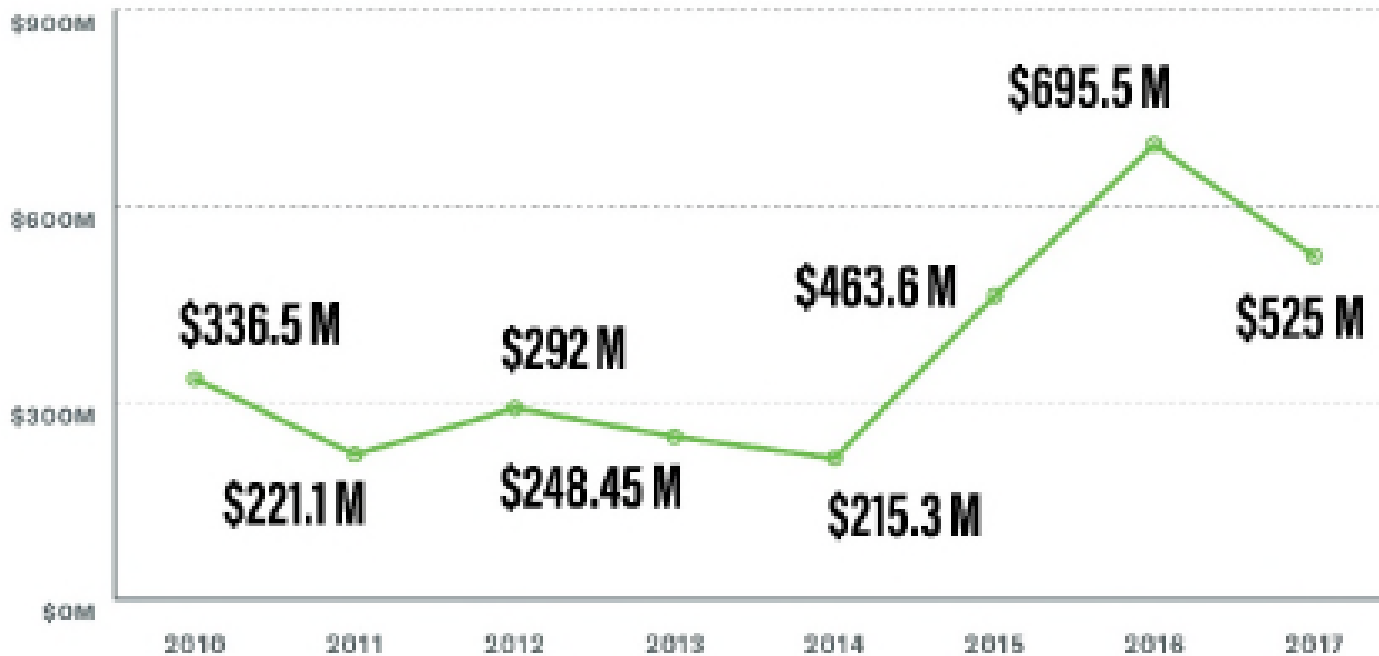
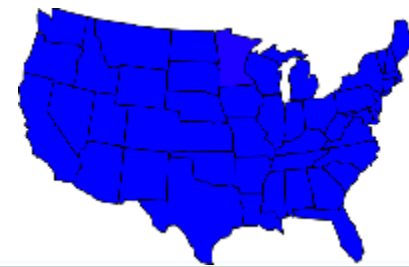
FLSA: National Trends



SETTLEMENT AMOUNTS BY CLASS ACTION TYPE



FLSA: National Trends



VALUE OF TOP 10 WAGE & HOUR CLASS ACTION SETTLEMENTS



FLSA: Common Litigation Issues



Commonly Litigated Issues

- Misclassification of Exempt Employees
- “Off The Clock” Time
- Incorrectly Computing Overtime Pay
- Improper “Independent Contractor” Designation
- Joint Employment
- Improper Use of Fluctuating Work Week
- Improper Deduction of Wages



FLSA: Noteworthy Decisions



Noteworthy Circuit Court Decisions

- ***Meeks v. Pasco Cty. Sheriff*, 688 Fed. App'x 714 (11th Cir. 2017) (*per curiam*)**
- ***Romero v. Top-Tier Colo., LLC*, 849 F.3d 1281 (10th Cir. 2017)**
- ***Marsh v. J. Alexander's, LLC*, 869 F.3d 1108 (9th Cir. 2017)**
- ***McKeen-Chaplin v. Provident Sav. Bank*, 862 F.3d 847 (9th Cir. 2017), *cert. denied* No. 17-371 (S. Ct. Nov. 27, 2017)**
- ***Nance v. May Trucking Co.*, 685 Fed. App'x 602 (9th Cir. 2017)**



Noteworthy Circuit Court Decisions

- ***Stiller, et al. v. Costco Wholesale Corp.*, Case No. 673 Fed. App. 783 (9th Cir. 2017)**
- ***Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183 (6th Cir. 2017)**
- ***Monroe v. FTS USA, LLC*, 860 F.3d 389 (6th Cir. 2017), *denying cert.* No. 17-637 (S. Ct. Feb. 20, 2018)**
- ***Hills v. Entergy Operations, Inc.*, 866 F.3d 610 (5th Cir. 2017)**
- ***Clark v. Centene Co. of Texas*, 656 Fed. App'x 688 (5th Cir. 2016) (per curiam)**



Noteworthy Circuit Court Decisions

- ***Salinas v. Commercial Interiors, Inc.***, 848 F.3d 125 (4th Cir. 2017)
- ***Hall v. DIRECTV, LLC***, 846 F.3d 757 (4th Cir. 2017), *cert. denied* No. 16-1449 (U.S. Jan. 8, 2018)
- ***Sec’y U.S. Dep’t of Labor v. Am. Future Sys., Inc.***, 873 F.3d 420 (3d Cir. 2017), *petition for cert. docketed* No. 17-995 (U.S. Jan. 18, 2018)
- ***Opalinski v. Robert Half Int’l Inc.***, 677 Fed. Appx. 738 (3d Cir. 2017)
- ***Wang v. Hearst Corp.***, 877 F.3d 69 (2d Cir. 2017)



Noteworthy District Court Cases

- ***Rodriguez, et al. v. Nike Retail Servs., Inc.*, 2017 U.S. Dist. LEXIS 147762 (N.D. Cal. Sept. 12, 2017)**
- ***Lawson v. Grubhub, Inc.*, 2017 U.S. Dist. LEXIS 106291 (N.D. Cal. July, 2017)**
- ***Salazar v. McDonald's Corp.*, 2017 U.S. Dist. LEXIS 9641 (N.D. Cal. Jan. 5, 2017)**
- ***Reyes, et al. v. Transamerica Life Ins. Co., et al.*, Case No. 2:15-cv-03452-DMG-FFM (C.D. Cal.)**
- ***McEarchen v. Urban Outfitters, LLC*, 2017 U.S. Dist. LEXIS 144203 (E.D.N.Y. Sept. 6, 2017)**



Noteworthy District Court Cases

- ***Brown v. Barnes & Noble, Inc.*, 252 F. Supp. 3d 255 (S.D.N.Y. May 1, 2017)**
- ***Gorczyca v. NVR., Inc.*, No. 13-CV-6315-L (W.D.N.Y. Dec. 2016)**
- ***Crawford, et al. v. Saks & Co.*, Case No. 2016 U.S. Dist. LEXIS 71805 (S.D. Tex. June, 2016)**
- ***Leonard, et al. v. Delaware North Companies Sport Service, Inc.*, Case No. 4:15-cv-01356-CDP (E.D. Mo.)**



Noteworthy State Court Cases

- ***Wilson, et al. v. Farmers Insurance Exchange*, Case No. B260729 (Cal. App. 2017)**



Settlements for the Weary



Largest Wage and Hour Settlements: 2017

1. \$227 million – FedEx Ground Package System, Inc.
2. \$110 million – American Commercial Security
3. \$61.69 million – The City Of Dallas, Texas
4. \$27 million – Lyft, Inc.
5. \$21 million – U.S. Security Associates, Inc.
6. \$19.1 million – Carlson Restaurants, Inc.
7. \$16.7 million – JP Morgan Chase & Co.
8. \$16 million – PNC Bank, N.A.
9. \$13.5 million – Duane Reade, Inc.
10. \$13 million – Wells Fargo



Final Thoughts

ANY
QUESTIONS
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