



## Wage & Hour Alert: Why A Litigation Tsunami Warning Is Issued For 2016

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The law firm Seyfarth Shaw LLC reports that cases under the Fair Labor Standards Act (FLSA) rose 7.6 percent in a 12-month period, continuing a trend. The firm expects the number of cases to top 9000 in 2016.

FLSA matters include charges for failure to pay; failure to pay minimum wage; misclassification; and child labor. Although raising the minimum wage receives the most media attention, the greatest risk for employers in 2016 is misclassification.

Misclassification includes classifying non-exempt employees as exempt and classifying employees as contractors. Misclassification has the attention of the DOL, the IRS, and the trial bar.

The DOL argues that misclassification is a form of wage theft. The IRS argues that misclassification is tax theft. Trial lawyers take misclassification cases because they are easy to prove and have large damage awards. The common theme of all three parties is they want employers to pay more.

Employers argue that they are simply doing what was allowed in the past before the litigation storm, but that argument falls on deaf ears, including those of federal court judges and juries.

The Seyfarth announcement states that some federal courts have made it easier for trial attorneys to certify classes of employees for FLSA matters. Opposing class certification successfully was one way defense lawyers could stem the litigation tidal wave. With that slowly eroding away, one can expect more wage and hour class actions. "Federal Wage and Hour Lawsuits Up 8%, To Record High, Firm Finds," *www.staffingindustry.com* (Nov. 24, 2015).

Adding to the mix, 2016 is an election year, and the Obama Administration's DOL has stated its plans to make changes before it departs.

Already promised by the DOL, but delayed, is the moving of the threshold for payment of overtime from \$23,660 to a proposed \$50,440. In general terms, any employee making less than the proposed \$50,440 is due overtime no matter their position or job duties. This change will be fundamental and will impact every employer, especially small and rural employers and start-ups that do not have the capital to pay hefty salaries, but need work hours to get a business off-the-ground.

The hits keep coming for 2016 with the July 15, 2015, DOL Administrator's Interpretation No. 2015-1, [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.htm](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm) The Interpretation will make it more difficult for employers to classify workplace participants as contractors. The recent popularity of the new Uber work model and the use of contractors to avoid paying benefits, like the mandates of the Affordable Care Act, has many in Washington concerned. According to the DOL, misclassification leads to lower collection of tax revenue.



Although not a certainty, there is talk that the DOL will narrow some of the exemptions for 2016. If that does happen, it will also increase overtime exposure for employers.

The result of these judicial and regulatory changes is a wage and hour tsunami that will begin in 2016 and that could crest in 2017 or 2018 unless legislative changes are made. Until then, employers need to start filling their sand bags and prepare because 2016 will be a year of wage and hour change.