Back Pay or Payback?

Wage-and-hour suits are increasingly common and almost always expensive.

By Deborah Rosenthal

Jack Black

When Oakland attorney Scott E. Cole filed an amended complaint against Coca-Cola Enterprises in May alleging violations of state overtime laws, the suit became one of several filed against the company since 2000 and one of hundreds of wage-and-hour suits pending in California courts. Another 330 cases are active in the federal courts, giving wage-and-hour suits the dubious distinction of becoming the nation's most commonly filed class action.

"This is not unlike the explosion of discrimination cases that followed the Clarence Thomas hearings," says Cole, who represents Rancho Cucamonga workers in *Santilli v Coca-Cola Enter.* (San Bernardino County Super Ct, Civ No. RCV 059085). "Public awareness of the unlawful activity has paved the way for employees to come forward."

Well, yes and no. The surge in litigation actually began with Gray Davis's labor-supported campaign for governor in 1998. The Democratic Legislature then endorsed Davis's nod to workers' rights by enacting the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 (Lab C §§500 et seq., effective January 1, 2000). That bill reinstated overtime provisions repealed during Gov. Pete Wilson's tenure—and inadvertently created opportunities for plaintiffs attorneys because of differences between federal and state regulations.

Federal law set out in the Fair Labor Standards Act (29 USC §§201 et seq.) requires that employees who work more than 40 hours a week must be paid overtime, unless their job classification is designated "exempt." The distinction between hourly and exempt employees (generally executives, administrators, and professionals) is based on job duties rather than titles. To be considered exempt, employees usually must use their independent judgment or advanced education. 29 USC §213.

California law is similar but more restrictive. For example, exempt employees are defined as executive, administrative, and professional employees earning at least twice minimum wage who spend more than half their time performing discretionary work. Lab C §515. This and other disparities have proved a litigation gold mine for plaintiffs attorneys. "Until the wave of wage-and-hour class actions hit, California employers hadn't focused on the difference between federal and state law," says Orange County defense attorney Stephen L. Berry of Paul, Hastings, Janofsky & Walker. "That has produced exposure for them."

Berry says the earliest cases addressed misclassified executive and managerial positions, largely in the retail context. That was followed by challenges to the classification of administrative employees in the financial and insurance industries. Recent suits also target positions that companies have labeled "professional," such as computer operators doing routine work in service industries. "The exemptions are being scrutinized more than ever," Berry says. "And it's not just limited to class actions; we've seen a sizable increase in individual cases as well."

In fact, there are a vast number of employees who have been routinely misclassified. "There are some industries where compliance has lagged badly, and those industries are discovering that relying on common practice doesn't get you anywhere," says R. Brian Dixon, a

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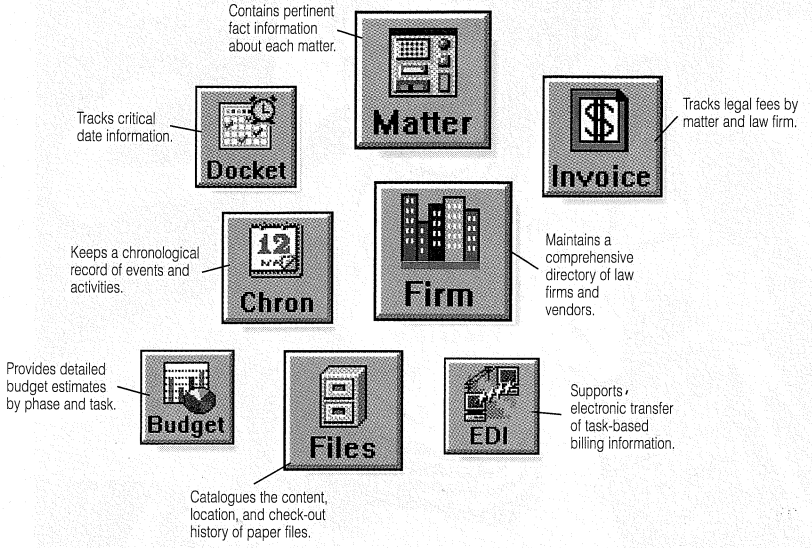

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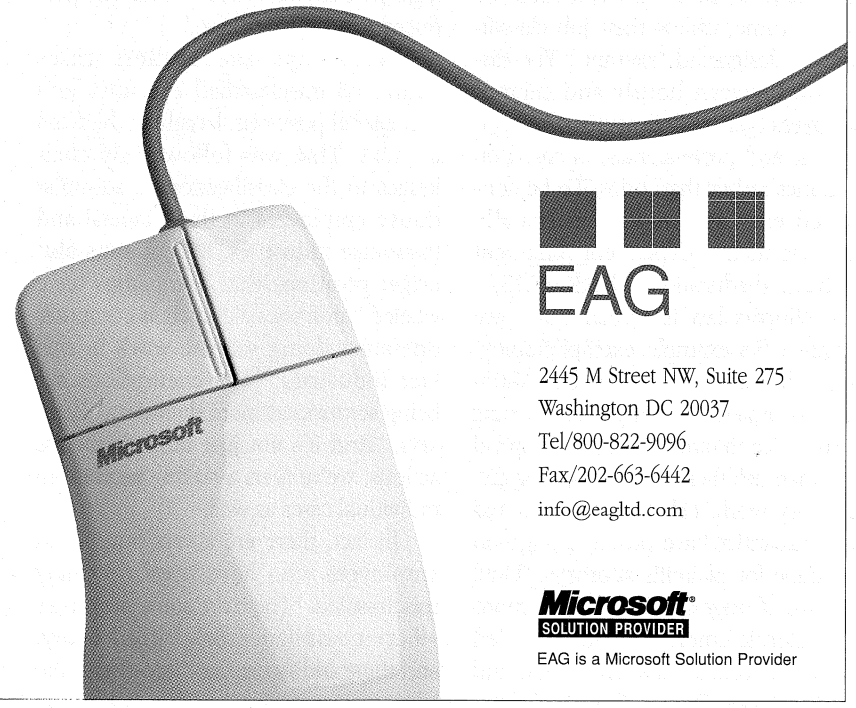

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Attorneys for employers contend that determining who is and who isn't exempt is intensely factual, making classification challenges time-consuming and costly to defend. When misclassifications have occurred, says Kenneth D. Sulzer of Seyfarth Shaw's Los Angeles office, they are most often unintentional. "In many cases," he says, "nobody has really taken a hard look at the difference between federal and state law."

But plaintiffs attorneys claim at least some of the misclassifications are calculated to limit labor costs. Employers, Cole says, "simply wait until the exemption is tested by a lawsuit to reclassify the position as nonexempt." Though tort claims in wage-and-hour suits are rare, damages can accumulate quickly, depending on the size of the potential class and the alleged number of hours worked. State statutes also provide for penalties and attorneys fees. Lab C §§558, 1194. As a result, settlements in the $10 million range are not unusual. In recent years, Starbucks settled a California wage-and-hour case for $18 million, Pacific Bell for $35 million, Bank of America for $22 million, and three Coca-Cola bottling companies for a total of $20.2 million. With claims that can reach back four years (under Bus & P C section 17208) and proposed classes numbering in the thousands, $100 million awards are not improbable.

Still, wage-and-hour litigation from the plaintiffs' perspective seems counterintuitive and could ultimately prove self-defeating. To be awarded damages, plaintiffs must argue that their job classification was higher than merited and that their duties using independent judgment were outweighed by more menial duties. That's asking for less status and lower rank in return for past overtime hours they may not be able to prove, and future overtime hours that may not be scheduled.

Nevertheless, because the bubble of wage-and-hour filings could continue for years, defense attorneys advise clients alerted to misclassification to respond properly, realistically, and carefully. CL