



PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

Adapting to the DOL's New Overtime Rules

June 8, 2016

Presented by PLUS Diamond Sponsors





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A copy of the presentation slides will be available following this webinar, on the PLUS website at: www.plusweb.org



Meet the Presenters

MODERATOR:

Noel Tripp, Principal, Jackson Lewis P.C.

PANELISTS:

Wayne Imrie, Underwriter – Management Liability, Beazley Group

Samantha Manfredini, Assistant Vice President - EPLI, Aon Risk Solutions

Wage & Hour Issues

Wage & Hour claims represent over 90% of the employment class actions filed every year
Federal wage & hour lawsuits filed nationally have increased more than 400% since 2000, with record high in 2015 of 8,781

Employee Misclassification

Exempt v. Non-Exempt Status

New White Collar Exemption Regulation

Resulting in the failure to pay overtime wages, failure to provide meal and rest breaks, and to account for off-the-clock work

Expansion of Joint Employer Liability

Independent Contract v. Employee

NLRB and DOL “Economic Realities Test”

Franchisor – Franchisee Relationships

Department of Labor’s focus on “Fissured” industries (high levels of independent contractors and franchisees)

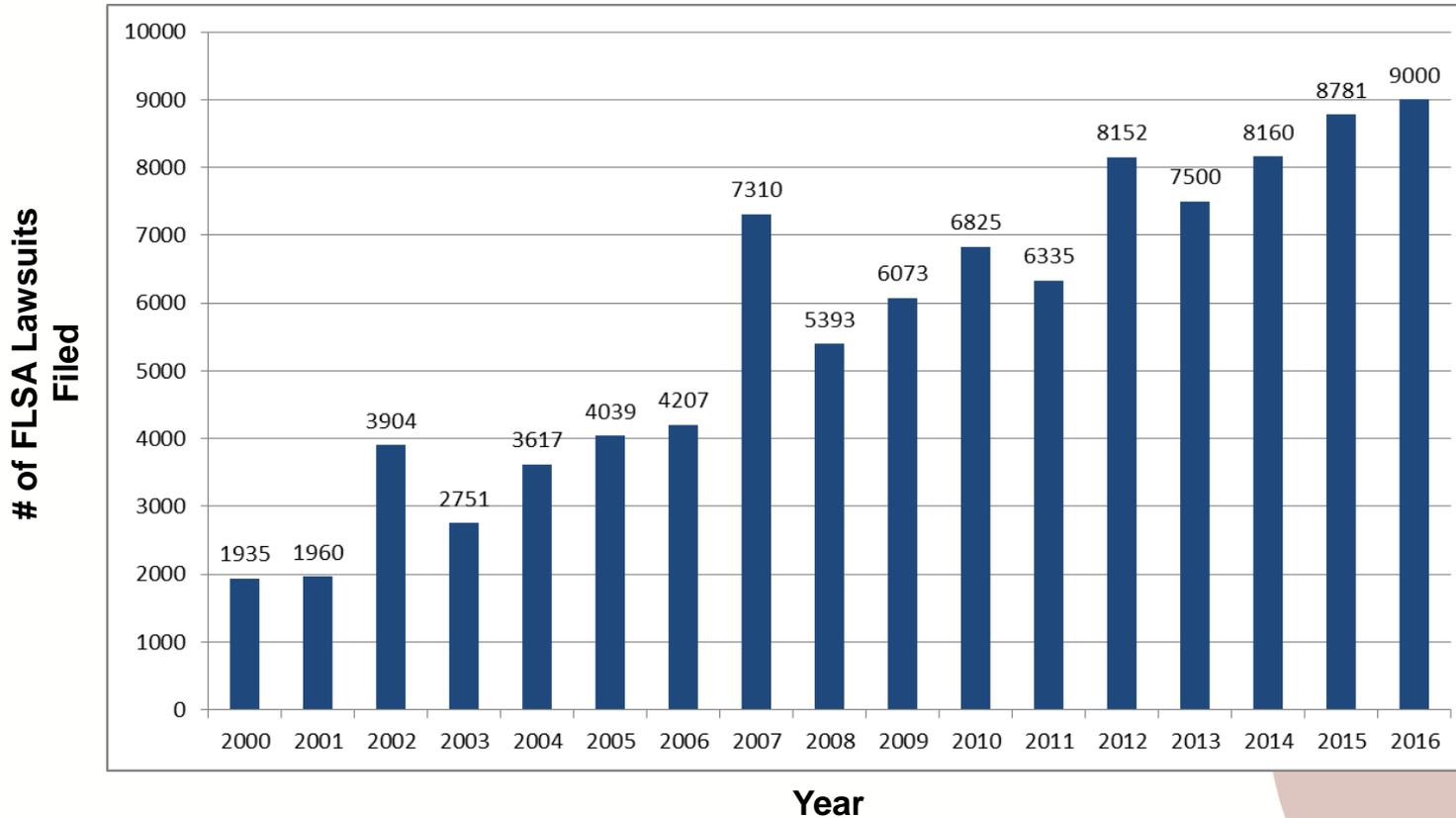
Pay Practices Issues Continue to Evolve Even at the State & Local Level

Arbitration with Class Action Waiver to the Rescue?

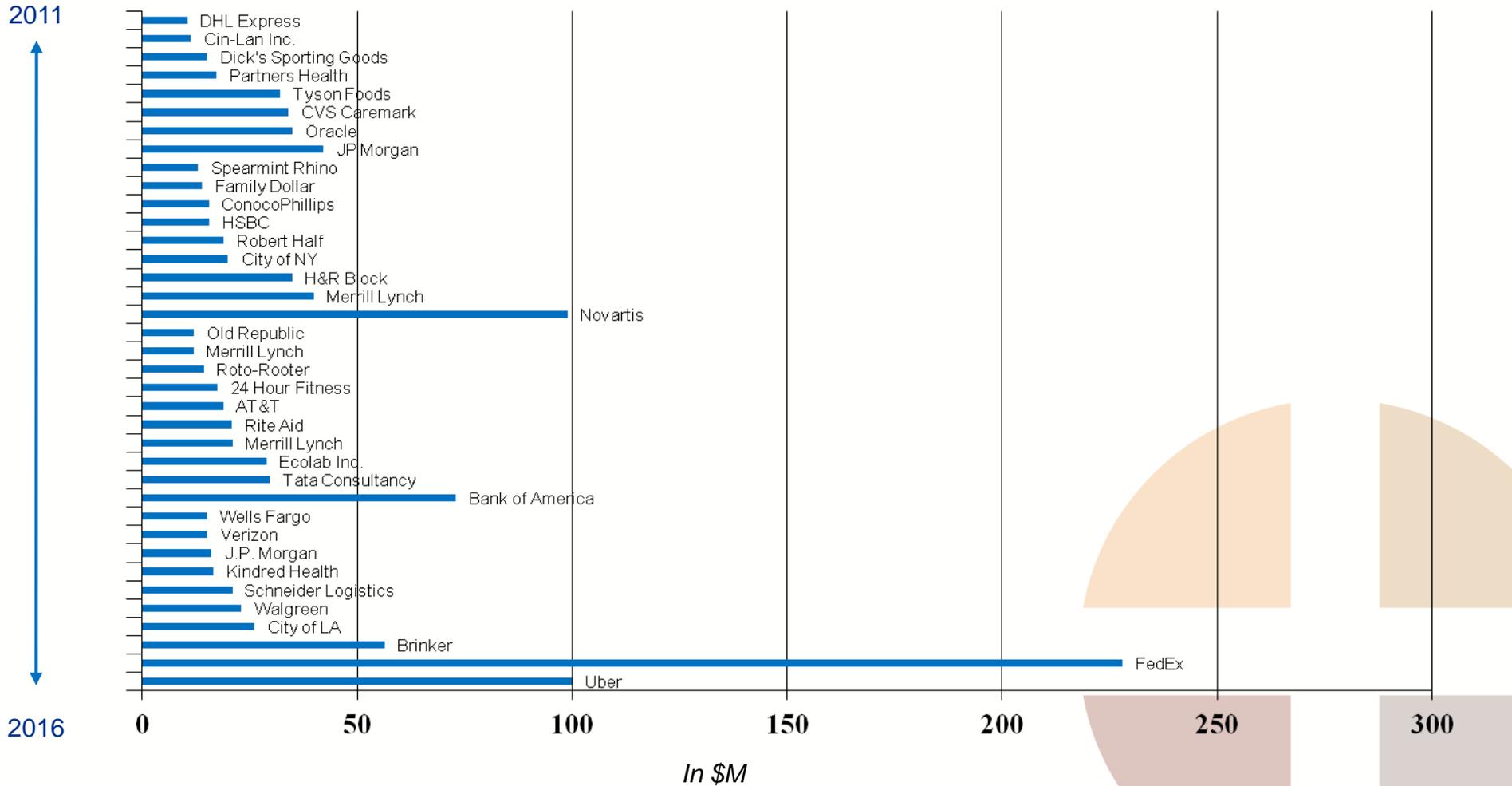


FLSA Cases Filed in Federal Court 2000 to 2015

FLSA case filings reached a record high of 8,781 in 2015 with no end to the increases in sight as regulatory changes expected to be implemented in 2016 will likely drive filings over 9,000 in the new year.



Source: Federal Judicial Caseload Statistics, Federal Judicial Center 12-month period ending September 30, 2015



Covers 128.5 million workers – almost 90% of workers in the United States

Requires payment of minimum wage and overtime.

Subject to exemptions

Goals of FLSA:

Reduce unemployment – overtime pay for workers encourages employers to spread the work and increase hiring

Provide “Fair Days Pay for a Fair Day’s Work”

Reduce Overwork and detrimental effect on health and well-being



Change: Salary Level Will Increase

New Salary Level for White Collar Exemptions – Equal to the 40th Percentile of Weekly Earnings for Full-Time Salaried Workers Based on BLS Data

\$913 per week or \$47,476 Per Year

BLS began tabulating data in 2015 at the request of DOL

New Salary Level for Highly Compensated Exemptions – Equal to the 90th Percentile of Earnings for Full-Time Salaried Workers Based on BLS Data

Final Rule is \$134,004 per year - \$2,577 per week

HCE only requires employee to have one exempt duty, effectively amounting to anyone making more than \$134,004 is exempt



Change: Salary Level Will Increase

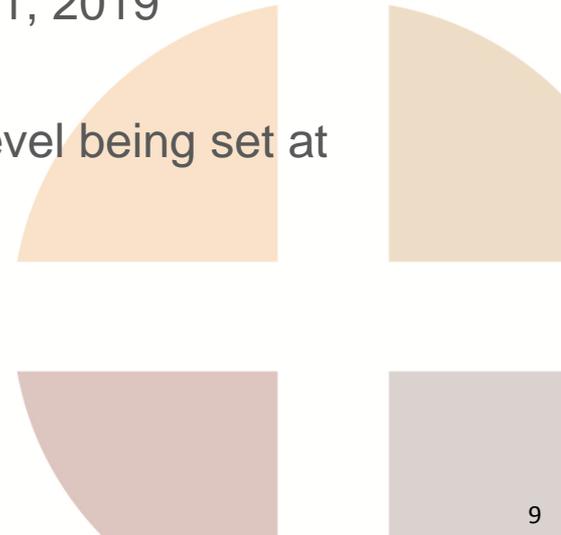
Salary Level Will Increase Automatically Every Three Years

Without automatic adjustment, DOL states it will be in perpetual rulemaking

Updates will occur every three years, the first to occur January 1, 2020

DOL will give 150 days notice prior to change – August 1, 2019

DOL estimates the first update will result in the salary level being set at \$51,168





Change: Salary Level Will Increase

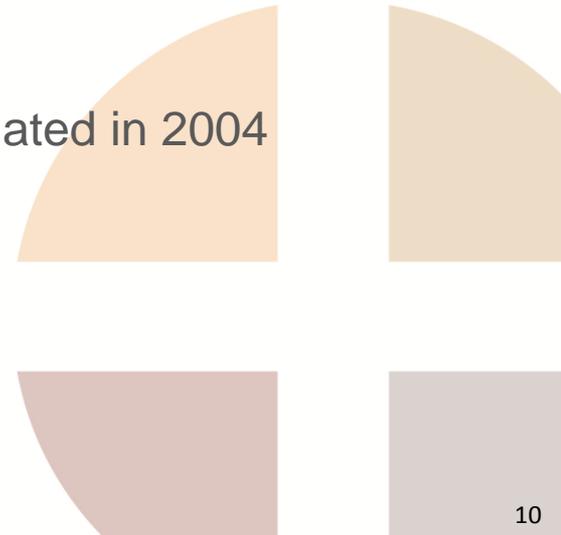
Reasons for Change

Current salary level below the poverty line for family of four

Simplify the exemptions by allowing employers to more easily identify employees who perform exempt work

Less Litigation

Preferable to reinstating long/short test that was eliminated in 2004



144.2M Workers in United States, 128.5M Covered by FLSA

43M white collar workers

21.4M white collar workers subject to salary requirement (doctors, lawyers, teachers do not have a salary requirement)

DOL Estimates that 4.6M Employees Will Be Affected in Year 1

Employees who earn between \$455 and the new salary level would become overtime eligible without some other action

36,000 Highly Compensated Employees Will Be Impacted

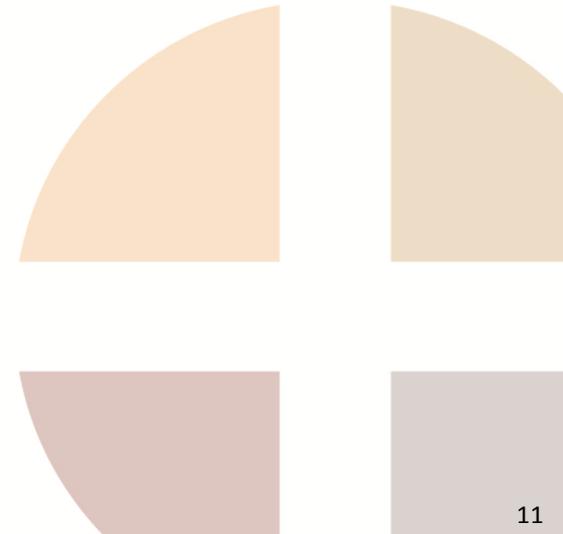
Industries / Jobs Most Impacted

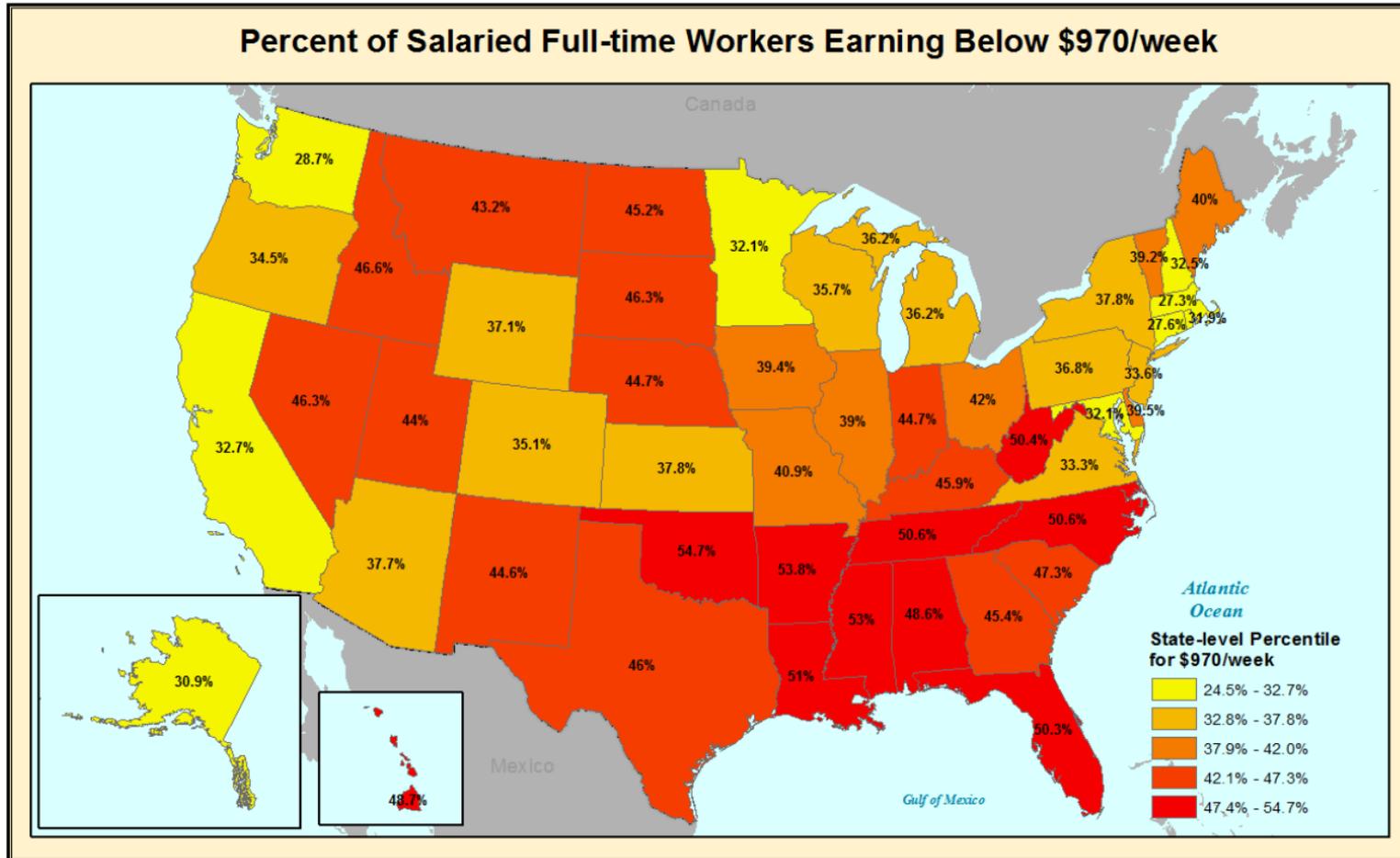
Middle Management

Non-Profits

Retail

Hospitality





Source: Oxford Economics (August 18, 2015)

Duties

No Changes to the Standard Duties Tests

Should employees be required to spend a minimum amount of time performing work that is their primary duty?

Should the DOL adopt the California Rule regarding exempt work – more than 50% of the employees time must be spent performing exempt work?

More rigorous than FLSA “Primary Duty” test

Bonuses and Commissions

Currently only permitted for Highly Compensated Exemption

Employers will now be permitted to use commissions and non-discretionary bonuses (up to 10%) to satisfy the new salary level, paid quarterly, and subject to a “catch up”



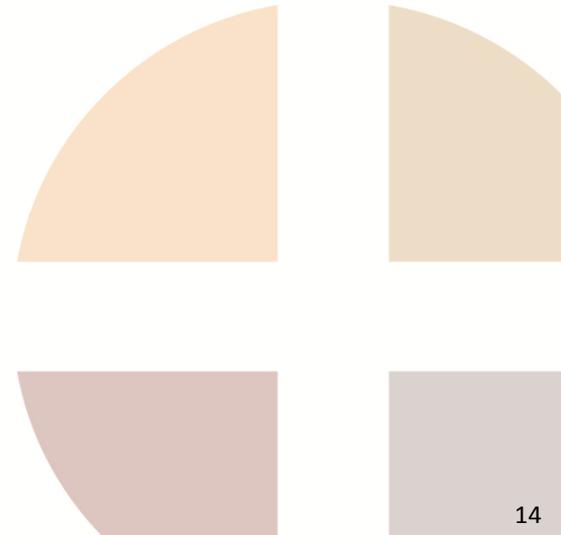
When Does Final Rule Become Effective?

Issued on May 17, 2016

Effective December 1, 2016

After Election

Timed to avoid giving Congress the full 60 days to take action because there are less than 60 days left in this session



Identify Employees Who No Longer Meet the Salary Level Test

Option One – Increase salary level for affected employees

Will Employers just absorb the additional cost?

Reduce variable compensation

Reduce fringe benefits

Reduce pay for non-exempt employees or provide slower and smaller wage increases to non-exempts

Delay Promotions

May impact other exempt employees above the salary level – global adjustment?

Option Two – Reclassify as non-exempt and overtime eligible

Adjust hourly rate to account for anticipated overtime so reclassification is cost neutral (e.g. \$900 week = \$16.36 per hour @50 hours per week)

Challenges

Recording time (particularly work outside the office using electronic devices)

DOL to issue Information Request in the future

Loss of flexibility

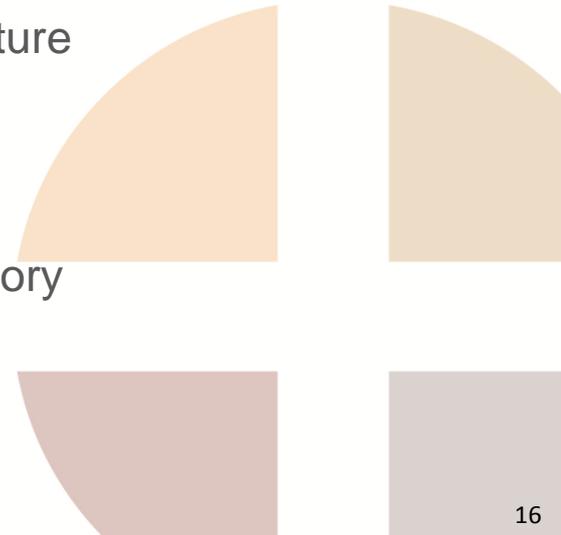
Loss of steady income – wages will fluctuate

Employee morale (punching hours; demotion)

Overtime estimates not reliable because no past history

Potential for significant increase in costs

May require hiring of more workers – additional cost

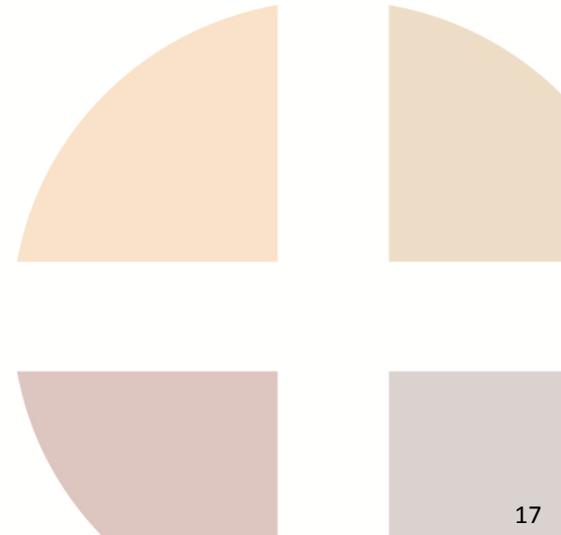


Option Three – Reduce Staff and Have Other Exempt Managers Absorb Duties and Perform More Work

Unemployment increases not decreases

Option Four – Hire More Part-Time Workers

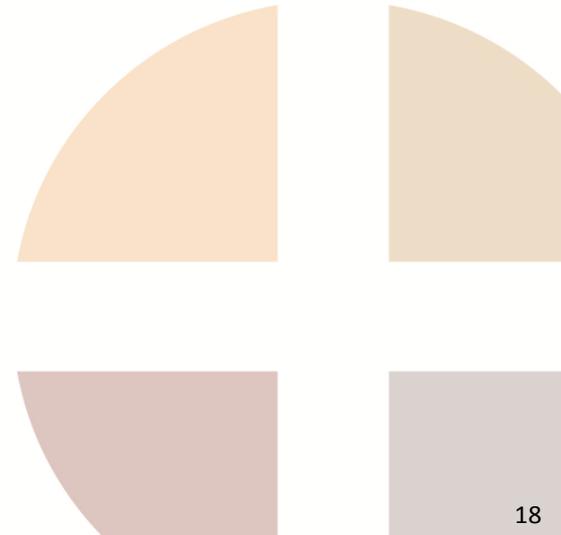
Take 60 hour job and make it two 30 hour jobs without overtime





Does the Change Provide Employer Opportunities

Excellent Time to conduct Wage/Hour Audit and Reclassify Borderline Employees



- **Proactive response**
 - HR and Legal departments already working on a solution
 - How will this be communicated
 - Implementing policies and procedures for ongoing monitoring
- **Consultation with outside counsel**
 - How to navigate the change successfully
 - Understand the impact – Unions, Federal Contractors
 - Use of other incentives to satisfy a portion of the increased salary
 - Keeping track of automatic increases every 3 years

- **Increased activity in both W&H and EPL claims**
 - **The obvious**
 - Huge misclassification claims
 - Claims for failing to pay overtime
 - Greater oversight from the Dept of Labor
 - **The less obvious**
 - Increase in retaliation claims
 - Increased discrimination issues relating to changes in roles or pay
 - Claims relating to a reduction in benefits
 - Potential lay-offs
 - Increased exposure to union activity

Available Structures

Stand-alone limits of as little as \$5 million and as high as \$125 million

Blended limits available from all primary markets

AIG has recently released primary W&H policy and will now offer standalone and blend W&H

Minimum retention of \$1 million out of Bermuda and even lower out of London

Markets Expanding Primary Limits

As carriers obtain reinsurance, they have become more flexible on size of limits offered

Markel and XL, for instance, now technically have up to \$25 million in available limits but tend to put out no more than \$15 million on primary

AIG is offering \$25 million on a primary basis but largely focusing on existing large EPLI client base (minimum \$5 million retention)

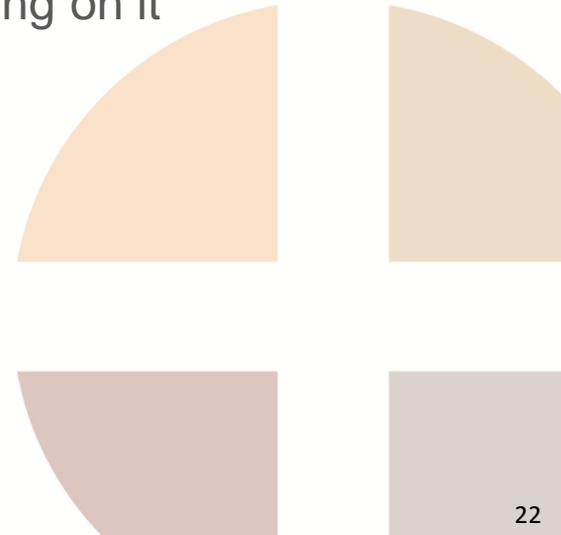
Beazley willing to pursue lower retentions and smaller companies but usually offers only \$5 million in capacity

Excess Markets Continue to Expand

9 of 11 Bermuda EPLI markets now willing to provide excess limits

2 carriers providing capacity out of London

Domestic markets continuing to trail but some are working on it



Flexibility / Creativity in the Marketplace

Transaction Liability Issues

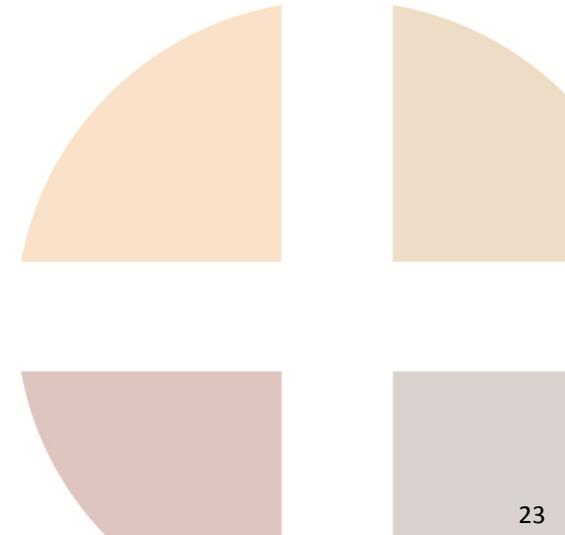
Industry Specific Issues

Independent Contractor Specific Issues

Purchasing Data

Average Limits - \$20M (Range - \$5M to \$100M)

Average Retention - \$5M (Range - \$250,000 to \$25M)



Declarations Page Structure

Allows for different limits, retentions and purchase decisions between Defense, Classification Claims, and Pay Practices Claims

Defense Structure

Allows Insured choice of counsel but requires consent for counsel when case reasonably anticipated to exceed 25% of retention or for purported class/collective actions

Pre-Approved Firms

Select group of firms that do not require prior consent from carriers to defend claims

Wage and Hour Law Classification Practices Violation

Actual or alleged violation of the Fair Labor Standards Act (except the Equal Pay Act or similar state or local pay equity laws or regulations) or any similar federal, state or local laws governing or related to the classification of employees as exempt or non-exemption from the payment of overtime or minimum wage, the notice requirements for exempt or non-exempt employee, and misclassification of workers as independent contractors for the purposes of determining employees' eligibility for benefits and other compensation, as well as the company's various tax withholding obligations under such laws.

Wage and Hour Law Pay Practices Violation

Actual or alleged violation of the Fair Labor Standards Act (except the Equal Pay Act or similar state or local pay equity laws or regulations) or any similar federal, state or local laws governing or related to the payment of wages, including but not limited to compliance with information required to be provided on pay stubs, tip credit issues, meal and break period laws, regular rate claims, failure to timely pay wages upon termination, failure to pay wages for off-the-clock work, and including donning and doffing claims.

Loss

Damages, judgments (including prejudgment and post-judgment interest awarded against an insured on that part of any judgment paid by insurer), settlements, statutory attorneys fees, statutory liquidated damages, statutory fines and penalties, defense costs, and punitive, exemplary, restitutionary and multiple damages.

EPL Exclusion

If W&H is purchased on a standalone basis the W&H policy will have an exclusion for activities typically insured under an EPLI policy.

Certain exclusions in the standard form may be removed or modified with proper underwriting

Exclusions for expense deductions, benefits, and taxes may be removed in relation to independent contractor misclassification

Exclusions for prior and pending claims and related claims may be modified

10% to 20% Settlement Clause

US Only Coverage

Initial “Ballpark” Premium Indications Available from Carriers with Limited Information

Headcount Information Broken Down by State

Exempt / Non-Exempt

Full-Time / Part-Time

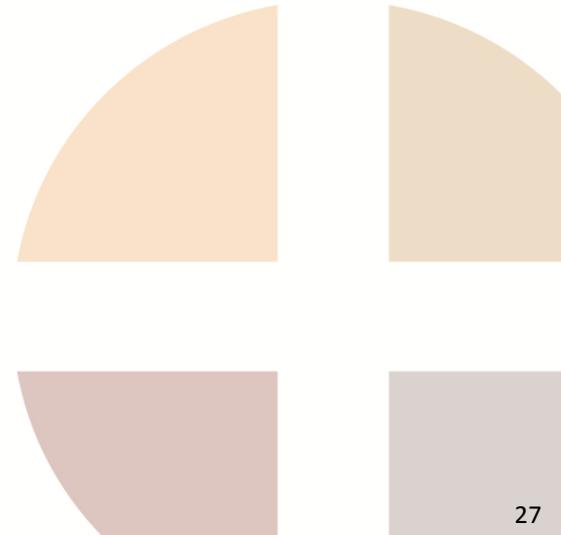
Contingent Workers

5 Year Wage and Hour Loss History Above 50% of the Desired Retention Level

Full Application Ultimately Required for Bindable Quotes

Underwriting Conference Call / Meeting Invariably Adds Value

Questions





Thank You Presenters

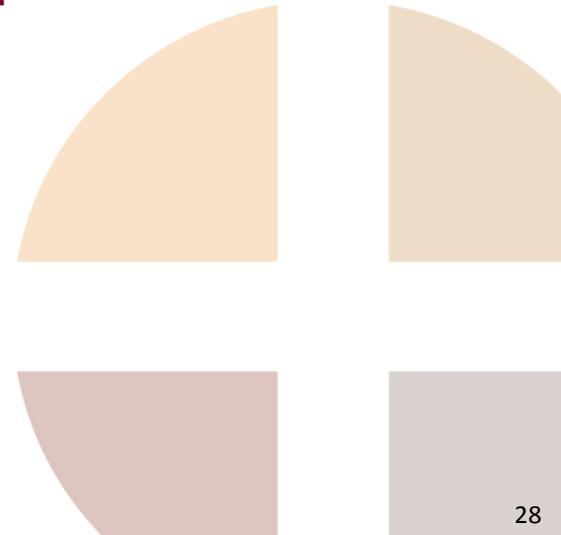
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Thank you for your time.

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