

Barley Snyder

# State of the Union – Spotlight on the DOL

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Presented by:

Jill S. Welch, Esq.

[jwelch@barley.com](mailto:jwelch@barley.com)

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# Chavez-DeRemer Pick for Secretary of DOL

- Republican Representative Lori Chavez-DeRemer of Oregon
- Elected to Congress in 2022; lost re-election in a swing district in Oregon
- Small businesswoman who founded an anesthesia management company and opened medical clinics with her husband, an anesthesiologist



# Chavez-DeRemer Pick for Secretary of DOL

- Chavez-DeRemer is expected to oversee significant changes to DOL's labor and wage and hour priorities including updating enforcement strategies, initiating rulemaking on issues such as Overtime, Joint Employment, and Independent Contractor
- Unions? Chavez-DeRemer co-sponsor of the Democratic-led Protecting the Right to Organize Act which would give workers protections when bargaining with employers and when organizing or joining unions

# Has The Wave Of W&H Litigation Crested?



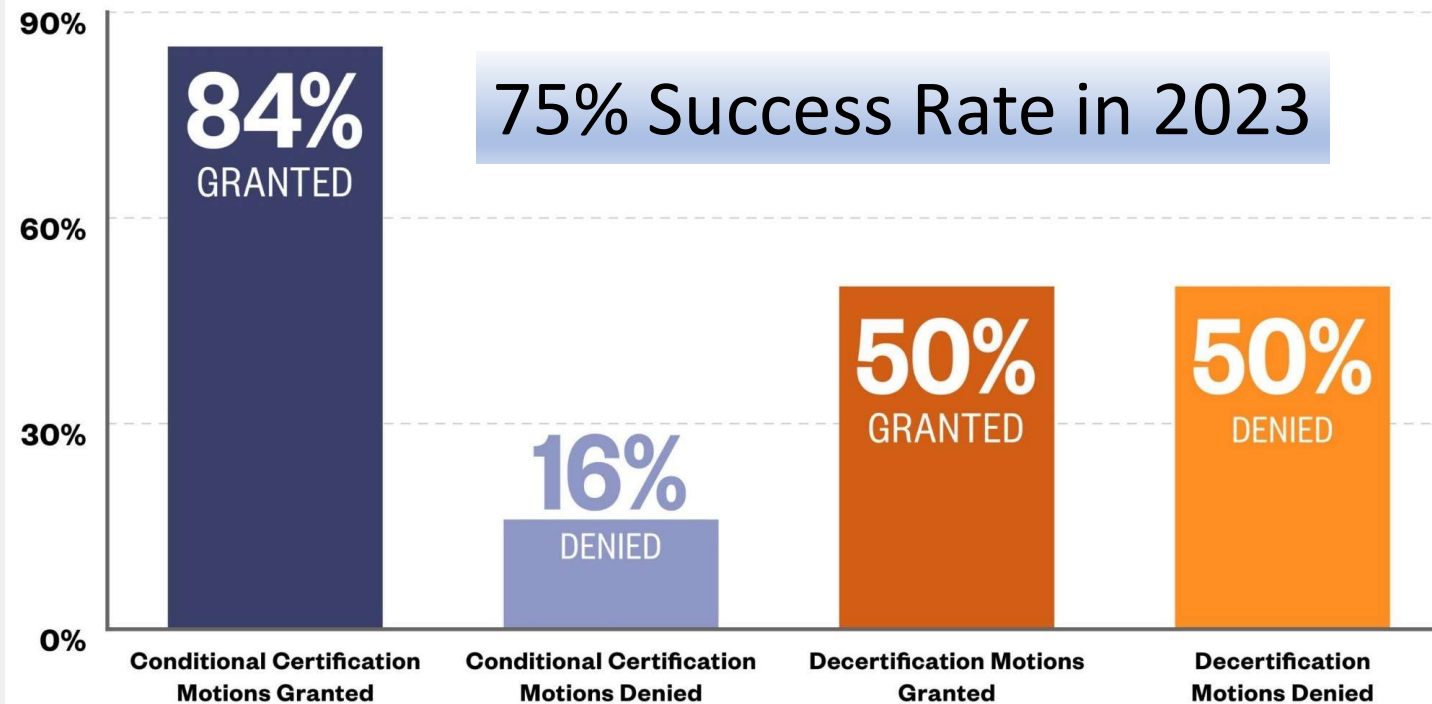
**After the 10% increase in wage & hour lawsuit filings in federal courts in 2022, 2023 saw a decrease to 5,996 cases, following prior trend of 6 years of decreased litigation**

**Pennsylvania federal courts saw 205 cases; EDPA ranked 15<sup>th</sup>, with 100 of these cases; MDPA had 75 cases**

**HEALTH CARE is the top industry targeted by wage & hour lawsuits, comprising 13.3% of all federal FLSA litigation filed, followed by BUSINESS SERVICES (11.5%); SERVICES (8.2%); RETAIL (8.2%); and CONSTRUCTION (6.6%)**

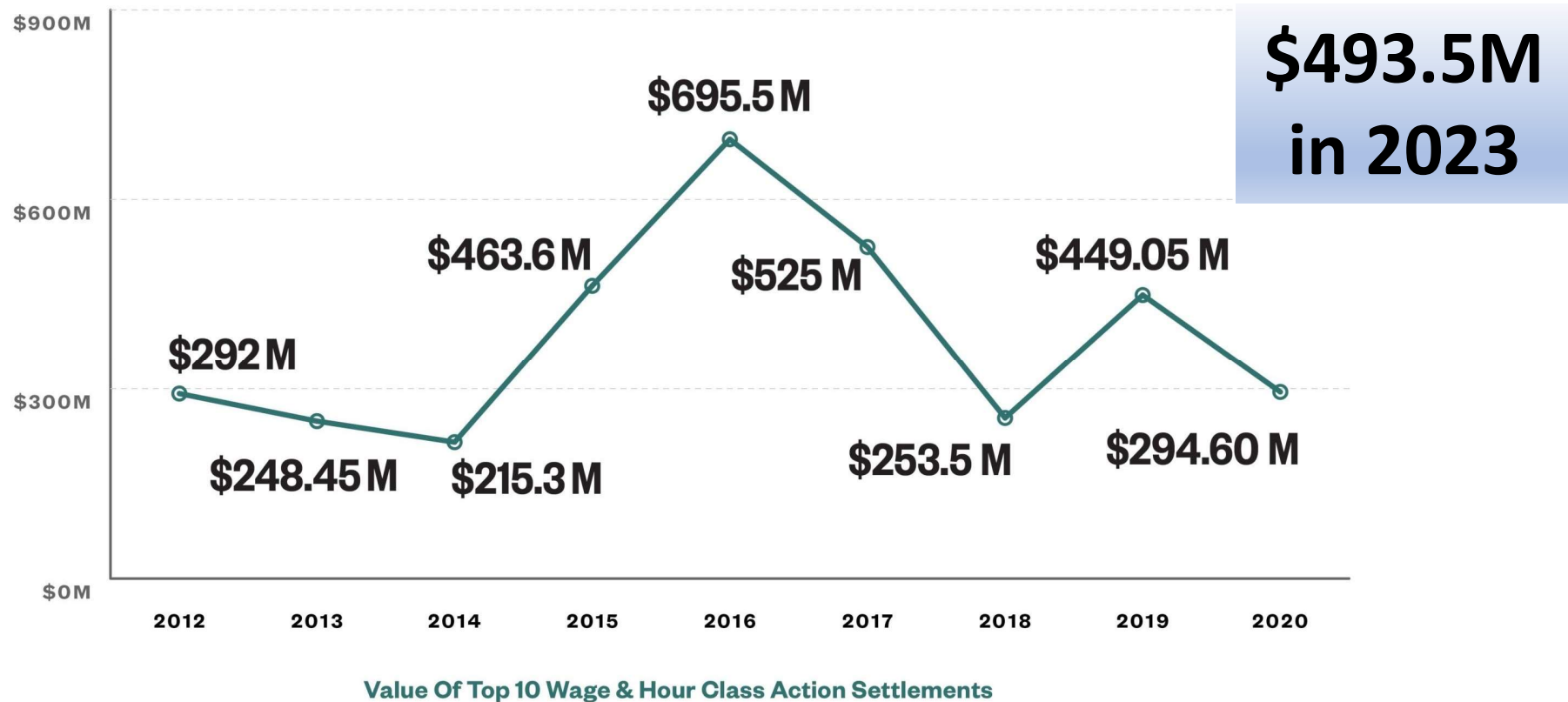
# W&H Litigation – Class Certifications

## 2020 FLSA Conditional Certification Motions and Decertification Motions



Graph from Seyfarth's 2021 Workplace Class Action Litigation Report

# W&H Litigation – Settlement Values



Graph from Seyfarth's 2022 Workplace Class Action Litigation Report



# **Federal Developments**



# DOL Final Overtime Salary Rule **VACATED!**

- **VACATED** 7/1/24 increase to **\$844 per week (\$43,888 annually)** **AND** 1/1/25 increase in minimum salary threshold to **\$1,128 per week (\$58,565 annually)**
- **VACATED** Increase minimum salary threshold for highly compensated employees **from \$107,432 per year to \$132,964 per year** in July and \$151,164 per year in January
- **VACATED** Automatic update to the minimum salary threshold **every 3 years**
- **REVERTS BACK** to **\$684 per week (\$35,568 annually)**



# **Chevron Deference – not just for law geeks anymore . . .**

**The “Chevron Deference” doctrine: federal courts grant considerable deference to federal agency regulations.**

**Supreme Court overrule of “Chevron Deference” doctrine means DOL’s authority to interpret the FLSA and other statutes through rulemaking could be sharply curtailed**

# White Collar Exemptions



- Executive
- Administrative
- Learned and Creative Professionals
- Outside Sales
- Computer Professionals, Highly Compensated Executives  
**(NOT IN PA!)**

# Exempt: “Salary Basis” Test

- Regularly receives predetermined amount not subject to reduction due to variations in **quality or quantity of work**
- Minimum earnings of now **\$684 per week**
- **Highly compensated employees (NOT IN PA!)**

# Duties Tests: Executives



Primary duty: the management of the enterprise or recognized department



Customarily and regularly directs work of 2 or more full-time employees (or equivalent) of employer



Authority to hire or fire, or recommendations given particular weight



Under PA MWA, **does not devote more than 20% of work hours in any other capacity**

# Duties Test: Administrative

Primary duty: performing office/non-manual work directly related to management or business operations of **employer** or **employer's customers**

Not inside sales or production or merely clerical

Primary duty includes **exercise of discretion and independent judgment** on matters of significance

Under PA MWA, **does not devote more than 20% of his or her work hours in any other capacity**

## **Administrative: Directly Related To Management Or General Business Operations**

- Tax; finance; accounting;
- Budgeting; auditing; insurance; quality control;
- Purchasing; procurement;
- Advertising; marketing; research; public relations; government relations;
- Personnel management; human resources; employee benefits; labor relations;
- Computer network, internet and database administration;
- Safety and health; legal and regulatory compliance



# Exercise Of Discretion & Independent Judgment

- ✓ Authority to formulate, affect, interpret, or implement management policies or operating practices;
- ✓ Carries out major assignments in conducting the operations of the business;
- ✓ Performs work that affects business operations to a substantial degree (even if assignments related to operation of particular segment of the business);
- ✓ Authority to commit the employer in matters that have significant financial impact;
- ✓ Authority to waive or deviate from established policies and procedures without prior approval;

# Exercise Of Discretion & Independent Judgment

- ✓ Authority to negotiate and bind the company on significant matters;
- ✓ Provides consultation or expert advice to management;
- ✓ Involved in planning long or short-term business objectives;
- ✓ Investigates and resolves matters of significance on behalf of management; and
- ✓ Represents the company in handling complaints, arbitrating disputes or resolving grievances

# Positions That May Qualify for Administrative Exemption

- Tax or finance consultants
- Insurance claims adjusters
- Quality control employees
- Purchasing representatives
- Advertising/Marketing Directors/Public Relations
- Human Resource Managers
- Executive Assistant to senior managers
- Persons ensuring legal or regulatory compliance

# Duties Test: Learned Professionals



Requires **advanced knowledge** in a field of **science or learning** (law, medicine, theology, accounting, engineering, teaching)



Customarily gained by **prolonged course of specialized intellectual instruction or academic training**

Not on-the-job training

High School degree not enough

Jobs that require associate's or bachelor's degree in any field as a prerequisite do not qualify



No more than 20% of time in activities that are not an essential part of or necessarily incident to the primary work performed



Compensated for services on a salary or fee basis

# Positions That May Qualify for Learned Professional Exemption

- Registered nurses
- Dental hygienists
- Physician assistants
- Accountants
- Executive chefs
- Engineers
- Funeral directors
- Not paralegals, not cooks, not LPNs

# Duties Test: Outside Sales

- No salary requirement
- Making sales or contracts to sell goods or obtaining orders or contracts for services
- Customarily and regularly engaged **more than 80% of work time away from the employer's place of business**
- Promotional and clerical work incidental to sales (incl. deliveries and collections) **exempt if no more than 20% of hours worked**



# FLSA DOL Independent Contractor Regs

## The DOL Six Factor Economic Realities Test

1. **Opportunity for profit or loss depending on managerial skill.**
2. **Investments by the worker and the potential employer.**
3. **Degree of permanence of the work relationship.**
4. **Nature and degree of control. Includes “reserved control” (a.k.a. “right to control”).**
  - ER use of technology to supervise the performance of the work, reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose
  - Economic -- control over prices/rates for services and marketing of the services/products provided by the worker
  - May include ER control over compliance methods, safety, quality control, contractual or customer service standards
  - Does not include ER actions for “sole purpose of complying with” laws or regulations
5. **Extent to which the work performed is an integral part of the potential employer's business.**
6. **Skill and initiative.**
  - Focus on “specialized” skill.



# State Minimum Wage Increases of Note

- **Delaware** -- Delaware's minimum wage will reach the **\$15** benchmark on Jan. 1, 2025
- **New Jersey** – Eff. Jan. 1, 2025, the wage rates increase to **\$15.49** per hour for employers w/ 6 or more employees
- **New York State** – Eff. Jan. 1, 2025, the minimum wage in New York is **\$15.50** per hour State (excluding NYC, Nassau, Suffolk, Westchester counties which is \$16.50 per hour)
- **Ohio** -- Ohio's wage rates will adjust on Jan. 1, 2025 to **\$10.70** per hour (for employers w/ GR > \$394,000 per year)

# Future of Federal Contractor Min. Wage?

- On **Nov. 5**, 9th Cir. Court of Appeals **vacated** district court decision and found that President Biden did not have authority under the Procurement Act to implement the federal contractor min. wage increase
- Currently a circuit split on whether the president has authority to issue a wage mandate; petition for cert. is pending in the U.S. Supreme Court
- **The federal contractor minimum wage rate is slated to increase on Jan. 1, 2025, from \$17.20 to \$17.75 per hour**
- Trump Administration expected to address the federal contractor minimum wage, such as rescinding prior executive orders or issuing new orders, but not before wage increase takes effect

# **DOL Guidance on AI for Employers. . .**

## **ESTABLISHING AI GOVERNANCE AND HUMAN OVERSIGHT**

- Organizations should have clear governance systems, procedures, human oversight, and evaluation of AI systems for use in workplace

## **ENSURING TRANSPARENCY IN AI USE**

- Employers should be transparent with workers and applicants about the AI systems used in the workplace

## **PROTECTING LABOR & EMPLOYMENT RIGHTS**

- AI systems should not violate/undermine workers' right to organize, health & safety, wage and hour rights, and anti-discrimination and anti-retaliation

<https://www.dol.gov/sites/dolgov/files/general/ai/AI-Principles-Best-Practices.pdf>

# DOL Guidance on AI for Employers. . .

## **USING AI TO ENABLE WORKERS**

- AI systems should assist, complement, and enable workers and improve job quality

## **SUPPORTING WORKERS IMPACTED BY AI**

- Employers should support and upskill workers during job transitions related to AI

## **ENSURING RESPONSIBLE USE OF WORKER DATA**

- Workers' data collected, used, or create by AI systems should be limited in scope and location, used only to support legitimate business aims, and protected and handled responsibly

<https://www.dol.gov/sites/dolgov/files/general/ai/AI-Principles-Best-Practices.pdf>

# Questions?

**Jill S. Welch, Esq.**  
[jwelch@barley.com](mailto:jwelch@barley.com)

