



Employee lawsuits a bigger part of modern American workplace

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By **Alison Grant, The Plain Dealer**

CLEVELAND, Ohio -- Bank loan officers, phone company engineers, exotic dancers, delivery truck drivers, exterminators, janitors and drug store assistant managers are among tens of thousands of U.S. workers who filed class action lawsuits against their employers last year.

They are part of a flood of wage and hour cases that reached record levels in 2010. Nearly 6,800 private-sector lawsuits were filed nationwide. In Northern Ohio, the number of cases was up 37 percent over the year before.

The Department of Labor, meanwhile, handled about 32,000 wage and hour complaints in 2010, a jump of 33 percent in just two years. And the **Equal Employment Opportunity Commission** says pay and promotion cases are now the biggest category of employment discrimination filings.

"No question about it. There's been explosive growth in wage and hour complaints," said employer-side attorney James Stone, managing partner of the Cleveland office of the **Jackson Lewis** law firm.

Rising workplace disputes are fueled by layoffs and plant closings in a fragile economy. Stricter enforcement of wage



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Associated Press file

Plaintiffs in a case of women employees against Walmart, from left, Betty Dukes, of Pittsburg, Calif., Deborah Gunter, of Palm Springs, Calif., Christine Kwapnoski, of Bay Point, Calif., and Edith Arena, of Duarte, Calif., take part in a news conference outside the Supreme Court in Washington on March 29.

Wage and hour complaints

Federal lawsuits filed nationwide

2009: 6,120

2010: 6,761

Number filed in U.S. District Court for the Northern District of Ohio

and hour laws, and plaintiffs' lawyers
pursuing new litigation strategies also
figure in.

2009: 52
2010: 71

So does our swiftly morphing work world.
Should call center workers be paid for boot
-up and boot-down time on their
computers? Should mortgage officers be
paid for answering dozens of work emails
after-hours on their BlackBerrys?

Wage and hour complaints to the Department of Labor:

2009: 26,311
2010: 31,824

Gina Markosky became part of the
statistics when she hired a lawyer to talk
to her former employer, **Akron
Community Health Resources.**

Back wages collected by Department of Labor

2009: \$173 million
2010: \$176 million

The Portage Lakes women said her tasks
as a patient care coordinator required
more time than she could squeeze into a
40-hour work week. So Markosky, 40,
came in on Saturdays or worked evenings,
and periodically filed for overtime.

SOURCE: Annual Workplace Class Action Litigation Report,
Seyfarth Shaw LLP; Department of Labor

Then the health clinic put her on a salary, with no overtime pay although her job demands were even bigger,
she said. The health clinic did not return several calls seeking comment.

Wayne Brown, 41, of Willard said he ran into a similar situation at **Pegasus Custom Car Coaches**, a
Sandusky producer of trailers for hauling race cars and horses.

After Brown's overtime hours mounted to 20 a week, the company changed the eight-year employee's pay
to a salary.

"I was supposed to be a production foreman but I was actually a working production foreman. I still put the
trailers together," said Brown, who lost his job in September.

An attorney for Pegasus Custom Car declined comment because the case is pending.

"Employers are seeking ways to avoid labor costs, and switching employees from hourly to salary is often
the first mistake they make," said Anthony Lazzaro, who represents Markosky and Brown.

The Fair Labor Standards Act requires that employers pay the minimum wage, now \$7.40 an hour in Ohio, and time-and-a-half for work over 40 hours a week. It was a sleepy statute, on the books since 1938, until a few years ago.

Stone, the employment attorney, said it's taken off in part because of an unintended consequence. Recent legislation to limit damage payments in medical malpractice cases has pushed plaintiffs' lawyers to look for new business in other areas of law, he said. Employment laws are both complex and somewhat ambiguous, Stone said, leaving companies open to claims they're breaking the rules.

Ellen Hoadley, whose firm **Lexington Insurance Co.** insures businesses against worker claims, recalled hearing one defense lawyer recently complain "For the plaintiffs bar, employment law is the new slip-and-fall."

Employee-side attorneys don't agree. Wage theft became rampant during years of non-enforcement by U.S. agencies, said Catherine Ruckelshaus, legal co-director of the **National Employment Law Project**, which advocates for low-wage workers.

"The employer community got pretty emboldened to feel like there's not going to be any risk if I just chisel workers," she said. "It became a way of doing business for a lot of job sectors."

Workers have become more educated about their rights, said Lazzaro, whose Cleveland firm filed about a third of the wage cases in **U.S. District Court for the Northern District of Ohio** between 2007 and 2009.

A 2009 undercover government investigation found the **Department of Labor's Wage and Hour Division** often pushed off callers by encouraging them to resolve issues themselves. The division directed most calls to voicemail, failed to return calls, and provided conflicting or misleading information on filing complaints, the investigation found.

The Obama administration responded by saying it would increase enforcement of wage and hour laws. It hired about 200 additional field investigators to tighten oversight.

Even so, the Department of Labor has more cases than it can handle. In December, it launched a program with the American Bar Association to help aggrieved workers find private-sector lawyers.

The Cleveland Metropolitan Bar Association is one of 38 programs in 20 states collaborating on the **Bridge to Justice program**. (Call 216-696-3532.)

Wage and hour cases have yet to slow down, even as the economy is starting to improve, said Chicago attorney Gerald Maatman Jr., co-chair of the class action defense group at Seyfarth Shaw.

Store managers at **AutoZone** sued the parts supplier last year for "intentionally understaffing" its stores, leaving managers doing the work of full-time sales clerks for the bulk of work weeks that routinely stretched past 50 hours, without overtime pay.

A federal judge in December agreed to certify as a class action a lawsuit that could cover as many as 1,700 exotic dancers at **Rick's Cabaret International**. The dancers said they were wrongly classified as independent contractors, got no wages and had to earn all their money through tips.

Bank workers sued San Francisco-based Wells Fargo for allegedly requiring them to work off the clock on designated "call nights" without paying overtime.

But the most-watched recent U.S. case was the **gender-bias class action suit against Walmart Stores Inc.**, now before the U.S. Supreme Court. The justices heard oral arguments in the case March 29.

The lawsuit says 1.5 million current and former female workers at Walmart received pay and promotions that lagged their male counterparts'. Walmart denies discrimination and says that millions of separate personnel decisions made by store managers can't be clumped into the common pattern of treatment needed for a class action.

The massive volume of paper in the case, with supporters weighing in on both sides, is evidence it may be the most important employment lawsuit in decades, Maatman said.

"The stakes in the case are enormous," he said, "and the future ruling is likely to be transformative for class action litigation."

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