before the advent of wage-and-hour class action litigation, labor and employment cases rarely rose to a level that impacted corporate financial statements.

Today, wage-and-hour litigation outpaces every other type of workplace class action, with settlements commonly exceeding $10 million. Last year, employers paid $467 million in 102 reported settlements of these cases, including the agreement by New Jersey’s Novartis Pharmaceuticals Corp. to pay $99 million to settle unpaid overtime claims involving more than 7,000 current and former sales representatives. Other notable settlements included H&R Block Enterprises paying $35 million to 18,000 employees for violating California labor laws.

This rise in class litigation is partially because of the fact now recognized by more employees and their lawyers that wage-and-hour violations are widespread. The U.S. Department of Labor reports that it receives nearly 25,000 wage-and-hour complaints per year. The DOL has added more than 600 new wage-and-hour investigators since 2008 to aggressively push enforcement of these laws.

Geographically, the Mid-Atlantic and the West Coast are considered the two most active regions for this type of litigation, with California and New York leading the way, followed closely by New Jersey, Pennsylvania and Massachusetts. As for industries, health care, retail, food services and transportation have paid the largest settlements in recent years.

So what is a general counsel to do? Fortunately, there are proactive steps that can protect corporations and reduce the legal fees associated with such claims.

To begin with, it is helpful to review and understand the most common wage-and-hour class claims. Typically, employees or former employees claim unpaid overtime under the federal Fair Labor Standards Act and similar state laws. Overtime claims account for 40 percent of wage-and-hour class actions. Other common claims include:

- Failing to pay for compensable work time before or after the work shift, such as time turning on and off a computer, or donning and doffing specialized work gear.
- Misclassification of a class of employees — such as inside salespeople, insurance adjusters or paralegals — as “exempt” from overtime.
- Failing to pay overtime and employee benefits to workers classified as “independent contractors,” who qualify as employees under state and federal law.
- Failure to pay overtime.
- Improper calculation of overtime pay.
- Violation of laws as to pay for meal breaks.

Wage-and-hour laws are attractive to plaintiffs lawyers — and expensive to corporations — because the remedies, which can apply classwide, include (1) recovery of unpaid past wages, including overtime, for up to three years; (2) liquidated damages equal to the back-pay award; and (3) attorney fees and costs.

To limit a corporation’s exposure to wage-and-hour class actions, general counsel should consider the following six actions:

1. Adopt mandatory and binding arbitration agreements.

The best step an employer can take to avoid class actions in the workplace is to require employees to sign a mandatory and binding arbitration agreement, with a class action waiver, as a condition of employment. In June, the U.S. Supreme Court ruled in *American Express v. Italian Colors Restaurant*, 130 S. Ct. 2401 (2013), that class action waivers in mandatory arbitration agreements are enforceable. Although *American Express* involved restaurants challenging a commercial contract, the holding is expected to apply in the employment context, as the current Supreme Court has been stalwart in enforcing mandatory and binding arbitration agreements under the Federal Arbitration Act. State laws, however, may vary.

2. Conduct a wage-and-hour audit.

An internal wage-and-hour review or audit by outside counsel with expertise in this area of the law can identify and correct most violations of the law before a lawsuit is filed. The costs for such a review are minimal, and typically less than the fees to defend a single administrative charge.

An effective wage-and-hour audit will include review of classifications of employees as exempt versus nonexempt, independent contractor relationships,
job descriptions, timekeeping practices, payroll practices, employment policies and training, and overtime calculations, among other items.

If violations are found, counsel can advise as to strategies to correct them and deal with any potential back-pay obligations in ways that reduce the likelihood of class action litigation. After an effective audit, a general counsel can have confidence that his or her corporation is complying with the law or, at worst, know the risks that exist and explore appropriate steps to bring the company into compliance in non-adversarial, nonpublic ways that benefit all.

3. Enhance compliance training.

Another way to avoid wage-and-hour class litigation is to ensure human resources and supervisors are properly trained in the key danger areas where violations commonly arise.

Large retailers like Wal-Mart have been accused of having line supervisors who encouraged employees to work “off the clock” before and after the times they punched in for their shifts. Effective training, policies and enforcement could have avoided these suits, and generally are effective at preventing widespread wage-and-hour violations.

4. Adopt effective timekeeping measures.

In class actions, disgruntled employees and former employees often claim that the hours paid were not accurate and were underreported by the employer (or not recorded at all).

The best practice to prevent this type of claim is to ensure that the workforce timekeeping practices are well documented, and that the reported time is verified by the employee. Best practices for accomplishing this include:

- Using a punch-clock to record time in and time out, where feasible.
- Having each nonexempt employee record, review and sign off on his or her time each week, with a signed verification that the hours reported accurately record all of the employee’s time worked for the period.
- Requiring supervisors to monitor and review the timecards of employees.
- Adopting a policy that informs employees of the employer’s policy to pay employees for all time worked and overtime, prohibits off-the-clock work, instructs employees to accurately record their hours and provides a hotline to report concerns or complaints about their pay.

5. Review state law.

General counsel should not forget to ensure compliance with state wage-and-hour laws, not just the FLSA. Although most counsel know that California has its own unique labor laws, the reality is that most states have quirks and exceptions relating to overtime exemptions and wage payment laws that are not consistent with the FLSA.

For example, while the FLSA’s fluctuating work-week method is an effective way to reduce overtime liabilities for employees with varying schedules who agree to such a system, nearly a dozen states, including Pennsylvania, have not adopted this method of calculating overtime, and require the standard time-and-one-half formula.

Counsel therefore should ensure a thorough review of state wage-and-hour laws in all states in which the company operates.


In the event that proactive steps do not succeed and a corporation ends up in court, the war is far from over. Retaining competent outside counsel with experience litigating wage-and-hour class actions can steer the company toward dismissal of the claims or reduced liabilities and settlement.

One way to defeat a class action, as confirmed by the U.S. Supreme Court this year in Genesis Healthcare v. Symczyk, 133 S. Ct. 1523 (2013), is to make a Rule 68 offer of judgment to the named plaintiff. Such a tactic renders the individual plaintiff’s claim moot and requires the dismissal of the entire FLSA collective action, the Supreme Court ruled.

In addition, employers should take heart that, in general, a small minority of potential plaintiffs generally opt in to an FLSA collective action, greatly reducing the exposure from such claims. Unfortunately, in Rule 23 class actions (under state law) the plaintiffs must opt out, leading to much greater class participation and exposure.

Another effective tactic is to focus on the distinctions between the individual members of the putative class, including job duties, supervision, timekeeping method of payment, varying damage calculations, facility worked and geographic region. Plaintiffs counsel often overreach in designating their putative class, and the Supreme Court has grown increasingly hostile to large class actions. In two recent cases, Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011), and Comcast v. Behrend, 133 S. Ct. 1426 (2013), it rejected class certification where the individual issues as to liability and the calculation of damages, respectively, were found to predominate over class issues.

Finally, in-house counsel can take some comfort in the fact that class action litigation usually takes years — an average of five — to run its course. That gives time for the company to analyze its exposure and set aside reserves for any potential judgment or settlement, while simultaneously fighting aggressively to defeat the plaintiffs’ claims. While class action litigation is expensive, if the class and exposure are large enough, a strong defense can be rewarded with decertification of the class, a reduced class or a more reasonable settlement.