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COVER STORY

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# Wage Wars

## Workers—from truck drivers to stockbrokers—are winning huge overtime lawsuits

**COVER STORY PODCAST**

There's a place in Reno, Nev., that practically mints money. It's not one of the many casinos in town. Nor is it one of the legal brothels that operate in the area. It is a law firm, located in a wing of a private home nestled in the foothills of the Sierra Nevadas. From a utilitarian office, with a view of horses grazing in a neighbor's paddock across the road, attorney Mark R. Thierman pursues a practice that in recent years has won his clients hundreds of millions of dollars from some of the biggest names in Corporate America—and produced tens of millions for himself.

A Harvard Law School grad, Thierman, 56, spent the first 20 years of his career as a management-side labor attorney and self-described union buster. He has been pelted with eggs by construction workers and his tires have been slashed by longshoremen. But in the mid-1990s he brought a series of cases on behalf of workers in California and established himself as a trailblazer in what had long been a sleepy, neglected area of the law. Thierman sues companies for violating "wage and hour" rules, typically claiming they have failed to pay overtime to workers who deserve it. Since the beginning of this decade, this litigation has exploded nationwide. Because wage and hour laws have been so widely violated, undetonated legal mines remain buried in countless companies, according to defense and plaintiffs' lawyers alike.

No one tracks precise figures, but lawyers on both sides estimate that over the last few years companies have collectively paid out more than $1 billion annually to resolve these claims, which are usually brought on behalf of large groups of employees. What's more, companies can get hit again and again with suits on behalf of different groups of workers or for alleged violations of different provisions of a complex tapestry of laws. Framed on the wall of Thierman's office, for example, is a copy of a check from a case he settled for $18 million in 2003 on behalf of Starbucks (SBUX ) store managers in California. But the coffee chain is currently defending overtime lawsuits, filed by other attorneys, in Florida and Texas. Wal-Mart Stores (WMT )is swamped with about 80 wage and hour suits, and in the past two years has seen juries award $172 million to workers in California and $78.5 million in Pennsylvania.

"This is the biggest problem for companies out there in the employment area by far," says J. Nelson Thomas, a Rochester (N.Y.) attorney, who, like Thierman, switched from defense to plaintiffs' work. "I can hit a company with a hundred sexual harassment lawsuits, and it will not inflict anywhere near the damage that [a wage and hour suit] will." Steven B. Hantler, an assistant general counsel at Chrysler, says plaintiffs' lawyers are "trying to make all employees subject to overtime. It's subverting the free enterprise system."

In overtime cases, Depression-era laws aimed at factories and textile mills are being applied in a 21st century economy, raising fundamental questions about the rules of the modern workplace. As the country has shifted from manufacturing to services, for example, which employees deserve the protections these laws offer? Generally, workers with jobs that require independent judgment have not been entitled to overtime pay. But with businesses embracing efficiency and quality-control initiatives, more and more tasks, even in offices, are becoming standardized, tightly choreographed routines. That's just one of several factors blurring the traditional blue-collar/white-collar divide. Then there's technology: In an always-on, telecommuting world, when does the workday begin and end? The ambiguity now surrounding these questions is tripping up companies and enriching lawyers like Thierman.

About 115 million employees—86% of the workforce—are covered by federal overtime rules, according to the U.S. Labor Dept. The rules apply to salaried and hourly workers alike. Plenty of wage and hour lawsuits are filed on behalf of the traditional working class, be they truckers, construction laborers, poultry processors, or restaurant workers. But no one has been more successful than Thierman in collecting overtime for employees who are far from the factory floor or fast-food kitchen. His biggest settlements over the last two years have been on behalf of stockbrokers, many of whom earn well into the six figures. Thierman has teamed up with other lawyers to extract settlements totaling about a half-billion dollars from brokerage firms, including $98 million from Citigroup's (C ) Smith Barney and $87 million from UBS Financial Services Inc. (UBS ) (As is typical in settlements, the companies do not admit liability.) With those cases drawing to a close, he and other attorneys already are pursuing new claims on behalf of computer workers, pharmaceutical sales reps,

and accounting firm staff.

As Thierman sees it, these are the rank and file of a white-collar proletariat. "In the 1940s and 1950s," he writes in an e-mail, "a large portion of American workers who were protected by overtime laws seem to have been forgotten as inflation drove up the absolute (not the relative) amount of compensation, and the bulk of workers began wearing sports coats and processing information instead of wearing coveralls and processing widgets." In a subsequent interview he says: "I'm interested in the middle class—those are my folks."

The core wage and hour law, the federal Fair Labor Standards Act (FLSA), has been on the books since 1938. The New Deal statute, which mandated that a broad swath of the workforce receive 90 minutes' pay for every hour worked beyond 40 in a week, had two goals. One was to reward laborers who put in long hours. But another was to expand employment by making it cheaper for companies to hire additional workers than pay existing ones time and a half. This penalty, Thierman argues, is ineffective today, given the enormous costs of health care and other benefits for each employee. The result, he says, is that businesses prefer to require long hours, and they either pay overtime or not—and hope they don't get caught.

Of course, not everyone is entitled to overtime. Under "white-collar exemptions" to the law, employers don't have to pay extra to various executives and professionals. These exemptions, labor historians say, are rooted in decades-old thinking about a workforce that bears little resemblance to today's. A clear distinction between professional and production classes used to be assumed. Nowadays mortgage brokers, for instance, crank out loan applications in assembly line operations and are paid based on how much they produce. Lenders around the country have battled, largely unsuccessfully, to defeat overtime claims by these employees.

Then there's the notion that white-collar jobs are cushier and pay more. "Bankers used to work bankers' hours," notes Jerry A. Jacobs, a sociologist at the University of Pennsylvania. But, he notes, the tendency of working-class employees to put in longer hours than professionals flipped by the 1960s. Consider pharmaceutical sales reps. While they make an average of $79,000 a year, their jobs require them to work about 65 hours a week, says Charles Joseph, a New York attorney who, along with others, has filed overtime cases against every major drugmaker. In order to earn a middle-class income, he observes, they essentially "have to work two jobs."

Beth Amendola would agree with that. She is suing Bristol-Myers Squibb Co., where she worked as a sales rep in South Florida from 1998 to 2006. Often called on to attend evening programs and medical meetings, Amendola and her colleagues would say, "Oh, another hour, another 25 cents—that was the standard joke." A Bristol spokesman says the company believes it complies with the FLSA, and won't comment on pending litigation.

While the Bush Administration updated regulations governing white-collar exemptions in 2004, attorneys say the changes were incremental and left plenty of room for lawsuits. There are two basic categories of overtime claims. One arises because a company has misclassified employees as exempt from the wage and hour laws, and thus improperly failed to pay overtime. In some of these cases the workers have been classified as independent contractors, meaning the company doesn't pay them benefits, either. The second is a so-called off-the-clock claim, in which employees allege that some of the work they do is not recorded by the company, sometimes as an intentional way to keep them from accruing overtime.

Even defense attorneys acknowledge that vast numbers of companies are violating the law. "Industries long steeped in tradition as to who is exempt and who is not exempt...are not necessarily compliant with the letter of the regulations," says Kirby C. Wilcox, a partner at Paul, Hastings, Janofsky & Walker in San Francisco. Indeed Thomas, the former defense attorney, says he switched sides after representing an employer in a wage and hour case. "I was amazed at how prevalent the violations were and the size of the settlement," says Thomas, who co-founded his own firm, Dolin, Thomas & Solomon, in 2000. "I said to myself, Boy, I'm really on the wrong side here.'"

The proliferation of cases—more than doubling in the federal courts from 2001 to 2006—at first drew little notice in the business community, but that's changing. "Everybody's talking about it," says Robin S. Conrad, head of the litigation arm of the U.S. Chamber of Commerce, which recently began filing briefs in cases in support of companies.

## POWER OF SUGGESTION

While violations appear widespread, employees themselves rarely think to make wage and hour claims. Instead, they usually have it suggested to them by lawyers. "Ninety-five percent of our wage and hour cases are a result of someone coming to us complaining about something else," says Thomas. "I can't tell you how many people have come into our office with employment disputes that are meritless and would be thrown out of court and walk out with an FLSA claim."

So deeply rooted are archaic workplace stereotypes that many college-educated, white-collar workers are resistant to the idea that they are entitled to overtime. They associate it with a labor pool that is valued for brawn rather than brains. The notion of keeping track of their hours so they can get paid for long weeks strikes them as déclassé.

Scores of plaintiffs' firms are now aggressively pursuing overtime cases, but it is Thierman whom defense lawyers consistently cite as the most successful and innovative in the business. "He seeds the clouds," and others collect the rain, says defense attorney Wilcox. Thierman has particularly made his mark in pursuit of claims on behalf of relatively well-paid workers.

Tall with wavy gray hair, Thierman is a bit of an iconoclast and calls himself a libertarian. He works with just a couple of assistants. A dog (Yoda) and a cat

(Obi Wan) wander in occasionally for attention. At one point in the late 1980s, Thierman thought about quitting the law altogether, and, as documented by a framed certificate in his office, became a registered hypnotherapist. He owns a vacation home in Venezuela. He and his wife, who have three grown children, moved from San Francisco to Reno six years ago, and he contemplated semiretirement. Then his wage and hour practice took off.

The bulk of Thierman's cases involve claims of misclassification. In the case he settled against Starbucks in 2003, Thierman contended that merely giving employees the title of store manager or assistant manager doesn't make them "executives," who are exempt from overtime. A majority of their work, he argued, was making lattes and Frappuccinos, just like the lower-ranking, and overtime-eligible, baristas. (A Starbucks spokeswoman says it is the company's policy to comply with overtime laws.) This is the same approach he is now pressing against a wide range of other companies on behalf of employees who would widely be viewed as white-collar. His focus is on what they actually do, not on their job titles, income, or academic degrees. "You don't have to be stupid to get overtime," Thierman says. "In fact you're stupid if you don't get overtime."

Computer workers of various stripes, for example, have commonly not been paid for their extra hours. In a sop to the IT industry, lawmakers exempted such employees, who tend to be well-educated, well-paid, and have a culture of working virtually round the clock. The companies argued that they would otherwise not be able to remain competitive with foreign rivals. But under California law, the exemption applies only for workers whose primary function involves "the exercise of discretion and independent judgment." In numerous lawsuits, Thierman and other plaintiffs' attorneys have alleged that legions of systems engineers, help desk staff, and customer service personnel do no such thing. Of programmers, Thierman says, "Yes, they get to pick whatever code they want to write, but they don't tell you what the program does.... All they do is implement someone else's desires."

Already the settlements are rolling in. Siebel Systems (ORCL ) has agreed to pay $27.5 million to about 800 software engineers, and IBM (IBM ) is forking over $65 million to technical and customer support workers. Thierman says he also plans to go after other big employers of computer personnel, including banks and health insurers.

Stockbrokers are highly compensated and have long been presumed to be exempt, but Thierman caught financial services firms by alleging a technical violation of the law: To be treated as exempt, employees must receive a salary, and brokers have generally received only commissions. Although they deny liability, a parade of firms has settled after facing one of Thierman's suits, including Merrill Lynch, Morgan Stanley, and A.G. Edwards. Under a complex formula, most brokers received about $30,000 after attorneys' fees, Thierman says. An industry trade group, the Securities Industry & Financial Markets Assn., notes in a statement that the Labor Dept. issued an opinion letter in November, 2006, which stated that brokers are exempt. The letter, however, came too late to help firms that have already settled, and it isn't binding in court.

## STOPPING THE CLOCK

In some of his lawsuits, Thierman has made off-the-clock claims on behalf of lower-wage employees. For instance, in a suit on behalf of employees of Hollywood Video stores, a movie rental chain, he alleged workers had to boot up the computer before they could punch in, and had to punch out before they could close the register for the night and do the store tally. He used store surveillance cameras to document the time spent on these tasks, settling the case for $7.2 million.

Nearly all of the cases faced by Wal-Mart are off-the-clock claims, with allegations that employees worked through lunch breaks without pay, or were forced to punch out when the store closed but then continue with tasks such as restocking shelves. Store managers are under constant pressure from Wal-Mart headquarters to keep wages down, says attorney Michael Donovan, who won the $72.5 million verdict against the retailer in Philadelphia last year. The easiest way to control wages, he says, is to prevent workers from logging overtime. "We're finding that that's a common pattern in large retail operations where a store manager's compensation is based in part on the profitability of their store," says Piper Hoffman, a New York attorney who has filed similar suits. John Simley, a spokesman for Wal-Mart, says the notion that the retailer doesn't pay people for overtime is "simply not true." Simley says that Wal-Mart will appeal the $172 million California verdict. He also notes that the company has persuaded courts to reject numerous class actions.

There are many variations on the off-the-clock theme. In June, Bank of America was sued in Florida by an employee who alleges that her branch manager deleted the amount of overtime she logged from the bank's records in order to receive a branch productivity bonus. A BofA spokeswoman says there is no basis for the complaint.

The issue of when the workday begins can get complicated. Delivery truck drivers, utility workers, and service technicians, for example, now regularly download their route assignments or appointments from their homes by computer each morning. Should they be paid for this time? Should this be the start of their workday? The same questions arise for white-collar workers. Daniel J. McCoy, an attorney at Fenwick & West in Mountain View, Calif., says that 15 years ago he would have presumed that a person who checked her e-mail remotely or who telecommuted had the type of job that would not be eligible for overtime. "That's less and less true today," he says. He gives the example of his own assistant, who sent McCoy an e-mail on a Sunday. McCoy said he promptly told his assistant that he didn't need to be working on a weekend, but that if he was, he had to be sure to record his time, since he is covered by wage and hour laws.

Management-side attorneys like McCoy are certainly cashing in on the wage and hour lawsuit boom. But they can only look with astonishment and envy at what plaintiffs' attorneys are now making in this area. Thierman says his recent settlements alone total $458 million. Attorneys fees are about 25% of that, and Thierman usually splits his take with various co-counsel on each case. While he won't say how much he's due to receive from these cases (and courts must still approve the fees in some of them), he doesn't dispute that it's in the low tens of millions.

In a friend-of-the-court brief filed in a case in August, the U.S. Chamber of Commerce decried the "FLSA litigation explosion" and its having become the "claim du jour" for plaintiffs' attorneys. Thierman shrugs at such concerns. The alternative, in his view, would be to have the laws enforced by a government bureaucracy. "Somebody's got to regulate this stuff," he says, "and I think the bounty hunter system works just fine."

**Corrections and Clarifications**

In "Wage wars" (Cover Story, Oct. 1), a reference to a lawsuit against FedEx Ground should have stated that about 200 plaintiffs allege that they and 14,000 of their current and former co-workers have been improperly classified as independent contractors, not that 14,000 workers are making such claims.

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