RESOLVING WORKPLACE CONFLICTS THROUGH LITIGATION: EVIDENCE, ANALYSIS, AND IMPLICATIONS

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ABSTRACT

Purpose – *Industrial relations, organizational behavior, and human resource management scholars have studied numerous aspects of internal workplace conflict resolution, ranging from the design of conflict resolution systems to the processes used for resolving conflicts to the outcomes of the systems. Scholars from these specialties, however, have paid considerably less attention to external workplace conflict resolution through litigation. This chapter analyzes certain areas of such litigation, focusing specifically on workplace conflicts involving issues of managerial and employee misclassification, independent contractor versus employee status, no-poaching agreements, and executive compensation.*

Methodology/approach – *Leading recent cases involving these issues are examined, with particular attention given to the question of whether the conflicts reflected therein could have been resolved internally or*

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through alternative dispute resolution (ADR) methods rather than through litigation.

Practical implications – *Implications of this analysis are drawn for workplace conflict resolution theory and practice. In doing so, I conclude that misclassification disputes could likely be resolved internally or through ADR rather than through litigation, but that no-poaching and executive compensation disputes could very likely not be resolved internally or through ADR.*

Originality/value – *The chapter draws on and offers an integrated analysis of particular types of workplace conflict that are typically treated separately by scholars and practitioners. These include misclassification conflicts, no poaching and labor market competition conflicts, and executive compensation conflicts. The originality and value of this chapter are to show that despite their different contexts and particular issues, the attempted resolution through litigation of these types of workplace conflicts has certain common, systematic characteristics.*

Keywords: Workplace; conflict resolution; litigation; misclassification; no poaching; executive compensation

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Scholars from a variety of disciplines and specialized fields have studied workplace conflict resolution. For several decades industrial relations scholars in particular concentrated their research on unionized employment relationships featuring written collective bargaining agreements that included formal grievance procedures to resolve disputes that arose during the duration of those agreements (Budd, 2013; Kuhn, 1961; Lewin & Peterson, 1988, 1999). As the incidence of unionism and collective bargaining declined in the United States and other nations, though, this research focused increasingly on non-union employment relationships, individual employer-employee agreements, and alternative dispute resolution (ADR) (Eaton & Keefe, 1999; Lipsky, Seeber, & Fincher, 2003; Colvin, 2003). This latter focus attracted human resource management and organizational behavior scholars in particular (Kaufman, Lewin, & Fossum, 2000; MacDuffie, 1995; Pfeffer, 1998).

As a whole, this research features a strong emphasis on positive workplace conflict resolution. For industrial relations scholars, this emphasis is reflected in such phrases as integrative bargaining and mutual gains negotiations (Lewin, 2010; Walton & McKersie, 1965). For human resource management scholars, it is reflected in such phrases as high involvement management and employee engagement (Albrecht, 2010; Cotton, 1993). For organizational behavior scholars, it is reflected in such phrases as organizational citizenship (Bateman & Organ, 1983) and restorative justice (Braithwaite, 2002). This is not to say that scholars in these areas are unmindful of, or ignore, negative workplace conflict resolution. To the contrary, industrial relations scholars' studies have attempted to explain factors associated with adversarial employment relationships (Chamberlain & Kuhn, 1965; Katz & Keefe, 1992). Human resource management scholars' studies have attempted to explain factors associated with high employee turnover (Huselid, 1995) and low employee morale (Sanborn & Oehler, 2013). Organizational behavior scholars' studies have attempted to explain factors associated with intragroup and intergroup conflict (Alper, Tjosvold, & Law, 2000; Jehn & Bendersky, 2003). Nonetheless, most of this research focuses on how the direct parties to workplace conflict, that is, employees and managers, their representatives and agents, can resolve conflict internally through one or more processes, mechanisms, or methods.[1]

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By contrast, the focus of this chapter is on external workplace conflict resolution, that is, workplace conflicts that are not resolved internally but, instead, become the subject of litigation. The specific issues taken up in such litigation are many and varied, although most of them fall under the heading of "labor and employment." These include wages and hours, specifically alleged failure to pay minimum wage, misclassification, off-the-clock work, missed meal and rest breaks, and excess waiting time to receive end-of-employment pay; independent contracting versus employee status, which is also a particular form of misclassification; and employment discrimination on the basis of age, gender, race, national origin, disability, or religion. Other issues involving workplace conflict do not fall (or fall neatly) under the labor and employment rubric. Conflicts over wrongful termination, for example, are pursued through claims of violation of public policy, sometimes in conjunction with claims of discrimination; conflicts over hiring and labor market competition are pursued through antitrust law; and conflicts over executive compensation are pursued through laws pertaining to fraud, bankruptcy, merger and acquisition, and securities transactions.

All of these otherwise varied workplace conflict issues have been pursued externally through litigation. Because the litigation (i.e., judicial) system

followed in the United States (and many other nations) is based on the principle of adversarialism, workplace conflicts that proceed all the way through litigation to trial verdicts yield clear winners and losers. Often, however, the parties reach negotiated settlements prior to trial or during trial prior to a verdict. Such settlements suggest the possibility that some workplace conflicts could have been settled internally or via ADR rather than externally through litigation.

This chapter explores this possibility by analyzing several main types of workplace conflict in which resolution has been pursued through litigation. It focuses on litigation involving managerial and employee misclassification, independent contractor versus employee status, no-poaching agreements and labor market competition, and the reasonableness of executive compensation.

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LABOR AND EMPLOYMENT LITIGATION: WAGES AND HOURS

In the United States, labor and employment litigation may be pursued under a wide variety of federal laws, including the National Labor Relations Act (NLRA), the Labor-Management Reporting and Disclosure Act (LMRDA), the Railway Labor Act (RLA), the Employee Retirement Income Security Act (ERISA), the Fair Labor Standards Act (FLSA), the Equal Pay Act (EPA), the Civil Rights Act (as amended), the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), the Americans With Disabilities Act (ADA), and the Occupational Safety and Health Act (OSHA). It may also be pursued under similar state and local government laws, where, in fact, most of it originates. A portion of this state or local litigation may subsequently proceed to the federal level or be filed simultaneously under federal laws.

Especially in an era of "big data," one expects the volume of labor and employment-related litigation that occurs annually or during a particular time period to be well documented and systematically incorporated into extant databases. This is apparently not the case, however. Extensive Google, LexisNexis, Westlaw, U.S. Department of Labor (DOL), U.S. General Accounting Office (GAO), Federal Judicial Center, and Factiva searches yielded only piecemeal data in this regard, as did searches of academic and professional journal articles. Consequently, it is not possible precisely to determine the overall volume, issue composition, level of

government, or other characteristics of contemporary labor and employment-related litigation.

The most systematic available data in this regard pertain to the FLSA and are shown in Fig. 1.[2] Between 1990 and 2015, the annual volume of FLSA cases filed in U.S. federal courts increased about 10-fold, from 888 in 1990 to 8,954 in 2015 (PACER, 2016).[3] This happened while employment in the United States increased by about 31 percent (USDOL, BLS, 2016).[4] Furthermore, these case filing data tell only part of the story because they do not include state-level filings under state FLSA-like statutes (McGillivary & Mechak, n.d.). All but a handful of U.S. states have their own wage and hour laws, and it is likely that thousands of cases alleging violations of those laws were also filed during the 1990–2015 period. While California is often considered to be the hotbed of FLSA-related litigation, Florida and New York have consistently been the "leaders" in this regard. Between 2005 and 2012, for example, these two states accounted for about half of all FLSA lawsuits filed in federal courts

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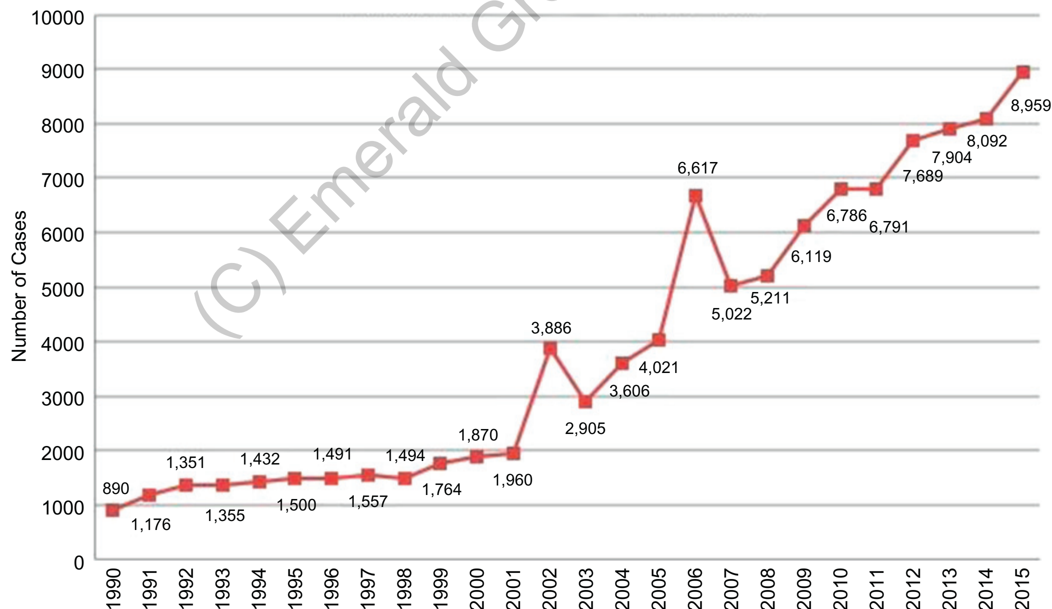

Fig. 1. FLSA Cases Filed by Calendar Year. *Notes*: Pacer Case Locator was used to compile these statistics by selecting the "Civil" tab and searching by nature of suit "710 Labor: Fair Standards," which returns all FLSA cases. Each search was limited to one year increments. *Source*: Pacer Case Locator-Civil-Nature of Suit (NOS) Labor: Fair Standards – FLSA per year.

(USGAO, 2014).[5] In these lawsuits, moreover, both current and former employees may be and typically are represented.[6]

The FLSA and similar state laws are particularly wide-ranging in terms of the aspects of employment relationships they regulate. These include minimum wages, overtime, meal and rest breaks, waiting time (among others), and child labor. The most frequently alleged violation of the FLSA involves overtime, with employee plaintiffs claiming that they were not paid at one and half times their regular pay rate when they worked beyond 40 hours in a week.[7] A detailed analysis of 2012 FLSA lawsuits conducted by the United States General Accounting Office (USGAO) estimated that 95 percent of these lawsuits contained alleged violations of the overtime pay provision (USGAO, 2014). This percentage far outpaced the proximately one-third of 2012 lawsuits that contained alleged violations of the FLSA's minimum wage provision. Notably, about 30 percent of the lawsuits alleged that employees were required to work "off-the-clock" and therefore were not paid at all for such work. In addition, about 20 percent of these lawsuits contained allegations of misclassification.[8] The main such allegation was that employees were mistakenly classified as exempt from the FLSA when they should have been classified as non-exempt from (i.e., covered by) the law. The other such allegation was that independent contractors were mistakenly excluded from FLSA coverage because they were in fact employees rather than contractors.

FLSA lawsuits have been concentrated in four industries, namely, accommodations and food services, manufacturing, construction, and other services, which include laundry services, domestic work, and nail salons (USGAO, 2014).[9] Employees who worked in accommodations and food services, which include hotels, restaurants, and bars, filed about 23 percent of FLSA lawsuits in 2012. Employees in manufacturing filed another 20 percent: most of these, however, were employees in automobile manufacturing who filed individually in the State of Alabama where they were originally part of two class action lawsuits in which the classes were later decertified.[10]

In this regard, it is especially notable that under the FLSA, "an action may be brought by any one or more employees for and on behalf of himself or themselves and other employees similarly situated."[11] During the last quarter century and especially during the 21st century to date, class action lawsuits as a percentage of all FLSA lawsuits have risen markedly.[12] By 2012, fully 40 percent of FLSA lawsuits were class actions or, in the parlance of the USGAO, "collective actions."[13] An additional 16 percent of such lawsuits were individual actions "originating from a decertified

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collective action."[14] It is interesting that employee use of collective action through unionization and collective bargaining declined substantially during this very same period.[15] This means that relatively fewer workplace disputes were settled internally through the negotiation of collective agreements and the use of grievance procedures contained in those agreements, and that relatively more disputes were settled externally through litigation. In such litigation, moreover, individual employees are always represented by an agent (i.e., an attorney rather than a union official), and employees frequently form a collective – that is, a class – that is also represented by an agent. This is a leading example of how private sector representation in employment relations in the United States has shifted markedly from internally oriented unionization and collective bargaining to externally oriented litigation.

But a decline in unionization and collective bargaining does not necessarily mean that workplace disputes cannot be resolved internally or through ADR. To the contrary, internal non-union employment dispute procedures have become quite common, even pervasive; these procedures increasingly include arbitration as a specific ADR method; and there is evidence that these procedures are actually used, that is, are not simply available (Colvin, 2013; Colvin, Klaas, & Mahoney, 2006; Lewin, 2008, 2014). If this is so, then why aren't these internal procedures or ADR methods used to take up and resolve issues of off-the-clock work, failure to pay for overtime hours worked, misclassification, and the like? Why is it that disputes involving these matters are pursued and resolved through litigation? Analysis of two main types of misclassification over which lawsuits are filed may be helpful in developing answers to these interrelated questions. In doing so, I focus on litigation involving relatively large companies that typically have both a formal human resource (HR) staff function (or department) and an internal conflict resolution system. Such litigation encompasses far more employees (and former employees) than the relatively more numerous lawsuits filed against smaller companies that typically do not have either a formal HR staff function or an internal conflict resolution system.[16]

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MANAGER AND EMPLOYEE MISCLASSIFICATION

The first type of misclassification litigation features the claim that some employees are incorrectly classified as exempt from the FLSA and should be reclassified as non-exempt. On its face, the FLSA contains certain

exemptions from coverage, including those for executive, administrative, professional, outside sales, and computer employees (USDOL, 2008). The law also exempts from coverage employees who earn above a specified annual income. Currently, this income level is $100,000 (USGAO, 2014).[17] Nonetheless, the stated exemptions from FLSA coverage become considerably less straightforward and considerably more contentious in practice (USGAO, 2013).

Let me illustrate. A common type of misclassification claim is one made on behalf of individuals holding managerial positions. These are typically first-line or front-line positions, such as store or location managers in large, chain type big box retailers, supermarkets, restaurants, and car rental agencies. In such businesses, most front-line managers have been promoted through the ranks, are paid an annual salary rather than (as previously) an hourly wage, and have bonus potential, meaning that they may qualify to receive an annual or periodic bonus based on their performance or the business's performance (Levine & Lewin, 2006).

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The key question that arises in these types of managerial misclassification lawsuits is whether and to what extent front-line managers actually perform managerial work as distinct from or instead of non-managerial, that is, employee work. Extant research indicates that when businesses are relatively young, small, and in the early stages of their organizational life cycles, front-line managers do perform largely managerial work (Lewin, 2012). In retail store businesses with these characteristics, for example, store managers decide or participate in deciding hours of operations, product prices, product displays, and inventory. They also choose or play a role in choosing vendors and negotiating prices and other terms with vendors. They play a lead role in hiring, staffing, deploying, evaluating and, when necessary, disciplining employees.

When such businesses grow larger and especially when they become national (or even international) chain type enterprises, however, the decision-making role and exercise of managerial duties by front-line store managers decline substantially. This is due to such factors as the adoption by these enterprises of standard operating procedures, workplace replication, supply chain optimization, and nationally focused marketing and branding initiatives. These factors, in turn, lead these enterprises to adopt more centralized decision-making, often by creating new internal regional and district units headed by upper level managers as well as by expanding corporate staff units. As a result, the extent to which front-line store managers actually perform managerial work declines markedly (Levine & Lewin, 2006).

Furthermore, the non-managerial work performed by front-line store managers may also increase, perhaps considerably, because of the way in which they are compensated. As noted earlier, store managers are paid base salaries and are also bonus eligible. Bonuses paid to front-line store managers are based either on store profitability or the extent to which actual store operating costs are lower than budgeted. One of the main components of store operating costs is labor cost, which is commonly considered to be a controllable cost. Hence, bonuses for front-line store managers often are determined by the extent to which actual store labor costs are below budgeted labor costs. In any event, by substituting his or her own labor for some of the work that would otherwise be performed by hourly paid employees that these managers ostensibly supervise and manage, a store manager increases the likelihood of achieving the business's or store's particular profit or cost objective and thus of receiving a bonus. The fact that, unlike employees, store managers are not eligible for overtime pay provides additional incentive for such managers to substitute their labor for that of employees (Levine & Lewin, 2006).

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In light of these developments, it is not surprising that store managers have increasingly filed lawsuits – class action lawsuits – claiming that they are or were managers in name only, that they should be reclassified as non-exempt from the FLSA (and state wage and hour laws), and that they should receive overtime pay for all the overtime hours they worked during certain prior years (known as the class period). Some of these lawsuits, especially the larger ones, have included front-line managers at different levels, for example, store manager, associate manager and assistant manager or department manager. Notably, many businesses that have faced such litigation subsequently classified or reclassified their assistant and associate managers – but not store managers – as non-exempt employees and thereby made them eligible for overtime pay.[18] Also notable is the fact that class action managerial misclassification lawsuits almost always include both currently employed managers and formerly employed managers.

While claims of managerial misclassification appear to be especially prevalent in retail type businesses, they have also been made in other settings. Local location managers of a California-based moving and relocation company, for example, sued that company, claiming that they mainly performed non-managerial duties and therefore should have been reclassified as non-exempt and made eligible for overtime pay. This lawsuit was unusual in that it proceeded all the way through a jury trial, which in 2001 resulted in a verdict for plaintiffs/location managers. The jury concluded that the local

location managers were managers in name only and that they largely performed employee type work.[19]

Other employees, that is, non-managerial employees, have also made claims of misclassification. For example, the U.S.-based sales representatives of a large international pharmaceutical company sued that company, claiming that they were non-exempt from the FLSA and therefore should have been reclassified and deemed eligible for overtime pay. In 2009, a Federal District Court judge ruled in favor of those plaintiffs/sales representatives on the ground that despite their title they did not actually consummate sales to hospitals, doctors, and other health care professionals.[20] As a result of this decision, the pharmaceutical company reclassified their sales representatives as non-exempt from the FLSA and began to record the amount of time those sales representatives spent performing their work.

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In yet another example, claim adjusters of a large national insurance company sued that company, alleging that they were misclassified as exempt from the coverage of Illinois State law and the FLSA. In particular, the adjusters alleged that they did not exercise sufficient independent judgment and discretion in performing their work to warrant exempt status under the laws. A substantial amount of testimony about the content of claim adjusters' jobs was presented during the trial in this matter. At the conclusion of the trial in July 2010, the Circuit Court of Cook County, Illinois, decided in favor of the defendant insurance company.[21] In May 2012, an Illinois Appellate Court upheld that decision.[22] In all of these class action cases, the plaintiffs included both current and former employees.

Returning to the question posed earlier, why is it that misclassification disputes involving a wide range of employees are pursued and eventually resolved externally through litigation rather than internally through grievance, appeal, complaint, ADR or related procedures? Answering this question requires consideration of several factors. First, in the case of front-line managers who claim to be misclassified, a union does not represent them in collective bargaining even if the employees they supervise are unionized and bargain collectively with the employer. In this circumstance, the terms and conditions of front-line managers' employment are determined unilaterally by the employer and are not subject to challenge by front-line managers exercising their voice through a collectively bargained grievance procedure. The same is true of the aforementioned sales representatives and insurance claims adjusters, who were also not unionized or represented in collective bargaining with their respective employers. Furthermore, both current and former employees are represented in class

action misclassification litigation whereas only current employees are (or would be) represented in collective bargaining.[23]

In non-union businesses that have grievance or grievance-like systems and processes for their employees, the scope of employee coverage is typically broader than in unionized businesses; it often includes supervisors and front-line managers. In this circumstance, front-line managers apparently have a voice mechanism available to them for pursuing their claims – grievances – about misclassification. However, availability is different from use, and some empirical studies find that managers are statistically less likely to use available grievance procedures than non-managerial employees (Lewin & Boroff, 1996). In particular, managers are significantly more likely than non-managerial employees to fear retaliation for filing grievances and exercising voice under a non-union grievance procedure (Boroff & Lewin, 1997). Moreover, formerly employed managers are not eligible to use non-union grievance systems, but they can be and often are represented in misclassification and other types of wage and hour litigation.

Another characteristic of these non-union grievance procedures is that the scope of issue or topic coverage is determined by the employer rather than jointly between the employer and front-line managers or a representative of those managers. The topic of job classification is not included in such procedures, and front-line managers therefore cannot exercise voice about misclassification by using these procedures. Furthermore, even if an employer is aware of a reduction in managerial work and an increase in non-managerial work performed by front-line managers, it is likely to be in the economic interest of the employer not to reclassify such managers. In this regard, the employer weighs the economic gain from not having to incur overtime pay costs for salaried managers against the probability that such managers will file a misclassification lawsuit and the probability of the employer losing such a lawsuit.

These same factors apply to the resolution of non-managerial employee claims of misclassification. Salespersons, computer technicians, professional employees, and others (such as insurance claims adjusters) who believe that they are mistakenly classified as exempt from the FLSA and state wage and hour laws are no more likely than managerial employees to be able to exercise voice about this matter through internal grievance or grievance-like procedures. If they attempt to exercise such voice or do in fact exercise it, such as by talking with their immediate supervisors or managers or with employment relations or human resource management staff, it is unlikely to result in an employer decision to reclassify them. This helps us

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understand why both managerial and non-managerial employees who believe that they are misclassified have increasingly turned to external litigation in attempting to resolve this particular type of workplace conflict.[24]

Could such conflict be resolved through mediation, arbitration, or other third-party methods? In theory, yes, it could, but this would require the parties agreeing to the establishment of a process they would actually use and to being bound by the results or outcomes the process created. For employers, their aforementioned reluctance to include job classification (and alleged misclassification) as a matter falling within the scope of internal conflict resolution systems contrasts with their strong support for and use of arbitration as a final, binding alternative to litigation in the resolution of conflicts with consumers and in the resolution of conflicts with employees over matters other than classification. It would therefore be a relatively modest, incremental change for them to agree to include job classification as a matter subject to arbitration, either in a modified internal conflict resolution system practice or as a stand-alone practice. For employees, including but not limited to those who might challenge their employers' decisions about job classification, they too would have to agree a priori to the use of binding arbitration as a conflict resolution procedure. Furthermore, both employers and employees could agree to a job classification conflict resolution process in which mediation is the first and potentially final step of the process. Thus, workplace conflict resolution through ADR processes of mediation and arbitration is conceptually plausible.

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INDEPENDENT CONTRACTOR VERSUS EMPLOYEE STATUS

The second main type of misclassification issue over which lawsuits are filed concerns independent contractor versus employee status. By definition, independent contractors are not employees and therefore are not covered by the provisions of the FLSA, state wage and hour laws, and other federal and state "labor" legislation. Accordingly, an independent contractor can be viewed as just another vendor or service provider. If it can be shown, however, that an independent contractor is basically an employee, then the coverage and related provisions of the FLSA and state wage and hour laws will apply. Hence, the key question in this regard is whether and to what extent independent contractors are in fact independent.

To answer this question, consider the "economic realities" factors specified in the FLSA for application to this issue. These factors are (1) the extent to which the work is an integral part of the employer's business, (2) the extent to which the worker's management skill affects that work's opportunity for profit or loss, (3) the extent to which the worker's relative investment compares to the employer's investment, (4) the extent to which the work performed requires special skill and initiative, (5) the extent to which the relationship between the worker and the employer is permanent or indefinite, and (6) the nature and degree of the employer's control over the work performed.[25] As with the specified exemptions from FLSA coverage, however, application of these economic realities factors becomes considerably less straightforward and considerably more contentious in practice.

A leading example in this regard involves FedEx, specifically FedEx Ground Package System, Inc. (hereafter, "FedEx Ground"), a business that has been the defendant in numerous lawsuits filed during the 21st century. In those lawsuits, delivery drivers for FedEx Ground claim that they are FedEx employees rather than independent contractors. While certain state courts have decided some of these lawsuits individually, about three dozen of the lawsuits that were originally filed in 26 states were combined into multidistrict legislation (MDL) and assigned to the U.S. District Court for the Northern District of Indiana. In December 2010, that court applied the aforementioned economic realities factors as well individual state factors to the MDL and ruled that the delivery drivers were independent contractors to FedEx Ground in 23 states and employees of FedEx Ground in three other states.[26]

Numerous appeals were then filed in this matter, and in August 2014 the Ninth Circuit Court of Appeals issued decisions reversing the lower court rulings regarding California and Oregon. In those states, said the appeals court, FedEx Ground delivery drivers were employees rather than independent contractors.[27] In the court's judgment, the extent of control that FedEx maintained over its delivery drivers was such that it met the California and Oregon laws' "right of control" tests for determining that such drivers were in fact employees. The court gave substantial weight to the fact that, in the operating agreement between FedEx and the delivery drivers, FedEx retained the right to control the physical appearance of drivers, the physical appearance of vehicles, drivers' use of vehicles when not delivering FedEx packages, drivers' workloads, and the reconfiguration of drivers' territories. One year after this decision, FedEx settled the California lawsuit for $228 million. Similarly and also in 2014, the Seventh Circuit Court of Appeals issued a decision that concurred with the findings

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of the Kansas Supreme Court that "Given the undisputed facts presented to the district court in this case, the plaintiff drivers are employees of FedEx Ground Package System, Inc. as a matter of law under the Kansas Wage Payment Act … and a plaintiff driver does not lose his or her employee status by acquiring another route for which that plaintiff is not the driver."[28]

Returning once more to the question posed earlier, could the independent contractor versus employee status cases involving FedEx Ground have been resolved internally through grievance-like procedures rather than externally through litigation? The answer may seem to be "no" because whereas in the type of misclassification disputes analyzed earlier all of the plaintiffs unquestionably were employees of the defendant employers, in the FedEx Ground cases the fundamental dispute was over whether delivery drivers were or were not employees. A "no" answer, however, may be premature or even wrong. Consider, for example, that FedEx Corporation is in essence a holding company composed of several businesses (often referred to as strategic business units or SBUs). FedEx Ground is one of these units but so, too, is FedEx Express. FedEx Ground is a "B to C" business that delivers packages and related items to residences, mainly homes and apartments. FedEx Express is a "B to B" business that delivers packages and related items to companies' and other organizations' offices and field locations. These two FedEx businesses provide virtually identical services and their delivery drivers perform virtually identical functions. Yet, in FedEx Ground these delivery drivers are (or have been) independent contractors whereas in FedEx Express these delivery drivers are employees.

How can this be? How can two such different arrangements for delivery drivers performing essentially identical work co-exist in the same company? They can do so because FedEx's Corporation's strategy and related organizational structure provide considerable decision-making autonomy to its SBUs. As long as the general managers of those businesses achieve the strategic objectives set for them by FedEx Corporation (sometimes referred to as P&L objectives), they are more or less free to manage their respective business as they choose. FedEx Ground's general managers chose to have its delivery drivers operate as independent contractors, while FedEx Express's general managers chose to have its delivery drivers operate as employees. Hence, from both a business perspective and an independent contractor versus employee status perspective, FedEx is not a single, undifferentiated company.

However, some FedEx Corporation policies and practices are uniform or companywide, meaning that they do not vary by business unit. One of

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these is the Guaranteed Fair Treatment Procedure (GFTP), which dates to the company's founding in 1973. The GFTP is a multi-step process that in some respects closely resembles a unionized grievance procedure. It is formal, contains provisions for putting complaints in writing, and specifies time limits for employee filing and management responses at each step of the process.[29] In other respects, the GFTP does not closely resemble a unionized grievance procedure: the scope of employees and the scope of issues covered by this procedure are broader than in a typical unionized grievance procedure.[30] All FedEx employees except executives and senior managers are eligible to use the GFTP, meaning that about 90 percent of the company's workforce across its various business units is eligible to file complaints under the GFTP. They may do so over a wide range of issues, including traditional issues such as pay, work schedules, and discipline, but also such nontraditional issues as performance appraisals, workflow, technological change, and delivery schedules.

These characteristics of the GFTP are consistent with FedEx's founders' beliefs that employees were its most important constituency, that FedEx should have a strong organization culture, and therefore that employees should have a mechanism through which they could express their voice to senior management.[31] This reasoning is consistent with concepts of organizational citizenship, mutual gains, integrative bargaining, and problem-solving type employer-employee relations. It is not at all consistent with the adversarial, fixed-sum, win-lose nature of the litigation involving FedEx Ground delivery drivers. As noted earlier, the FedEx litigation has been voluminous, long standing, and resulted in judicial decisions against FedEx Ground that require this business to reclassify its delivery drivers as employees in most states. Given the existence of the GFTP for FedEx employees, it is conceivable that FedEx Corporation could have adopted a similar procedure for independent contractors, such as delivery drivers at FedEx Ground.

Disputes over independent contractor versus employee status have also occurred in other industries, including insurance. To illustrate, Allstate Insurance Company has been the defendant in class action lawsuits filed by insurance agents who were converted from employees to independent contractors beginning in 1999. Those insurance agents claimed that the company violated the terms of their employment agreements and that the change from employment to independent contractor was motivated by the company's desire to increase profitability by reducing labor costs, especially fringe benefit costs. This long-standing litigation is multifaceted, features several relatively small class action lawsuits, and continues to be adjudicated.[32]

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Farmers Insurance Company has also been a defendant in misclassification lawsuits, which have been filed by individual district managers as well as by individual insurance agents or classes of agents. In the district manager lawsuits, former district managers claim that they did not perform management functions or exercise independent judgment and discretion while ostensibly serving in management roles. Therefore, these plaintiffs contend that they should be reclassified as non-exempt from the FLSA and state laws and should be awarded retroactive overtime pay for all of the overtime hours they worked for the company. The courts have typically ruled against plaintiffs in this litigation, finding that the district managers did indeed perform such management functions as planning, organizing, staffing, directing, and controlling.[33]

Other disputes over the independent contractor versus employee status issue feature newer, younger companies than FedEx, Allstate, and Farmers, especially companies that have emerged as part of the "gig" economy. Two of these companies are Uber and Lyft, which are both in the "on demand" limousine and car service portion of the transportation industry. Uber has faced class action misclassification lawsuits in states that include California, Texas, New York, Arizona, Pennsylvania, and Florida. In the California litigation, a federal district court ruled in December 2015 that arbitration clauses contained in the drivers' agreements with Uber were unenforceable. Had they been enforceable, those agreements would have prevented drivers from participating in a class action and required them to bring individual claims against Uber if they had any such claims.[34] The court also ruled that the drivers could proceed with a class action seeking reimbursement by Uber of the costs that drivers incurred while operating their vehicles for Uber-related business. This includes transportation and cell phone costs and entitlement to the full amount of all tips that drivers receive from customers.[35]

In a class action misclassification lawsuit filed against Lyft by the company's California-based drivers, a federal court judge rejected Lyft's argument that the lawsuit should be dismissed. That decision, rendered in March 2015, also concluded that the question of whether Lyft's drivers were independent contractors, as the company claimed they were, or employees, as the drivers claimed they were, should be decided in a jury trial. Subsequently, in January 2016, Lyft paid $12.25 million to its drivers to settle this lawsuit and also agreed to limit the grounds on which it could terminate its relationships with drivers.[36]

In another closely related example, Amazon has been sued by drivers in California and Arizona who deliver its products to the company's

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"on-demand" customers within one or two hours of being ordered to do so through Amazon's Prime Now app. In the Arizona litigation, the drivers claim that both Amazon and Courier Logistics Services, LLC, a company that provides delivery services for Amazon, have misclassified them as independent contractors. The drivers allege that they (a) are entitled to unpaid minimum wage and overtime compensation, (b) are prohibited from accepting tips even though the Prime Now app suggests a $5.00 tip per trip for drivers, (c) are scheduled to work fixed shifts, (d) cannot reject work assignments or request particular geographical area assignments, (e) are required to wear clothing bearing the Amazon Prime Now logo, (f) receive substantial training in making Amazon Prime Now deliveries, (g) must check in with a dispatcher prior to the start of a shift, (h) are tracked while making deliveries, (i) receive fees that are unilaterally determined by the defendants, and (j) are required to use their own vehicles without reimbursement by the defendants. In short, these drivers claim that they are not "independent" and that they are highly controlled by Amazon and Courier Logistics Services.[37]

These particular examples of current litigation over the independent contractor versus employee status issue illustrate how the modern economy and advanced technology have in essence converted what once would have been employment relations or workplace conflict into a form of vendor or service provider conflict. Indeed, this is a main difference between this type of conflict and the employee misclassification conflict analyzed previously. In conflict over independent contractor versus employee status, there is no employment relationship and therefore no employer – such as FedEx, Uber, Lyft, and Amazon – at least not according to defendants. The plaintiff service providers, whether drivers or others, are seeking to establish employment relationships through conversion of the independent contractor relationship. In theory, a company such as Uber or Amazon could seek to have this particular type of dispute resolved internally, either on an ad hoc basis or by establishing a standing process or method for doing so. The company might respond to a claim by its drivers that they are not really independent in the work they perform or the service they provide by analyzing that work or service using certain established criteria and then reaching a conclusion in this regard. This is basically a process of job analysis, which has a long history and is well documented (Brannick, Levine, & Morgeson, 2007). If this type of analysis led to the conclusion that the drivers were not independent, then the company could decide to reclassify those drivers so that they become employees.

Another approach to this type of conflict could be for a company to establish a third-party dispute resolution ADR procedure, providing for

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mediation, arbitration, or both. Analytically, this would be comparable to performing a contractor job analysis, but a third-party mediator would assist in doing so and a third-party arbitrator would decide whether or not the results of the job analysis warranted a decision to convert independent contractors to employees. This approach would also be consistent with the widely adopted use of arbitration (but not mediation) by non-union companies for workplace disputes involving their employees.

Set against these analytical approaches, however, is the cost saving that accrues to a company when independent contractors rather than employees perform some of its work. The main saving in this regard stems from not having to pay for overtime work or provide fringe benefits or incur payroll taxes for them. Especially if such savings are substantial, an employer not only has a strong incentive to continue to have certain types of work performed by independent contractors rather than employees, but also to convert additional work from that performed by employees to that performed by contractors. This incentive appears to be strongly prevalent among businesses in portions of both the gig and the more traditional economy.

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LABOR MARKET COMPETITION AND "NO POACHING"

Another type of workplace conflict for which resolution is pursued through litigation rather than internally involves alleged restrictions on labor market competition or, in popular parlance, "no poaching." Unlike litigation on other workplace conflict matters that is initiated under one or another labor law, this litigation is initiated under antitrust law, that is, the Sherman Act. The leading example in this regard is a case known as the High Tech Employee Antitrust Litigation (HTEAL), which was originally filed in September 2011 with the Federal District Court of Northern California.[38] In that lawsuit, current and former employees of seven Silicon Valley-based high-tech companies claimed that their pay had been suppressed over several years due to no-poaching agreements reached by the Chief Executive Officers (CEOs) of those companies. The plaintiffs claimed that in effect these companies engaged in cartel arrangements that had the effect of restraining trade (competition) in the labor market and therefore violated the Sherman Act.[39] This lawsuit was filed shortly after the completion of a U.S. Department of Justice investigation of the same allegation against the same companies. That year and an half-long investigation

concluded without charges being filed against the companies, but also with the companies signing a cease-and-desist order.[40]

Initially, more than 100,000 employees of the seven companies constituted the proposed class in the HTEAL. During the first two years of this litigation, plaintiffs and defendants filed numerous motions with the court in attempting to receive rulings favorable to their respective positions. The court's responses to these motions tended to concur with plaintiffs' positions in some instances and with defendants' positions in others in what was basically a form of three-party negotiations. Substantial intra-organizational negotiations also occurred among both the plaintiffs and the defendants. As a result, in late 2012 plaintiffs employed by three of the companies, namely, Pixar, Lucasfilm, and Intuit, reached settlements that were later approved by the court. This left Adobe, Apple, Google, and Intel as the four remaining defendants. In October 2013, the court issued a decision certifying a class of 64,625 technical, creative, and research and development employees of these companies as the plaintiffs in the continuing litigation.[41]

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The no-poaching agreements that plaintiffs claimed existed in this matter were not contained or expressed in formal written documents or contracts but, rather, in email messages and other communications exchanged among CEOs of the four companies. Plaintiffs contended that during 2005–2009 (a) these agreements cut off the flow of information about job vacancies that existed in the companies other than the ones at which individual class members were employed, (b) members of the class would have applied for those jobs at the other companies had they known about them, and (c) members of the class would have been hired into those jobs at higher rates of compensation than they were receiving at the time from their individual employers.[42] The ultimate result of these agreements, claimed the plaintiffs, was to restrict labor market competition and thereby suppress their pay during the entire period for which these agreements were in effect, that is, 2005–2009. In sum, said the plaintiffs, the total amount of this pay suppression was $3.1 billion. Had the plaintiffs prevailed at trial in this matter – that is, won their case – the treble damages provision of the Sherman Act would have been applied, thereby resulting in an award of $9.3 billion.

Analytically, these 64,625 employees constituted a collective that was represented by counsel that, in turn, retained several experts to support its position in this matter. Although separate counsel represented each of the four defendant companies and each company retained one or more experts to support its particular position, the four companies also constituted a collective in this matter.[43] The two collectives engaged in episodic

negotiations that appeared to be largely adversarial in nature during 2012–2013, but that became relatively more cooperative later on. The case was scheduled for trial in May 2014 in San Francisco. About 10 days prior to the trial start date, however, the parties submitted a proposed settlement of $324 million to the court. The court subsequently rejected it. Shortly thereafter, defendants requested that the U.S. Court of Appeals for the Ninth Circuit overturn the lower court's rejection of the settlement.[44] Meanwhile, the parties to the dispute continued to negotiate with each other, and in December 2014 submitted a new proposed settlement of $415 million to the court. That settlement was subsequently approved by the court and thereby brought this landmark case to its end.[45]

Returning to the focal question posed earlier, could these employees' claims of pay suppression have been settled internally? After all, the defendant companies are widely known and admired (including for the quality of their human capital), are considered to have leading-edge human resource management policies and practices, and are often ranked among the best places to work.[46] With such characteristics, one might expect that an employee or group of employees in any one of these companies who believed that their pay was being suppressed due to no-poaching agreements would bring this matter to their own management's attention and would exercise voice in their employment relationships.

There is no evidence, however, that this occurred in the companies that were party to the HTEAL litigation. Instead, plaintiffs appear to have voiced their concerns to each other on a within-company and across-company basis, largely through internet-based social networks. Furthermore, the complaint in this matter included the actual names of only five of the plaintiffs, which implies that at least initially the allegations about the effects of no-poaching arrangements on plaintiffs' compensation were concentrated among a few employees. It was these named plaintiffs who sought and eventually retained legal counsel to pursue their claim.[47]

Moreover, the allegation in this matter did not involve explicit company policies or sets of codified practices that might otherwise be the subject of grievances. Instead, it involved actions allegedly taken and agreements reached informally by those at the very top of the defendant companies, which could not be grieved or complained about through internal workplace dispute resolution systems or processes. In this regard, it appears that in the defendant companies the heads and senior staffs of functional units that are typically involved in internal workplace conflict resolution, namely,

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human resources and legal, were unaware of the alleged no-poaching agreements that their CEOs had initiated or agreed upon with their counterparts.[48] Hence, these agreements were outside the formal scope of the issues over which employees of the defendant companies could exercise internal voice.

Similarly, it is highly unlikely that employees' claims of pay suppression in this matter could have been resolved through mediation, arbitration, or other ADR methods. To do so would have required the parties (or their representatives) either to establish a process that included one or more ADR methods or to adopt one or more such methods on an ad hoc basis. But the very nature of this dispute, which at its core involved the behavior of CEOs, mitigates the potential use of ADR methods to resolve the dispute. Ironically, the litigation of this dispute ultimately featured what may plausibly be characterized as a combination of mediation and arbitration (med-arb) undertaken by the judge in the case, who rejected the parties' first proposed settlement of $324 million but accepted the parties' second proposed settlement of $415 million. This is a particularly redolent example of workplace dispute resolution through litigation rather than through the use of ADR methods, per se.

Although the HTEAL has concluded, other cases involving the same type of no-poaching and wage suppression allegations have been filed against various companies, including Sony, Disney, and DreamWorks. Animators employed by these companies and by Pixar and Lucasfilm, two of the original defendants in the HTEAL, have brought their own class action lawsuit against these companies and have requested that they be provided class certification documents and expert reports from the HTEAL.[49] In a separate matter, a group of former account managers at Oracle Corporation sued the company, claiming that it had no-poaching agreements with Google and other companies that resulted in suppressing the account managers' pay.[50] In a related matter that is notable for being outside of the high-tech sector, an assistant professor of radiology at Duke University who sought a similar position at the University of North Carolina filed a class action lawsuit in June 2015 against both universities alleging that they had a no-hire agreement that suppressed competition and employee wages, thereby violating the Sherman Act (and state law).[51] In sum, it appears that there is a new wave of labor and employment litigation that involves challenges by current and former employees to the anticompetitive behavior of companies (and other employers) in the labor market, challenges that do not seem amenable to internal workplace dispute resolution.

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EXECUTIVE COMPENSATION

Most labor and employment litigation involves employees and former employees who work or worked in lower level, mid-level, or upper level jobs in companies. Some of this litigation, especially concerning wages and hours, features class actions. Litigation over executive compensation, however, involves those at the top levels in companies and rarely features class actions. Yet this, too, is an active and apparently growing area of contemporary labor and employment litigation.

In disputes over executive compensation, one or more parties typically contend that the compensation received by one or more executives is or was "unreasonable," that is, excessive. The objective of such litigation appears to be recouping or clawing back excessive executive compensation. Disputes over executive compensation may arise because shareholders of a public company believe that a severance package granted to an outgoing CEO was excessive or because creditors of a bankrupt company that is reorganizing believe that a new incentive plan designed to retain top officers is "too rich" or because a trustee of a defunct financial services company seeks to recover fraudulently obtained monies from top executives or because a non-officer co-owner of a family-owned business believes that the co-owner family member officers are overpaid.[52]

Let me illustrate. After Hewlett-Packard's board of directors fired CEO Carleton Fiorina in February 2005, a group of shareholders sued the company, the board, and Fiorina claiming that her severance package of approximately $42 million was excessive. According to these shareholders, the board violated its own policy (adopted in 2003) that a departing executive's severance payments would be limited to 2.99 times that executive's annual salary and bonus. Therefore, the severance package should have been $16.7 million instead of $42 million. The excess amount, said the shareholders, should be returned to the company.[53]

An example of a dispute involving compensation for the executives of a bankrupt enterprise is Molycorp, a mining company that produces rare earths used in electric cars and wind turbines. The company filed for Chapter 11 bankruptcy in June 2015 and subsequently filed a reorganization plan with the court.[54] That plan included a proposed key employee incentive plan (or KEIP) that was intended to retain top executives of the company and motivate them to perform well during reorganization. Essentially, the KEIP specified cash payments to be made to these executives as a replacement for their "under water" stock shares in the bankrupt company. The exact amount of the payments depended in part on the

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achievement of certain reorganization milestones. The contending parties are the creditors and debtors of the company, respectively, with the executives being among the debtors. The dispute is over the amount of the cash payments to be made under the KEIP, with the creditors filing periodic objections claiming that these payments are (or will be) excessive, and the debtors claiming that they are necessary and proper. The Bankruptcy Court is charged with deciding this matter. KEIPs are commonly included in bankrupt companies' reorganization plans, meaning that disputes between creditors and debtors over proposed incentive or replacement compensation for executives are quite common; this case constitutes but one example.

A leading example of a dispute over executive compensation in which a trustee of a defunct company seeks to recover fraudulently obtained monies is that involving Bernard L. Madoff Investment Securities, LLC (BLMIS). Mr. Madoff, the company's founder and owner, became famous – notorious – for running a major, far-reaching Ponzi scheme for which he was convicted and sentenced to a long prison term (Henriques, 2009). The particular executive compensation matter of concern to the trustee involves Mr. Madoff's two sons, Andrew and Mark, who served as Co-Directors of the Proprietary Trading Division of BLMIS during 2000–2008.[55] If it can be shown that their compensation was unreasonable, that is, excessive, the excess will be clawed back (recouped) by the trustee. The trustee retained an expert to determine whether and to what extent reasonable executive compensation was paid in this matter. (More will be said below about the criteria for determining such reasonableness).[56]

An example of a dispute over executive compensation that involves a non-officer co-owner of a family-owned business who believes that his officer co-owner family members' compensation is unreasonable – meaning that they are overpaid – is World Oil Company, a privately owned firm based in Los Angeles. The company is co-owned by three brothers, two of whom serve as the top officers of the company. The other brother is not an officer or employee of the company and is therefore not paid a salary or bonus or any other type of compensation. However, he and his two brothers share equally in the returns on their invested capital in the company or, in other words, they each receive one-third of the return annually. This has not stopped the non-officer brother from periodically filing lawsuits claiming that his two brothers are excessively compensated.[57] The court must then make a determination about the reasonableness of such compensation. This type of dispute is basically a family feud, and this particular example is hardly an isolated one in the realm of executive compensation litigation.

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Despite their different characteristics and circumstances, these examples of litigation over executive compensation all involve claims that one or more executives' compensation was unreasonable. To resolve such claims requires a standard of or criteria for or an approach to determining reasonableness. Probably the most well-established and surely the most single-minded approach to determining the reasonableness of executive compensation is the independent investor test in which the relevant consideration, in question form, is "would an independent investor would be willing to compensate the employee as he was compensated?"[58] While some courts have adopted this test in adjudicating disputes over executive compensation, the more widely used approaches in this regard are known, respectively, as the 12-factor test and the 9-factor test.[59]

The 12-factor test is made up of the following: (1) the employee's qualifications, (2) the nature and scope of the employee's work, (3) the size and complexity of the business, (4) general economic conditions, (5) the employer's financial condition, (6) a comparison of salaries paid with sales and net income, (7) distributions to shareholders and retained earnings, (8) whether the employee and employer dealt at arm's length and, if not, whether an independent investor would have approved the compensation, (9) the employer's compensation policy for all employees, (10) the prevailing rate of compensation for comparable positions in comparable companies, (11) compensation paid in prior years, and (12) whether the employee guaranteed the employer's debt. The 9-factor test is narrower but similar and is made up of the following: (1) the employee's qualifications, (2) the nature, extent and scope of the employee's work, (3) the size and complexities of the business, (4) a comparison of salaries paid with gross income and net income, (5) the prevailing economic conditions, (6) a comparison of salaries with distributions to shareholders, (7) the prevailing rates of compensation for comparable positions in comparable companies, (8) the salary policy of the taxpayer as to all employees, and (9) in the case of small corporations with a limited number of officers, the amount of compensation paid to the particular employee in previous years. Whether these complex tests are actually helpful in adjudicating lawsuits over the reasonableness of executive compensation is unclear, but they nonetheless illustrate how the courts are searching for an operational definition of reasonableness.

Returning to the focal question posed earlier, could any of these (and similar types of) litigated disputes over executive compensation have been resolved internally through one or another conflict resolution system or process or through ADR? Perhaps yes in certain disputes, but probably no

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in most. In the aforementioned shareholder dispute with Hewlett-Packard over the "excessive" severance package granted to its former CEO and in other disputes like it, it is conceivable that a corporate governance system would be in place through which such a dispute would be heard, deliberated, and resolved without resort to litigation but with the potential use of mediation and/or arbitration. In order to do so, however, the dispute would have to be aired early on, that is, prior to finalization of the decision about the amount of severance pay to be awarded to a CEO or other executive – and perhaps even prior to the decision to fire such an executive. The corporate governance responsibility would most likely rest with the board of directors or one of its subcommittees, meaning that the board would be attempting to fulfill the dual and in this instance likely conflicting roles of judge (deciding to fire an executive and the amount of severance pay for that executive) and mediator (among corporate constituents). Yet, this is what corporate boards of directors have increasingly been called upon to do, as is reflected in the "say on pay" movement.[60] Hence, a combination of shareholder activism and more fulsome corporate governance with selective use of ADR methods may lead to more internally based resolution of certain types of conflicts over (the reasonableness of) executive compensation.

In other circumstances, however, such as the bankruptcy, fraud, and family feud examples provided earlier, the internal resolution of conflicts over executive compensation or the use of ADR methods are most unlikely to occur. A bankrupt firm by definition has gone almost all the way through its organizational life cycle and may not re-emerge under a reorganization plan. Opposition to a proposal to pay additional monies to executives of such a firm under a KEIP constitutes a conflict that cannot be resolved internally or through ADR methods. A firm that has experienced organizational death due to the fraudulent activities of one or more of its owners or top executives and in which a post-death attempt is made to recoup excess compensation paid to the firms' executives also constitutes a conflict that cannot be resolved internally or through ADR, but even more so than in a bankrupt (but still existing) firm. In the case of a firm in which there is deep-seated intra-family conflict over executive compensation, an internal organizational grievance-like procedure would also not be well suited to resolving the conflict. Indeed, in this particular circumstance the parties to the conflict typically do not want to deal directly with one another and do not want to participate in mediation or arbitration or other ADR methods, preferring instead to be represented by counsel in a third-party litigation process. In sum, these various types of conflict over executive

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compensation are ones for which resolution is much more likely to be pursued through litigation.

IMPLICATIONS FOR WORKPLACE CONFLICT RESOLUTION THEORY AND PRACTICE

A long history of research into workplace conflict resolution emphasizes and strongly favors the use of internal grievance, grievance-like, and ADR procedures, but many such disputes are not settled internally. Instead, they are pursued and settled externally through litigation. Determining the extent to which such litigation occurs, however, turns out to be considerably more difficult than might be thought, partially due to the fact that some of it is pursued under antitrust, bankruptcy, securities, fraud, and other laws rather than under traditional labor laws.

The most systematic data about this litigation are those pertaining to the FLSA, for which it is possible to trace the volume of lawsuits filed and the issues they covered. These data show a 10-fold increase in such litigation – popularly known as wage and hour litigation – during 1990–2015, with the sharpest increases occurring during the last few years of this period. It appears that state-level wage and hour litigation simultaneously also increased substantially. Among the leading wage and hour issues litigated are those involving misclassification, which in some instances pertains to employees, including managerial employees, and in others to independent contractors.

Most of this litigation features class actions, that is, groups of employees or contractors who are more or less similarly situated and who band together and retain attorneys to file their complaints with the courts and to represent them during the ensuing legal proceedings. In these respects, such collective action and representation bear close resemblance to unionization and collective bargaining. The same is true for the process of decertification, which may be applied to a previously certified class for litigation and to a previously certified union for collective bargaining. These processes differ, however, with respect to the scope of employees covered by and represented in them. In wage and hour litigation, supervisory and managerial employees often constitute classes of plaintiffs. Under (private sector) unionization, only non-supervisory, non-managerial employees are legally eligible to become members of a bargaining unit whose representative(s) may then bargain collectively with management. Furthermore, in class

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action litigation involving workplace disputes, both former employees and current employees are represented, whereas in collective bargaining it is only current employees (and sometimes retirees) who are represented.

Another putative difference between these two processes concerns the nature of the negotiations. Litigation over wages and hours (and other matters) occurs within the adversarial system of jurisprudence in which one party presumably wins and the other party presumably loses the case at hand. Collective bargaining can feature integrative negotiations and result in mutual wins for both parties. But this difference is surely overdrawn. Most wage and hour litigation does not culminate with trial verdicts but, instead, is settled prior to or during trial. Such settlements result from negotiations between the representatives of the plaintiffs and defendants and reflect their respective assessments of the risks of winning and losing their cases. Analytically, such negotiations are not consistent with the strict win-lose, distributive, adversarial characterization of wage and hour litigation. But collective bargaining does not necessarily feature integrative or even modestly integrative negotiations, either. This is reflected not only in company efforts to drive hard bargains with unionized employees over wages and working conditions, but also in accompanying efforts to outsource work, substitute technology and capital for labor, and sometimes seek decertification of the bargaining unit. Hence, negotiations under litigation and under collective bargaining may be relatively more similar than dissimilar.

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Whether workplace conflicts over misclassification can be resolved internally without resort to litigation is another question, one to which the conceptually plausible answer is "yes." Employee misclassification litigation basically involves assertions by plaintiffs that they mainly perform work that is non-exempt from the FSLA (and/or comparable state laws) and they should therefore be reclassified. Companies need not accept these assertions on their face, but they could decide to study one or more of the jobs held by such employees to make a factual determination about job content and the propriety of continuing to classify these employees as exempt – and do so before the employees become plaintiffs. Companies could also make use of such ADR methods as mediation in which a third party assists in the process of job analysis and in inter-party communications about the results and implications of the analysis. Arbitration could also be used to assist in resolving these types of disputes, consistent with its increased use in resolving other types of workplace conflict.

In order to proceed this way, however, a company has to be willing to in effect negotiate with its employees even when they are not unionized and

thereby relinquish some of its sole decision-making authority. This might be acceptable to employers when the individuals claiming that they should be reclassified as non-exempt are front-line managerial employees, which is often the case.

Whether a company will be willing to attempt to resolve internally a misclassification dispute that involves independent contractors is more questionable. Contractors are by definition not employees, and the cost difference between work performed by employees and work performed by contactors may be so large as to make it highly unlikely that a company will seek to resolve such a dispute internally or through ADR. Nonetheless, in this instance, a "yes" answer to the aforementioned question is also conceptually plausible.

A "no" answer to the question is more plausible when it comes to the resolution of workplace conflict over alleged pay suppression through no-poaching agreements and alleged unreasonable, that is, excessive, executive compensation. Such disputes have increasingly become the subject of litigation, although it is more difficult to determine their actual incidence and trends than for FLSA disputes. Indeed, no poaching and executive compensation are not traditional wage and hour topics or areas of regulation, at least not regulation by labor law. Additionally, both no-poaching and executive compensation disputes typically involve employees at the highest levels of their companies, that is, CEOs and Presidents or Managing Directors. In no-poaching disputes, top executives of companies are alleged to have suppressed the pay of non-top management employees, and in executive compensation disputes top executives of companies or units thereof are alleged to have unreasonably (and illegally) inflated their own compensation. Because of this top executive involvement, it is highly unlikely that either of these types of conflicts could be settled through an internal grievance, grievance-like, ADR, or governance system. Litigation may be the only potential settlement mechanism that is feasible.

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NOTES

1. There is also a substantial research stream on employee silence as a response to workplace conflict. See, as examples, Brinsfield (2014), Gruman and Saks (2014), and Boswell and Olson-Buchanan (2004).

2. The Fair Labor Standards Act became law in 1938. Its Wage and Hour Division (WHD) is charged with enforcing the law, including by filing lawsuits on behalf of employees. However, employees or, more precisely, the attorneys who

represent them file most such lawsuits. This may occur in any one of the 94 federal district courts, which are divided into 12 regional circuits.

3. Accessed at https://www.pacer.gov, February 22, 2016.

4. The data used here are total nonfarm employment, which was 109,160,000 in December 1990 and 143,137,000 in December 2015.

5. The volume of charges filed annually with the U.S. Equal Employment Opportunity Commission (EEOC) is far larger than the volume of FLSA lawsuits shown in Fig. 1. In 2015, for example, the Commission received 89,385 charges of employment discrimination. However, most of these charges do not proceed to litigation. Instead, they are typically settled via negotiated resolution or are dismissed or withdrawn. In the same year, 2015, the Commission reported that it resolved 92,461 previously received discrimination charges (EEOC, 2016).

6. A referee of this chapter commented that most employees initiating wage and hour litigation no longer work for the companies they are filing against. However, empirical analysis of FLSA case filing data for the 1990–2015 period indicates that more than three quarters of the plaintiffs in wage and hour litigation were current employees.

7. In California, that state's law mandates that overtime pay at the rate of time and one half be paid to a (covered) employee for hours worked beyond eight in a day as well as beyond 40 in a week.

8. Cumulatively, these percentages add to more than 100 percent because FLSA lawsuits typically contain allegations of violations of more than one of the law's provisions.

9. These industry titles are from the North American Industry Classification System (NACIS).

10. USGAO (2014, p. 8).

11. *Ibid*.

12. In determining whether or not to certify a class of employee plaintiffs, Federal District Court judges apply the Federal Rule of Civil Procedure, that is Rule 23(b)(3), specifically the decision criteria specified therein, which are predominance, superiority, numerosity, commonality, typicality, and adequacy. For an example, see *Bowerman v. Field Asset Servs*. (2015). This decision was rendered on March 24, 2015 in the United States District Court for the Northern District of California.

13. USGAO, *op. cit*., p. 5.

14. *Ibid*.

15. The private sector unionization rate in the United States declined from 12.1 percent in 1990 to 6.7 percent in 2015. The percentage of nonfarm private sector workers covered by unions in collective bargaining declined from 13.4 percent in 1990 to 7.5 percent in 2015. See "Union Membership and Coverage Database from the CPS," *Index of Tables*. Extracted on February 15, 2016 from unionstats.com

16. A referee of this chapter commented that most firms facing FLSA litigation are small firms that do not have internal conflict resolution systems. While I agree that smaller firms typically do not have such systems, the vast majority of employees (both current and former) represented in class action lawsuits alleging misclassification are (or were) employed by large companies, including those cited and/or discussed in this chapter (e.g., Allstate Insurance, Novartis, FedEx, Wal-Mart, and

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Home Depot). Smaller companies are relatively more likely to be subject to lawsuits alleging violations of the minimum wage provisions of the FLSA and related state laws.

17. Also under the FLSA, an employee earning less than $455 per week (or $23,660 annually) is considered to be a non-exempt employee entitled to overtime pay for overtime hours worked. In mid-2015, the USDOL announced a proposal to increase this earnings threshold to $921 per week (or $47,892 annually) and, as well, to adjust this amount annually based on change in the cost of living. If implemented, this proposal would very substantially increase the non-exempt portion of the U.S. workforce. However, this proposal has received substantial opposition from organized employer groups and their representatives, and the Congress must approve it in order for it to become law. This almost certainly will not occur during the Presidential election year of 2016, and its prospects thereafter are uncertain as well.

18. Examples include Smart & Final, Wal-Mart, Tuesday Morning, Inc. and Home Depot.

19. *Crandall v. U-Haul* (2001).

20. In Re Novartis Wage and Hour Litigation (2010).

21. *Nettles, Czarnecki, et al. v. Allstate Insurance Company, Order* (2010). This was a bench trial, that is, a trial before a judge without a jury.

22. *Nettles, Czarnecki, et al. v. Allstate Insurance Company* (2012).

23. Retirees may also be represented in collective bargaining, but not employees who quit or were reduced in force or separated for performance or other reasons.

24. A referee of this chapter usefully points out that there are legal incentives for the parties involved in workplace discrimination claims to attempt to settle those conflicts internally. This is because the controlling legal decision (in *Faraghner et al. v. City of Boca Raton*) states that if an employee fails to engage in "reasonable" internal workplace conflict resolution options, the employer may escape liability. The FLSA and court decisions reached under this law contain no comparable incentives.

25. See USDOL (2015).

26. In Re FedEx Ground Package System, Inc. Employment Practices Litigation (2010).

27. *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014) and *Alexander v. FedEx Ground Package Sys., Inc.* (2014).

28. *In Re FedEx Ground Package System, Inc. Employment Practices Litigation. Craig, et al. v. FedEx Ground Package System, Inc.,* U.S. Court of Appeals (7th Cir. July 8, 2015, p. 4). These court decisions clearly placed strong emphasis on the criterion of control in ruling on whether FedEx delivery drivers were independent contractors or employees. But the criterion of independence may be even more compelling in this regard. To illustrate, if an independent contractor to FedEx cannot contract with another company or decide which customers to deliver to or decide which packages and other items to deliver to customers, that contractor has very little if any independence. For more on this point, including additional criteria for determining independence, see Lewin (2012).

29. See Lewin (2015) for additional detail about this process. From its inception, FedEx sought to avoid employee unionization. Thus, the GFTP and another FedEx

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initiative, the Survey Feedback Action process (SFA), can be viewed as alternatives to or substitutes for unionization. FedEx's pilots became unionized in 1992, which stemmed from the company's acquisition in 1989 of Flying Tigers, whose pilots were unionized and who led the post-acquisition pilot unionization of FedEx. No other FedEx employees have become unionized since then. On types and examples of employee representation other than through unionization, see Lewin (2013) and Gollan and Lewin (2013).

30. Another difference is that the final step of the GFTP is internal Appeals Board review rather than arbitration. However, both of these final steps result in binding decisions.

31. Lewin, Dralle, and Thomson (1992). FedEx Corporation's motto is and always has been "People-Service-Profits."

32. *See Romero, et al. v. Allstate Insurance Company* (2014).

33. See, for example, *Pexa v. Farmers Insurance Company* (2012).

34. The use of arbitration to settle many types of commercial disputes has become ubiquitous. Contributing to this trend are a series of court decisions supporting deferral to arbitration in disputes involving customers of companies and employees of companies. See Lewin (2014).

35. *O'Connor v. Uber Technologies, Inc.*, No. 3:13-cv-03826-EMC (N.D. Cal. December 9, 2015).

36. *Cotter v. Lyft, Inc.*, No. 3:13-cv-04065-VC (N.D. Cal.).

37. *Curry v.* Amazon.com*, Inc.*, No. 2:16-cv-00007 (D. Ariz. January 5, 2016).

38. *In Re: High Tech Employee Antitrust Litigation, Consolidated Amended Complaint* (2011). The claim was not that all seven companies colluded in one overall no-poaching agreement but, rather, that dyads and triads of these companies had done so.

39. The Sherman Act of 1890 was enacted to combat cartels and their price-fixing in product markets – colloquially, to "bust the trusts." However, the first applications of the Sherman Act were to labor unions rather than to business enterprises, and for about two decades following passage of the Act courts repeatedly ruled that unions were cartels that violated its provisions. See Falcone (1962).

40. See *In Re: High Tech Employee Antitrust Litigation, Consolidated Amended Complaint*, pp. 19–20, and *United States of America v. Adobe Systems, Inc.; Apple Inc.*; *Google Inc.*; *Intel Corporation*; *Intuit, Inc.*; *and Pixar* (2011). This investigation was conducted between September 2009 and March 2011.

41. In Re High Tech Employee Antitrust Litigation, Order Granting Plaintiffs' Supplemental Motion for Class Certification (2013).

42. Analytically, it is extremely unlikely that, had they known about job vacancies at the defendant companies other than the ones at which they worked, all of the plaintiffs would have applied for those jobs and all would have been hired to fill the jobs at higher rates of pay than they were receiving at the time. But the plaintiffs' theory as well as plaintiffs' counsel's theory and plaintiffs' experts' theory was that the alleged pay suppression affected *every* member of the class.

43. These experts included faculty members from Stanford University, Cornell University, UCLA, and the London School of Economics. One of these experts argued that the no-poaching agreements constituted a labor market monopsony in Silicon Valley. Defendants' experts included faculty members from the University

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of Chicago and UCLA. One of these experts argued that the Silicon Valley labor market was highly competitive, based on analysis of company hiring and turnover data in years prior to, during, and after the 2005–2009 class period.

44. *In re Adobe Systems, Inc., Apple, Inc., Google, Inc., and Intel Corp. v. United States District Court for the Northern District of California. Petition for Writ of Mandamus* (2014).

45. See U.S. Judge Approves, *Reuters*, 2015. The settlement was formally approved in September 2015 and the process of distributing settlement amounts to class members commenced during October 2015.

46. See, for example, Workforce.com (2015) and Fortune (2016).

47. None of the named plaintiffs were employed by any of the defendant companies when the class action lawsuit was filed in 2012. They had all worked previously at one or another of these companies at various times during 2006–2011, typically for about two years. See *In Re: High Tech Employee Antitrust Litigation, Consolidated Amended Complaint*, pp. 3–4.

48. *Ibid.*

49. *Animation Workers Antitrust Litigation* (2015).

50. *Garrison v. Oracle Corporation* (2014).

51. *Seaman, et al. v. Duke University, et al.* (2015).

52. An example of each of these types of disputes is presented below. For a primer on how executive compensation should be determined, see Ellig (2014). The extent to which executive compensation is or is not related to company financial performance is highly debated in the research literature. See, for example, Tosi, Werner, Katz, and Gomez-Mejia (2000).

53. Indiana Electrical Workers Pension Trust Fund, IBEW; SEIU Affiliates' Officers and Employees Pension Plan; SEIU National Industry Pension Plan; and Pension Plan for Employees of *SEIU v. Patricia Dunn, Carleton S. Fiorina, et al. and Hewlett-Packard Company* (2008). More recently, in 2014, a group of Hewlett-Packard shareholders won their lawsuit against the company and Leo Apotheker, who served as the company's CEO for 11 months before being fired by the board of directors in September 2011. However, that lawsuit pertained to Hewlett-Packard's overpayment for acquiring Autonomy Corp., a British software company, during Mr. Apotheker's tenure as CEO, rather than to his executive compensation or severance pay. See Tan (2014).

54. Re Molycorp, Inc. (2015).

55. *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC. Irving H.Picard, Trustee v. Peter Madoff, Estate of Marl D. Madoff, Andrew Madoff, et al. SIPA Liquidation* (2012). Both sons are deceased, but the litigation against their estates and other named family member defendants remains in place.

56. For an example of a law firm whose top executives were charged with committing fraudulent executive compensation practices, see *Securities and Exchange Commission (SEC) Against Steven H. Davis, Stephen Decarmine, Joel Sanders, Francis Canellas and Thomas Mullikin, Complaint*. March 6, 2014. The defendants were the top officers of the Dewey& LeBoeuf law firm, which declared Chapter 11 bankruptcy on May 29, 2012.

57. See, for example, *Richard Roth v. Steven Roth, Robert Roth, et al., First Amended Complaint*, 2012.

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58. *Eberl's Claim Serv., Inc. v. Commissioner* (2001, p. 6). The independent investor test is also included as one factor in the 12-factor test of the reasonableness of executive compensation discussed below.

59. See *Eberl's Claim Serv., Inc. v. Commissioner* (2001), and *B & D Foundations, Inc. v. Commissioner of I.R.S., T.C. Memo* (2001).

60. See U.S. Securities and Exchange Commission (2011).

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