Marsh

The basics of wage and hour liability insurance

FINPRO Spotlight Series

Wage and hour litigation, under the Fair Labor Standards Act (FLSA) and similar state laws, represents one of the greatest threats to US companies today. Federal and state lawsuits on a single plaintiff, class, and collective basis have increased in frequency dramatically over the last decade. Plaintiffs continue to pursue lucrative wage and hour claims, in light of the fact that the bar for collective actions under the FLSA is lower than for other types of employment litigation, such as discrimination or harassment. The damages in FLSA cases can also be more readily quantified and compound very quickly.

Typical employment practices liability (EPL) policies are not designed to provide coverage for wage and hour claims. As such, in response to feedback from our clients, Marsh's innovation team conducted extensive research and has worked with NERA, Mercer, and employment law firms to help assess the potential exposure and bring the concept of wage and hour insurance to the Bermuda marketplace. Standalone wage and hour (W&H) policies first became formally available in 2013 from Bermuda insurers, and the market has since continued to improve.

What's covered?

W&H policies are written on a claims-made basis and include coverage for claims brought by, or on behalf of, any past or present employee, or the Department of Labor and state equivalents, alleging wage and hour violations. These generally include but are not limited to:

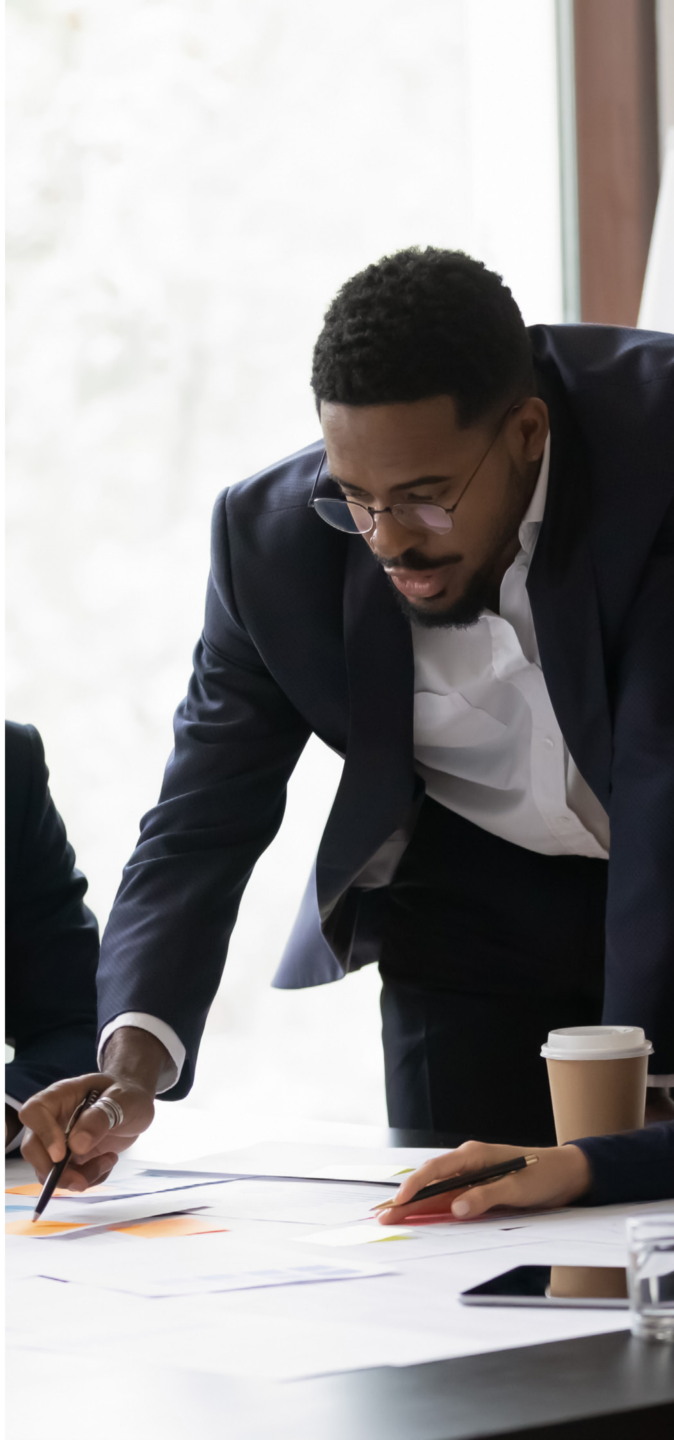
- Misclassification of employees (including as independent contractors or as exempt versus non-exempt from overtime).
- Failure to provide adequate meal and rest break periods.
- Inaccurate payment of wages, including tip credit issues.
- Incomplete pay stub disclosures.
- Failure to pay employees for time spent "donning and doffing" uniforms.
- Failure to pay wages for various off-the-clock duties.

Although the policy will only cover claims made during the policy period, alleged wrongful acts could have occurred anytime during, or before, the policy incepts. Pre-existing litigation and claims, however, are not covered.

Insureds are generally the company and its subsidiaries, and any director, officer, or employee.

The definition of loss under a W&H policy is broad; it includes settlements, judgements, pre- and post-judgment interest, defense costs, plaintiffs' counsel fees, liquidated damages, punitive and exemplary damages, and statutory fines and penalties (where insurable by law). All of these components can be very costly in a multi-plaintiff claim scenario.

W&H policies typically exclude coverage for criminal or fraudulent conduct, traditional EPL claims, bodily injury, workers' compensation, unemployment benefits, ERISA claims, and claims made before coverage incepted.



How has the product evolved?

2012
No true wage and hour coverage available; small sublimit for defense costs only. Marsh's innovation team does extensive research and works with NERA, Mercer, and employment law firms to help assess the potential exposure and bring the concept to the Bermuda marketplace.

2013
First formal product offering from Markel using Marsh's policy form targeting existing EPL clients. Maximum limits of $10 million, minimum retention of $5 million, and rate per million average of $40,000.

Mid to late 2013
Markel, XL Bermuda, and AWAC Bermuda release their own primary W&H forms, creating three viable primary options. Retentions decrease to $2.5 million, while limits are still capped at $10 million.

2014
Alternative structures are explored and the product is blended with EPL coverage. This mitigates the new "line item" some potential buyers face. Each primary market can now deploy up to $25 million and pricing is trending down.

2015
Beazley in London enters the W&H space with $5 million in capacity, targeting employers with fewer than 10,000 employees. Retentions as low as $250,000 are offered. AIG enters the market offering capacity from the US or Bermuda. Coverage purchased is split 50/50 between standalone W&H and blended EPL/W&H.

2016
The Department of Labor's white collar exemption rule sparks interest from many new buyers. Aspen Bermuda enters as the newest market to offer primary coverage.

2017
Argo Re Bermuda enters the market as a primary alternative to Beazley for companies with up to 10,000 employees, but can only offer standalone W&H.

2018
Employers continue to consider and purchase W&H coverage.

2019
Chubb Bermuda enters the market as a primary insurer, offering both standalone and blended options.

2020
Beazley plans to exit the wage and hour market as of May 1, citing significant losses amid a low premium base.

What is the current market appetite?

- Primary options are mainly available from Bermuda; Markel and Axa XL are leaders in this space. Awac Bermuda and Argo Bermuda continue to offer primary coverage, and Chubb Bermuda is now writing primary coverage. Aspen Bermuda is no longer looking to grow in primary, but will consider excess coverage. AIG US and AIG Bermuda have the ability to write primary, but generally prefer excess. Beazley UK previously offered primary coverage, particularly for smaller companies, but intends to withdraw from the market in mid-2020.
- Almost all other Bermuda markets are willing to write excess coverage.
- Retentions can be as low as $1 million for larger companies; Argo may consider $500,000 for headcounts of up 10,000.
- All industry classes will be considered.
- Underwriters can provide indications based on limited initial information, with binding subject to a completed application.
- Pricing has come down significantly since the product launched in 2013.
- Insurers are offering discounts of up to 30% for blended W&H/EPL coverage.

Who is buying?

- More than 200 companies are now purchasing the coverage. Many companies are evaluating quotes or preparing submissions.
- Companies from all industries have purchased the coverage; the leading industries are retail and health care.
- At present, slightly more than half of buyers are doing so on a combined basis with EPL as opposed to a standalone basis.

How much can a wage and hour claim cost?

50 employees of ABC Company were improperly classified as exempt from overtime for three years, from September 2015 through September 2018. The average unpaid overtime was $5,000 per employee per year. As a result of a willful FLSA violation, ABC is equired to provide three years of back pay.

Penalties and costs for ABC's violations — all of which are covered under most W&H policies — include:

$5,000 x 50 employees x three years = $750,000 x 2 (liquidated damages):	$1.5 million
$1,925 x 72 pay periods x 50 employees (civil monetary penalties):	$6.93 million
Plaintiffs' attorneys' fees, administrative costs, and defense expenses:	$1.5 million
Total cost of noncompliance:	**$9.93 million**

For more information, contact your Marsh representative or:

Deepak Adappa
US FINPRO Advisory Leader
+1 312 391 2948
deepak.adappa@marsh.com

Laura Burns
Employment Practices Liability/Wage & Hour, Marsh FINPRO — Bermuda
+1 441 2998805
laura.burns@marsh.com

La'Vonda McLean
Employment Practices Liability/Wage & Hour Product Leader, FINPRO
+1 678 365 6863
lavonda.mclean@marsh.com

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1166 Avenue of the Americas, New York 10036