Title: The Role of Strategic Attorney Behavior in the Increase in Federal Wage and Hour Litigation

Author: Sunmi Hirata, Monica Shen, Rwanda Smith

Faculty Sponsor: Prof. Charlotte Alexander, Assistant Professor of Law, Department of Risk Management and Insurance

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Introduction: Between 2000 and 2015, the number of minimum wage and overtime cases filed in federal court under the Fair Labor Standards Act (FLSA) increased by 317%. We hypothesize that plaintiffs’ attorneys’ strategic behavior is an important reason for this trend.

Specifically, we propose that changes in the law have made it more difficult for plaintiffs to win employment discrimination cases, and that, in reaction, plaintiffs’ attorneys have shifted their caseloads. In interviews by Prof. Alexander, plaintiffs’ attorneys suggested that it is easier to use payroll data to prove pay violations than to prove discrimination or harassment, which require establishing the employer’s subjective intent. According to this theory, plaintiffs’ lawyers who previously specialized in discrimination have “discovered” the FLSA as a set of replacement claims that they can bring on behalf of aggrieved employees.

Alternatively, FLSA litigation might have increased because the number of FLSA violations has increased. Companies might have attempted to cut labor costs during the Great Recession. In addition, technology and cultural shifts in the way employees work may have produced more uncompensated time spent on-the-clock. In this view, the FLSA increase is being driven by a set of economic and structural factors, rather than primarily by attorney behavior.

This project’s purpose is to explore the role of attorneys’ shifting caseloads in driving up FLSA litigation numbers.

Method: We have compiled case filing numbers for discrimination and FLSA cases between 2000 and 2015, and lists of all plaintiffs’ lawyers on those cases. We then cleaned the data by standardizing attorney names and expunging incorrectly entered listings. We will use the attorney names to examine shifts in case types handled by specific lawyers and across geographic regions and years.

Tentative Results: We found that FLSA cases filed in 2000-2015 are negatively correlated with discrimination cases at -.8221. As FLSA cases have increased by 317%, discrimination cases have shrunk by 34%. We are continuing to analyze the attorney name data to explore whether lawyers have shifted from discrimination to FLSA cases.

Conclusion: This research sheds light on the drivers of FLSA litigation, which in some jurisdictions has become the most frequently filed type of workplace lawsuit and a major source of litigation risk for employers today.