

THE FAIR LABOR STANDARDS ACT
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The stodgy and statutorily intense world of the Fair Labor Standards Act (hereinafter “FLSA”) is taking center stage as one of the hottest practice areas in the country. FLSA actions have increased 25% since 1998.¹ In the year 2001, more wage and hour class actions were filed than class actions filed on the basis of race discrimination. In December 2001, the Law Practice management section of the ABA stated that FLSA litigation would be one of the hottest practice areas for the year 2002. Best of all, federal judicial statistics show plaintiffs are winning more than fifty percent of the cases filed in federal court.

The FLSA covers many employment practices ranging from child labor laws to minimum wage; however, my experience has shown that the greatest exposure to employers for private actions under the Act occur in the areas of overtime payment and misclassification of employees. Non-payment of work required before or after clock-in in violation of the Portal-to-Portal Act is also common.

These materials will give you, the Employee’s lawyer, a basic understanding of the Act and the tools you need to identify potential FLSA or wage and hour causes of action. The materials will focus on the proper classification of employees as either “exempt” or “non-exempt” from overtime provisions of the FLSA. They also will shed some light on activities occurring prior to or following an employee’s work shift, which

may be excluded from compensation. The materials will then review the prospects for Class or collective actions under 29 U.S.C §216(b) due to the frequent institutional character of the violations. It will conclude with the legislative trends present in the wage and hour area, particularly the FLSA.

The Basics

The FLSA has remained relatively unchanged since its inception in 1938. Enacted during the height of the Great Depression, the legislation was intended to prevent wage exploitation of vulnerable workers by setting a minimum wage, to promote fair competition in interstate commerce by equalizing labor costs and to generate jobs by encouraging employers to hire more workers rather than extending the hours of current workers.²

The Wage and Hour Division of the Department of Labor (hereinafter “WHD”) is charged with the administration and enforcement of the FLSA. The agency issues rules, regulations and interpretations under the act and conducts compliance reviews. Employees may maintain a private right of action against their employer for violations of the act; no administrative filing is necessary.

Broadly stated, the FLSA covers any employee who is employed by an enterprise engaged in commerce or in the production of goods for commerce, unless such employee is otherwise excluded. The act also covers federal and municipal employees; however, since the *Seminole* decision, it has been widely held that state employees are not covered under the act.³

Is Your Client An Employee Under The Act?

What seems to be a straightforward question often is not. Often employees are labeled contract workers or are paid by other entities. Whether your client is an employee under the FLSA is a legal question to be determined by the court. The following six factors have been held relevant to the determination: (1) the degree to which alleged employee is independent or subject to the control of the employer; (2) the employee's opportunities for profit or loss; (3) the employee's investment in the facilities and equipment of the business; (4) the permanency of the relationship between employer and employee; (5) the degree of skill required to perform the work of the employee; and (6) the extent to which the alleged services in question are an integral part of the employing entity. *See generally Robicheaux vs. Radcliff Material, Inc.*, 697 F.2d 662 (5th Cir. 1983).

Who is the Employer?

One of the great aspects of suit under the FLSA is the number of persons and entities who can be held jointly and severally liable for the damages under the Act under the theory of "joint employment." Under the FLSA an employer is "any person acting directly or indirectly in the interest of an employer in relation to an employee."⁴ Courts have generally held that the statutory definition of "employer" should be liberally construed to affect the Act's remedial purpose. *See Reich v. Circle C Invs., Inc.* 998 F.Supp. 1301 (D. Colo. 1991). While ownership interest in a company is not enough to convey liability, the courts have held that stockholders who were also involved in establishing corporate policies and had influence over hiring and firing employees could be held liable. *See Martin v. W.E. Monks & Co.*, 805 F. Supp. 500 (S.D. Ohio 1992)

Similarly, consulting companies who have exercised significant control over the day-to-day operation of a company may be considered employers within the meaning of the Act.⁵ Courts have also held that temporary staffing agencies and the client companies who supervised the work can be jointly liable. *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998).

Overtime Requirements of the FLSA

The FLSA entitles non-exempt employees to wages at the rate of one-and-a-half times their regular rate of pay for all hours worked in excess of forty hours per week. 29 U.S.C. §216(b). “Hours worked” includes “[a]ny work of consequence performed for an employer.” *Dunlop v. City Elect*, 527 F.2d. 394, 397 (5th cir. 1976). The work is compensable if it is performed “at least in part for the benefit of the employer.” *Sec. Labor v. ER Field*, 495 F2d 749, 751 (1st Cir. 1974). The employer may not use failure to report the work as a defense. *Holzappel v Town of Newburgh*, 145 F. 3d 516 (2d Cir. 1998); *Reich v. Dept of Conserv. and Natural Resources, State of Alabama*, 28 F3d 1076, 1082 (11th Cir. 1994).

An employer has a non-delegable duty to keep time, and if the employer delegates that duty and misclassifies employees, it does so at its own peril. “Personal duty rests on him to inquire into conditions prevailing in his business; he is not relieved of such duty because extent of his business may preclude his personal supervision and compel reliance on subordinates, and record-keeping obligation is not discharged by mere promulgation of rule on part of employer.” *Andrews v. Montgomery Ward & Co.* 30 F. Supp 380 (1939).

Overtime: Exempt or Non-exempt

In screening potential cases, the majority of the work will be in determining whether the potential client is exempt under the Act. The exemptions to the act are numerous and can depend on a number of factors including the industry involved, the size of the business, the job duties of the employees, and the type of material the employee uses. However, exemptions are to be strictly construed, and the burden is on the employer to demonstrate that an employee is exempt. All employees are presumed to be exempt. *Schultz v. Hartin*, 428 F.2d 186, 189 (4th Cir. 1970).

The most common exemptions are the “white collar” exemptions. This includes executive, administrative, professional and outside sales employees. 29 USC 213(a)(1); 29 CFR Part 541. Remember, job titles are freely doled out by employers and have no bearing on whether the employee is exempt. You must look to the duties, responsibilities and salary to determine whether the potential client is exempt. Employers often will cause an otherwise exempt, salaried employee to become non-exempt by withholding some or all of the employee’s pay for a period when work is not available or for disciplinary or partial-day leaves.

Executive Exemption

This exemption is also known as the “supervisory” exemption. For an employee to come within the executive exemption, it is necessary that:

1. The employee is compensated on a salary basis at a specified rate of not less than \$250.00 per week.
2. The employee’s primary duty be the management of an enterprise, or of a customarily recognized department or subdivision thereof;

3. The employee customarily and regularly directs the work of other employees therein;
4. The employee has the authority to hire and fire other employees or the employee's suggestions and recommendations as to hiring or firing, advancement or promotion or other change of status of employees be given particular weight;
5. The employee customarily and regularly exercises discretionary powers;
6. The employee devote only limited amount of work time to nonexempt duties (no more than 20%);

Managing an enterprise may include such duties as hiring, firing, directing or evaluating employees, determining work techniques, and determining appropriate levels of supplies and merchandise.⁶

Administrative Exemption

If your potential client's primary duty consists of office or nonmanual work that is directly related to the employer's management policies or general business operations and that requires the exercise of discretion or independent judgment, they may be exempt as an Administrator.⁷ This is perhaps one of the most misapplied exemptions by employers because of the way the "duties test" is defined in the DOL Regulations. Just as in the Executive exemption, the employee must first meet the salary test of at least \$250.00 per week. Under the duties test it is necessary that:

1. The employee's duties involve primarily performance of office or non-manual work directly related to management policies or general business operations as opposed to "production worker" duties.

2. The employee must customarily and regularly exercise discretion and independent judgment to satisfy this exemption.

It is interesting to note that para-professionals such as paralegals have never been held by the Department of Labor to be exempt.

Professional Exemption

The FLSA provides a complete minimum wage and overtime exemption for any employee engaged in a bona fide professional capacity. These are typically “learned” professions such as medicine and law. 29 CFR §541.301. To be considered an exempt professional, the employee must meet all of the following tests:

1. The employee’s primary duties involve:
 - a) Work requiring advanced knowledge in a field of science or in learning customarily obtained by a prolonged course of specialized instruction or study.
 - b) Work that is original and creative in a recognized field of artistic endeavor; or
 - c) Teaching, tutoring, instructing or lecturing in the capacity of a certified professional.
2. The employee consistently exercises discretion and judgment in performing his or her duties.
3. The employee’s work is predominantly intellectual and varied, rather than routine and mechanical.
4. The employee does not spend more than 20% of his or her time in a workweek on non-professional duties.

5. The employee is paid on a salary basis at a rate of not less than \$170.00 dollars per week. (Note: salary requirement does not apply to doctors, lawyers or teachers).⁸

The WHD has denied the exempt status of avionics technicians who trouble-shoot and repair sophisticated avionics and electrical equipment. These technicians have one year of academic training and one year of hands-on training. The WHD stated that an exemption for a learned professional could not be stretched to cover an employee with one year of academic training.⁹

Computer Professionals

In addition to the general exemption for professional employees, the FLSA contains a special exemption for computer professionals. 29 USC §213(a)(17). To qualify for this exemption, an employee must be paid not less than \$27.63 for each hour worked. In addition, the employee's primary duties must involve at least one of the following:

1. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system-functional specifications.
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.
3. The design, documentation, testing, creating, or modification of computer programs related to machine operating systems.
4. A combination of the above duties, which require the same level of skills.

While these exemptions seem straight forward, the WHD has issued several opinion letters, useful in evaluating technology related professionals.

In an opinion letter, the WHD denied exempt status to systems engineers who designed computer solutions to fit the needs of local business clients. The WHD stated because the employee does not design, create, or modify computer systems or programs, they did not qualify for either the general professional exemption or the special exemption for computer professionals.¹⁰ Similarly, the WHD denied the exemptions of computer technicians that maintain networks, load software and educate employees on the use of the software.¹¹ Finally, the WHD found network administrators were not exempt under either professional exemption or the computer professional exemption because of the lack of education and because their job does not involve systems analysis or programming.¹²

Remedies Available under the FLSA

Several remedies are available to aggrieved employees who prove statutory violations in private actions. These include injunctive relief, back wages, liquidated and punitive damages for willful violations and prejudgment interest and attorney's fees.

The statute of limitations determines the limit of back wages that can be sought. 29 U.S.C §255(a) Non-willful violations of the act entitle the plaintiff to collect back wages for the two years prior to the filing of the complaint. Willful violations extend the statute back to three years from the date of filing. Additionally, willful violations subject the employer to liquidated damages in an amount equal to the amount of back pay due. Liquidated damages are discretionary with the court. An employer must show that he acted in good faith and on reasonable belief that he was complying with the law to avoid

a finding of willfulness. Typically this requires a WHD opinion letter or a legal opinion obtained by outside counsel. Most judges will award the liquidated damages where willfulness is found.

Punitive damages may be awarded under retaliation claims without a separate award for compensatory damages, but only liquidated damages are available for violations of statutory minimum wage and overtime requirements.

The availability of prejudgment interest, in addition to liquidated damages, is an issue that is undecided. The circuits are evenly split on this issue with the Fourth Circuit having failed to address prejudgment interest.

A prevailing plaintiff is also entitled to an award of legal fees and costs at the discretion of the court.

Portal to Portal Act

The Portal to Portal Act states that all time during which an employee is required to be on duty or on an employer's premises or at a prescribed workplace should be counted as hours worked. However, activities that are incidental to work are not compensable. 29 U.S.C. §251-262. Therefore, an evaluation of a Portal-to-Portal claim involves determining whether activities required by an employer constitute "hours worked." Generally, this is determined by whether the employee's activity is controlled or required by the employer, is necessarily and primarily for the benefit of the employer, and is an integral and indispensable part of the job. *Brock v. City of Cincinnati*, 236 F.3d 793 (6th Cir. 2001).

Collective Actions

The private enforcement action under 29 U.S.C. §216(b) may be maintained as a collective or class action by any one or more employees for and on behalf of himself and others similarly situated. Because of the very institutional character of many FLSA and Portal-to-Portal violations, they are very conducive these class actions. However, class actions und §216(b) differ from those established under Rule 23. They are instead “spurious” class actions, meaning that the res judicata effect extends only to the named parties, as distinguished from a true Rule 23 class action. Thus, a member of a 216(b) class action who does not file a consent to join the lawsuit as a party plaintiff or opt-in plaintiff can neither benefit nor be bound by the judgment in the suit.

Class actions under 216(b) often take the form of a two-step process. The first step is a court ordered notice to similarly situated employees. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989), *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992). This is typically done shortly after filing the initial complaint because of the 3-year statute of limitations that continues to run on each potential plaintiff until his or her opt-in is filed with the court. Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in conditional certification of a representative class.” *Mooney v. Aramco Services*, 54 F.3d 1207 (5th cir. 1995). Once discovery is complete, the defendant has the opportunity to move to decertify the class. At this stage courts have applied three factors to determine whether opt-in plaintiffs are “similarly situated.” (1) the disparate factual and employment settings of the individual plaintiffs’ (2) the various defenses available to the defendant which appear to be

individual to each plaintiff; and (3) fairness and procedural considerations. *Thiessen v. General Electric Capital Corporation*, 13 F. Supp. 2d 1131 (D. Kansas 1998).

From a practical standpoint, the wording of the Notice approved by the court is of great importance and will go a long way towards determining the response rate of the Notice. Many courts also impose time limits on opt-in returns. These range from 45 to 90 days.

The Future of the FLSA

As with many other protections afforded employees, the FLSA is under attack. The House Workforce Protections subcommittee recently heard testimony from representatives of the US Chamber of Commerce on whether the FLSA offered enough flexibility for today's workplace.¹³ The testimony supported the use of compensatory time off for overtime and more liberal white-collar exemptions.

More likely, Congress will continue carving out of exemptions, such as those that have been proposed for funeral directors, inside sales people, and computer technicians instead of making broad changes to the Act.¹⁴

While this article is only a cursory glimpse at the FLSA, I hope that it has convinced you as an employment lawyer of the potential value of these cases. As the work force changes and employers try to squeeze more productivity out of each employee for less labor cost, you will see increasing opportunities to bring private actions or class actions under this Act.

¹ Federal Judiciary Statistics found at the Administrative Office of the Judiciary.

² See, e.g. 29 U.S.C. §202(a); *Dunlop v. Carriage Carpet Co.*, 548 F. 2d 139 (6th Cir. 1977).

³ *Seminole tribe of Florida vs. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996). Supreme Court held that the Commerce Clause did not invest Congress with the power to waive the states' Eleventh Amendment immunity and to create private causes of action against states in federal court that had not consented to suit

⁴ 29U.S.C. §203(d).

⁵ *Reich v. Circle C Invs., Inc.* 998 F.Supp. 1301 (D. Colo. 1991).

⁶ 29 C.F.R. S 541.101 – 541.119

⁷ 29 C.F.R. S 541.2

⁸ 29 C.F.R. S 541.3

⁹ WHD Opinion Letter No. 2281.

¹⁰ WHD Opinion Letter 2275.

¹¹ WHD Opinion Letter 2090.

¹² WHD Opinion Letter 2209.

¹³ Wage and Hour Compliance Report, (April, 2002).

¹⁴¹⁴ Wage and Hour Compliance Report, (April, 2002).