

The Fair Labor Standards Act and the Modern Workplace: How an Old Wage and Hour Law Can Create New Headaches for Employers.

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I. Overview of Fair Labor Standards Act of 1938 (29 U.S.C. § 201, *et seq.*)

A. Enacted in 1938

1. Established minimum wage for employees engaged in interstate commerce or employed by an enterprise engaged in interstate commerce
2. Required time and a half for hours worked over 40 in one week
3. Prohibited most child labor
4. Contained exemptions for certain types of workers (e.g., executive, administrative, professional).

B. 1947 Amendments (Portal-to Portal Act)

1. Specified what type of time was considered compensable work time;

2. In general, as long as an employee is engaging in activities that benefit the employer, regardless of when they're performed, the employer has an obligation to pay the employee for his or her time.

3. Preliminary or Postliminary activities are compensable only if the activities are an integral and indispensable part of the principal work activities;

4. Travel to and from the work place was a normal incident of employment and did not count as paid working time.

C. 1961 Amendments

1. Specified that FLSA coverage extends to schools, hospitals, residential care facilities, and governmental entities;

D. 1963 Amendments

1. Equal Pay Act—specified that wages to female employees could not be lower because of their sex

2. “Equal pay for equal work”: at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs[,] the performance of which requires equal skills, effort, and responsibility, and which are performed under similar working conditions

E. Enforcement Mechanisms

1. Enforced by the Secretary of Labor

2. Individuals Have a Private Right of Action to recover unpaid overtime or amounts less than the minimum wage

3. Collective Action: employees can bring action on behalf of himself and others “similarly situated”

F. Remedies

1. Amount of Unpaid Wages;

2. Liquidated Damages of double the unpaid wages are mandatory unless the employer can prove it acted in good faith and with reasonable grounds for believing it complied with the FLSA;

3. Willful violations extends the statute of limitations to three years; statute of limitations for non-willful violations is two years;
4. Attorney's fees;
5. Any settlement not involving an action by the Secretary of Labor must be approved by the court; otherwise, the Secretary's right to bring an action on behalf of the employees is not barred;

II. Litigation and Enforcement Trends under FLSA

A. Department of Labor

1. Announced in October 2009 the hiring of 250 additional investigators to investigate wage and hour violations;
2. Department of Labor's "Misclassification Initiative": the DOL has budgeted \$25 million in its 2011 budget and dedicated 100 inspectors targeting the misclassification of employees as independent contractors.

B. Collective Action

1. Authorized by 29 U.S.C. § 216(b): employee is authorized to bring action on behalf of himself and others "similarly situated";
2. Comparison of FLSA Collective Action and FRCP 23 Class Action
 - a. Opt-in vs. Opt out;
 - b. "Similarly situated" relatively easy to prove, at least at the initial certification level;
 - c. If Not Defeated at Certification Stage, many cases are settled;
 - d. Violations of State Wage and Hour law can lead to a Rule 23 Class action in addition to FLSA Collective action;
 - e. Most settlements result in small payments to class members with substantial share of the payment for plaintiff attorney's fees.

C. Recent Settlements in FLSA Collective Actions

1. Total value of private settlements in cases alleging wage and hour violations was \$363.6 million (up from \$252.7 million in 2008);
2. In October 2009, the Department of Labor announced the hiring of 250 additional investigators to look for wage and hour violations;
3. Local Settlements in FLSA Collective Actions
 - a. Casey's General Stores—\$11 million settlement in claim alleging overtime violations by 7,600 current and former management level employees and 76,000 current and former non-management employees;
 - b. Wal-Mart--\$11 million settlement in state court action in Clinton County, alleging overtime violations and failure to keep appropriate records; each employee received between \$25-\$300.

III. FLSA Issues in the Modern Workplace

A. Exempt vs. Non-Exempt (29 U.S.C. § 213; 29 C.F.R. § 541)

1. Employees classified as “exempt” are not subject to minimum wage and overtime provisions of the FLSA
2. Burden of proof is on the employer to prove an employee is exempt;
3. **Executive Employees**
 - a. Primary duty is “management” of the enterprise or a “department” or subdivision thereof;
 - b. Customarily and regularly directs the work of “two or more other employees”;
 - c. Authority to hire and fire, or whose suggestions and recommendations about these matters are given “particular weight”;
 - d. Any employee who owns a 20 percent equity interest and who is actively engaged in the management of the enterprise;

4. Administrative Employees

a. Primary duty is the performance of office or non-manual work “directly related to the management or general business operations” of the employer or the employer’s customers; and

b. Whose primary duty includes the exercise of “discretion and independent judgment” with respect to matters of significance.

c. Specific Examples of Administrative Exemptions contained in the regulations:

i) insurance claims adjusters;

ii) employees in the financial services industry;

iii) project or team leader;

iv) executive assistant or administrative assistant to business owner or senior executive;

v) human resources managers;

vi) purchasing agents;

d. Job Title alone is insufficient to determine whether the exemption is satisfied; the duties are the ultimate test;

5. Professional Employees

a. Primary duty is the performance of “work requiring knowledge” of an advanced type in a “field of science or learning” “customarily acquired by a prolonged course of specialized intellectual instruction”; or

b. A job that requires “invention, imagination, originality, or talent” in a recognized field of artistic or creative endeavor;

6. Outside Sales Employees

a) Primary duty is making sales of goods; or

b) Obtaining orders or contracts for services or for the use of facilities;

c) Person must be customarily and regularly engaged “away from the employer’s place of business”;

7. Computer Employees

a. Applies to systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field;

b. Employee must be paid at least \$27.63 per hour;

c. Primary duties must involve the application of systems analysis techniques and procedures, design or development of computer systems or operating systems;

8. Salary Test

a. Exempt employees must be paid at least \$455 per week on a salary or fee basis, regardless of total compensation;

b. Employee with compensation of \$100,000 or more is deemed exempt if the employee regularly performs the duties under the executive, administrative, or professional employees;

9. Examples of Cases Addressing Exemption Issues

a. *Young v. Cooper Cameron Corp.*, 586 F.3d 201 (2d Cir. 2009)(Employee who was a “Product Design Specialist II”, which required complicated technical expertise and responsibility, was not exempt as a “professional” employee; job description required 12 years of relevant experience, but no particular education);

b. *Smith v. Johnson & Johnson*, __F.3d__ (3d Cir 2010)(pharmaceutical sales rep held to be exempt under administrative exemption);

c. *Reiseck v. Universal Communications*, 591 F.3d 101 (2d Cir. 2010)(holding that advertising sales director was not exempt under administrative exemption because she sold advertising directly to specific customers, as opposed to handling marketing that was intended to increase sales generally);

i) key lesson: it is important to identify the specific exemption under which an employee falls—the court did not address the sales or executive exemptions, because they were not at issue.

d. *Freeman v. NBC*, 80 F.3d 78 (2d Cir. 1996)(plaintiff was the domestic news writer for the NBC Nightly News and coordinated coverage for all U.S. sourced news; held he was exempt under the creative endeavor element of the professional exemption).

B. What is “Work”

1. Donning and Doffing

a. *Alvarez v. IPB, Inc.*, 339 F.3d 894 (9th Cir. 2003)

b. Held: the donning and doffing of specialized protective gear required to ensure the slaughter plant remained sanitary was compensable work time; it was “integral and indispensable” to the primary work activity, and the time spent was more than *de minimis*;

c. Time spent walking through the plant to the work station was compensable;

d. Time spent donning and doffing non-unique protective gear (hard hats and safety goggles) was not compensable because the time spent was *de minimis*.

2. Waiting—On Call

a. *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 725 (8th Cir. 2001).

b. Held: nurse’s on call time was not compensable work time;

c. Factors included: restrictions on personal activities during on-call time; number of calls; amount of time by which the nurse’s were expected to be at the hospital after receiving an emergency call;

3. Answering Electronic Communications After Regular Work Hours

a. T-Mobile Litigation: plaintiffs are employees of T-mobile retail store; they allege they were required to respond to e-mails and customer calls on company issued smart phones after regular work hours;

b. SSM Health Care: DOL investigation concluded that 4000 nurses who answered calls on company issued phones during 30 minute unpaid lunch period were entitled to compensation.

4. Pre and Post Shift Tasks

a. *Turner v. Best Buy*: plaintiffs were retail employees of Best Buy; they claimed the time spent waiting to go through a security check after their shift was complete (to ensure they did not steal merchandise) was compensable work time;

b. \$900,000 settlement recently approved.