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**A. RECENT DEVELOPMENTS IN FEDERAL AND STATE WAGE AND HOUR LAW.**

(American Bar Association Continuing Legal Education's ALI-ABA Course of Study: FLSA, 29 U.S.C. § 201 (1999): 2000 Update, SE52 ALI-ABA 505, (May 4, 2000) utilized as reference material).

**1. Coverage: Enterprise and Individual Employees**

a. Enterprise Coverage

1. While the rules for enterprise coverage remain the same, the courts have been more willing to rule that certain types of organizations are outside FLSA's coverage. See Briggs v. Chesapeake Volunteers in Youth Servs., Inc., 68 F.Supp.2d 711, (E.D.Va. 1999) (holding that a nonprofit business that advises a city's court system on juvenile matters was not considered an "enterprise").

b. Retaliation Claims

1. Under 29 U.S.C. § 215(a)(3), a retaliation charge prohibits "any person" from discharging or discriminating against any employee "because such employee has filed any complaint or instituted...any proceeding under or related to this chapter." However, unlike the FLSA's "enterprise" test, there is no required amount to be considered a "person" under § 215. Thus, a plaintiff may pursue a retaliation claim, even if his/her minimum wage and maximum hour action were not maintainable because of failure to meet the definition of an "enterprise." See Sapperstein v. Hager, 188 F.3d 852 (7<sup>th</sup> Cir. 1999) (citing 29 U.S.C. § 215(a)(3)).

c. Primary Duty Test

1. For purposes of determining whether an employee is an exempt under the FLSA's overtime compensation exemption, courts continue to deny exempt status using the primary duty (50%) test. However, "flexibility is appropriate when applying this rule, depending on the importance of the managerial duties as compared with other duties, frequency of exercise of discretionary power, freedom from supervision, and comparative wages." See Lott v. Howard Wilson Chrysler-Plymouth, Inc., 203 F.3d 326 (5<sup>th</sup> Cir. 2000).

## **2. Overtime**

### **a. Preemption**

1. Even in areas directly tied to interstate commerce, such as the trucking industry, federal overtime law does not preempt state laws that grant higher wage rate or fail to grant federal exemptions. Keely v. Loomis Fargo & Co., 11 F.Supp.2d 517, 520-21 (D.N.J. 1998).

## **3. Compensatory Time for Governmental Employees**

- a. A split in the circuits involving whether governmental employees have a "property" right in their accrued comp time was settled this spring by the U.S. Supreme Court. The Court held that while the FLSA required public employers to honor an employee's reasonable request to use compensatory time, it did not prohibit the employer from forcing employees to use accrued compensatory time. 29 U.S.C. § 207 (o)(5) imposes restrictions upon an employer's efforts to prohibit use of comp time but it says nothing about restricting an employer's right to require that time to be used. Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1665 (2000).

## **4. Judicial Enforcement of FLSA by Employees**

### **a. Concurrent Federal and State Jurisdiction**

1. In one case, state probation officers claimed a violation of FLSA. The Supreme Court clearly held that Congress could not subject a state to suit without the state's consent and thus a state employee could not pursue an FLSA action without state consent. Alden v. Maine, 527 U.S. 706 (1999). Further, states are not subject to FLSA suits in federal court. Mills v. Maine, 118 F.3d 37 (1<sup>st</sup> Cir. 1997), cited with approval in Alden v. Maine.

b. Arbitration

1. Collective Bargaining Agreements

aa. In a case involving an ADA claim, the Supreme Court ruled that a collective bargaining agreement's arbitration provisions do not affect individual rights, such as those under the FLSA, unless the agreement's language expresses such an intent "clear[ly] and unmistakabl[ly]." Wright v. Universal Maritime Serv., 525 U.S. 70, 119 S.Ct. 319, 396 (1998).

2. Individual Employee Contracts

aa. In general, federal courts continue to hold that disputes and rights arising out of employment including FLSA are subject to binding arbitration. For example, in a race discrimination case, an arbitration agreement contained in an individual's employment application was held enforceable by the Fourth Circuit in Johnson v. Circuit City Stores, 148 F.3d 373 (4<sup>th</sup> Cir. 1998). Cited with approval in Morrison v. Circuit City Stores, 70 F.Supp.2d 815 (S.D. Ohio, 1999).

**5. Defenses and Limitations**

a. Reliance on Government Interpretations

1. Courts determining an employee's exempt status owe deference to regulations stating the Department of Labor's interpretation of the FLSA and exemptions will be narrowly construed against the employer. While Courts should follow the Department of Labor's guidelines for the "short test," those guidelines are not necessarily controlling. Further, Department of Labor opinion letters do not receive the same deference as do administrative regulations and, while a Court may consider the letters, a Court is under no obligation to defer to the Department of Labor's interpretation. See Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655, 1662 (2000); Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521 n.5, (5<sup>th</sup> Cir. 1999).

## **B. OVERTIME COMPENSATION**

### **1. 29 U.S. C. § 207(a)**

This section requires employers to compensate covered employees at a rate of one and a half times their regular pay for all time worked over 40 hours in one week.

- a. 40 hours is the standard work week, which was lowered from 44.
  1. If hourly employees, then hourly wage equals regular pay.
  2. For salaried employees, divide by 40, and that equals the regular rate for overtime calculation.
  3. This does not include benefits (health plans, pensions, bonuses).
  4. An employee cannot legally waive rights to overtime.

### **2. Congressional Purpose for FLSA overtime provision**

- a. Congress sought to increase employment by making it expensive for employers to employ workers for more than forty hours per week, and this encourages employers to hire more workers rather than pay overtime.
  1. Stimulates labor market and reduces unemployment.
- b. Congress wanted employees to receive additional compensation for working in excess of the forty hours.

### **3. Exceptions to Overtime**

- a. FLSA exceptions exist for certain occupations whose hours do not traditionally fit a standard eight hour day, including:
  1. Taxi drivers;
  2. Movie Theatre employees;
  3. Radio/TV news announcers;
  4. Local Agriculture workers; and
  5. A variety of employees engaged in transportation.

See 29 U.S.C. § 207

- b. Jobs that are partially exempt from overtime pay provisions include:
  - 1. Retail employees paid on a commission basis;
  - 2. Law Enforcement; and
  - 3. Firefighting Personnel.

See 29 U.S.C. § 207

- c. More extensive exceptions are covered in the irregular hours section of this outline.

## **C. EXEMPT V. NON-EXEMPT STATUS**

An employer will be subject to FLSA standards if it has at least two employees, is engaged in interstate commerce, and has a minimum of \$500,000 in annual gross volume of sales made or business. 29 U.S.C. § 203. Several exceptions are noted in the statute including family businesses, certain charity foundations, and public and state employees. Id. Assuming the employer is covered by FLSA, the next inquiry should be whether an individual employee exception exists in 29 U.S.C. § 213.

The most common type of exemption under the FLSA is for salaried employees that are considered to be “white collar.” Certain employees that can be statutorily classified as executives, administrators, professionals, or outside salespersons will be exempt from FLSA’s minimum wage requirements and overtime requirements. 29 U.S.C. § 213(a)(1).

Each salaried position must meet the requirements set forth by the Department of Labor to establish an exemption from FLSA. The inquiry is always fact sensitive and a careful review of existing case law will help practitioners determine exempt status.

### **1. “Short test” for evaluating exemptions**

Assuming the employees in question receive more than \$250 in compensation per week, the following “short test” will be applied by a reviewing Court to determine if the employees are exempt from FLSA overtime requirements. A separate, “long test” exists if an employee in question earns less than \$250. The short test requires the following inquiries to be made:

- a. Did the employee receive a salary which was not subject to reduction because of variations in the quantity of work performed?
- b. Did the employee's primary duties consist of non-manual work directly related to management operations or general business operations?
  1. This prong is limited to employees who perform work of substantial importance to the management or to the operation of the business
  2. It is generally enough that an employee's work affects management policy or that the employee has the responsibility to execute policy.
- c. Does the employee exercise discretion and independent judgment which involves the comparison and the evaluation of possible courses of conduct?
  1. "Independent judgment" implies that the employee has the authority to make an independent choice free from immediate supervision regarding matters of importance.
  2. The right to hire, fire, demote and/or discipline is often sufficient to satisfy this requirement.

Douglas v. Argo-Tech Corp., 113 F.3d 67 (6<sup>th</sup> Cir. 1997).

If the answer to all three questions is found to be "yes," courts will hold that the employee is exempt from FLSA standards, including time and a half. Of course, answering those questions is the exact point of almost all litigation involving the FLSA and the following outline will offer additional guidance.

## **2. Professional Exemption**

The exemption will be available assuming the professional exercises discretion and independent judgment as noted above, and his or her duties consist of at least one of the following:

- a. Work requiring knowledge of an advance type in a field of science or learning that is acquired through a long or specialized course of study, but not a general academic education or from an apprenticeship, or from training in the performance of routine mental, manual or physical process. 29 C.F.R. § 541.3(a)(1).

- b. Work that is original and creative in nature in a recognized field of artistic endeavor and which relies on the invention, imagination or talent of the employee. 29 C.F.R. § 541.3(a)(2).
- c. Teaching, tutoring, instructing, or lecturing and employed and engaged as a teacher in a school system or educational establishment. 29 C.F.R. § 541.3(a)(3).
- d. Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field. 29 C.F.R. § 541.3(a)(4). However, any employee engaged in a computer-related field may be compensated on an hourly basis as long as it exceeds 6 ½ times the minimum wage and be exempt.

### **3. Administrative Exemption**

This is often one of the most controversial areas of evaluation. An employee will be exempt if the employee's primary duties consists of either:

- a. Performance of office or nonmanual work directly related to management policies or general business operations of his or her employee or his or her employer's customers. 29 C.F.R. § 541.2(a)(1).
- b. Performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision in work directly related to the academic instruction or training carried on therein. 29 C.F.R. § 541.2(a)(2).

-and-

- c. Customarily and regularly exercises discretion and independent judgment. 29 C.F.R. § 541.2(b).

-and-

- d. Regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity. 29 C.F.R. § 541.2(c)(1). –OR–

e. Performs work under only general supervision that is along specialized or technical lines requiring special training, experience, or knowledge. 29 C.F.R. § 541.2(c)(2). –OR–

f. Executes under only general supervision special assignments and tasks. 29 C.F.R. § 541.2(c)(3).

-and-

g. Does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his or her hours worked in the workweek to activities which are not directly and closely related to the performance of the work described above. 29 C.F.R. § 541.2(d).

Generally, administrative work cannot be of a routine clerical nature. It must be important to the management and administration of the business. 29 C.F.R. § 541.205. A careful and thorough review of case law is the best source of the lengthy list of job classifications which have been reviewed.

#### **4. Executive Exemption**

An Employee will be exempt if his or her primary duty consists of the management of the enterprise in which he or she is employed. 29 C.F.R. § 541.1(a). “Primary duty” for this purpose is generally defined as a duty which occupies at least 50% of an employee’s time. 29 C.F.R. § 541.103.

-and-

a. Customarily and regularly directs the work of two or more employees. 29 C.F.R. § 541.1(b).

-and-

b. Has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees, will be given particular weight. 29 C.F.R. § 541.1(c).

-and-

c. Customarily and regularly exercises discretionary powers. 29 C.F.R. § 541.1(d).

-and-

- d. Does not devote more than 20 percent or in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his or her hours of work in the workweek to activities which are not directly and closely related to the performance of the work described above. 29 C.F.R. § 541.1(e).

## 5. Examples of Exempt and Non-Exempt positions

- a. An assistant manager at a fast food restaurant who earned more than \$250 a week had management as his primary duty and thus, was exempt from overtime requirements. The Court noted that while the employee in question performed crew work, he was also managing at the same time. Thus, the Court held that an employee can manage while performing other work and still be found to be an exempt employee. Donovan v. Burger King Corp., 672 F.2d 221 (1<sup>st</sup> Cir. 1982).
- b. A restaurant chain's "associate managers" were employees rather than executives when managers served as management trainees, primarily performing crew member work as training to be executives. Unlike the Burger King case, the evidence showed the employees in question were performing almost exclusively crew work and labeling them as "executives" in training was not sufficient to make them exempt under FLSA. Dole v. Papa Gino's of America, Inc., 712 F. Supp. 1038 (D. Mass. 1989).
- c. A bookkeeper was not necessarily exempt when the work included tasks, such as preparing commission checks and W-2 forms. While the work went beyond simple bookkeeping, it did not prove that the bookkeeper exercised real and substantial discretion where bookkeeper merely filled in W-2 forms, did not sign the checks and all payroll had to be authorized of another official. Clark v. J.M. Benson Co., 789 F.2d 282 (4<sup>th</sup> Cir. 1986).
- d. A production editor for a publishing company was not an exempt employee. While she did perform some creative tasks such as editing, her primary duty was to manage book projects through the editing and publishing process which required diligence, good time management, organization, and assertiveness but not invention, imagination, or talent in the artistic field. The Court found book publishing and editing to be an artistic endeavor but that the employee in question did not have that as her primary duty. Shaw v. Prentice Hall, Inc., 977 F. Supp. 909 (S.D. Ind. 1997).

- e. Certain exemptions exist for recreation and amusement establishments, but not for the Cincinnati Reds. The Sixth Circuit held that while the team played less than seven months out of the year which was required to receive an exemption, the franchise employed over 120 people year round, making the duration of the Reds operation greater than seven months and subjecting it to the FLSA. Bridewell v. Cincinnati Reds, 68 F.3d 136 (6<sup>th</sup> Cir. 1995).

The statute also provides an extensive list of job specific maximum hour exemptions ranging from agricultural workers, to delivering newspapers and wreath making, and processing of sugar beets or sugar cane to cotton ginning.

#### **D. FLEXIBLE HOURS AND IRREGULAR SCHEDULES**

The FLSA set not only a minimum wage but also a maximum number of hours an employee may work in any one week, unless the employee receives time and half. 29 U.S.C. § 207(a)(1). The purpose was to force employers to hire more employees as opposed to having the existing employees work longer hours and to fairly compensate employees for the burden of working in excess of forty hours. Walling v. Hemerich & Payne, 323 U.S. 37 (1944).

The following are the exceptions that are recognized by FLSA and the courts:

1. Two permissible ways a union may negotiate for differing overtime rules:
  - a. The union contract may waive this if no employee will be employed for more than 1,040 hours within any period of 26 consecutive weeks. 29 U.S.C. § 207(a)(1). While that averages forty hours per week, it allows flexibility such a one week of 50 hours and the next week of 30 hours.
  - b. The union contract may waive this if in a year the employer guarantees the employee will have at least 1,840 hours of work and no more than 2,240 hours of work, and the employer has to pay overtime for all hours in between. 29 U.S.C. § 207 (a)(2).
2. The second exception is called a “Belo” agreement arising from the U.S. Supreme Court’s interpretation of 29 U.S.C. § 207 (f) in Walling v. A.H. Belo Corporation, 316 U.S. 624 (1942).
  - a. The U.S. Supreme Court recognized the some jobs require irregular hours and set out certain guidelines for payment of these types of employees under the FLSA. The so called “Belo” plans are meant to protect employees whose work necessitates wide and unpredictable fluctuations in hours against “short” paychecks in

weeks when they work very few hours. Donovan v. Brown Equipment and Service Tools, Inc., 666 F.2d 148, 153 (5<sup>th</sup> Cir. 1982).

1. The duties of the employee must necessitate irregular hours of work. Irregular hours must, in a significant number of weeks, fluctuate both below forty hours per week as well as above exclusive of vacations, holidays, illness or personal reasons. Donovan v. Brown Equipment and Service Tools, Inc., 666 F.2d 148, 154 (5<sup>th</sup> Cir. 1982).
2. The employee must be employed pursuant to a bona fide individual contract or collective bargaining agreement.
3. The contract must specify a regular rate of pay for hours up to forty and one and one-half times that rate for hours over forty.
4. The contract must provide a weekly pay guarantee for not more than sixty hours.

29 U.S.C. § 207 (f) (1) (2).

3. There are also a series of job specific exceptions found in 29 U.S.C. § 207(g-n) which provide for exceptions ranging from employees in police and fire protection, to employment in hospitals, employment in the tobacco industry, and employment by railway or motorbus operators. The exemptions are detailed in the FLSA and are dependent not only job functions, but also on time periods worked.

## **E. THE INS AND OUTS OF INDEPENDENT CONTRACTORS**

29 U.S.C. § 213 specifically excludes independent contractors from coverage. Thus, the determination of an individual's status as independent contractor or employee constitutes a factual issue that will have significant impact on the outcome of a wage and/or hour claim.

### **1. Benefits of Independent Contractors to Employers**

- a. Risks of strikes or labor unrest diminished;
- b. Less chance of governmental investigations;
- c. Less disability claims and other potential exposures (ex: wrongful discharge claims);

- d. Employer not required to supply vacation, pension, insurance, and other economic benefits (taxes);
- e. Use independent contractors if bad economy and risk of lack of work or low wages; and
- f. Reduces management costs (less training).

## 2. **Employee v. Independent Contractors**

- a. There is no uniform or single test to define an employee or an independent contractor. The relationship is categorized differently for diverse regulatory purposes.
- b. Different tests used to determine if an individual is an employee include:

### 1. **The common law test from the Restatement (Second) of Agency § 220**

- aa. According to the U.S. Supreme Court, when a statute contains the term “employee” but does not adequately define it, the Court will presume Congress intended to incorporate traditional agency law criteria for identifying master-servant relationships.
- bb. Employment status under ERISA is determined by this test.
- cc. The National Labor Relations Board also uses this test in labor-management cases. See Roadway Package Systems, 326 NLRB No. 72, 159 LRRM 153 (1998).

### 2. **The 20 Factor Internal Revenue Service Test** (Rev. Rul. 87-41, 1987-1 C.B. 296)

The 20 Factors have 3 conceptual umbrellas:

#### aa. **Control Test**

- 1. Whether the hirer of the services controls the worker with respect to the time and

manner in which the worker performs the work.

- i. When an employer can dictate only the result of the work, the worker is usually independent contractor.
- ii. If the employer has the right to exercise control the means by which the worker performs the work, as well as the end product, then worker is likely an employee.
- iii. The more detailed the supervision and the stricter the enforcement standards, more likely the person is an employee.

2. Factors to be considered

- i. degree of supervision and control;
- ii. intent of parties;
- iii. industry norm;
- iv. skill required; and
- v. who supplies tools and materials

**bb. Organization Test**

1. Whether the worker has been integrated into the organization by being graded, paid according to a job evaluation scheme, and required to conform to the employer's disciplinary code.

**cc. Economic Realities Test**

1. Whether the worker is in a business of her own. (i.e., Does independent contractor derive direct economic benefit from fruits of her own labor, does this benefit depend on her productivity and skill, and does the independent contractor have a capital investment in the venture?)
  - i. A worker is an employee when he/she is dependent on the business to which she renders services.

**3. The 6 Factor Test Often Used in FLSA Cases:**  
(See Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376 (3<sup>rd</sup> Cir. 1985)).

- aa. The degree of the alleged employer's right to control the manner in which the work is to be performed;
- bb. The alleged employee's opportunity for profit or loss depending upon his managerial skill;
- cc. The alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- dd. Whether the service rendered requires a special skill;
- ee. The degree of permanence of the working relationship; and
- ff. Whether his service rendered is an integral part of the alleged employer's business.

**3. Common Law Tort Liability**

- a. The employer is generally not liable for negligent acts of an independent contractor.
- b. An employer is liable for physical harm to 3<sup>rd</sup> persons caused by its failure to exercise reasonable care to employ a competent and careful contractor: a) to do work which will involve the risk of physical harm unless it is skillfully or carefully done, or b) to perform any duty which the employer owes to 3<sup>rd</sup> persons.
- c. Most states impose liability for negligent selection of an independent contractor
- d. When not negligent in selecting an independent contractor, an employer was still liable where:
  - 1. The independent contractor acts pursuant to orders or directions negligently given by the employer;
  - 2. The independent contractor is hired to perform acts which the employer of the independent contractor should

recognize creates an unreasonable risk of harm to others unless special precautions are taken, and no such precautions are taken, and the employer itself failed to either provide those precautions itself, or see to it that the independent contractor would provide the precautions;

3. The employer retains some or total control over the conduct of the contractor, and fails to exercise that control in a reasonable manner;
4. The independent contractor injures an invitee on the land of the employer;
5. The independent contractor's work creates risk of injury in a public place or thoroughfare; and
6. The recipient of the services from an independent contractor reasonably believes those services are being provided by the employer of the independent contractor.

#### **4. Tax Liability**

- a. Employers using independent contractors are not obligated to withhold unemployment, social security, or income taxes.
- b. However, if employer misclassifies a worker, an employer will be liable for some or all of taxes and penalties.

#### **5. Results of Classifying as Independent Contractors**

- a. If there was an *honest* misclassification of an employee as an independent contractor:
  1. § 3509: The employer is liable for up to 20% of an employee's share of FICA that should have been withheld, the employer's full share of FICA, and 1.5% of the wages paid to the employee.
  2. Penalties are doubled if employer failed to report the worker's income to I.R.S.
- b. If there was an *intentional* misclassification of an employee as independent contractor:
  1. Employer may be liable for all of its own and the employee's share of FICA, all FUTA tax, and the full

amount of income tax owing with respect to worker's income.

- c. If the need arises to reclassify a worker as employee, the employer may be able to seek protection in safe harbor provisions in § 530 if:
    - 1. It had a reasonable basis for classifying an employee as an independent contractor;
    - 2. It was consistent in treating similarly situated workers as either independent contractors or employees;
- and-
- 3. The employer filed all required information returns.
- d. The determination of whether a worker is properly classified is a factual one made on a case-by-case basis.