

1-2014

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Recommended Citation

Joseph A. Schremmer & Sean M. McGivern, *The Fair Labor Standards Act: A Tool for Those Who Represent Employees, Claimants, and Plaintiffs*, XXXVII Journal of the Kansas Association for Justice 18 (2014).

Available at: https://digitalrepository.unm.edu/law_facultyscholarship/755

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The Fair Labor Standards Act: A Tool for Those Who Represent Employees, Claimants, and Plaintiffs

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KsAJ champions individual and corporate responsibility and accountability. To that end, its members hold those who injure others accountable for their actions. KsAJ has few greater allies than the Fair Labor Standards Act (FLSA) of 1938, a comprehensive federal statute that regulates minimum wages, maximum hours, and child labor.¹ This article is intended to provide background for the general practitioner in an effort to help advance the interests of our clients and workers generally.

History of the FLSA and Its Relevance Today

Passed amid the Great Depression, the Fair Labor Standards Act was a hallmark of Franklin D. Roosevelt's New Deal.² FDR's goal for the law was simple: to secure "a fair day's pay for a fair day's work."³ The House and Senate Labor Committees conducted extensive hearings during the legislative process. These Committees' findings illustrated that, from the beginning, the law was targeted at disreputable employers that chiseled workers' wages as a means of unfair and unreasonable competition.⁴

Congress also recognized the problem was national in scope. Maintenance of substandard labor conditions by a few employers in a particular industry necessarily lowers labor standards industry-wide.⁵ Similarly, individual states are unable to adequately address the problem of unfair labor standards because goods produced in one state under substandard labor conditions can

freely flow into another state that maintains — or attempts to maintain — fair standards.⁶ The solution was a comprehensive national law.

The FLSA targeted two sources of unfair labor practices: long hours and low pay. Long hours of work, it was understood, threaten the health of workers.⁷ And, before the law's enactment, wages were permitted to dip "too low to buy the bare necessities of life."⁸ The two trunks of the FLSA remain the minimum wage and overtime rules.

The FLSA remains relevant today. National news abounds with stories of wage theft and abuses of workers' rights.⁹ Whether unpaid internships are or should be legal is particularly pertinent.¹⁰ There is also a movement afoot to increase the minimum wage.¹¹ Fast-food workers across the country have taken to the streets in protest of the current minimum wage.¹² President Obama has lent his voice in support of a federal wage increase.¹³ The question is hotly contested by those who believe a higher minimum wage would cause a concomitant rise in unemployment.¹⁴ The existence of this debate illustrates the continuing significance of the FLSA.

The Basics

For all intents and purposes, coverage under the FLSA extends to employees of public employers and private businesses with \$500,000.00 or more in gross annual receipts.¹⁵ The law mandates a minimum wage of \$7.25 per hour for all hours worked.¹⁶ For each hour of work

beyond 40 hours per workweek, the law requires employers to pay employees “not less than one and one-half times the regular rate at which he is employed.”¹⁷

Certain employees are exempt from the Act’s minimum wage, overtime provisions, or both.¹⁸ The exemptions — and the contours and requirements of the exemptions — are wide ranging. There are exemptions for “bona fide executive, administrative, or professional” employees that generally require payment of wages on a “salary basis.”¹⁹ Truck drivers are usually, but not always, exempt from overtime obligations²⁰; so too are employees “engaged in the processing of maple sap into sugar (other than refined sugar) or syrup.”²¹

After all, the FLSA is federal legislation, and nothing is simple in Washington. Thus, the FLSA is accompanied by thousands of pages of regulations, interpretations, and enforcement guidance.²² There are even exemptions to exemptions.²³ Have no doubt, there can be a steep learning curve for practitioners.

Actions for unpaid wages under the FLSA are different than other cases. The law deputizes private attorneys to vindicate employees’ wage rights through mandatory fee shifting.²⁴ The law allows for efficient “collective action” litigation, discussed below. Collective action cases usually focus on the exemptions or misclassification, the compensability of certain activities, and the calculation of the overtime rate.²⁵

Collective Actions and Personal Liability

One hallmark of the FLSA is its collective action provisions. Under 29 U.S.C. § 216(b), and the case law interpreting it, individuals may bring “collective actions” on behalf of themselves and of others “similarly situated.” However, an employee’s statute of limitation will continue to run as the claim is commenced “when and only when his written consent to become a party plaintiff to the action is filed in the court in which the action was brought.”²⁶

As a consequence of putative class members’ statutes of limitation running even after filing of the suit, courts often entertain motions to conditionally certify the class and to notify similarly situated employees of their right to join the litigation as a party plaintiff.²⁷ To conditionally certify the case as a collective action and distribute notice, the plaintiff must provide “substantial allegations that the putative class members were together the victims of a single decision or plan” that violates the FLSA.²⁸ “This initial step creates a lenient standard which typically results in conditional certification of a representative class.”²⁹ The court will not weigh the evidence at this phase or resolve factual disputes when deciding to conditionally certify a class.³⁰

The issue of certification may be revisited, often prompted by a defendant’s motion to decertify.³¹ At this second stage, after discovery, the court applies a stricter “similarly situated” standard to determine whether the plaintiff and the class members should be permitted to proceed to trial on their collective claims.³² However, even if the class is decertified, those who have opted in can pursue their individual cases.³³

Not only are corporate employers subject to liability for wage and hour violations, their owners, officers, and managerial staff are too. The FLSA defines “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”³⁴ The FLSA contemplates the existence of several simultaneous employers who may be responsible for compliance with the FLSA. As the Sixth Circuit has observed, “[t]he overwhelming weight of authority is that a corporate officer with operations control of a corporation’s covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA.”³⁵

Properly wielded, this aspect of the FLSA gives real teeth to FDR’s promise of a fair day’s pay for a fair day’s work.

Common Minimum Wage Issues

Despite the clarity of the FLSA’s minimum wage obligation — \$7.25 per hour for all hours worked — employers frequently violate this mandate. This happens, for example, when employees are compensated on a piece rate that does not meet minimum wage.³⁶ It also occurs when deductions for uniforms and tools cause an employee’s rate of pay to dip below minimum wage.³⁷ Likewise, agreements that require an employee to reimburse the employer for training costs cannot cut an employee’s pay rate below the minimum wage.³⁸ Egregious violations of the minimum wage include requiring kickbacks or reimbursements for breakage or shortage, paying wages in the form of scrip or coupons, and requiring unlawful agreements in which an employee agrees to accept less than minimum wage.³⁹

Tipped employees present a unique situation. The tip-credit provision of the FLSA “allows an employer to pay tipped employees an hourly rate less than the federal minimum wage, by allowing them to credit a portion of the actual amount of tips received by the employee against the required hourly minimum wage.”⁴⁰ Thus, waiters, waitresses, bartenders, and similar employees are usually compensated with a sub-minimum wage (usually the legal minimum of \$2.13 per hour) plus tips. The tip credit is an exemption to FLSA liability. An employer who fails to follow its requirements is liable to employees for the full minimum wage of \$7.25 per hour, no matter how much compensation in tips the employees received.⁴¹ Violations of the tip-credit regulations often result from unlawful tip pools in which employees are required to share tips with managers, “back of the house” employees, and others employees who work in positions that do not customarily receive tips.⁴² Requiring employees to reimburse walkouts, breakage, or shortages with tips likewise violates the regulations.⁴³

Common Overtime Issues

Overtime violations cause the majority of FLSA activity on the courts' dockets. These claims arise from an employer's failure to pay time-and-a-half of an employee's regular rate for all hours worked in excess of 40 per workweek.⁴⁴ To reinforce this requirement, employers are required to maintain accurate records of employees' work hours and compensation.⁴⁵ When an employer fails to maintain accurate records, the employee's evidentiary burden is relaxed.⁴⁶

In their crudest form, overtime violations result from "off-the-clock" work, in which corporate policies or practices result in employees working without compensation. Our firm has handled cases with timecards that are filled out by the employer, in advance, to show 40 hours, and others in which employees are instructed not to report overtime hours.

Other off-the-clock violations are more discrete. Call center employees who are required to report to work 10 or 15 minutes early to boot up their computers, load certain applications, and otherwise be prepared to receive calls at the beginning of their scheduled shifts, must be paid for that time.⁴⁷ Activities like carpooling to the job site with supervisors and coworkers are usually not compensable.⁴⁸ But travel time throughout the day, between job sites, is clearly compensable.⁴⁹ Timekeeping or payroll software that automatically deducts meal breaks, when none are taken, violates the law.⁵⁰

Another type of overtime violation occurs when the employer shorts the "regular rate." Again, employers must pay time and a half of an employee's regular rate for all hours worked in excess of 40 hours.⁵¹ The regular rate is determined by dividing the employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.⁵² Thus, the regular rate of an employee paid an hourly wage, plus commissions or production bonuses,

includes not only the hourly rate, but also the value of the extra compensation divided over the number of hours worked.⁵³

Many types of extra compensation are excluded from the regular rate, including gifts, extra compensation for overtime work, and certain shift differentials.⁵⁴

Finally, there are misclassification issues. These violations frequently occur when an employer determines that employees are exempt from minimum wages and overtime pay by classifying them as exempt "administrative" or "executive" employees.⁵⁵ Highly summarized, white-collar exemptions generally require the payment of wages on a salary basis of at least \$455.00 per week, and a primary duty that involves either management of the enterprise (plus supervision of employees) or the exercise of discretion and judgment with respect to matters of significance in the business' operations.⁵⁶

The regulations and the attendant case law regarding white-collar duties tend to be fact specific. However, employers regularly violate the salary basis requirement of these exemptions by subjecting their employees' salaries to unlawful deductions.⁵⁷ A recent case illustrates this point: the employer deducted \$44.59 from the salary of a restaurant assistant manager.⁵⁸ The employee sought an explanation for the deduction by emailing the company's HR/payroll director. She responded: "I paid you that because you only worked 105 hours. Just as I pay you more if you work more if you work less I pay you less."⁵⁹ That exchange provided sufficient evidence to certify a class of Assistant Managers at dozens of fast food restaurants to pursue overtime claims.

Conclusion

The FLSA was created to hold disreputable employers to account for chiseling their workers. The tangle of rules and regulations that followed may have complicated the operation of a basically straightforward law. But as long as lawyers understand and can navigate these highly technical

provisions, FDR's grand vision for fair and safe employment is within reach. ▲

Endnotes

- 1 Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (2006).
- 2 I THE FAIR LABOR STANDARDS ACT 1-2 (Ellen C. Kearns, ed. 2010).
- 3 *Id.* at 1-11 (quoting H.R. REP. NO. 101-260 (Sept. 26, 1989)).
- 4 *Id.* at 1-12 (citing Joint Hearings on H.R. 7200 and S. 2475, H.R. REP. NO. 75-2182, at 6 (1937)).
- 5 *Id.*
- 6 *Id.*
- 7 *Id.* at 1-15 (citing *U.S. v. Rosenwasser*, 323 U.S. 360, 361 (1945)).
- 8 *Id.*
- 9 E.g., Pat Loeb, *Center City Restaurant 'Fat Salmon' Agrees To Repay Workers Skimmed Tips*, CBS PHILLY (Dec. 3, 2013, 1:21 PM), <http://philadelphia.cbslocal.com/2013/12/03/center-city-restaurant-fat-salmon-agrees-to-repay-workers-their-tips/>; Matt Gregory, *Epicurean Owner Denis Allegations of Abuse*, HOYA (Dec. 6, 2013, 3:12), <http://www.thehoya.com/epicurean-owner-denies-allegations-of-abuse-1.3127084#>. UqM5b9JDuuI; *Unpaid Wages, Damages to be Paid to 15 Workers*, NORWALK REFLECTOR (Nov. 26, 2013), <http://www.norwalkreflector.com/article/3814461>; Ana Sofia Knauf, *Redmond Spa Company Must Pay Massage Therapists Back Wages*, PUGET SOUND B.J. (Nov. 12, 2013, 4:01 PM), <http://www.bizjournals.com/seattle/news/2013/11/12/redmond-spa-pay-employees-back-wages.html>; Brenda Medina & Melissa Sanchez, *Restaurant Pays Workers Part of What They Were Owed*, MIAMI HERALD (No. 11, 2013), <http://www.miamiherald.com/2013/11/11/3746522/restaurant-pays-workers-part-of.html>.
- 10 See, e.g., Malcom Harris, *The Unpaid Internship for Credit Must End*, AL JAZEERA AM. (Nov. 14, 2013), <http://america.aljazeera.com/opinions/2013/11/unpaid-internshipscollegedcredit.html>.
- 11 Eugene Robinson, *Raise the Minimum Wage*, REAL CLEAR POLITICS (Dec. 6, 2013), http://www.realclearpolitics.com/articles/2013/12/06/raise_the_minimum_wage_120870.html.

- 12 *Fast Food Workers across Country Protest Federal Minimum Wage*, CBS PITTSBURGH (Dec. 5, 2013, 11:20 AM), <http://pittsburgh.cbslocal.com/2013/12/05/fast-food-workers-across-country-protest-federal-minimum-wage/>.
- 13 *Id.*
- 14 Glenn Kessler, *Obama's Claim that There is 'No Solid Evidence' that Boosting the Minimum Wage Harms Jobs*, WASH. POST (Dec. 5, 2013, 6:00 AM), <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/12/05/obamas-claim-that-there-is-no-solid-evidence-that-boosting-the-minimum-wage-harms-jobs/>.
- 15 29 U.S.C. § 203(s)(1) (2006).
- 16 *Id.* § 206(a)(1).
- 17 *Id.* § 207(a)(1); *Walling v. A. H. Belo Corp.*, 316 U.S. 624, 630 (1942).
- 18 *See* 29 U.S.C. § 213(b)(1) (exempting from the overtime requirement “any employee with whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant”).
- 19 *Id.* § 213(a)(1); 29 C.F.R. Part 541 (defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer, and Outside Sales Employees).
- 20 *See* 29 U.S.C. § 213(a)(1).
- 21 *Id.* § 213(b)(15).
- 22 *See* 29 C.F.R. Chapter V (Wage and Hour Division, Department of Labor); WAGE AND HOUR DIVISION RULINGS AND INTERPRETATIONS, available at <http://www.dol.gov/whd/opinion/opinion.htm>; WAGE AND HOUR DIVISION FIELD OPERATIONS HANDBOOK, available at <http://www.dol.gov/whd/FOH/>.
- 23 SAFETEA-LU TCA, Pub. L. No. 110-244, 122 Stat. 1608 (2008), codified in relevant part at 29 U.S.C. § 207 Note (exempting operators of certain vehicles from the application of the motor carrier exemption).
- 24 29 U.S.C. § 216(b).
- 25 *See, e.g., Clopton v. TSS, Inc.*, No. 10-1229, 2011 WL 346478 (D. Kan. Feb. 2, 2011) (denying motion to dismiss because plaintiff alleged that residential companions performed work in group homes, not private residences, which eliminated the applicability of the companionship services exemption at 29 U.S.C. § 213(a)(15)). Notably, the Department of Labor has recently announced that it will significantly limit the exemption for private home health care workers. *See Fact Sheet: Proposed Rule Changes Concerning In-Home Care Industry Under the Fair Labor Standards Act (FLSA)*, U.S. DEPT LABOR, <http://www.dol.gov/whd/flsa/whdfs-NPRM-companionship.htm>.
- 26 29 U.S.C. § 257.
- 27 *Shockey v. Huhtamaki, Inc.*, 730 F. Supp. 2d 1298, 1303 (D. Kan. 2010); *Foster v. The Food Emporium*, No. 99-CV-3860, 2000 U.S. Dist. LEXIS 6053, *5 n.1 (S.D.N.Y. Apr. 26, 2000).
- 28 *Renfro v. Spartan Comp. Serv. Inc.*, 243 F.R.D. 431, 432 (D. Kan. 2007).
- 29 *Id.* (emphasis added).
- 30 *Shockey*, 730 F. Supp. 2d at 1303.
- 31 *Williams v. Sprint/United Mgmt. Co.*, 222 F.R.D. 483, 485 (D. Kan. 2004); *Clopton v. TSS, Inc.*, No. 10-1229, 2011 WL 1430015, *1 (D. Kan. Apr. 14, 2011) (citations omitted).
- 32 *Gieseke v. First Horizon Home Loan Corp.*, 408 F. Supp. 2d 1164, 1166-67 (D. Kan. 2006). These factors include: “(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required before instituting suit.” *Clopton*, 2011 WL 1430015.
- 33 *See, e.g., Plaunt v. Dolgencorp, Inc.*, 3:09CV079, 2010 WL 5158620 (M.D. Pa. Dec. 14, 2010).
- 34 29 U.S.C. § 203(d).
- 35 *Dole v. Elliot Travel Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991) (quoting *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983)).
- 36 *See Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 776 F. Supp. 2d 117, 124 (E.D.N.C. 2011).
- 37 *See* 29 U.S.C. § 203(m) (2013); 29 C.F.R. § 531.3 (2013).
- 38 *See Heder v. City of Two Rivers*, 295 F.3d 777 (7th Cir. 2002).
- 39 *See* 29 C.F.R. § 531.35 (2013) (requiring the payment of minimum wage to be a “free and clear” payment).
- 40 *Chung v. New Silver Palace Rest., Inc.*, 246 F. Supp. 2d 220, 228 (S.D.N.Y. 2002) (referring to 29 U.S.C. § 203(m)).
- 41 *See, e.g., Martin v. Tango's Rest., Inc.*, 969 F.2d 1319, 1323 (1st Cir. 1992).
- 42 *Ayres v. 127 Rest. Corp.*, 12 F. Supp. 2d 305, 308 (S.D.N.Y. 1998).
- 43 *Bernal v. Vankar Enter., Inc.*, 579 F. Supp. 2d 804, 810 (W.D. Tex. 2008).
- 44 29 U.S.C. §§ 207(a), 215(a)(2) (2013).
- 45 *Id.* § 211(c); 29 C.F.R. Part 516 (2013).
- 46 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946) (“The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of s 11(c) of the Act.”).
- 47 *Burch v. Qwest Comm. Int'l, Inc.*, 677 F. Supp. 2d 1101, 1109 (D. Minn. 2009).
- 48 *Smith v. Aztec Well Serv. Co.*, 462 F.3d 1274, 1287 (10th Cir. 2006).
- 49 29 C.F.R. § 790.6 (2013).
- 50 *Creely v. HCR ManorCare, Inc.*, 789 F. Supp. 2d 819, 834 (N.D. Ohio 2011).
- 51 *See* 29 U.S.C. § 207(a)(1) (2013).
- 52 29 C.F.R. § 778.109 (2013).
- 53 *See id.* § 778.110(b). Like most provisions of the FLSA, there are caveats. Certain commissioned employees are exempt from overtime pay requirements. *See id.* § 207(i).
- 54 *See* 29 U.S.C. § 207(e) (2013).
- 55 *Id.* § 213(a)(1); *Reiseck v. Univ. Comm. of Miami, Inc.*, 591 F.3d 101, 108 (2d Cir. 2010) (holding the primary duty of an advertising salesman for magazine publisher was not “directly related to management policies or general business operations,” and therefore, the employee was not administrative exempt).
- 56 *See* 29 C.F.R. Part 541, Subparts B, C, and G.
- 57 *See id.* §§ 541.602, 541.603.
- 58 *Armstrong v. Genesh, Inc.*, No. 11-1161, 2011 WL 6151416, *2 (D. Kan. Dec. 12, 2011).
- 59 *Id.*

