

CURRENT ISSUES: FAIR LABOR STANDARDS ACT 2016

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Fair Labor Standards Act (FLSA)

- Establishes minimum wage, overtime pay, record keeping and child labor standards.
- Overtime pay is most common dispute.
- Employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 hours in a workweek, at a rate not less than 1.5 times regular pay rate.
- Creates a private cause of action for employees against their employers for unpaid back wages for overtime.

See 29 U.S.C. Section 216(b); Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 930 (11th Cir. 2000)
- Significant increase in number of FLSA cases filed over last several years, particularly in Florida and New York.

FLSA Unauthorized Overtime

- ▶ An employer must pay for any overtime work, even if overtime is not authorized
- ▶ “Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.”

29 C.F.R. 785.11

FLSA Unauthorized Overtime

- ▶ “[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.”

29 C.F.R. 785.13

- ▶ Consequently, even a clearly communicated policy prohibiting unauthorized overtime does not relieve an employer from its legal obligation to pay employees for all hours worked. If the employer allows the employee to perform the work, the employer is liable for compensating the employee

FLSA Available Damages

- Unpaid overtime compensation
- Liquidated damages
 - equal to the unpaid overtime compensation (i.e., double recovery of wages/overtime)
- Attorneys' Fees and Costs
 - attorneys' fees sought by plaintiff's counsel typically exceed any award of overtime pay/liquidated damages

FLSA Available Damages

(cont'd)

- Liquidated Damages: Good Faith Exception

- “[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of [the FLSA].”

See 29 U.S.C. 260

- An employer who violates the FLSA’s overtime provision carries the burden of proving its entitlement to this safe harbor provision.
- Ignorance of the prevailing law does not equate to “good faith.”

See Reich v. S. New England Telecomm. Corp., 121 F.3d 58, 71 (2d Cir. 1997)

FLSA Statute of Limitations

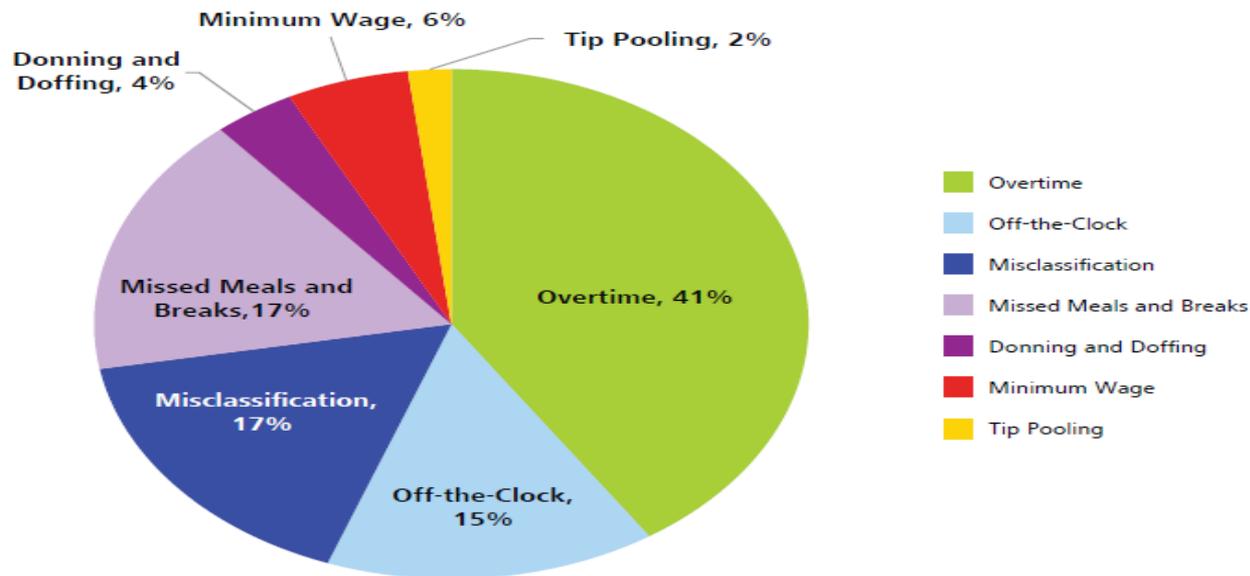
- ▶ Employee may seek unpaid wages for **2 years** prior to the date of filing the lawsuit
- ▶ **Extended 3-year period**
 - FLSA extends the statute of limitations to 3 years for cases in which the employer's violation is **willful**
 - “The three-year statute of limitations may apply even when the employer did not knowingly violate the FLSA; rather, it may apply when it simply disregarded the possibility that it might be violating the FLSA.”

See 29 U.S.C. 255

See Allen v. Bd. of Public Educ. For Bibb Cnty., 495 F.3d 1306, 1324 (11th Cir. 2007)

FLSA Litigation: Most Common Allegations

- ▶ Over 40% of allegations in settled cases relate to overtime violations

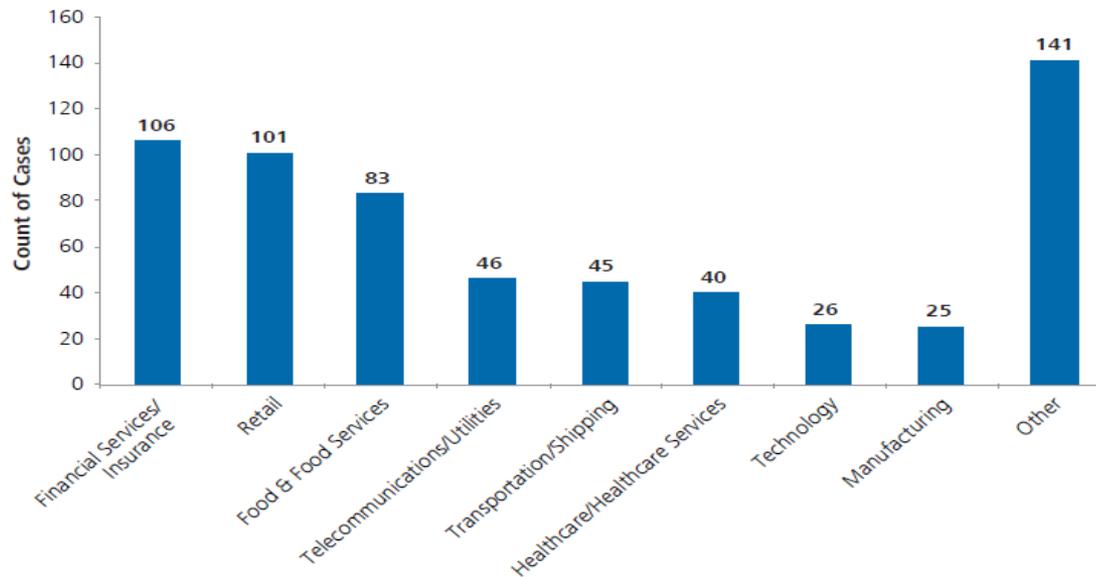


Allegations in settled wage and hour cases: January 2007 – March 2015

- * Data from NERA Economic Consulting report, “Trends in Wage and Hour Settlements: 2015 Update,” dated July 14, 2015.
- * Data based on 613 settlements for wage and hour cases, obtained from articles published in *Law360* between 01/01/2007 and 03/31/2015, and a review of the Seyfarth Shaw annual litigation report for 2007 through 2014.

FLSA Litigation: Most Common Industries for Settlement

- ▶ The financial services/insurance, retail, and food/food service industries are the most common industries for settlement.

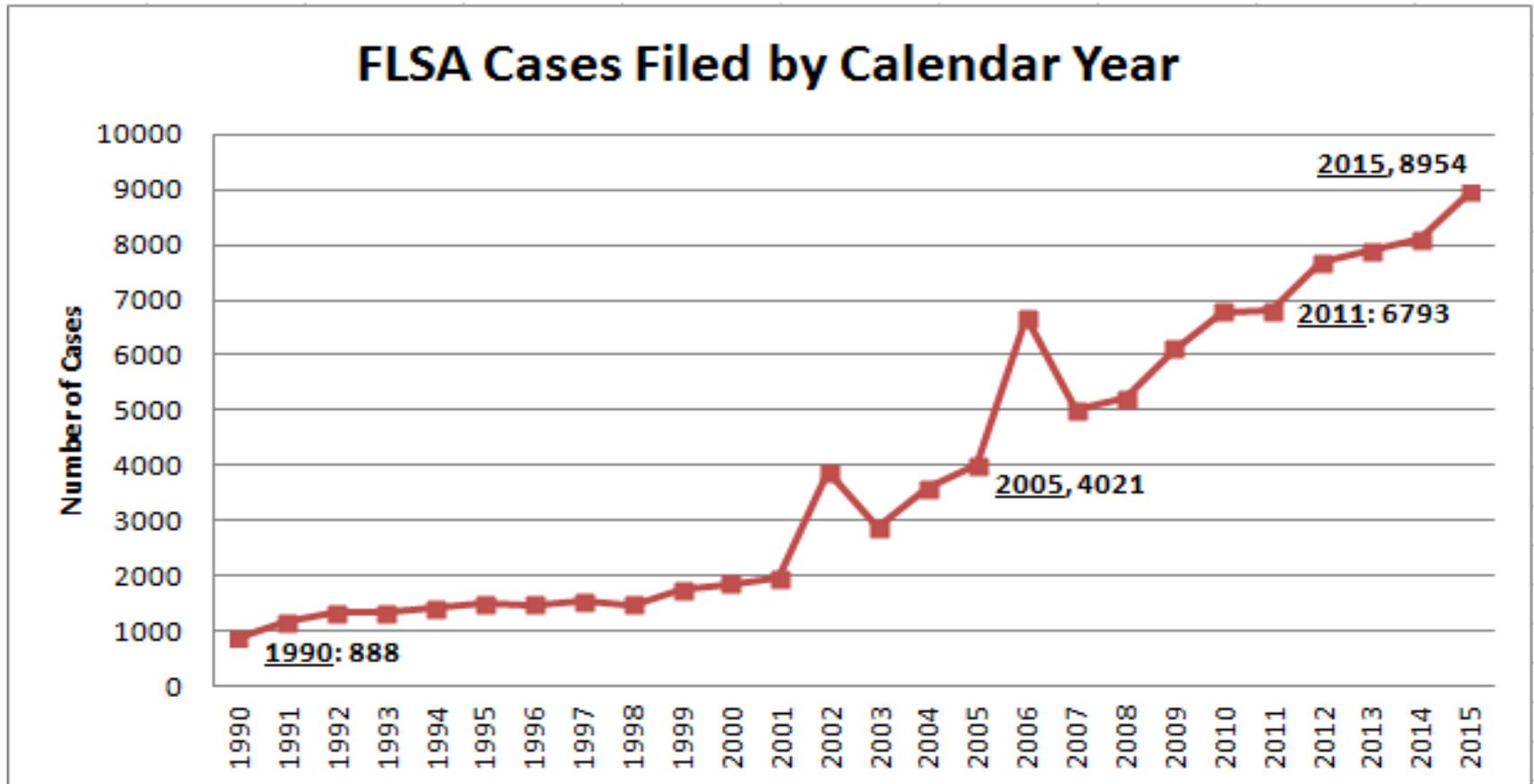


Settled wage and hour cases by industry of employer, January 2007 – March 2015

* Data from NERA Economic Consulting report, “Trends in Wage and Hour Settlements: 2015 Update,” dated July 14, 2015.

* Data based on 613 settlements for wage and hour cases, obtained from articles published in *Law360* between 1/1/2007 and 3/31/2015, and a review of the Seyfarth Shaw annual litigation report for 2007 through 2014.

Federal Wage & Hour Lawsuits Filed Each Year



FLSA lawsuits are on the rise. The number of FLSA cases filed per year has nearly nonupled (increased by multiple of 9) since the early 1990's, and has increased by 450% since 2000.

Reasons for Increase in Cases?

1. Attorney's fee provision – Not limited to a percentage of recovered wages. Fee awarded based upon:
 - Number of hours expended, multiplied by reasonable hourly fee
 - Awarded by the court.
2. Burden placed on employer.
Record keeping; burden of proof to establish exempt status
3. Lack of Bright Line Test to determine classifications:
Exempt/Non-Exempt
Employee/Independent Contractor
4. Increase in Attorney Advertising
Lawyers are advertising specifically for FLSA cases

Location, Location, Location

Where are FLSA Cases Filed the Most?

Florida: Ground Zero for FLSA Suits

- 1,145 FLSA cases filed in the Southern District of Florida in 2014
 - More than any other court in the country
- 608 FLSA cases filed in the Middle District of Florida in 2014
 - Fourth busiest jurisdiction for FLSA complaints

Exempt vs. Non-Exempt Employees

- ▶ Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees.
- ▶ Presently, in order to qualify for the exemption, employees generally must meet certain **tests** regarding their **job duties**, and be paid on a **salary level at not less than \$455/wk** (\$23,660 for a full-year worker).
 - Job titles do not determine exempt status.

See 29 C.F.R. Section 541.2

Exempt vs. Non-Exempt Employees

(cont'd)

- ▶ Exemptions are narrowly construed against the employer asserting them
 - Burden of supporting the application of an exemption rests on the employer
- ▶ Exemptions typically applied on an individual workweek basis
 - Employees performing exempt and non-exempt duties in the same workweek are normally not exempt in that workweek

Exempt vs. Non-Exempt Employees

(cont'd)

- ▶ Three tests regulate who is an exempt employee:
 - **Salary Basis Test**
 - Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
 - **Salary Level Test**
 - The amount of salary paid must meet a minimum specified amount
 - **Duties Test**
 - The employee's job duties must primarily involve executive, administrative, professional, computer, or outside sales employee duties, as defined by the regulations

An employee must satisfy each of the above tests to qualify as exempt.

Exempt vs. Non-Exempt Employees

(cont'd)

Salary Basis Test

- ▶ Salary Basis – Definition:
 - Employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis.
 - Predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work.
 - Subject to certain exceptions, the exempt employee must receive full salary for any week in which he/she performs **any** work, regardless of the number of days or hours worked.
 - Exempt employees do not need to be paid for any workweek in which they perform no work.

See 29 C.F.R. Section 541.602

- Hourly employees are automatically non-exempt.

(Note: exemption for computer employees)

Exempt vs. Non-Exempt Employees

(cont'd)

Salary Level Test

- ▶ Presently, employee must be paid at not less than \$455/wk (\$23,660/yr) on a salary basis
 - Salary level requirements do not apply to **outside sales employees, teachers, and employees practicing law or medicine.**
 - Exempt computer employees may be paid at least \$455/wk on a salary basis, *or* on an hourly basis at a rate not less than \$27.63/hr.

Exempt vs. Non-Exempt Employees

(cont'd)

Duties Test

- ▶ Employee duties/responsibilities:
 - Must meet the requirements of employee employed in a bona fide *executive, administrative, professional, computer, or outside sales employee*

Exempt vs. Non-Exempt Employees

(cont'd)

Duties Test: Executive Capacity

- ▶ In addition to the salary requirements noted above, the employee must meet **each** of the following qualifications:
 - Primary duty – management of the enterprise in which the employee is employed, or of a customarily recognized department or subdivision thereof.
 - Customarily and regularly directs the work of two or more other employees.
 - Has authority to hire/fire other employees, or whose suggestions/recommendations regarding hiring/firing/advancement/promotion/employment status of others is given particular weight.

Exempt vs. Non-Exempt Employees

(cont'd)

Duties Test: Executive Capacity

- ▶ Also applies to the following situations:
 - Employee who owns at least a 20% equity interest in the enterprise, and is actively engaged in management

See 29 C.F.R. Sections 541.100, 541.101

Exempt vs. Non-Exempt Employees

(cont'd)

Duties Test: Administrative Capacity

- ▶ In addition to the salary requirements noted, the employee must meet **each** of the following qualifications :
 - Primary duty – performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
 - Primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance.
- ▶ Examples may include the following:
 - Insurance claims adjusters; employees in the financial services industry (unless primary duty is selling financial products); executive assistant or administrative assistant (where delegated authority regarding matters of significance); human resource managers; purchasing agents; leaders of other employees assigned to complete major projects for the employer.

See 29 C.F.R. Sections 541.200, 541.203

Exempt vs. Non-Exempt Employees

(cont'd)

Duties Test: Professional Capacity

- ▶ In addition to the salary requirements noted above, the employee must meet **either** the Learned Professional or the Creative Professional qualifications:
 - **Learned Professional:** Primary duty – 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
 - May include such examples as registered or certified medical technologists, registered nurses, dental hygienists, physician assistants, chefs, athletic trainers, and licensed funeral directors or embalmers
 - Paralegals generally do not qualify as an exempt learned professional because an advanced specialized academic degree is not a standard prerequisite for entry into the field

Exempt vs. Non-Exempt Employees

(cont'd)

- **Creative Professional:** Primary duty – performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
 - Determination made on a case-by-case basis
 - Requirement generally met by actors, musicians, composers, conductors, and soloists; certain painters; certain cartoonists; essayists, novelists, short-story writers, and screen-play writers. Journalists may also qualify
 - Requirement generally not met by a copyist, such as an “animator” of motion-picture cartoons, or a retoucher of photographs
- This exemption may also apply to teachers, tutors, instructors, or lecturers.
- This exemption also applies to licensed lawyers and doctors

See 29 C.R.F. Sections 541.300-541.304

Exempt vs. Non-Exempt Employees

(cont'd)

Duties Test: Computer Employee

- ▶ In addition to the salary requirements noted above, the employee's primary duty must consist of **one** of the following:
 - Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
 - 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;

Exempt vs. Non-Exempt Employees

(cont'd)

Duties Test: Computer Employee

- Design, documentation, testing, creation, or modification of computer programs related to machine operating systems; **or**
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

See 29 C.F.R. 541.400-402

Exempt vs. Non-Exempt Employees

(cont'd)

Duties Test: Outside Sales Employee

- ▶ Employee's primary duty must be:
 - making sales as defined in the FLSA, **or**
 - Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer
- ▶ Employee must **also** be customarily and regularly engaged away from the employer's place or places of business
- ▶ "Sales" includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition
- ▶ The salary requirements of the FLSA and Part 541 of the Federal Regulations **do not** apply to outside sales employees

See 29 C.F.R. Section 541.500

Exempt vs. Non-Exempt Employees

(cont'd)

▶ Salary Level/Duties Test: Highly Compensated Employees

- ▶ The FLSA also exempts “highly-compensated” employees under Section 13(a)(1) if **each** of the following requirements are met:
 - Presently, total annual compensation of \$100,000 or more;
 - Must include at least \$455/wk paid on a salary basis
 - May consist of commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned in a 52-week period
 - Does not include boarding or lodging, medical or life insurance payments, retirement plan contributions, or other fringe benefits

Exempt vs. Non-Exempt Employees

(cont'd)

- Primary job duty must include performing office or non-manual work; and
- Employee must customarily and regularly perform **at least one** of the exempt duties/responsibilities of an exempt executive, administrative, or professional employee
 - Example: Employee who customarily/regularly directs the work of 2 or more other employees, but does not meet other requirements of an executive, such as the authority to hire/fire other employees

See 29 C.F.R. Section 541.601

Exempt vs. Non-Exempt Employees

(cont'd)

Recent Changes to the Salary Basis Test

Pursuant to direction from President Obama, on May 18, 2016, U.S. Department of Labor released its Final Rule updating the regulations regarding exempt employees.

- ▶ Threshold salary increases from \$455/wk to \$913/wk (\$47,476/yr)
 - Nondiscretionary bonuses and incentive payments, including commissions, may satisfy up to 10% of the salary basis requirement
 - Bonuses must be made on a quarterly or more frequent basis

Exempt vs. Non-Exempt Employees

(cont'd)

- ▶ Total annual compensation requirement for highly compensated employees increases from \$100,000 to \$134,004
 - Employee must still be paid the salary threshold of \$913/wk, exclusive of any nondiscretionary bonuses or incentive payments
- ▶ These amounts automatically update every three years
 - First update effective January 1, 2020
 - Standard salary level set at the 40th percentile of weekly earnings for full-time salaried workers
- ▶ Effective Date of Changes – December 1, 2016

**Estimated to impact 331,000 workers in Florida;
4.1 million nationwide**

FLSA: Government Employees

FLSA and DOL regulations contain some provisions applicable only to public sector employees.

Comp Time

- State or local government agencies may arrange for their employees to earn comp time instead of payment for overtime hours.
- Comp time arrangement must be established pursuant to collective bargaining, memorandum of understanding, or agreement between employer and employee before performance of the work.
 - i.e., include as a provision of the personnel handbook provided to employee.
 - Comp time must be provided at rate of 1.5 hours for each hour of overtime worked.

FLSA: Government Employees

- State or local government employees may generally accrue up to 240 hours of overtime
- Law enforcement, fire protection and emergency response personnel may accrue up to 480 hours of overtime

Fire & Police Small Agency Exemption

- Fire protection or law enforcement employees are exempt from FLSA overtime protection, if employed by an agency with fewer than 5 fire protection or law enforcement employees, respectively.

FLSA: Government Employees

- Fire protection and law enforcement may be paid overtime on a “work period” basis, rather than usual 40-hour workweek of FLSA.
- Formula outlined in DOL regulations.
- Elected officials not covered by FLSA.

Resource

U.S. Department of Labor; Fact Sheet – Guidance for State and Local Governments.

Website: <https://www.dol.gov/whd/overtime/final2016/>

PDF: www.dol.gov/sites/default/files/overtime-government.pdf

FLSA: Government Volunteers

- ▶ FLSA does not apply to “any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency if
 - the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; **and**
 - such services are not the same type of services which the individual is employed to perform for such public agency

See 29 U.S.C. 203(e)

- ▶ An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered an **exempt volunteer** during such hours
 - individual must perform the services freely and without pressure or coercion, direct or implied, from an employer

See 29 C.F.R. 553.101

The End of the Intern?

Fair Labor Standards Act (FLSA) “trainee” exception

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;

The End of the Intern?

(cont'd)

- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Best Practices for Structuring an Internship Program

- Do not displace employees with interns
- Provide close supervision over the interns and ongoing instruction
- Seek interns that are able to obtain academic credit
- Obtain a written agreement that the intern understands that no wages are to be paid and that there is no expectation of employment at the end of the internship
- Structure the internship like an educational program
- Do not refer to interns as “free” labor

FLSA Recordkeeping Requirements

Posting of Notices

- ▶ Every employer employing any employees subject to the FLSA minimum wage provisions must post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed
 - The Department of Labor Wage and Hour Division provides an official poster for employers to use to satisfy this requirement

Available at:

<https://www.dol.gov/oasam/programs/osdbu/sbrefa/poster/main.htm>

FLSA Recordkeeping Requirements

General Recordkeeping Requirements

- ▶ Every employer covered by the FLSA must keep certain records for each non-exempt worker.
- ▶ The records need not be kept in any particular form
- ▶ The records must include certain identifying information about the employee and data about the hours worked and the wages earned
 - This information must be accurate

Timekeeping

- ▶ Employers may use any timekeeping method they choose
 - Examples: time clock, timekeeper who keeps track of employees' hours worked, or employees write down their own times
 - Only requirement is that the records be complete and accurate

FLSA Recordkeeping Requirements

Basic Records to Maintain for Each Employee

- ▶ Full name and SSN
- ▶ Address, including zip code
- ▶ Birth date if younger than 19
- ▶ Sex and occupation
- ▶ Time and day of week when employee's workweek begins
- ▶ Hours worked each day
- ▶ Total hours worked each workweek
- ▶ Basis on which employee's wages are paid (e.g., "\$9/hr," "\$440/wk")
- ▶ Regular hourly pay rate
- ▶ Total daily or weekly straight-time earnings
- ▶ Total overtime earnings for the workweek
- ▶ All additions to or deductions from the employee's wages
- ▶ Total wages paid each pay period
- ▶ Date of payment and the pay period covered by the payment

See 29 C.F.R. 516.2

FLSA Recordkeeping Requirements

Retention Period

- ▶ Preserve the following for **at least 3 years***:
 - payroll records, collective bargaining agreements, sales and purchase records
- ▶ Records on which wage computations are based should be retained for **2 years**
 - Includes time cards, wage rate tables, work and time schedules, and records of additions to/deductions from wages
- ▶ These must also be open for inspection by the Division's representatives
- ▶ Records may be maintained at place of employment or in a central records office

See 29 C.F.R. 516.5-516.7

**Note: These are federal requirements.*

Your agency's records retention schedules may require longer periods.

FLSA: Other Considerations

FLSA Collective Actions

- ▶ An FLSA action may be brought against an employer by one or more employees, on behalf of themselves and other similarly situated employees
- ▶ Opt-in requirement:
 - “No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court”
 - Different from a class action suit, where class member must opt-out of the action
- ▶ Collective Actions increase potential damages and attorneys’ fees

See 29 U.S.C. 216(b)

FLSA: Other Considerations

FLSA Settlements

- ▶ Subject to Court or DOL approval
 - Court must determine whether a settlement proposed by an employer and employees is a **fair and reasonable resolution of a bona fide dispute over FLSA provisions**
- ▶ Even where a terminated employee signs a release that explicitly provides for release of wage/labor litigation, release is not valid/enforceable without court approval.
 - FLSA provisions are mandatory and are not subject to negotiation of bargaining between employer and employee

See Lynn's Food Stores, Inc. v. U.S. ex rel. U.S. Dep't of Labor, 679 F.2d 1350, 1352 (11th Cir. 1982)

FLSA: Other Considerations

FLSA: Expense of Litigation

- ▶ FLSA cases can be expensive to defend
 - Fact intensive investigation
 - Review of payroll records; timecards; computer; e-mails; other employees
 - Numerous interview and depositions
 - Because of attorneys' fees provisions, plaintiff's counsel will work the case to increase his/her fees

FLSA: Other Considerations

FLSA: Recent Attorney Fee Awards

▶ Southern District of Florida

- Reasonable attorney rates of \$350.00/hr and \$375.00/hr awarded to lead attorney
 - *See Picado v. Lafise Corp.*, 2014 WL 4471391 (S.D. Fla. Sept. 11, 2014); *De Armas v. Miabraz, LLC*, 2013 WL 4455699 (S.D. Fla. Aug. 16, 2013); *Medrano v. Mi Colombia Bakery, Inc.*, 2013 WL 1748403 (S.D. Fla. Jan. 10, 2013)

▶ Middle District of Florida

- In *Yassine v. La Dolbe, LLC*, 2016 WL 2754052 (M.D. FLa. April 22, 2016), the Court awarded Plaintiff's counsel \$5,060 for 21.9 hours of work, which results in an hourly rate of \$230/hour. The Court stated that this was "well below the rate of \$300 to \$350 typically awarded in FLSA cases to experienced counsel."

FLSA: Other Considerations

FLSA: Recent Attorney Fee Awards

▶ Northern District of Florida

- In *Oliva v. Infinite Energy, Inc.*, 2013 WL 6815989 (N.D. Fla. Dec. 24, 2013), the Magistrate Judge noted that although the case had a value of about \$10,000 to \$15,000, the Plaintiff excessively litigated the case such that he sought a total of **\$306,310 for attorney's fees**.
 - Fees were calculated at an hourly rate of \$295/hr through the date of Plaintiff's motion, and at \$350/hr for additional work anticipated for after the motion
 - Court concluded reasonable hourly rate was \$235/hr
 - Court deducted 108.70 hours for unnecessary, excessive or redundant work, resulting in 245.5 hours that were reasonable
 - Total attorneys' fees recoverable: \$57,692.50

FLSA: Other Considerations

FLSA – Break Time for Nursing Mothers

- ▶ Effective March 23, 2010, the Patient Protection and Affordable Care Act amended Section 7 of the FLSA to require employers to provide a nursing mother reasonable break times to express breast milk after the birth of her child.
- ▶ Employer shall provide
 - A reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee needs to express milk; and
 - A place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk.
 - Compensation is not required during these breaks.

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