The Fair Labor Standards Act

I. Introduction

In an effort to help bring an end to the Great Depression by generating jobs, Congress enacted the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §201 *et seq.* The FLSA's stated purposes are, in essence, to prevent the exploitation of workers and to facilitate fair competition and efficiency in interstate commerce. 29 U.S.C. §202(a).

The FLSA sets standards for minimum wages, maximum hours, overtime pay, child labor, and record keeping. Amendments to the FLSA, in the form of the Portal-to-Portal Act, 29 U.S.C. §251 *et seq.*, and the Equal Pay Act, 29 U.S.C. §206(d), added provisions addressing travel time and equal pay for women.

Despite its broad scope, the FLSA does not address issues such as vacations, holidays, rest periods, or premium pay for work on holidays, weekends, and work in excess of eight hours *per* day.

The FLSA also does not preempt state or local laws, which may provide greater protection for employees. Employers and their counsel should consider the applicability and requirements of such laws, as well as the FLSA, whenever specific wage and hour issues or questions arise.

Who is Covered by the FLSA?

Employees can be covered by the FLSA in two ways: enterprise coverage or individual coverage.

~Enterprise Coverage

The FLSA covers those employees who work for companies or organizations having two or more employees and doing at least $500,000 a year in business, or hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies. 29 U.S.C. §203(s).

- Hospitals and residential care facilities, as well as schools, are covered automatically. *Id.*
- Most federal, state, and local employers are covered. *Id.*

~Individual Coverage

The FLSA also protects employees if their work regularly involves them in commerce between states ("interstate commerce").

This can include producing goods to be shipped out of state, regularly making telephone calls to persons located in other states, handling records of interstate transactions, traveling to other states for their jobs, and doing janitorial work in buildings where goods are produced for shipment outside the state. The FLSA also covers domestic service workers.

Is There An Employment Relationship?

An employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1) The extent to which the services rendered are an integral part of the principal's business.

2) The permanency of the relationship.

3) The amount of the alleged contractor's investment in facilities and equipment.

4) The nature and degree of control by the principal.

5) The alleged contractor's opportunities for profit and loss.

6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7) The degree of independent business organization and operation.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such factors as the place where work is performed, the

absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

Typical Problems

(1) One of the most common problems is in the construction industry where contractors hire so-called independent contractors, who in reality should be considered employees because they do not meet the tests for independence, as stated above. (2) Franchise arrangements can pose problems in this area as well. Depending on the level of control the franchisor has over the franchisee, employees of the latter may be considered to be employed by the franchisor. (3) A situation involving a person volunteering his or her services for another may also result in an employment relationship. For example, a person who is an employee cannot "volunteer" his/her services to the employer to perform the same type service performed as an employee. Of course, individuals may volunteer or donate their services to religious, public service, and non-profit organizations, without contemplation of pay, and not be considered employees of such organization. (4) Trainees or students may also be employees, depending on the circumstances of their activities for the employer. (5) People who perform work at their own home are often improperly considered as independent contractors. The Act covers such homeworkers as employees and they are entitled to all benefits of the law.

Joint Employment

Notably, more than one person or entity can be deemed to be an individual's employer under the FLSA. 20 C.F.R. §791.2(a). For example, businesses using temporary employees provided by temporary employment services can find themselves shouldered with liability for FLSA violations even though the temporary employees are paid by the temporary employment service. Determination of the joint employment issue "depends upon all the facts in the particular case." *Id.* Crucial to the determination is whether (a) there is an arrangement to share an employee's services, (b) one employer is acting directly or indirectly in the interest of another employer in relation to the employee, or (c) the employers share control of the employee, in that "one employer controls, is controlled by, or is under common control with the other employer." *Id.*

See Hall v. Fanticone, 322 N.J. Super. 302 (App. Div. 1999) (joint employment brought about by a joint business arrangement in a leased equipment context).

Who Is Exempt

A few employers, including small farms – those that use relatively little outside paid labor – are explicitly exempt from the FLSA. In addition, some employees are exempt from the FLSA even though their employers are covered. A few common categories of employees are exempt from FLSA requirements, such as pay for overtime and minimum wages.

Executive, administrative and professional workers. This is the most confusing and most often mistakenly applied broad category of exempt worker.

The requirements for executive workers are most rigorous. To qualify as an exempt executive, you must:

- be paid with a salary, so that compensation is not subject to reduction for quality and quantity of work
- use discretion in performing job duties
- regularly direct the work of two or more people
- have the authority to hire and fire other employees, or to order such hiring and firing
- be primarily responsible for managing others, and
- devote no more than 20% of worktime to other tasks that are not managerial. For certain retail and service companies, 40% of nonmanagerial time is allowed.

~See 5 C.F.R. §551.205 for definition of an "executive."

The definitions of administrative and professional employees are similar, but contain minor differences. For example, employees categorized as professionals must perform work that is primarily intellectual, such as lawyers. See 5 C.F.R. §551.206 and 207.

The definitions also change with the employee's salary level. For example, if the weekly salary of the executive, administrative or professional employee exceeds a certain minimum, fewer factors are required to qualify for the exemption.

To help workers and employers understand their rights and responsibilities under the Regulations, Part 541, the Department of Labor has developed this FLSA overtime Security Advisor. Department of Labor recently updated these regulations which became effective August 23, 2004. The overtime Security Advisor is intended to help workers and employers identify:

1) Those workers who are entitled to a minimum wage and overtime pay; and

2) Those who, by law, are not subject to the FLSA's minimum wage and overtime pay requirements.

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Outside salespeople. An outside salesperson is exempt from FLSA coverage if he or she:

- regularly works away from the employer's place of business while making sales or taking orders, and
- spends no more than 20% of worktime doing work other than selling.

Typically, an exempt salesperson will be paid primarily through commissions and will require little or no direct supervision in doing the job.

Computer specialists. This exemption applies to computer system analysts and programmers who receive a salary of at least $170 a week or who, if paid by the hour, receive at least $27.60 an hour.

An individual will likely be exempt from the wage and hour laws as a computer specialist if their primary duties consist of such things as determining functional specifications for hardware and software, designing computer systems to meet user specs and creating or modifying computer programs. 5 C.F.R. §551.207(a)(3).

Miscellaneous workers. Several other types of workers are exempt from the minimum wage and overtime pay provisions of the FLSA. The most common include:

- employees of seasonal amusement or recreational businesses
- employees of local newspapers having a circulation of less than 4,000
- newspaper delivery workers
- switchboard operators employed by phone companies that have no more than 750 stations
- workers on small farms, and
- personal companions and casual babysitters. Officially, domestic workers – housekeepers, childcare workers, chauffeurs, gardeners – are covered by the

FLSA if they are paid at least $1,000 in wages from a single employer in a year, or if they work eight hours or more in a week for one or several employers. For example, if you are a teenager who babysits only an evening or two each month for the neighbors, you probably cannot claim coverage under the FLSA; a fulltime au pair would be covered.

Apprentices. An apprentice is a worker who's at least 16 years old and who has signed an agreement to learn a skilled trade. Apprentices are exempt from the requirements of the FLSA. But beware that your state may have a law limiting the number of hours you can work as an apprentice. State law may also require that as an apprentice, you must be paid a certain percentage of the minimum wage. Check with your state labor department for more information.

Independent Contractors

Finally, the FLSA covers only employees, not those who work as independent contractors. However, whether a person is an employee for purposes of the FLSA generally turns on whether that worker is employed by a single employer, not on the Internal Revenue Service definition of an independent contractor.

Whether a worker is an independent contractor rather than an employee, for purposes of the FLSA depends on the economic realities of the relationship. The ultimate issue is "'whether the individual is economically dependent on the business to which he renders service. . . or is, as a matter of economic fact, in business for himself." *Bartels v Birmingham,* 332 U.S. 126, 130 (1947). The determination of this issue can turn upon a number of factors, the most important of which is the extent to which the putative employer has control or the right to control the worker both as to the work done and the manner in which it is performed. Other relevant factors include:

- the extent to which the worker's services are an integral part of the business that is using them;
- the extent to which the worker pays for facilities, materials, and equipment;
- the worker's exposure to profit and loss opportunities;
- the amount o€ initiative, judgment, or foresight required for the success of the worker's endeavor;
- the permanency of the relationship;
- whether the worker is listed on the payroll;

- whether regular payroll tax deductions are withheld from compensation to the worker;
- whether remuneration to the worker is charged to a “labor and salary” account or to an account to which attorneys' and auditors' fees and the like are charged;
- whether the putative employer approves any employees of the worker;
- whether the putative employer “keeps the books" for the worker;
- whether the worker has an independent economic or other interest in the work, aside from increasing his pay**;** and
- whether compensation paid to the worker is treated as remuneration to an independent contractor.
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Close Cases

In court cases determining close questions of employment status, workers are increasingly found to be employees rather than independent contractors. Key realities cited by the courts: the relationship appeared to be permanent, the workers lacked bargaining power with regard to the terms of their employment (*Martin v. Albrecht*, 802 F. Supp. 1311 (1992)) and the individual workers were economically dependent upon the business to which they gave service (*Martin v. Selker Bros., Inc.,* 949 F. 2d 1286 (1991)).

But workers’ skill and pay levels can push courts to the opposite conclusion. Some courts are more likely to class workers with higher skills and higher pay as independent contractors rather than employees. In two recent cases hailing from Texas, for example, two groups of workers – pipe welders and topless dancers – who were classified as independent contractors claimed they were really employees under the labor laws and so should be entitled to overtime pay. The courts, apparently reasoning that welding pipes takes more skill than dancing topless, held that the welders were independent contractors, but the dancers were employees. *(Carrell v. Sunland Constr., Inc.,* 998 F.2d 330 (5th Cir. 1993); *Reich v. Circle C. Investments, Inc.,* 998 F.2d 324 (5th Cir. 1993)).

COMMONLY USED EXEMPTIONS

Commissioned sales employees of retail or service establishments are exempt from overtime if more than half of the employee’s earnings come from commissions and the employee averages at least one and one-half times the minimum wage for each hour worked.

Computer professionals: Section 13(a)(17) of the FLSA provides that certain computer professionals paid at least $27.63 per hour are exempt from the overtime provisions of the FLSA.

Drivers, driver's helpers, loaders and mechanics are exempt from the overtime pay provisions of the FLSA if employed by a motor carrier, and if the employee's duties affect the safety of operation of the vehicles in transportation of passengers or property in interstate or foreign commerce.

Farmworkers employed on small farms are exempt from both the minimum wage and overtime pay provisions of the FLSA. For the specific regulations on this exemption. Young workers employed on small farms, with parental consent, are also exempt from the child labor provisions of the FLSA. Other farmworkers are exempt from the FLSA's overtime provisions.

Salesmen, partsmen and mechanics employed by automobile dealerships are exempt from the overtime pay provisions of the FLSA.

Seasonal and recreational establishments: Employees employed by certain seasonal and recreational establishments are exempt from both the minimum wage and overtime pay provisions of the FLSA.

Executive, administrative, professional and outside sales employees: (as defined in Department of Labor regulations) and who are paid on a salary basis are exempt from both the minimum wage and overtime provisions of the FLSA.

THE TOP TEN REASONS FOR LAWSUITS UNDER THE FLSA

1. Employees are working "off-the-clock." Employees are putting in extra hours tending to their duties or going to meetings without being paid.

2. Employees are working "on-the-clock" and not being paid for all of their work time either because of unlawful ways that work time is added up at the end of the pay period or because employers are simply chopping off hours.

3. Workers are misclassified as exempt from overtime pay requirements.

4. Employees entitled to overtime pay are misclassified as independent contractors and in provided overtime pay.

5. Shift differentials and other components of the regular rate are not included in overtime calculations.

6. Employees learn that they cannot volunteer their time without pay.

7. Employees are not compensated for training time.

8. Employees work through lunch without pay.

9. Employees are not paid for short breaks.

10. Plaintiff employment lawyers can file a collective action under the FLSA or a class action under state law.

Minimum Wage

Covered employers who are unable to take advantage of an exemption as to a particular employee must treat the employee in compliance with the FLSA's requirements. Thus, nonexempt employees must be paid no less than the FLSA's specified minimum wage, which presently is $5.15 *per* hour. 29 U.S.C. §206(a). This does not mean that such employees must be paid by the hour. Rather, they may be paid on a salary basis, or on a time, piece rate, commission, or any other basis, so long as their compensation is the equivalent of at 1east $5.15 *per* hour worked. 29 C.F.R. §778.109.

The current minimum wage rate in New Jersey is $6.15 *per* hour (effective October 1, 2005). The next increase will be effective October 1, 2006 (increase of $7.15 *per* hour).

Opportunity Wage

An exception to the standard minimum wage requirement is that employers may pay an "opportunity wage" of as little as $4.25 *per* hour to employees under 20 years of age for the first 90 days of their employment. 29 U.S.C. §206(g). Employers must not displace current employees, or partially displace current employees by reducing their hours, wages, or employment benefits, in order to hire someone at the opportunity wage. *Id.*

Tipped Employees

A variation of the standard minimum wage requirement is available for employees who receive tips. An employer may credit a portion of the tips received by its tipped employees toward its minimum wage obligations to such employees if all of the following requirements are met:

- only employees who customarily and regularly receive more than $30 *per* month in tips are subjected to the tip credit arrangement;

- the employer informs its employees of the rules of the tip credit;
- the employee's actual tips equal or exceed the amount of the tip credit; and
- the credit may be no more than the amount by which the minimum wage exceeds $2.13 *per* hour.

29 U.S.C. §203(m), (t); 29 C.F.R. §§531.50-531.59, *i.e., the employer must pay an hourly rate (a minimum of $2.13 per hour) that along with the tips brings the pay to a minimum wage rate of $6.15 per hour.*

Employers may take advantage of the tip credit even where "tip pooling" arrangements are in place. 29 C.F.R. §531.54. Tip pooling occurs when waiters share tips with bussing staff or when an employer redistributes tips on an agreed basis. *Id.* In a tip pooling situation, the amounts received by each employee after redistribution of the tips are counted as his or her tips for purposes of the tip credit. *Id.*

OVERTIME

Employees who are not exempt from the FLSA's overtime pay requirements are entitled to overtime pay for any overtime that they work. This means that employers must pay such employees at the rate of one and one-half times their regular rate of compensation for any hours physically worked in excess of 40 in a workweek. 29: U.S.C. §207(a). I

~Holiday and comp time used do not qualify as "hours worked."
~Working on a Saturday, Sunday or Holiday do not require overtime payment.

A. The Workweek

For purposes of the FLSA's overtime pay requirements, a workweek is "a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods." 29 C.F.F. §778.105. An employer may select the day and hour on which the workweek starts; once an employer makes such a selection it may not change it unless the change is intended to be permanent and is not intended to evade the requirements of the FLSA. *Id.*

The FLSA generally defines the term "hours worked" as any time spent working whether "requested", "suffered," or "permitted" by the employer. 29 C.F.R. §785.11.

B. Calculating the Regular Rate of Pay

Under the FLSA, overtime pay is calculated as one and one-half times the employee's "regular rate." The regular rate must be computed each week. In most cases, the regular rate is simply the employee's stated hourly rate. Problems arise

when other compensation must be added to the hourly rate to arrive at the regular rate for overtime pay.

~Nondiscretionary Bonuses
~Shift Premiums
~On Call Pay

a. Nondiscretionary bonuses

When an employee earns a nondiscretionary cash award or bonus (as opposed to discretionary cash awards or bonuses as described in §551.511(b)(3)), the bonus must be taken into account in determining overtime pay for the period of time during which the bonus was earned.

b. Shift premiums

The Act requires the inclusion in the regular rate of such extra premiums as night shift differentials (whether they take the form of a percent of the base rate or an addition of so many *cents per* hour), and premiums paid for hazardous, arduous, or dirty work.

It also requires inclusion of any extra compensation that is paid as an incentive for the rapid performance of work, and since any extra compensation in order to qualify as an overtime premium must be provided by a premium rate *per* hour, except in the special case of pieceworkers, lump sum premiums that are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate.

c. On-call pay

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944), the Supreme Court addressed the question whether "waiting time" can be considered working time. The Court refused to set down a legal formula, but stated:

> Whether in a concrete case such time falls within or without the [FLSA] is a question of fact to be resolved by appropriate findings of the trial court. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to waiting time, and all the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged.

If an employee is waiting to be engaged his or her time cannot be considered working time-or part of the regular rate. An employee's time in which he or she is engaged to wait is considered a part of the regular rate.

- Employee engaged to wait: usually unpredictable and of short duration; *i.e. firemen*

- Employee waiting to be engaged: employee is not completely relieved of duty and cannot use the time effectively for his own purposes, *i.e., truck driver*.

Items Excluded From Regular Rate

These are excluded from regular rate:

- payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

- payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure pf the employer to provide sufficient work, or other similar causes;

- reasonable payments for traveling expenses or other expenses, incurred by an employee in the furtherance of his employer's interests that are properly reimbursable by the employer, and other similar payments to an employee that are not made as compensation for his hours of employment.
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- Sums paid in ***recognition of services*** performed during a given period if (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; (b) the payments are made pursuant to a *bona fide* ***profit sharing plan*** or trust or *bona fide* thrift or savings plan, meeting the requirements of the secretary of labor set forth in appropriate regulation that he shall issue, having due regard among other relevant factors to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are ***talent fees*** (as such talent fees are defined and delimited by regulations of the secretary) paid to performers, including announcers, on radio and television programs;

- contributions irrevocably made by an employer to a trustee or third person pursuant to a ***bona fide plan*** for providing old age, retirement, life, accident, or health insurance or similar ***benefits*** for employees;

- ***extra compensation*** provided by a premium rate paid for work by the employee on ***Saturdays, Sundays, holidays***, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

- ***extra compensation*** as a result of a premium rate paid to the employee, in pursuance of an ***applicable employment contract*** or collective bargaining agreement, for work outside the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for life work performed during such workday or workweek.

C. Compensatory Time Off

The FLSA does not allow private sector employers to provide compensatory time off to employees *in lieu* of overtime payments. Thus, providing compensatory time off *in lieu* of overtime to nonexempt employees is not an available option.

There is, however, no statutory prohibition against providing compensatory time off to **exempt** employees in recognition of hours in excess of their regular schedules.

D. Rest and Meal Periods

The FLSA does not require rest or meal periods. However, generally, rest periods will be considered time worked. 29 C.F.R. §785.18.

Bona Fide meal periods are not time worked. 29 C.F.R. §785.19.

Statute of Limitations

~ 2 years
~3 years for willful violations

5 C.F.R. §551.702(b)

Enforcement

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA. Among other things, the Wage and Hour Division may:

- audit employers' compliance with the FLSA by inspecting their required records**,** talking to employers and their representatives, and interviewing employees. 29 U.S.C. §211;

- assess civil penalties of up to $1,000 against any person who repeatedly or willfully or with reckless disregard violates the FLSA's minimum wage or overtime provisions, 29 C.F.R. §578.3; and

- sue on behalf of employees to recover past due wages, liquidated damages in an amount equal to the past due wages, and interest. 29 U.S.C. §216.

In addition, individual employees or a group of employees may sue to recover past due wages, liquidated damages in an amount equal to the past due wages, interest, attorneys' fees and costs. 29 U.S.C. §216.

FAQ's:

Q. If an employee wants to work overtime (in excess of 40 hours the workweek) and will accept straight time, can the employee his/her right to overtime pay?

A. No, the employee and the employer cannot mutually agree to violate the law.

Q. How does an employer compute the overtime rate for a employee who has two or more job titles with different hourly rates?

A. The overtime rate is calculated by using the weighted average method. The total gross wage is divided by the total number of hours worked to obtain the average hourly rate. The average hourly rate then divided in half to determine the additional premium (half rate due the employee).

Example:

An employee does clerical work for $10.00 per hour and is also a hostess for $7.75 per hour. The employee works 30 hours at $10.00 per hour and 16 hours at $7.75 per hour for a total of 46 hours during the week. The overtime rate due the employee is calculated as follows:

30 hours x $10.00 per hour = $300.00

16 hours x $7.75 per hour = $124.00
Total gross = $424.00

The total gross ($424.00) is divided by the total hours (46) to obtain the average hourly rate. The average hourly rate is $9.22 per hour.

The employee is still due the additional premium pay (half time) for the 6 overtime hours. The average hourly rate ($9.22) is divided in half. The half-time rate is $4.61.

6 overtime hours x $4.61 = $27.66

The $27.66 (premium pay) is added to the original gross amount of $424.00. The new gross amount is $451.66. This is the amount that must be paid to the employee for the week.

Q. Can my employer require me to work overtime?

A. Yes. An employer can require an employee to work overtime provided the employer pays the appropriate wages and does not violate any existing employer-employee collective bargaining agreement.