THE IDC MONOGRAPH:

Wage Peace, Not War: What Employers Need to Know About the Fair Labor Standards Act

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I. Introduction

Over the past 15 years, employers have faced lawsuits under the Fair Labor Standards Act (FLSA)[1] with greater frequency and with increased damages. In fact, FLSA cases have surpassed all other types of employment cases.

According to figures from PACER, on a national basis there were a total of 8,954 FLSA lawsuits filed in 2015, compared to only 4,021 in 2005, and 888 in 1990. The number of FLSA lawsuits decreased in only two years over the past 25 (2003 and 2007). Between 1990 and 2001 there was a relatively marginal increase from year to year. Then 9/11 happened, the "dot com" market took a large hit, and there were nearly double the number of FLSA lawsuits filed in 2002 (3,886) compared to 2001. Another spike between 2008 and 2010 likely correlates with the 2008 recession, when more employees were laid off. Overall, FLSA lawsuits have increased about 450% since just 2000. If new overtime regulations go into effect, employers can likely expect another spike thereafter.

U.S. Department of Labor (DOL) statistics show that, in 2015, the DOL filed 10,642 minimum wage violation cases and 10,496 overtime violations. The DOL successfully recovered $37,828,554 for unpaid minimum wage violations and $137,701,703 for overtime violations.[2] Multi-million dollar verdicts and settlements for FLSA suits are now commonplace.

In addition to the country's general economic status, increases in the number of FLSA cases can probably be traced to

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an increase in the number of attorneys who find the field lucrative given the fee-shifting provision in the law. FLSA claims are typically filed as collective actions, which helps increase the overall potential attorneys' fees. Common sense dictates that more layoffs mean more disgruntled employees. The further we get from 1938, when the law was enacted, the more outdated and antiquated the original law and definitions become, and the less similarities there are to the economic realities and conditions that existed nearly 80 years ago. The country has moved from the manufacturing-centered economy that existed in 1938 to a more service-based economy, and the changes in technology in the past 80 years are immeasurable. Twenty-first century employees are more savvy and educated on their rights due to the ease with which they can research the law and communicate with others on the Internet. Further, large wins for employees are often publicized.

In 2003, which is the last time an *IDC Monograph* was published on the subject of the FLSA, the article discussed, among other things, the fact that there were proposals for new regulations to increase the minimum payment for an employee to qualify for one of the "white collar" exemptions from overtime laws from $155 to $425 per week.[3] In 2004, the final minimum amount was $455. In May 2016, the DOL issued regulations to increase that number to $913 per week (six times more than just 13 years ago and double the current threshold) effective December 1, 2016. On November 22, 2016, however, a federal District Court in Texas issued a nation-wide injunction halting the implementation of the new overtime rules. Therefore, as of publication, it is unknown whether these new regulations will ever be implemented, or whether under a new presidential administration, they will be scaled back or repealed. We will not know until either the new administration or the court speaks to the issue, and there is no way to predict which may occur first.

> The purpose of this Monograph is to provide the reader with an overview of the Fair Labor Standards Act, including a detailed analysis of the main exemptions from overtime and minimum wage requirements, the most common mistakes in misclassifying employees as exempt or as independent contractors, proper and improper wage deductions, issues that have increased with a growth in telecommuting, and current issues in litigating FLSA cases.

The 2003 *IDC Monograph* also discussed recent large verdicts and settlements in the amounts of $10 million, $18 million, and $29.9 million.[4] More recently, there have been settlement payments of $73 million (Bank of America) in 2013, $56.5 million (Brinker Restaurant Corp.) in 2014, and $228 million (FedEx) in 2015.

In light of these numbers and recent trends, employers must become better educated about the requirements of the FLSA to avoid the often overwhelming effects of litigating wage claims. Employers should also be familiar with their own state's wage and hour laws. The parallel state law in Illinois is the Minimum Wage Law,[5] which generally mirrors the requirements of the FLSA, but carries different penalties.

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II. Overview

Enacted in 1938 as a result of the serious socioeconomic circumstances during the Great Depression, the FLSA was designed to protect "certain groups of the population from substandard

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wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce."[6] The FLSA mandates that, with certain exceptions, employees must be paid overtime (time and a half) for any hours over 40 during a workweek, as well as minimum wage (based on either the federal minimum wage or an individual state's minimum wage if it is higher than the federal level). Employees who fall within one of the exceptions are referred to as "exempt," which means they do not have to be paid time and a half (or minimum wage in certain circumstances) if they work more than 40 hours in a week. Although there are dozens of specific exemptions from FLSA regulations (for overtime, minimum wage, or both), the Department of Labor estimates that 86% of the workforce falls into the non-exempt classification. There is no prohibition against paying an exempt employee by the hour and paying overtime; rather, employers are prohibited from not paying overtime to non-exempt employees.

The FLSA is enforced by the Wage and Hour Division (WHD) of the DOL. Lawsuits can also be filed in federal courts throughout the country.

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III. Coverage Under FLSA

Not every employer is subject to the provisions of the FLSA; nor is every employee protected by the FLSA. An "employer" is defined by the FLSA as "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[7] An "employer," therefore, may be an individual, a corporation, a partnership, an association, or a representative of a corporation. Note, however, that the DOL regulations implementing the FLSA provide that an employee may have more than one employer.[8] Such "joint employment" arises when the employee "performs work which simultaneously benefits two or more employers" and "one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee."[9] In fact, joint employment cases are gaining the attention of the DOL. On January 20, 2016, the WHD issued an Administrator's Interpretation establishing new standards for determining joint employment under the FLSA. It is anticipated that the WHD will use the Administrator's Interpretation as justification for charging a greater number of employers with violations of the FLSA by arguing that they are joint employers with the entity committing the actual violations.[10]

The FLSA applies to all employees of certain enterprises engaged in interstate commerce (Enterprise Coverage). Employees of businesses not covered through Enterprise Coverage can be covered as individuals if they are involved in interstate commerce, *i.e.,* "Individual Coverage."[11] Hence, an employer may be subject to the FLSA on an enterprise basis or it may be subject to the law only with respect to certain individual employees.

Under an "enterprise" application, all non-exempt employees who work for certain businesses or enterprises are protected by the FLSA. Courts have broadly interpreted Enterprise Coverage.[12] If an enterprise meets the threshold gross dollar volume amount of at least $500,000 a year in revenue, all employees of the employer are covered under the FLSA as long as some of its employees are: 1) engaged in commerce; 2) engaged in the production of goods for commerce; or 3) engaged in handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.[13] Hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies are automatically deemed to be "enterprises" engaged in commerce subject to the FLSA regardless of the annual gross sales volume of those businesses.[14]

Even where an individual's employer is not governed by the FLSA under Enterprise Coverage, the individual may be protected by the FLSA if his or her work regularly involves interstate commerce. If an individual is engaged in interstate commerce, production of goods for interstate commerce, handling or working on goods or materials that are moving in interstate commerce, or is in an occupation that is closely related or directly essential to the production of goods for interstate commerce, that employee is covered on an individual basis by the FLSA.[15] Under an individual theory of coverage, "[t]he test under this present act . . . is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."[16] Examples of employees involved in interstate commerce include those who produce goods that will be sent out of state (such as a factory worker), who regularly make telephone calls to persons located in other states, who handle records of interstate transactions or travel to other states on their jobs, or who perform janitorial work in buildings where goods are produced for shipment outside the state. Also, domestic service workers, such as housekeepers, full-time babysitters, and cooks, are normally covered by the FLSA.

A. Exemptions from Overtime and Minimum Wage under FLSA

The most common exemptions from overtime and minimum wage laws are executive, administrative, and professional.[17] There are also exemptions for commission salespersons,[18] certain computer professionals,[19] outside salespersons,[20] salespersons, parts men, and mechanics at automobile dealerships,[21] artists,[22] and certain farmworkers,[23] among many others. Some of these exemptions are discussed below as a general guide, but it must be understood that within each definition provided by the regulations interpreting the FLSA, many more terms must be defined and understood to perform a thorough analysis. The below summaries are not intended to be full substitutes for reviewing the law, but rather, an overview of the general principles of the exemptions.

1. Executive

An executive is an employee whose primary duty is managing the enterprise or managing a customarily recognized department or subdivision of the enterprise. The executive employee must be compensated on a "salary basis" at a rate of not less than $455 per week or $23,660 per year.[24] The executive employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent and must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement or promotion or any other change of status of other employees must be given particular weight.[25]

Many employers believe that if they call someone a "manager," that person falls within the exemption, which is not the case. The regulations provide a detailed list of what constitutes "management" under the exemption, including activities such as interviewing, selecting, and training of employees; setting and adjusting employees' rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision and control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other status changes; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.[26]

2. Administrative

The administrative exemption is perhaps one of the most commonly misapplied and misunderstood exemptions. In addition to the compensation being on a salary or fee basis at a rate not less than $455 per week (with the increase on hold), an administrative employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.[27] It is this last element that perhaps causes the most room for error, as employers must analyze the concepts of "discretion and independent judgment" and "matters of significance." The regulations provide many examples of these concepts.

"Discretion and independent judgment" involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. Factors to consider include, but are not limited to: whether the employee has authority to create, enforce, or deviate from management policies without higher level approval; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; and whether the employee has

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authority to commit the employer in matters that have significant financial impact. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.[28] The term "matters of significance" refers to the level of importance or consequence of the work performed.[29]

A few examples of employees who fall under the administrative exemption provided in the regulations may include insurance claims adjusters, employees in the financial services industry, an executive or administrative assistant to a business owner or senior executive of a large business, and human resources managers.[30] It must be understood, however, that there are specific qualifiers for each of these examples.

3. Professional

Professionals are employees who are compensated on a salary or fee basis at a rate not less than $455 per week (with the increase on hold). Their primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and that includes work requiring the consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning and must be customarily acquired by a prolonged course of specialized intellectual instruction (*i.e.* typically an education that results in an advanced degree).[31] Common examples of "professionals" under the FLSA include physicians, attorneys, accountants, architects, pharmacists, and certain scientists and engineers, although there are certainly others who may fall into the exemption.[32]

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FLSA regulations also provide that an employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. Thus, a lawyer working as a barista will be considered non-exempt in that position because the salary and salary basis requirements do not apply to bona fide practitioners of law or medicine. Those practicing law or medicine, however, do not have to be paid in excess of the salary threshold.[33]

Teachers are also exempt under the professional category if their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and if they are employed and engaged in this activity in an educational establishment.[34] Examples of exempt teachers include, but are not limited to: regular academic teachers, kindergarten or nursery school teachers, driving instructors, and music teachers.[35] The possession of elementary or secondary teaching certificates is a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals.[36]

Also falling under this exemption are "creative professionals," whose primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. A "recognized field of artistic or creative endeavor" includes such fields as music, writing, acting, and the graphic arts.[37] The requirement of "invention, imagination, originality or talent" generally is met by actors, musicians, composers, conductors, and soloists; painters (who at most are given the subject matter of their painting); cartoonists; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but rather are self-employed); and persons holding the more responsible writing positions in advertising agencies.[38]

There is also an exception for highly compensated employees if they are paid at least $100,000 per year (with the previously scheduled increase of $134,000 also on hold as of publication), perform office or non-manual work, and customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee.

4. Computer

The computer exemption from both minimum wage and overtime pay applies to computer systems analysts, computer programmers, software engineers and other similarly skilled workers in the computer field who meet certain tests regarding their job duties and who are paid at least $455 per week (with the increase on hold), or who are paid at a rate of not less than $27.63 per hour (which will not change no matter what happens with the previously scheduled increase).[39] For the computer exemption to apply, the employee's primary duties must consist of: 1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2) the 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; 3) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or 4) a combination of the aforementioned duties, the performance of which requires the same level of skills.[40]

5. Outside Sales

The outside sales exemption applies to employees whose primary duty is making sales within the meaning of section 3(k) of 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. The employee must be customarily and regularly engaged away from the employer's place or places of business in performing such primary duty. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.[41]

6. Commission Employees

The commission exemption applies to: 1) sales employees of retail or service establishments, 2) if more than half of the employee's earnings come from commissions and, 3) the employee averages at least one-and-a-half times minimum wage for each hour worked.[42] Certain salesmen, parts men, and mechanics in automobile dealerships are also exempt from overtime pay provisions of the FLSA.[43] However, they are not exempt from minimum wage requirements and, therefore, these employees must be required to keep track of their hours no differently than non-exempt employees so that the employer at all times is paying minimum wage, especially if little or no commissions are paid in a particular week.

B. New FLSA Regulations

As mentioned above, one of the requirements common to the executive, administrative, and professional employee exemptions (as well as for computer employees) is a minimum weekly salary, which is currently $455 per week, or $23,660 per year. On May 18, 2016, the DOL published its new regulations on overtime rules and has now set the minimum weekly wage at $913, or $47,476 per year.[44] Accordingly, in order for employees to be treated as exempt under the above four categories of workers (in addition to performing the duties unique to each), they would have to earn at least $913 per week. As previously mentioned, this increase is currently on hold, possibly to never go into effect and possibly to be modified or eventually enacted as is. The DOL's goal was to set the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, which is currently the South. If they do not meet this threshold, they must be paid overtime for any hours they work over 40 in a work week, even if they perform all the duties required for the exemption. Because as of publication, the status of the increase of the overtime threshold for white collar workers is fluctuating, this Monograph will still discuss what the new rule was set to change.

There are several other changes of which employers need to be aware. First, the total annual compensation of a "Highly Compensated Employee" (HCE) would increase to $134,004 (up from $100,000). The goal was to set the total annual compensation requirement for HCEs to the annual equivalent of the 90th percentile of full-time salaried workers nationally.

The new rule would amend the "salary basis test" to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. These payments would need to be made on a quarterly or more frequent basis. Discretionary bonuses, such as holiday bonuses, will not be allowed to satisfy any portion of

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the new standard salary level.

Further, the new rule, as written, would establish a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles. The first increase of the standard salary level was set to be on January 1, 2020 and then occur every three years thereafter. These dates could change should any increase ever finally go through due to the delay.

With the new rule previously set to go into effect on December 1, 2016, employers were working to assess their workforce to determine their next steps, and would have had to do the same before each of the automatic increases every three years. Companies with exempt employees who were only slightly below the new minimum weekly wage had to decide whether it made more sense to simply increase salaries to meet the new minimum rather than pay overtime. Employers were analyzing the number of hours over 40 their exempt employees had been working to make the determination. For situations in which the salary levels were much lower than the future minimum, or if it was going to be cost prohibitive for the company to raise salary levels, companies would need to begin treating those employees as non-exempt and pay them overtime (or take active steps to prevent overtime work if the company cannot afford to pay overtime). Companies can calculate an appropriate hourly rate that takes into consideration the expected number of overtime hours the employee will work. If these calculations are performed accurately, the overtime hours remain consistent, and limitations on performing overtime work are enforced, the new rules and subsequent triennial increases do not have to cost companies more in the long run.

With the new overtime rules being on hold, employers are scrambling to understand what they should do. Some had already set in motion the changes, including by notifying employees of their status change (and potential salary increase) and fear decreased morale if they do not go through with the change. For now, employers who do not wish to implement the changes do not have to do so. This will have to be an individual business decision for each employer.

In addition, companies would need to make sure that they are keeping track of their newly non-exempt employees' hours the same way they do for their previously non-exempt employees' hours (as is required under the FLSA). Moreover, companies would need to be aware of the laws of the states in which they have employees, as some states (including Illinois, Wisconsin, and California, to name a few) require tracking of all employees' hours, regardless of exemption status.

C. Salary Basis and Wage Deductions for Exempt Employees

The "salary basis test" (used in the executive, administrative, professional, and Computer exemptions) prohibits deductions from pay subject to few exceptions.[45] Consequently, an employer may unwittingly convert an otherwise exempt employee to non-exempt by improperly deducting wages.[46] An employee is not paid on a salary basis if "deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business."[47] So long as the employee is "ready, willing and able to work, deductions may not be made for time when work is not available."[48]

1. Permissible Deductions for Exempt Employees

The FLSA's implementing regulations set forth permissible deductions that include the following:

Personal Days: An employer may make wage deductions when an exempt employee is absent from work for personal reasons, other than sickness or disability.[49] The deduction only applies to full day absences.[50] Accordingly, if an employee takes off a full day and a half day the employer may only deduct for one full-day absence.[51]

Sickness/Disability Absences: Deductions for full day absences due to sickness, disability or work-related accidents are permitted if made "in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary" due to the sickness

An employee is not paid on a salary basis if "deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business."

or disability.[52] Wage deductions may also be taken for one or more full day absences where salary replacement benefits are provided by a State's disability insurance law or workers' compensation statute.[53]

Jury Fees and Military Duty Pay: An employer may not make wage deductions of an exempt employee for jury duty, attendance as a witness or temporary military leave.[54] However, the employer may offset any amounts received by an employee for jury fees, witness fees or military pay for a particular week against salary due for that week.[55]

Safety Violations: Employers may take deductions for penalties imposed in good faith for infractions of "safety rules of major significance."[56] Safety rules of major significance include rules designed to prevent danger in the workplace or to other employees.[57]

Disciplinary Suspensions: An exempt employee may be suspended without pay for one or more full days for violation of a workplace conduct rule if done in good faith and pursuant to a written policy applicable to all employees.[58]

First and Last Week of Employment: Employers are not required to pay full salary in the initial or terminal week of employment if the employee works less than the full week.[59]

FMLA: When unpaid leave is taken under the Family Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked.[60]

2. Effect of Improper Salary Reductions of Exempt Employees

The loss of exemption status is triggered when the facts demonstrate the employer did not intend to pay employees on a salary basis.[61] This intent is demonstrated where the employer has an "actual practice" of making improper deductions.[62] The FLSA's implementing regulations list several factors to consider in determining whether such an actual practice exists: 1) the number of deductions, particularly as compared to the number of employee infractions warranting discipline; 2) the time period during which the employer made improper deductions; 3) the number and geographic location of employees whose salary was improperly reduced; 4) the number and geographic location of managers responsible for taking the improper deductions; and 5) whether the employee has a clearly communicated policy permitting or prohibiting deductions.[63]

If an actual practice of making improper deductions is established, the exemption is lost during the time period in which the improper deductions were made.[64] The loss of exemption status applies to all employees in the same job classification working for the same managers responsible for the actual improper reductions.[65]

The FLSA's implementing regulations do provide employers with protection against loss of exemption status for "isolated or inadvertent" improper deductions if the employer reimburses its employees.[66] In addition, the regulations provide that employers with a "clearly communicated policy" which prohibit improper deductions and include a complaint mechanism can avoid losing exemption status.[67] Employers must still reimburse employees subjected to improper deductions and make a good faith effort to comply in the future.[68] The best evidence of a clearly communicated policy is a written policy distributed to employees.[69] Consequently, employers should incorporate a policy prohibiting improper salary deductions, with an established complaint mechanism, in employee handbooks or other written material readily available to employees.

D. Wage Deductions for Non-Exempt Employees

In order to determine how much compensation a non-exempt employee is entitled to receive, employers must know the number of compensable hours worked by that employee.[70] Employers can run afoul of the FLSA by failing to properly pay employees for certain work activities that are compensable even though performed outside of the employee's scheduled shift hours or away from workplace.[71]

The FLSA defines "employ" as to "suffer or permit to work."[72] The onus is on the employer to exercise control to ensure work it does not want performed is not performed.[73] An employer may not turn a blind eye and accept the benefits of work without compensating its employees.[74] An employee who voluntarily continues to work past the end of his scheduled shift is compensable where the employer knows or has reason to believe work is continuing.[75] Compensable hours may also include work performed away from the job site or even at home where the employer knows or has reason to know such work is being performed.[76]

1. On Duty and Off Duty Time

Employees are entitled to compensation when "on duty," which may include periods of inactivity.[77] The FLSA's regulations include several examples of compensable time for on duty periods of inactivity such as a factory worker chatting with his co-workers while waiting for machinery repairs.[78] These

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periods of compensable inactivity are unpredictable and typically of short duration.[79] Consequently, the employee is unable to use the time effectively for his or her own purposes; the time belongs to and is controlled by the employer.[80] An employee will be considered "off duty" when completely relieved from duty for such period of time sufficient to allow the worker to effectively use the time for his or her own purposes.[81]

2. Rest and Meal Periods

The FLSA does not mandate rest or meal breaks; however, employers must comply with certain rules if they do allow such breaks. Also, certain states, such as Illinois, do require meal breaks and/or rest breaks. Rest periods of short duration, generally 5 to 20 minutes, are considered to promote efficiency in the workplace and must be counted as hours worked.[82] In contrast, bona fide meal periods, which do not include coffee breaks or time for snacks, and are typically 30 minutes or longer, are not considered work time.[83] The employee must be completely relieved of duty for the purpose of eating regular meals.[84] It is not necessary that the employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.[85] Again, employers must check their state's laws as to whether meal breaks are mandatory.

3. Lectures, Meetings, and Training Programs

When an employer requires an employee to attend a lecture, meeting, training program, or similar activity, the time is considered compensable work time. Attendance at such activities need not be counted as compensable hours if four conditions are satisfied: 1) attendance is outside of the employee's regular working hours; 2) attendance is in fact voluntary; 3) the course, lecture, or meeting is not directly related to the employee's job; and 4) the employee does not perform any productive work during such attendance.[86]

4. Travel Time

The Portal-to-Portal Act provides employers with protection from liability under the FLSA for failing to compensate employees for travel "to and from the actual place of performance of the principal activity or activities which such employee is employed to perform."[87] As a result, normal commuting to and from work is not compensable work time.[88] However, there are several situations in which travel is deemed compensable work time. An employee who regularly works at a fixed location in one city and is given a special one-day assignment requiring travel to another city is not regarded as normal home-to-work commuting and is compensable.[89] The employer may offset the employee's normal commute time against the special assignment city-to-city travel time since the employee would have been required to report to the regular work location but for the special assignment.[90] Travel that is "all in a day's work" is compensable, such as travel from job site to job site.[91] Finally, overnight travel away from home is considered work time when it cuts across the employee's regular work hours because the employer is simply substituting travel for other duties.[92] However, time spent in travel away from home outside of regular work hours as a passenger on an airplane, train, boat, bus, or automobile is not considered work time.[93]

5. Preliminary and Postliminary Activities (Donning and Doffing)

The Portal-to-Portal Act also limits an employers' liability with respect to compensation for activities which are "preliminary to or postliminary to" the principal activity or activities that an employee is employed to perform during the workday.[94] Principal activities include all activities which are an integral and indispensable part of the principal activities.[95] Consequently, when donning and doffing of protective gear and clothing is required at the workplace before or after a regular work shift, it is generally compensable under the FLSA.[96] However, section 203(o) of the FLSA provides that time spent "changing clothes or washing" at the beginning or end of a shift may be excluded from compensable time through a collective bargaining agreement.[97]

In *Sandifer v. United States Steel Corp.,*[98] the Supreme Court addressed a claim by union employees that they were not properly compensated for donning and doffing items including: flame-retardant jackets, pants, and hood; hard hats; gloves; wristlets; leggings; steel-toe boots; safety glasses; earplugs; and a respirator.[99] The employer argued the time was non-compensable under its collective bargaining agreement because the donning and doffing was "time spent changing clothes" under section 203(o).[100] The Supreme Court provided a definition of "clothes" as "items that are both designed and used to cover the body and are commonly regarded as articles of dress."[101] Of the items at issue, only safety glasses, earplugs and the respirator were deemed to fall outside of section 203(o)'s definition of "changing clothes."[102] In affirming judgment for the employer, the Supreme Court articulated

In addition to employers potentially losing an exemption by making improper deductions from employees' salaries, employers also frequently make mistakes in the classification of employees in the first place.

the test for courts was whether the pre-shift or post-shift period "on the whole" is fairly characterized as time spent in changing clothes or washing.[103] If an employee spends the "vast majority" of time putting on and off equipment and other non-clothes items, the entire period would not qualify as "time spent changing clothes" under section 203(o), even if some clothes were donned and doffed as well.[104]

E. Misclassification: Exempt vs. Non-exempt

In addition to employers potentially losing an exemption by making improper deductions from employees' salaries, employers also frequently make mistakes in the classification of employees in the first place. Misclassification accounts for a significant number of lawsuits and DOL claims. Sometimes this is out of confusion over or misunderstanding of the law, or even simply ignorance of the law. Other times, the misclassification is an intentional attempt to take advantage of workers who may not know better. With proper education and training of employers, many of the most common mistakes in classifying employees can be avoided.

1. Common Mistakes and Misunderstandings

Method of Pay: A frequent mistake in classification of employees occurs simply due to a misunderstanding of the concept of the methods of paying employees. Many employers incorrectly hold the belief that if they pay their employees a salary instead of an hourly wage, the employees are exempt from overtime laws, without even considering their job duties. Salary versus hourly is not akin to exempt versus non-exempt. In other words, salary and hourly are merely methods of paying employees, but the method has nothing to do with determining whether their specific job duties make them exempt from overtime or minimum wage requirements.

For instance, an employer can tell a job applicant that he will be paid a salary of $40,000 per year to work as a receptionist. Calling the pay salary, however, does not exempt that employee from overtime laws. The $40,000 salary can be determined by roughly calculating an hourly rate of $19.25 and multiplying it by 40 hours a week and 52 weeks a year. If the receptionist (assuming he is only performing tasks such as greeting customers and answering phones) works more than 40 hours in a week, he must be paid overtime, regardless of the fact that the employer quoted him a salary of $40,000 per year.

Job Titles: Another common mistake is the belief that if the employer gives an employee an important-sounding title, he becomes exempt. Calling the above receptionist who is merely greeting customers and answering phones an "Executive Assistant," or even "CEO" or "Controller," will not exempt the employee from overtime laws. Likewise, an employee performing the duties of a CEO with the title of "receptionist" would still be exempt.

Better Benefits to Exempt Employees: Even if the classification as exempt technically results in a benefit to the employee, the FLSA is still being violated. Again, many common mistakes occur due to ignorance of the law with employers believing they are helping their employees by paying them as if they are exempt. For instance, some employers may offer more or better benefits for their exempt employees than their non-exempt employees. Believing they are helping their otherwise non-exempt employees, they may decide to treat those employees as exempt. Even if the employer set the exempt salary level at a rate that takes into consideration the amount of expected overtime the employees would work, which would not actually result in a loss for the employees, such a scheme would violate the FLSA and subject the employer to significant damages and attorneys' fees.

2. Penalties for Misclassification as Exempt

The penalties that can result from misclassified employees can be devastating to an employer, even where the mistake was unintentional or even when it did not result in a significant loss to the employee. If an employee was treated as exempt, but was actually

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non-exempt, he would be entitled to back pay of all overtime hours worked or minimum wages not paid.[105] Further, the back pay damages will be liquidated (doubled) unless the employer can prove "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."[106]

> In addition to employers misclassifying employees as exempt when they are actually non-exempt, employers also frequently run into trouble with misclassifying employees as "independent contractors."

As the Seventh Circuit has explained, however, "Doubling [the unpaid overtime] is not some disfavored 'penalty.'" Although doubling is discretionary rather than mandatory, there remains "a strong presumption in favor of doubling, a presumption overcome only by the employer's 'good faith . . . and reasonable grounds for believing that [the] act or omission was not a violation.' . . . Double damages are the norm, single damages the exception, the burden on the employer."[107]

If the violation is found to be "willful," which is defined as the employer knowing or having reckless disregard for whether its conduct was in violation of the FLSA, the statue of limitations is three years from the date of the underpayment. Otherwise, the statute of limitations is only two years.[108] "A two-year period is the norm, a three-year period the exception, and the burden is on the employee to show that the violation was 'willful.' So it must be easier to get double damages than to extend the statute of limitations."[109]

Employees who are improperly classified as exempt may also recover attorneys' fees and litigation costs if they are successful.[110] Front pay or reinstatement may be available if the employee can prove retaliatory discharge for raising a FLSA violation.[111]

It should also be noted that the Illinois Minimum Wage Law (IMWL) mirrors the FLSA in terms of requiring payment of minimum wage and overtime and what constitutes a violation for misclassification of employees as exempt. The IMWL, however, contains different damages provisions. Under the IMWL, damages for underpayments (either for overtime or minimum wage) are not liquidated, but are automatically subject to interest of 2% for each month following the date of the underpayment.[112] Actions under the IMWL must be brought within three years from the date of the underpayment.[113] (There is no two year statute of limitations like there is under the FLSA.)

Further, it is the employer's duty to keep accurate records of the time worked, (three years under the FLSA[114] and IMWL[115]) and in the case of litigation it will be the employer's burden to prove that the employee did not work overtime or worked less overtime than the employee is claiming, or was at all times paid minimum wage. Because many employers also mistakenly do not require their "salaried" employees whom they are treating as exempt to keep accurate time records of their hours, they face an uphill battle in trying to meet their burden. This is just one reason why it is important for employers to require all employees, regardless of their FLSA status and regardless of their method of payment, to keep exact records of their time worked. Illinois, and a few other states, mandate keeping time records for all employees, not just exempt employees.[116]

Reclassifying employees to their proper status can be difficult and painful to a company's bottom line, but done with proper guidance, it can frequently be performed with minimal damage. Failing to reclassify employees to their proper status when the error is realized will most often result in a much more costly situation, especially when more than one employee is involved, which is frequently the case. In addition to the potential for FLSA violations putting companies out of business, individual employees and officers can face personal liability for the violations, including monetary penalties and even imprisonment. Therefore, employers of any size can greatly benefit from having an attorney or human resources professional perform regular audits of their job classifications to make sure all employees are properly classified.

F. Misclassification: Independent Contractor v. Employee

In addition to employers misclassifying employees as exempt when they are actually non-exempt, employers also frequently run into trouble with misclassifying employees as "independent contractors." The DOL has described the misclassification of employees as independent contractors as "one of the most serious problems facing affected workers, employers and the entire economy."[117] In recent years the DOL has increased its enforcement activities through the "Misclassification Initiative," by collaborating with the Internal Revenue Service and partnering with 30 states to share information and coordinate enforcement activities.[118] For fiscal year 2015, the DOL reports collecting $74 million in back wages for more than 102,000 employees.[119] Beyond increased enforcement by the DOL, well-publicized lawsuits against ride-hailing companies Uber and Lyft are likely to spur even more employee misclassification litigation.

The FLSA defines "employee" as "any individual employed by an employer."[120] The term "employ" is defined as "to suffer or permit to work."[121] These statutory definitions are broad and comprehensive in order to accomplish the remedial purposes of the statute.[122] As a result, some individuals who might not qualify as an employee under traditional agency law principles will meet the statutory definition of an employee under the FLSA.[123] Moreover, employee status is not controlled by the "label" used by the parties to describe the employment relationship or even a contract describing an individual as an independent contractor.[124]

When deciding whether individuals are employees under the FLSA, courts apply the "economic reality" test and consider all the circumstances of the work activity.[125] The test seeks to determine whether, as a matter of economic reality, individuals are dependent upon the business to which they render service or are in business for himself or herself.[126] Application of the economic reality test generally involves the analysis of six non-exclusive factors, often referred to as the *Silk*[127] factors, although no single factor is dispositive or controlling.[128]

1. Work Integral to the Business

The extent to which the service rendered is an integral part of the alleged employer's business is a factor to be considered.[129] Workers are more likely to be deemed employees under the FLSA where the service performed was a primary function of the alleged employer's business.[130] For example, migrant workers who harvested pickles for a business that sold pickles performed work integral to the business.[131] Workers hired as maids to clean homes for a housekeeping business performed the primary function of the business.[132]

2. Managerial Skill for Profit/Loss

Whether an individual's managerial skill affects the worker's opportunity for profit or loss is taken into account. A worker's ability to work more hours or earn more by performing work more efficiently has little to do with the exercise of managerial skill and does not necessarily suggest an independent contractor relationship.[133] Individuals who make capital investments, advertise, determine location and set pricing exhibit managerial skill which impacts profit and loss.[134] When these types of decisions are controlled by the employer, an independent contractor relationship is not indicated.[135] Hiring other employees may support independent contractor status as long as the ability to hire is not controlled by the employer.[136]

3. Relative Investment

An individual's investment in work tools or equipment needed to perform his or her job does not preclude a finding of employee status.[137] Significant personal investments are more representative of an independent contractor than an employee.[138] When analyzing this factor it is appropriate to compare the workers' individual investment to the employer's overall investment in the business.[139]

4. Skill and Initiative

The Court of Appeals for the Seventh Circuit has admonished that skills "are not the monopoly of independent contractors."[140] The fact a worker has a specialized skill is not alone indicative of independent contractor status.[141] To support an independent contractor relationship, the individual's specialized skill should be used in an independent way demonstrating business initiative.[142] For example, workers with specialized skills such as nurses[143] and pipe welders[144] have been found to be employees under the economic reality test.

5. Permanency of the Relationship

The more permanent the working relationship is the more likely this factor will weigh in favor of employee status.[145] Independent contractors generally have a fixed employment period and offer their services to different employers.[146] A lack of permanency or long duration of employment is not necessarily dispositive. Courts will make allowances for workers in industries with unique operational characteristics such as seasonal workers.[147]

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6. Control

The most recent Gallup poll on work and education estimates that 37% of United States workers telecommute at least two days per month, that is, they work from home using a computer or other technology. This means that there is a good chance that some of the 194,000 workers in Illinois who would have been reclassified may occasionally work from home.

The control factor looks both at the alleged employer's exercise of control over the manner in which the work is done and whether the worker exerts control over a meaningful part of the business to stand as a separate economic entity.[148] Workers who lack control over hiring and firing, amount of pay, hours of work, and how the work is performed are less likely to be considered independent contractors.[149] Direct supervision of an individual's work is not required. Homeworkers of many varieties who are generally subject to little direct supervision have consistently been found to be employees under the FLSA.[150] Business needs of an employer will not excuse compliance with the FLSA.[151] Where the nature of the business requires the exercise of control over workers, the employer must hire employees, not independent contractors.[152]

Similar to misclassification of a non-exempt employee as exempt, employers who improperly classify employees as independent contractors face significant exposure. A misclassified employee is entitled to recover the amount of any unpaid minimum wages, unpaid overtime and an additional equal amount as liquidated damages together with costs and reasonable attorney's fees.[153] Absent a showing of good faith and reasonable belief by the employer that it was in compliance with the FLSA, there exists a presumption that double damages be awarded.[154] In addition to actual damages, federal courts have authority to restrain violations of the FLSA through an injunction.[155] Injunctive relief is appropriate after FLSA violations are established if there are insufficient assurances that defendants will comply with the FLSA in the future.[156] Liability under the FLSA for misclassification of employees as independent contractors is not an employer's only concern. Employee misclassification also has significant implications for employers under the Illinois Unemployment Insurance Act[157] and the Internal Revenue Code.[158]

IV. FLSA Issues in Telecommuting

The DOL estimates that of the 4.2 million workers newly eligible for overtime under the FLSA (as of December 1, 2016), 194,000 of those workers reside in Illinois.[159] The most recent Gallup poll on work and education estimates that 37% of United States workers telecommute at least two days per month, that is, they work from home using a computer or other technology.[160] This means that there is a good chance that some of the 194,000 workers in Illinois who would have been reclassified may occasionally work from home. Should employers continue to allow employees to telecommute? What if an employee's status changes from exempt to non-exempt (i.e. eligible for overtime) either under new DOL regulations or through job duties? What if the employee works from home as a reasonable accommodation under the ADA?

Best practices suggest that employers should avoid making any hasty decisions regarding telecommuting arrangements currently in place whether or not new overtime rules are enacted. Employees who have been telecommuting may have been hired pursuant to a work-from-home arrangement or may have become accustomed to the telecommuting arrangement and now rely on it. Exempt employees do not have to worry about punching in or out or tracking their hours. They work at their convenience to complete the job satisfactorily without regard to the time it takes to get the job done. Reclassifying such employees to non-exempt status would require a change in mindset for both the employee and the employer. Some may have telecommuted to accommodate child care needs or other family obligations while others may simply live too far from the office to drive in each day. Employees may also have been approved for telecommuting as a reasonable accommodation under the ADA.

Should any new regulations come to fruition, no matter the form, employers should take the time before that to review their employment policies, modify job descriptions and meet with employees to discuss new job expectations and compliance with any new rules.[161] Employees would have to document their time in accordance with the FLSA and forego some of their flexibility, while employers would have to implement new timekeeping measures and ensure that employees comply.

The FLSA does not require any specific method of tracking time, but it does mandate that an employee's time be recorded accurately. Employers must maintain payroll records regarding the hours worked each workday and total hours worked each workweek for each employee subject to the minimum wage and overtime provisions.[162] The Illinois Wage Payment and Collection Act requires Illinois employers to keep track of all employees' hours, regardless of their exempt status.[163] While this task may seem daunting with respect to employees working offsite, it is more feasible now thanks to the advent of electronic time-tracking solutions. Employers can (and should) purchase software that tracks the actual start and end time of each work day and the start and end time of unpaid breaks. These programs take random screen shots when an employee is logged in and allow employers to view the employee's screen to be sure the employee is performing work and not simply surfing the internet. There are also mobile phone applications that not only track time, but also provide clock in/out reminders, employee breaks and overtime alerts. Employees can also enter time manually and allocate time to certain projects or tasks. For employees who travel during the work day, GPS location points can be added to time tracking applications. These locations are attached to the individual employee's time sheet when he or she clocks in or out. Pricing for these applications vary and employers may be able to take advantage of free trial periods.

For those employers who are unwilling or unable to purchase time-tracking software or mobile phone applications, the DOL suggests low-tech alternatives.[164] For employees who work a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and indicate the number of hours the worker actually worked only when the worker varies from the schedule. This is the "payroll by exception" approach. For an employee with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. An employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each weekly pay period. This is the "weekly time sheet" approach.

These lower-tech approaches, however, may pose extra difficulty for Illinois employers, who, under the Illinois One Day Rest in Seven Act, must also provide meal breaks to all employees (regardless of exemption status). It follows that best practices would have employers accurately keeping track of meal breaks to make sure that employees who are scheduled to work seven and a half or more hours in a day take a minimum of 20 minutes for a meal break within the first five hours of the day.[165] The only way to absolutely ensure compliance with the Act (and the ability to prove compliance) is to require employees to clock in and out for their meal breaks. Moreover, even though meal breaks are not required under the FLSA like they are under Illinois law, the FLSA regulations provide that if meal breaks are granted, employers can generally only deduct for meal breaks of 30 or more minutes.[166] Therefore, Illinois employers must pay for breaks if they are between 20 and 30 minutes, so they may want to require breaks to be at least 30 minutes if they do not want to pay for meal breaks.

Inherent in both of these low-tech approaches is the lack of safeguards for employers to reduce inaccuracies in employees' time entries. An employee can easily claim that he or she worked additional hours before or after a shift or during a meal break and that the supervisor forgot, or refused, to record it. To alleviate these potential problems, employers who opt for the payroll by exception or weekly time sheet approaches should require their employees to record their time each day, rather than at the end of the week or pay period. Employers should also require employees to sign off on their hours at the end of each pay period. While this will not eliminate claims for unpaid overtime, it can be used to defend such claims. Employers should strongly consider setting out in writing a specific telecommuting agreement, which addresses the requirements for tracking hours, the expected hours during which the employee is expected to work, expectations regarding availability during those hours, frequency the employee is expected to check voicemail and email messages, and rules regarding preapproval for working overtime, among other things. Finally, employers must train their supervisors to communicate with their employees about the new timekeeping requirements and to review employee time records regularly to ensure strict compliance with the new overtime rule.

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Employers managing disabled employees have additional factors to consider when determining if employees can telecommute because working from home can be a reasonable accommodation under the Americans with Disabilities Act.[167] The ADA does not require an employer to allow telecommuting, but according to Global Workplace Analytics, a consulting and research firm that focuses on the business case for emerging workplace strategies, 463,000 disabled employees regularly work from home as a reasonable accommodation under the ADA.[168]

The ADA requires an employer to provide a reasonable accommodation to a qualified employee with a disability as long as the accommodation does not cause an undue hardship for the employer.[169] A reasonable accommodation is any change in the work environment or in the way things are customarily done that would enable the employee with a disability to enjoy equal employment opportunities.[170] Examples of reasonable accommodations are making facilities more accessible, job restructuring, modifying workplace policies and schedules, acquiring equipment and providing leave.[171] An employer must provide a reasonable accommodation unless it imposes an undue hardship on the employer, *i.e.*, a significant expense or a substantial burden, change or disruption of the employer's operations.[172]

An employee may work from home as a reasonable accommodation under the ADA even if the employer does not otherwise allow telecommuting because changing the location of where work is performed is a modification of workplace policies.[173] The employer might also provide the telecommuting employee with a software time-tracking application to help alleviate the employer's burden of keeping accurate time records. As long as the employee can perform the essential functions of the job and not impose an undue burden on the employer, telecommuting should remain a viable option for qualified employees with a disability. Employers should not eliminate working from home as a reasonable accommodation simply because of the new overtime rule. Such a knee-jerk reaction could result in unnecessary claims of disability discrimination.

V. Litigating FLSA Claims

When defending FLSA claims, many issues arise that are particular to that cause of action. In addition to the obvious dangers presented by the FLSA's fee-shifting provisions,[174] specific features of FLSA claims require intensive analysis and strategic decision-making. This is particularly so with respect to FLSA claims brought as class-actions, and when faced with the settlement of FLSA claims. Moreover, FLSA litigation involves particularized issues relating to damages and affirmative defenses.

When defending FLSA claims, many issues arise that are particular to that cause of action. In addition to the obvious dangers presented by the FLSA's fee-shifting provisions, specific features of FLSA claims require intensive analysis and strategic decision-making.

A. Collective Actions and Class Actions

The FLSA authorizes so-called "collective actions," which are typically treated by courts in the same fashion as class-action cases, despite the fact that they fundamentally differ from class-actions.[175] For example, the FLSA requires potential plaintiffs to *opt in* to a collective action. In contrast, plaintiffs in a class action filed under Federal Rule of Civil Procedure 23(b)(3) are included in the class definition until they *opt out.*[176]

The number of collective actions filed under the FLSA has risen dramatically in recent years.[177] With the increase in such litigation, plaintiffs' attorneys are experimenting with different strategies to maximize their odds of recovery. Often, plaintiffs will attempt to bring both a class action *and* a FLSA collective action. This allows the plaintiffs to pursue the FLSA statutory claims, and to simultaneously litigate supplemental state-law claims as a Rule 23(b)(3) class-action.

As an example of this, in *Ervin v. OS Restaurant Services,* the plaintiffs alleged that an Outback Steakhouse violated the FLSA, the Illinois Minimum Wage Law,[178] and the Illinois Wage Payment and Collection Act.[179] The plaintiffs moved for a conditional approval of a federal collective action under section 16(b) of the FLSA.[180] Plaintiffs also sought certification of the class under Rule 23(b)(3), relating to the alleged violations of the class-action claims.[181] The district court denied class certification of the state-law claims, on the basis that there was a "clear incompatibility between the 'opt out' nature of a Rule 23 action and the 'opt in' nature of a section 216 [FLSA] action."[182] The Seventh Circuit Court of Appeals disagreed and reversed the district court, noting:

> Outback complains that permitting a plaintiff who ends up in only the Rule 23(b)(3) class (because she neither opted out of that class nor opted in to the FLSA collective action) to proceed as part of the state-law class is in tension with the idea that disinterested parties were not supposed to take advantage of the FLSA. But such a plaintiff is doing no such thing. She will not be entitled to a single FLSA remedy, because she is not part of the FLSA litigating group. The most that one can say is that her state claim has found its way into federal court under the court's supplemental jurisdiction.
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> * * *
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> It does not seem like too much to require potential participants to make two binary choices: (1) decide whether to opt in and participate in the federal action; (2) decide whether to opt out and *not* participate in the state-law claims.[183]

To the defense attorney not experienced with FLSA claims, settlement of employees' grievances could prove fraught with danger. The FLSA, including case law interpreting that statute, requires that any settlement of a claim under the FLSA must be supervised and approved by the Department of Labor, or a trial court.

Thus, employees may pursue FLSA collective actions in addition to class actions premised upon other statutes or doctrines. As a result, the complexity of such actions—particularly in states such as Illinois, with a robust wage and hour statutory framework—can be expected to increase. In addition, the ready availability of a collective and class action creates a target-rich environment for specialized plaintiffs' attorneys who can more easily devote resources to one cause of action or focus upon one employer.

B. Court Approval of Settlements

To the defense attorney not experienced with FLSA claims, settlement of employees' grievances could prove fraught with danger. The FLSA, including case law interpreting that statute, requires that any settlement of a claim under the FLSA must be supervised and approved by the Department of Labor, or a trial court. In many areas of civil litigation, once a settlement is reached, drafting the settlement agreement and obtaining a dismissal of the lawsuit are considered nearly a ministerial formality. However, in the context of the FLSA, a great deal of attention and thought should be put into settlement of an employee's claim.

One issue that arises is in FLSA litigation is whether a so-called "private settlement" is enforceable. A private settlement is a settlement between an employer and an employee to settle a FLSA claim that is not approved by the court or the DOL. The U.S. Supreme Court, in two seminal cases, held that private settlements are not permitted under the FLSA.[184]

Federal courts have generally held that settlements of FLSA claims will be upheld under two circumstances: through a settlement supervised and approved by the Department of Labor, or when the settlement is approved by a court.[185] The DOL is given authority to supervise a settlement of a FLSA claim through 29 U.S.C. § 216(c). Federal courts have found that a private action initiated under 29 U.S.C. § 216(b) may be settled when approved by the court.

From the point of view of an employer, one serious issue is the confidentiality of settlements. Where FLSA litigation has been commenced, this creates a problem for settlement. If a claim brought under the FLSA is being litigated, submitting

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Typically, the defendant employers in an employment action take the form of a corporation, limited liability company, or some other business form that shields individual owners and managers from liability. However, in the context of FLSA claims, owners, shareholders, managers and other personnel may find themselves subject to individual liability.

that claim to the DOL for a supervised settlement will mean that the terms of the settlement arrangement will not be confidential. The employer may be justified in worrying that the details of a settlement, if they become public, could encourage further FLSA claims.

A similar problem emerges if the parties submit a settlement for court approval. A private FLSA claim initiated under 29 U.S.C. § 216(b) may be resolved through a stipulated judgment entered by the court, which has determined that the proposed settlement is a fair and reasonable resolution of a *bona fide* dispute over the FLSA's application.[186] Depending upon the position of the litigants, and the view of the particular trial court, it may be difficult or impossible to keep the terms of the settlement confidential. Some district court judges may allow the settlement agreement, itself, to be presented to the court for an *in camera* inspection and then enter a dismissal order specifically stating that the court has reviewed the agreement and finds it to be a fair and reasonable resolution of a *bona fide* dispute.

The difficulties are also vexing when litigation has not yet been commenced. Employers often seek to settle "pre-suit" demands quickly and quietly, in order to avoid additional suits from similarly-situated employees. However, in light of the law as discussed above, such a settlement will very likely be held invalid if challenged.

Some employers may consider creative options for avoiding the difficulties associated with settling a FLSA claim. Where the matter is in litigation, the employer could forego a release, and simply contract for a dismissal with prejudice, hoping that a subsequent action initiated by the plaintiff employee is barred. In the "pre-suit" context, an employer may attempt to insulate itself from a subsequent FLSA claim by having the employee confirm in writing that they have been made whole through the complete payment of wages, and penalties under the FLSA. Employers should know that any such maneuver is extremely risky in light of prevailing trends in FLSA case law. However, in the right situation, it may well be worth the risk, particularly when the employee is represented by counsel.

C. Individual Liability under FLSA

Typically, the defendant employers in an employment action take the form of a corporation, limited liability company, or some other business form that shields individual owners and managers from liability. However, in the context of FLSA claims, owners, shareholders, managers and other personnel may find themselves subject to individual liability.

The FLSA defines an "employer" as "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." In this vein, recent courts have noted that individuals may be subject to liability under the FLSA. For example, in *Lamonica v. Safe Hurricane Shutters*, the Court of Appeals for the Eleventh Circuit held that any individual with control over an employer's financial affairs who could potentially cause an employer to violate FLSA regulations could be subject to liability under the Act.[187] This is so, even if he or she spends as little as one week per month at work.

In *Schneider v. Cornerstone Pints*, the District Court for the Northern District of Illinois considered this issue, and analyzed the potential limits of this doctrine.[188] In that case, wage violations were alleged at a restaurant operated by a corporate defendant and one individual defendant. Those two defendants conceded liability, and the court held a bench trial to determine whether two additional individual defendants—the owners' brothers-in-law and investors in the business—were jointly liable as "employers" under the FLSA.

In reaching the conclusion that the individual investor defendants were not joint-owners, the *Schneider* court noted that in order to be an "employer" under the FLSA, the following factors must be considered: (a) a person must act in the interests of an employer in relation to an employee, although more than supervision of an employee is required; (b) all relevant facts should be considered, including the four commonly-bundled "economic realities factors;" (c) to be an employer, the defendant's conduct must have caused, in whole or in part, the alleged violation; and (d) the defendant must have actually exercised his authority, at least enough to have caused the violation in whole or in part.[189] Because the investors in *Schneider* "did not control the company's operations, whether considered day-to-day or big picture, and in particular . . . the work issues for the employees," and because they were not aware of the unlawful wage practices, the investors were not "employers" for purposes of FLSA liability. The court concluded that the investors "at most acted as sounding boards for Lewis and his ideas, and occasionally injected more money into the project."[190]

The practical reality of *Lamonica*, *Schneider* and cases like them, are that individual owners, supervisors and investors should be aware of the potential for individual liability under the FLSA. Employers should consult with lawyers who are knowledgeable about this area of law, and conduct an assessment of policies and procedures, to determine whether personnel within the company may be subject to individual liability.

D. Emotional Distress for Claims of FLSA Retaliation

The FLSA provides that it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."[191] In order to assert a *prima facie* claim of retaliation under this provision of the FLSA, a plaintiff must prove: (1) that he or she engaged in an activity protected by the FLSA; (2) that he or she suffered adverse action by the employer subsequent to or contemporaneous with such protected activity; and (3) that a causal connection existed between the employee's activity and the employer's adverse action.[192] Once an employee establishes a *prima facie* claim of retaliation, the burden shifts to the employer to provide a legitimate reason for the adverse action.[193] If the employer successfully sets out a non-discriminatory basis for its adverse reaction, the plaintiff may put forth evidence to demonstrate the pretextual nature of the explanation proffered.[194]

The anti-retaliation provisions of the FLSA also describe the damages available under such an action. "Any employer who violates the provisions of section 215(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."[195]

Various federal circuit courts have held that "legal or equitable relief" includes emotional distress damages.[196] Notably, the Court of Appeals for the Seventh Circuit has held that emotional distress damages are available under the FLSA.[197] In light of these holdings, employers should be aware that verdicts resulting from FLSA claims may include more than wages awards, penalties and attorney's fees. They may also include emotional distress damages, which under certain circumstances could be quite high.

E. Affirmative Defenses to FLSA Claims

Defense counsel should be aware of the affirmative defenses available to a FLSA claim. Traditionally, employers have raised two "good faith" affirmative defenses that are available under sections 10 and 11 of the Portal to Portal Act.[198] However, other affirmative defenses are provided by the courts. Because this is an ever-developing area of the law, an attorney practicing in the area of FLSA claims should stay closely apprised of the case law analyzing FLSA defenses.

1. "Section 10" Defense

Section 10 of Portal-to-Portal Act excuses an employer's violation of the FLSA's minimum wage and overtime requirements if the employer can prove that it acted in conformity with—and in reliance upon any written administrative regulation, order, ruling, approval, or interpretation of the Wage and Hour Division of the United States Department of Labor.[199] This defense applies only in relation to a written ruling, policy, regulation or order of the Wage and Hour Administrator.[200] Even where the Department of Labor may later rescind the ruling on which the employer relied, the employer may avoid liability as long as its actions were allowed when taken.

To escape liability, an employer's actions must conform to the opinion, regulation, or other ruling relied upon. Where there are material differences between the facts considered in the ruling and those in your case, the defense is

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not available. Reliance will be deemed "in good faith" if the employer acted as a reasonably careful person would have acted under the same or similar circumstances.[201]

2. "Section 11" Defense

Under section 11 of the Portal-to-Portal Act, an employer may avoid or reduce a liquidated damages award upon proof that the employer acted in good faith, with reasonable grounds to believe the employer was not violating the FLSA.[202] A defense under section 11 does not prevent a back-pay award. However, a successful section 11 defense will reduce or prevent an additional liquidated damages award.

A successful section 11 defense is supported by evidence that the employer acted with actual good faith, meaning an intention to follow the law, with no reason to believe FLSA violations were occurring. In some cases, employers have supported this defense with evidence that they relied upon their lawyer's legal advice that their conduct was consistent with the FLSA.

3. Other Defenses

Other affirmative defenses may be available to a FLSA claim, depending upon the circumstances of the case. Of course, affirmative defenses can be raised based on the plaintiff falling into one (or more) of the recognized exemptions. Even if this affirmative defense is ultimately unsuccessful, the facts can often help with the section 11 affirmative defense of acting in good faith, as some exemptions leave a lot of room for interpretation and contain quite a number of terms that require advanced defining. Likewise, employers can raise as an affirmative defense, if the plaintiff prevails on the underlying claim, that their conduct was not willful, and therefore, the statute of limitations should be limited to two instead of three years under 29 U.S.C. § 255(a).

At least one court has held that where the employee fails to notify the employer of the time worked through the established overtime record-keeping system, the failure to pay overtime is not an FLSA violation.[203]

An employer may also claim that the employee is estopped from collecting back pay or liquidated damages because the employee has deceived or misled the employer to the employer's detriment. This defense may apply where, for example, the employee has falsified his time record without his employer's knowledge.[204] The defense of estoppel is not available where the employer had knowledge of the deceit.[205]

Another defense available to employers is that the compensable time alleged is *de minimis*. Under the *de minimis* rule, employees generally cannot recover for otherwise compensable time if it amounts only to a few seconds or minutes of work beyond scheduled working hours.[206] When determining whether a claim is for *de minimis* time, courts will consider: (a) the practical administrative difficulty of recording the additional time; (b) the aggregate amount of compensable time; and (c) the regularity of the additional work.[207] Some courts have found that periods of approximately 10 minutes or less are *de minimis*.[208] However, other courts have found that small but regular daily amounts of time aggregated over a period of years are not *de minimis*.[209]

VI. Conclusion

With the ever-changing economic, political and technological environments, it is not difficult to predict that the FLSA and its interpreting regulations will continue to evolve. After nearly 80 years since its enactment, it must change in order to keep up with the times. Will the next major issue tackled include paid sick leave? Or a higher minimum wage? Or mandatory meal breaks? Only time will tell. Some changes may be announced (and discussed) with much fanfare, while other more minor changes may sneak past uneducated employers. It is the role of the employment attorney to make sure that each employer remain educated as to all changes, major and minor. Recommendations should be made for employers to conduct internal audits to make sure their employees are all properly classified and are keeping accurate records of their time worked, and to ensure employers are paying their employees properly and are not making illegal deductions.

(Endnotes)

[1] 29 U.S.C. §§ 201-219.

[2] *WHD Enforcement Statistics: All Acts*, U.S. Dep't of Labor (2015), *available at* https://www.dol.gov/whd/statistics/statstables.htm.

[3] *The IDC Monograph*, IDC Quarterly, Vol. 13, No. 2 (2d Quarter 2003).

[4] Victoria Roberts, *Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits*, Daily Lab. Rep. (BNA) C-1 (Dec. 12, 2002); *see also* Michael Orey, *Lawsuits From Workers Looking to Get Overtime Pay*, Wall St. J. (May 30, 2002) (in 2001, SBC Pacific Bell, Coca-Cola Bottling Co., and Bank of America Corp. settled FLSA suits for $35 million, $20.2 million, and $22 million, respectively).

[5] In Illinois, titled the Minimum Wage Law, 820 ILCS 105/1-105/15.

[6] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

[7] 29 U.S.C. § 203(d).

[8] 29 C.F.R. § 791.2(a) ("A single individual may stand in the relation of an employee to two or more employers at the same time" under the FLSA).

[9] 29 C.F.R. §§ 791.2(b), 791.2(b)(2).

[10] *Administrator's Interpretation No. 2016-1*, U.S. Dep't of Labor (Jan. 20, 2016), https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.

[11] 29 U.S.C. §§ 206(a), 207(a).

[12] *See Boekemeier v. Fourth Universalist Soc'y*, 86 F. Supp. 2d 280 (S.D.N.Y. 2000).

[13] *Boekemeier*, 86 F. Supp. 2d at 285; 29 U.S.C. § 203(s).

[14] 29 U.S.C. §§ 203(s)(1)(B) and (C).

[15] 29 U.S.C. § 207(a)(1).

[16] *McLeod v. Threlkeld*, 319 U.S. 491, 497 (1943).

[17] 29 U.S.C. § 213(a)(1).

[18] 29 U.S.C. § 207(i).

[19] 29 U.S.C. § 213(a)(17).

[20] 29 U.S.C. § 213(a)(1).

[21] 29 U.S.C. § 213(b)(10)(A).

[22] 29 C.F.R. § 541.302.

[23] 29 U.S.C. § 213(a)(6).

[24] Under Section III.B., below, this amount will be increasing on December 1, 2016 to $913 week or $47,476 per year. The "salary basis test," including deductions, will also be discussed separately below in Section III.C); 29 C.F.R. § 541.100.

[25] *Id*.

[26] 29 C.F.R. § 541.102.

[27] 29 C.F.R. § 541.200.

[28] 29 C.F.R. § 541.202.

[29] *Id*.

[30] 29 C.F.R. § 541.203.

[31] 29 C.F.R. § 541.300.

[32] 29 C.F.R. § 541.301(c).

[33] 29 C.F.R. § 541.304.

[34] 29 C.F.R. § 541.303(a).

[35] 29 C.F.R. § 541.303(b).

[36] 29 C.F.R. § 541.303(c).

[37] 29 C.F.R. § 541.302(b).

[38] 29 C.F.R. § 541.302(c).

[39] 29 U.S.C. § 213(a)(17); 29 C.F.R. 541.400.

[40] 29 C.F.R. 541.400(b).

[41] 29 C.F.R. § 541.500.

[42] 29 U.S.C. § 207(i).

[43] 29 U.S.C. § 213(b)(10)(A).

[44] *See Final Rule: Overtime*, U.S. Dep't of Labor (eff. Dec. 1, 2016), *available at* https://www.dol.gov/whd/overtime/final2016/.

[45] 29 C.F.R. § 541.602.

[46] *Ellis v. J.R.'s Country Stores, Inc.,* 779 F.3d 1184 (10th Cir. 2015).

[47] 29 C.F.R. § 541.602(a).

[48] *Id.*

[49] 29 C.F.R. § 541.602(b)(1).

[50] *Id.*

[51] *Id.*

[52] 29 C.F.R. § 541.602(b)(2).

[53] *Id.*

[54] 29 C.F.R. § 541.602(b)(3).

[55] *Id.*

[56] 29 C.F.R. § 541.602(b)(4).

[57] *Id.*

[58] 29 C.F.R. § 541.602(b)(5).

[59] 29 C.F.R. § 541.602(b)(6).

[60] 29 C.F.R. § 541.602(b)(7).

[61] 29 C.F.R. § 541.603.

[62] *Id.*

[63] 29 C.F.R. § 541.603(a).

[64] 29 C.F.R. § 541.603(b).

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[65] *Id.*

[66] 29 C.F.R. § 541.603(c).

[67] 29 C.F.R. § 541.603(d).

[68] *Id.*

[69] *Id.*

[70] 29 C.F.R. § 785.1.

[71] 29 C.F.R. § 785.9.

[72] 29 U.S.C. § 203(g).

[73] 29 C.F.R. § 785.13.

[74] *Id.*

[75] 29 C.F.R. § 785.11.

[76] 29 C.F.R. § 785.12.

[77] 29 C.F.R. § 785.15.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] 29 C.F.R. § 785.16.

[82] 29 C.F.R. § 785.18.

[83] 29 C.F.R. § 785.19.

[84] *Id.*

[85] 29 C.F.R. § 785.19(b).

[86] 29 C.F.R. § 785.27.

[87] 29 U.S.C. § 254(a)(1).

[88] 29 C.F.R. § 785.35.

[89] 29 C.F.R. § 785.37.

[90] *Id.*

[91] 29 C.F.R. § 785.38.

[92] 29 C.F.R. § 785.39.

[93] *Id.*

[94] 29 U.S.C. § 254(a)(2).

[95] *IBP, Inc. v. Alvarez,* 546 U.S. 21, 37 (2005).

[96] *IBP, Inc.,* 546 U.S. at 37

[97] 29 U.S.C. § 203(o).

[98] *Sandifer v. U.S. Steel Corp.,* 134 S. Ct. 870, 874 (2014).

[99] *Sandifer,* 134 S. Ct. at 874.

[100] *Id.*

[101] *Id.* at 876.

[102] *Id.* at 880.

[103] *Id.* at 881.

[104] *Id.*

[105] 29 U.S.C. § 216(b).

[106] 29 U.S.C. § 260.

[107] *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

[108] 29 U.S.C. § 255(a); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

[109] *Walton*, 786 F.2d at 310.

[110] 29 U.S.C. § 216(b).

[111] *Id.*

[112] 820 ILCS 105/12(a).

[113] *Id.*

[114] 29 C.F.R. § 516.5(a).

[115] 820 ILCS 105/8.

[116] 56 Ill. Adm. Code 300.630.

[117] *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LABOR, *available at* www.dol.gov/whd/workers/Misclassification/index.htm.

[118] *Id.*

[119] *Id.*

[120] 29 U.S.C. § 203(e)(1).

[121] 29 U.S.C. § 203(g).

[122] *Sec'y of Labor v. Lauritzen,* 835 F.2d 1529, 1534 (7th Cir. 1987).

[123] *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

[124] *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013).

[125] *Lauritzen,* 835 F.2d at 1534 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

[126] *Lauritzen*, 835 F.2d at 1534.

[127] *United States v. Silk,* 331 U.S. 704, 713-14 (1947) (partial abrogation by statute noted in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (stating that "[t]o be sure, Congress did not, strictly speaking, 'overrule' our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisitations, and Reid's presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise signaled our abandonment of Silk's emphasis on construing that term 'in the light of the mischief to be corrected and the end to be attained.'").

[128] *See Silk,* 331 U.S. 704 at 714.

[129] *Lauritzen*, 835 F.2d at 1535.

[130] *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985).

[131] *Lauritzen,* 835 F.2d at 1537.

[132] *Perez v. Super Maid, LLC*, 55 F. Supp. 3d 1065 (N.D. Ill. 2014).

[133] *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1316 (11th Cir. 2013).

[134] *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1372 (9th Cir. 1981).

[135] *Sureway Cleaners*, 656 F.2d at 1372.

[136] *Keller v. Miri Microsystems LLC*, 781 F.3d 799 (6th Cir. 2015).

[137] *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).

[138] *Perez,* 55 F. Supp. 3d at 1077.

[139] *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436 (10th Cir. 1998).

[140] *Lauritzen,* 835 F.2d at 1537.

[141] *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988).

[142] *Brock v. Mr. W. Fireworks, Inc.,* 814 F.2d 1042 (5th Cir. 1987).

[143] *Superior Care, Inc.,* 840 F.2d at 1054.

[144] *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662 (5th Cir. 1983).

[145] *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 309 (4th Cir. 2006).

[146] *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1372 (9th Cir. 1981).

[147] *Mr. W Fireworks, Inc.*, 814 F.2d at 1054.

[148] *Scantla Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1313 (11th Cir. 2013).

[149] *Superior Care, Inc.*, 840 F.2d at 1060.

[150] *DialAmerica Marketing, Inc.*, 757 F.2d at 1386.

[151] *Scantland*, 721 F.3d at 1316.

[152] *Id.*

[153] 29 U.S.C. § 216(b).

154 *Super Maid, LLC*, 55 F. Supp. 3d at 1080.

155 29 U.S.C. § 217.

[156] *Perez,* 55 F.Supp.3d at 1080.

[157] 820 ILCS 405.

[158] 26 U.S.C. § 3509.

[159] A state-by-state breakdown of workers affected by the DOL's final overtime regulation can be found at *State-by-State Breakdowns of Workers Affected by Department of Labor's Final Overtime Regulation*, whitehouse.gov, https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/OT_state_by_state_fact_sheet_final_rule_v3b.pdf.

[160] Jeffrey M. Jones, *In U.S., Telecommuting for Work Climbs to 37%*, Gallup (Aug. 19, 2015), *available at* https://www.gallup.com/poll/184649/telecommuting-work-climbs.aspx. The results were based on the annual poll conducted August 5-9, 2015.

[161] *See Final Rule: Overtime*, *supra*, note 44.

[162] 29 C.F.R. § 516.2.

[163] 56 Ill. Adm. Code 300.630.

[164] *See Final Rule: Overtime, supra*, note 44; *also see Overtime Final Rule and Higher Education*, U.S. Dep't of Labor, https://www.dol.gov/sites/default/files/overtime-highereducation2.pdf.

[165] 820 ILCS 140/3 (known as the Illinois "One Day Rest in Seven Act"); 56 Ill. Adm. Code 220.800.

[166] 29 C.F.R. 785.19.

[167] *See Work at Home/Telework as a Reasonable Accommodation*, EEOC, *available at* https://www.eeoc.gov/facts/telework.html.

[168] *Latest Telecommuting Statistics*, Global Workplace Analytics (June 24, 2016), *available at* http://globalworkplaceanalytics.com/telecommuting-statistics.

[169] 42 U.S.C. § 12112 (b)(5)(A).

[170] 29 C.F.R. § 1630.2(o).

[171] *See Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC, note 100 (Oct. 17, 2002), *available at* https://www.eeoc.gov/policy/docs/accommodation.html#N_100_.

[172] 29 C.F.R. § 1630.2(p).

[173] *See Enforcement Guidance*, *supra*, note 171.

[174] 29 U.S.C. § 216(b).

[175] *McMahon v. LVNV Funding, Inc.*, 744 F.3d 1010, 1017 (7th Cir. 2014).

[176] 29 U.S.C. § 216(b); *Ervin v. OS Rest. Servs.,* 632 F.3d 971, 973 (7th Cir. 2011).

[177] *See* Lisa Nagele-Piazza, *Uptick in FLSA Litigation Expected to Continue in 2016*, Bloomberg BNA (Nov. 27, 2015), *available at* http://www.bna.com/uptick-flsa-litigation-n57982064020/#!.

[178] 820 ILCS 105/1.

[179] 820 ILCS 115/1; *Ervin,* 632 F.3d at 974.

[180] 29 U.S.C. § 216(b).

[181] *Ervin*, 632 F.3d at 974-975.

[182] *Id*. at 975.

[183] *Id*. at 978.

[184] *See Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 704 (1945) (holding that an employee who accepted a delayed payment from his employer of the basic statutory wages due under the FLSA did not release and waive his right to recover liquidated damages under the FLSA); *D.A. Schulte, Inc., v. Gangi,* 328 U.S. 108, 116 (1946) (holding that even in cases of a controversy over coverage, private settlements are not permitted, and wages and liquidated damages may not be compromised); *See also Lewis v. Giordano's Enterprises,* 397 Ill. App. 3d 581, 588-89 (1st Dist. 2009).

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[185] *Lewis,* 397 Ill. App. 3d at 590.

[186] *Lynn's Food Stores, Inc. v. United States,* 679 F.2d 1350, 1355 (11th Cir. 1982).

[187] *Lamonica v. Safe Hurricane Shutters, Inc.*, 11 F.3d 1299, 1313 (11th Cir. 2013).

[188] *Schneider v. Cornerstone Pints, Inc.*, 148 F. Supp. 3d 690 (N.D. Ill. 2015).

[189] *Schneider*, 148 F. Supp. 3d at 698.

[190] *Id.* at 699.

[191] 29 U.S.C. § 2 15(a)(3).

[192] See *Conner v. Schnuck Markets Inc.*, 121 F.3d 1390, 1394 (10th Cir.1997).

[193] *Conner*, 121 F.3d at 1394.

[194] *Id.*

[195] 29 U.S.C. § 216(b).

[196] *See Moore v. Freeman*, 355 F.3d 558, 563-64 (6th Cir. 2004) (emotional distress damages are recoverable under the anti-retaliation provision of the FLSA); *Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 992 (8th Cir. 2001) (emotional distress damages are recoverable in Equal Pay Act retaliation case); *Lambert v. Ackerley*, 180 F.3d 997, 1017 (9th Cir. 1999) (reversing and remanding emotional distress award under anti-retaliation provision of FLSA for determination of appropriate amount of emotional distress damages).

[197] *Avitia v. Metro. Club of Chi., Inc.,* 49 F.3d 1219, 1228-29 (7th Cir. 1995); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111-12 (7th Cir. 1990).

[198] 29 U.S.C. § 251.

[199] 29 U.S.C. § 259.

[200] *See, e.g.*, *Usery v. Godwin Hardware*, 426 F. Supp. 1243 (W.D. Mich. 1976).

[201] 29 C.F.R. § 790.15.

[202] 29 U.S.C. § 260.

[203] *Brown v. ScriptPro*, *LLC*, 700 F.3d 1222, 1230-31 (10th Cir. 2012).

[204] *See, e.g., Mortenson v. Western Light & Tel. Co.*, 42 F. Supp. 319, 322 (D. Iowa 1941).

[205] *Burry v. Nat. Trailer Convoy*, *Inc.*, 338 F.2d 422 (6th Cir. 1964); *see also Duncan v. Brockway Standard, Inc.*, No. 90-CV-2867, 1992 WL 510256, at *7-8 (N.D. Ga. Sept. 21, 1992) (summary judgment in favor of the employer was not appropriate on an estoppel theory where employer's knowledge of unreported overtime was question of fact).

[206] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946); *Reich v. Monfort*, *Inc.*, 144 F.3d 1329 (10th Cir. 1998); *Lindow v. U.S.*, 738 F.2d 1057, 1062 (9th Cir. 1984).

[207] *Lindow*, 738 F.2d at 1063.

[208] *Id*. at 1062.

[209] *Id.* at 1063.