by Corie J. Tarara

The FLSA: The Law That Almost Every Employer Is Violating

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 210 et seq. was enacted in 1938 during a period of widespread unemployment and dismal profits.[1] The purpose of the FLSA is to establish "fair labor standards in employments in and affecting interstate commerce, and for other purposes."[2] Minimum wage was set at 40 cents ($0.40) per hour. The FLSA mandated that covered employers, for the first time, pay employees 150 percent of their "regular rate" for all hours worked over 40 per workweek.[3] The overtime pay requirement was designed to incentivize employers to hire more workers, spreading the work among the unemployed rather than having already employed individuals work longer days for the same pay.

The U.S. Department of Labor (DOL), through its Wage and Hour Division, has implemented regulations at 29 C.F.R. ch. V that interpret the FLSA. However, it is the regulations that both provide guidance and confusion for the employers attempting to comply with the FLSA. Although the DOL attempts to clarify certain regulations for requesting employers by issuing opinion letters, those opinions may change from one administration to the next.[4] For example, on January 16, 2009, numerous opinion letters were issued by the then-Acting Administrator Alexander J. Passantino. However, because those signed letters were not literally placed in a mailbox prior to the change in the presidential administration, they were withdrawn by the then-Deputy Administrator for Enforcement John McKeon. Although the DOL stated a final response to the opinion letter requests might be provided in the future, they have not, leaving confusion whether the current DOL stands by its then-opinion.

Regardless of the changing administrations and interpretations of regulations, employers must adhere to the FLSA. Unfortunately, many employers, whether through lack of knowledge or changing regulations, are in violation of the FLSA in some manner or another. While a self-audit may not be in every employers budget for 2013, it would be prudent for every employer (or its counsel) to at least take a mental inventory of some of the more common violations and hopefully correct mistakes prior to a DOL audit or employee complaint.

Ten Common Violations of the FLSA

While the FLSA has been instrumental in prohibiting oppressive child labor and mandating fair wages, the changing regulations and enforcement investigations have left many employers scratching their heads when contacted by the DOL. Most employers know that hourly employees are entitled to time and a half for work performed over 40 hours. However, there are a host of common mistakes that catch many employers off guard. Although these do not take into consideration more stringent state laws, the following are some of the more common mistakes that employers make (whether by policy or through supervisor discretion) under the FLSA:

1. Not Paying Overtime Because the Employer Erroneously Believes It Is Not Covered Under the FLSA

An employee may be covered by the FLSA if their employer is an "enterprise" that is covered by the FLSA. To be an "enterprise" the employer must have at least two employees and: (1) have an annual sales volume or business of at least $500,000; or (2) be a hospital, business providing medical or nursing care for residents, schools and preschools, and government agencies.[5] However, even if the employer does not meet the above definition, an employee may still be covered under the purview of the FLSA if their work regularly involves interstate commerce.[6] This "individual coverage" includes those who assemble parts that will go out of state, make phone calls to other states, or even handle credit card transactions. In our current electronically-engaged world that includes internet transactions and credit card transactions, virtually every worker is covered under the FLSA.

2. Improperly Calculating the "Regular Rate"

The definition of "regular rate" is the backbone to the FLSA and its overtime regulations. It is defined as:

> all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
>
> 1. sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not

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measured by or dependant on hours worked, production, or efficiency;

2. payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause … and other similar payments to an employee which are not made as compensation for his hours of employment;

3. sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly….[7]

Employers who do not include the above remuneration in an employees' "regular rate" will be in violation of the overtime provisions of the FLSA. For example, if an employer pays an employee a non-discretionary bonus such as a production bonus, and then fails to layer that bonus back into the wages earned, the employee's regular rate is lower than it should be for purposes of calculating the overtime due. In such instances where non-discretionary bonuses are paid to hourly employees who work overtime, the employer is in violation if it does not layer back the bonus onto the wages for that workweek and recalculate the overtime due and pay the additional overtime as a result of the bonus.

3. Failing to Pay for Overtime Hours Worked

While some employers may violate this by simply not paying for overtime hours, other employers may fail to pay overtime even though they have the best of intentions. For example, allowing employees to "carry over" hours from one week to the next in the private sector is not allowed. An employee cannot consent to an FLSA violation. Even if the employee asks to be able to work longer on a Monday to make up having to leave early on a Friday (the previous work week) to take care of a sick child, for example, it is not permitted under the FLSA, and overtime must be paid.

4. "Off the Clock" Work

In larger companies, executive management may not be aware of these violations, and may have a specific set of consequences in place to try to dissuade such violations. However, in certain industries, such as the restaurant industry, where managers are evaluated on the hours clocked by subordinates, employers need to be especially cautious that hourly employees are in fact recording all hours worked. For example, store supervisors may force an employee to clock out when they know that employee is reaching 40 hours in a workweek and tell the employee they can make it up the following week, or even worse, that the employee simply won't be paid but must work.

5. Misclassifying an Employee as Exempt From Overtime

The FLSA is clear that all employees working for a covered employer—unless they are exempt from the overtime provisions of the FLSA—must be paid overtime. The FLSA specifically exempts, "any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman."[8] Whether an employee is exempt "must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations."[9] In order to determine whether an employee is exempt from overtime, the employer must make a fact-intensive inquiry into the individual employee's daily activities and responsibilities and then apply the DOL's requirements.[10] Although many employees may ask to be "salaried" or "exempt" to feel like they are in a higher position, again, the employee is unable to consent to any violation of the FLSA. A solution to this may be payment of a salary plus overtime, which is discussed in number 10 below.

6. Misclassifying an Employee as an Independent Contractor

This issue could take an entire article, but is also one that is well known. Employers must take care to properly classify any individual performing work as a bona fide independent contractor. Although the DOL, IRS, states, and courts may use different tests, the old adage applies: if an individual looks like an employee, works like an employee and is treated as an employee, then the individual probably is an employee.

7. Changing the "Workweek" Often to Avoid Overtime

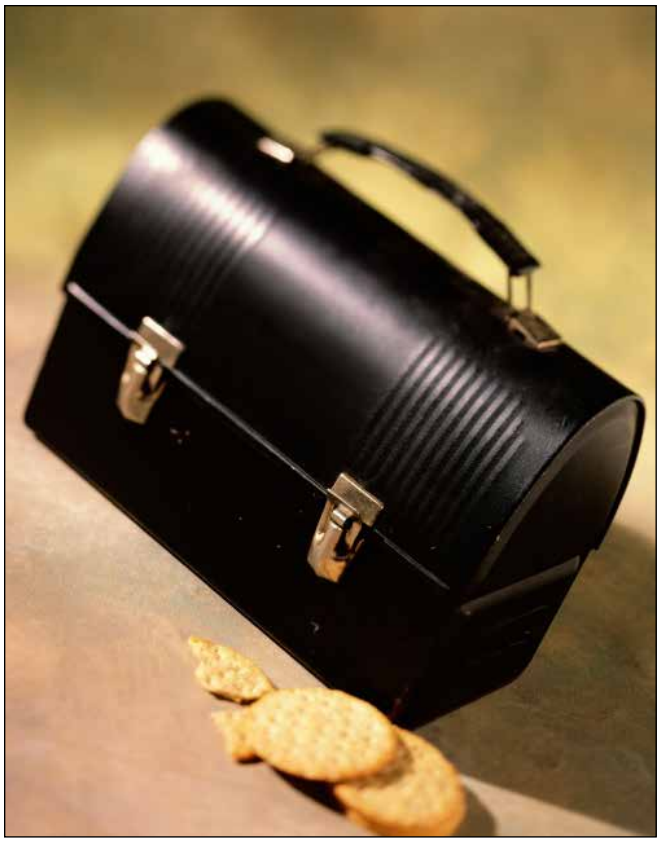
With some exceptions, the FLSA requires that overtime be paid based on a workweek (i.e., Monday–Sunday).[11] However, some employers may attempt to change the "workweek" to avoid paying overtime. While an employer may not change the workweek to evade paying overtime, a permanent change may be made for the purpose of reducing the number of hours in their normal work schedules that must be paid at the overtime rate.[12]

8. Improper Tip Credit and Overtime

So long as employees customarily and regularly receive more than $30 per month in tips, under the FLSA (not necessarily state law), employers can pay tipped employees $2.13 per hour and claim a "tip credit" for the rest of the minimum wage, if tips actually received average at least $5.12 per hour.[13] However, a violation occurs where an employee does not receive enough tips to make up the difference between the cash payment and the tips; where an employee only receives tips; where deductions are made for a shortage at a register or other such deductions; or where the employee must contribute to a tip pool that includes employees who do not customarily and regularly receive tips (such as cooks). In addition, overtime must be calculated on the full minimum wage, not the lower wage payment. An employer may also not take a larger tip credit for an overtime hour than it would for a straight time hour. In 2011, the DOL issued a rule clarifying that a tip is the sole property of the tipped employee ~~even~~ if a tip credit is taken; the employer may not use an employee's tips, even if it takes a tip credit, except as a credit against minimum wage obligations.[14]

9. Failing to Pay Minimum Wage/Improper Deductions

Employers must be sure to pay minimum wages. This seems simple enough. Minimum wages may include commissions, some bonuses, tips received, and the reasonable cost of room, board, and other "facilities" if provided for the employee's benefit. However, where an employer runs into trouble is when deductions are made for items that primarily benefit the employer (uniforms, tools, dam-



age to property, theft), or if the deductions reduce the employee's wage below minimum wage or cuts into overtime compensation. To be safe, any employee paid minimum wage should not have any deductions taken for items that primarily benefit the employer, as to do so would reduce their wages below minimum wage.

10. Improper Use of the Fluctuating Workweek Method for the Payment of Overtime

Although overtime is commonly referred to as "time and a half," some employees who are not exempt from the overtime requirements of the FLSA may be paid "half time" for overtime hours worked so long as certain conditions are met. This is known as the "fluctuating workweek method" or the "coefficient table method."[15] The fluctuating workweek method is commonly utilized by seasonal employers to provide employees a predictable set salary each pay period regardless of whether they are working five hours during rainy stretches or 50 during sunny ones.[16] Not known to many, the DOL regulations permit the payment of a fixed salary to employees who work fluctuating hours, so long as they are paid overtime at half the employee's regular rate.[17] However, this method may only be used in certain conditions: (1) the salary must be sufficiently large so that at no time does the salary fall below minimum wage; and (2) the employee must clearly understand that the salary covers all hours worked whether few or many.[18] It is also important that no deductions for absences are taken from their salary, and that overtime is paid at half of the regular rate. The regular rate must also take into consideration any bonuses paid, or other wages so that the overtime is paid at the proper rate.

As noted above, one common mistake employers make is misclassifying an employee as "exempt" and paying them a fixed salary, as opposed to an hourly wage. In employee misclassification cases, the DOL and many courts (but not all) will allow the use of the fluctuating workweek method in calculating backwages, as the employee has already received a salary for all hours worked, just not the extra half time due for overtime hours.[19] 29 C.F.R. § 778.114 provides that in order to determine the overtime due, the "salary is divided by number of hours worked, the resulting amount is divided by half and that rate is multiplied by the number of hours worked in excess of 40 to arrive at the overtime compensation due to the employee."

Conclusion

While any single violation of the FLSA against a single employee may be relatively small, the FLSA provides that a collective action may be maintained against an employer, so long as the plaintiffs are "similarly situated."[20] The FLSA allows for collective actions to proceed in order for one or more employees to recover "for and in behalf of himself ... and other employees similarly situated."[21] Unlike in a "class action," collective action "class" members must opt-in to the litigation by giving their written consent.[22] Since the FLSA requires the affirmative action of opting-in, the court has discretion to authorize—and facilitate—the notice of the collective action to putative class members.[23] Accordingly, it is important that employers have their pay practices regularly audited, properly train management, and quickly resolve any potential violations before a small mistake turns into a large liability. ⊙

Endnotes

[1]*Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942).

[2]29 U.S.C. § 201 pmbl.

[3]*Id.* § 207(a)(1) (2010); *Overnight Motor Transp. Co.,* 316 U.S. at 572, n.16; *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945).

[4]Opinion letters can be found at www.dol.gov/whd/opinion/flsa.htm.

[5]29 U.S.C. § 203(r).

[6]*Id.* § 203(b).

[7]*Id.* § 207(e)(1)(3). Simply, the "regular rate" is "[w]age divided by hours." *Overnight Motor Transp. Co.*, 316 U.S. at 572, n.16; *Walling*, 325 U.S. at 424 (clarifying the "regular rate" as the "hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed").

[8]29 U.S.C. § 213(a)(1) (2004).

[9]*Id.* § 541.2 (2004).

[10]*Icicle Seafoods Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Reich v. Avoca Motel Corp.*, 82 F.3d 238, 240 (8th Cir. 1996).

[11]29 U.S.C. § 207(a)(1).

[12]*Abshire v. Redland Energy Servs., Ltd. Liab. Co.*, No. 11-330 (8th Cir. Oct. 10, 2012).

[13]29 U.S.C. § 203(m); 76 Fed. Reg. 18832, 18856 (Apr. 5, 2011).

[14]U.S. DOL, DOL Field Assistance Bulletin No. 2012-12, Enforcement of 2011 Tip Credit Regulations (Feb. 29, 2012), *available at* www.dol.gov/whd/FieldBulletins/fab2012_2.htm.

[15]29 C.F.R. § 778.114 (2011).

[16]*See, e.g.*, *Lance v. The Scotts Co.*, No. 04 5270, 2005 WL 1785315 (N.D. Ill. July 21, 2005); *Haynes v. Tru-Green Corp.*,

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[15]564 U.S.___, 132 S. Ct. 2156 (Dec. 3, 2012).

[16]*Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 195 (3d Cir. 2011).

[17]*Weiss v. Regal Collections*, 385 F.2d 337, 348 (3d Cir. 2004).

[18]No. 11-1450, 2012 WL 2645080 (U.S. July 2, 2012).

[19]*Knowles v. Standard Fire Insurance Co.*, No. 4:11-CV-04044, 2011 WL 6013024 (W.D. Ark. Dec. 2, 2011), *leave to appeal denied*, No. 11-8030, 2012 WL 3828891 (8th Cir. Jan. 4, 2012).

[20]*In re American Express Merchants Litig.*, 681 F.3d 139 (2d Cir. 2012).

[21]No. 12-133, 2012 WL 3096737 (U.S. Nov. 9, 2012).

[22]531 U.S. 79 (2000).

[23]562 U.S.____, 130 S. Ct. 1758 (2010).

[24]675 F.3d 215 (3d Cir. 2012).

[25]*Id.*

[26]No. 12-135, 2012 WL_____ (U.S. Dec. 7, 2012).

[27]675 F.3d at 215. The Second Circuit had reached a similar result in *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 114 (2d Cir. 2011).

[28]681 F.3d 280 (5th Cir. 2012).

[29]*Id.* at 642-43, 646.

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The stand also permits me to rotate the iPad in landscape and portrait mode. The stand I chose is made by Mophie ($150). With the Bluetooth keyboard and the stand, it is like having a small desktop computer. The only difference is I do not have a mouse. Instead of using my finger, I purchased a stylus. There are actually two different styluses I like. One is called Bamboo ($25) and the other is called Hand ($29.99).

When I use the iPad while on the go, I find myself dictating with the microphone. This process is very quick and incredibly accurate. The microphone is located to the left of the space bar on the keyboard. It turns the dictation into text as I dictate. I understand I need to be connected to the Internet to do this. However, since I am either connected by Wi-Fi or through my data plan, this is not an issue.

Once I have more time with the iPad, I hope I will be able to write an article about its use to assist other lawyers. Who knows, I might even be able to get it published in *The Federal Lawyer* if I am lucky. ⊙

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507 N.E.2d 945 (Ill. App. Ct. 1987).

[17]29 C.F.R. § 778.114(a).

[18]*Id.* § 778.114(c).

[19]*Id.* § 778.114; *Urnikis-Negro v. American Family Property Servs.*, 616 F.3d 665, 681 (7th Cir. 2010), *cert. denied*, No. 10-745, 2011 WL 588987 (S. Ct. Feb. 22, 2011); *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1262-63 (10th Cir. 1999); *Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 918 (D. Minn. 2010); Letter from Joseph P. Mcauliffe, Director, Division of Minimum Wage and Hour Standards, Wage and Hour Opinion Letter, 1973 WL 335242 (Feb. 26, 1973); Letter from Maria Echaveste, Administrator, Wage and Hour Division Opinion Letter, 1996 WL 1005216 (July 15, 1996).

[20]29 U.S.C. § 216(b); *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989).

[21]29 U.S.C. § 216(b).

[22]*Id.*; *compare* Fed. R. Civ. P. Rule 23 *with* 29 U.S.C. § 216.

[23]*Hoffmann-La Roche*, 493 U.S. at 165.