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FLSA Status Check

What's New and What Employers Need to Know

Presented by
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Today's Presenter

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Road Map

- Background regarding FLSA updates
- Procedural history
- Where we stand
- What we expect
- Avoiding pitfalls
- Recent notable FLSA rulings
- FLSA waivers
- Litigation trends

Fair Labor Standards Act

- FLSA is the federal law which sets minimum wage, overtime, recordkeeping and youth employment standards.
- FLSA is enforced by Wage & Hour Division of U.S. Department of Labor (DOL).
- Current estimates provide that more than 130 million American workers are protected (or "covered") by the FLSA.

FLSA OT Requirements

- Basic overtime requirements:
  - Employers who require or permit employees to work overtime is generally required to pay employees premium pay for such overtime work.
  - Unless **specifically exempted**, employees covered by the Act must receive overtime pay for hours worked in excess of 40 in a **workweek** (not 80 in two workweeks, with few exceptions) at rate not less than time and one-half their **regular rate** of pay.

White Collar Exemptions

- Largest category of exempt employees = "white collar" exemptions (certain executive, administrative or professional positions)
- Generally, falls within white-collar exemption only if three criteria are satisfied:
  - Salary (or in some cases "fee") basis
  - Salary level
  - Duties
    - ***Regulations provide specific guidance***

Directive to Increase Salary Level Threshold

- In 2014, President Obama directed DOL to revise regulations for exempting employees from overtime.
- Purpose:
  - " ... another step in the President's effort to grow and strengthen the middle class by raising Americans' wages ... This extra income will not only mean a better life for American families ... But will boost our economy across the board as these families spend their hard-earned wages."

Process of Regulation Change

- March 13, 2014 – President Obama signed Presidential Memorandum directing DOL to update regulations.
- June 30, 2015 – DOL issues Proposed Rule.
  - *Proposed* Salary threshold: $970 per week/$50,440 annually
- March, 2016 – DOL submitted Final Rule
- May 18, 2016 – Final Rule was published was set to take effect on **Dec. 1, 2016**

Major Changes to FLSA Regulations

- Previous salary requirements:
  - $23,660 annually (less than that, automatically non-exempt) or $455/week
  - $100,000 annually for Highly Compensated Employee Exemption

New Thresholds for Exemptions

- New annual salary "Standard Salary Level" threshold: **$47,476**
- New annual "Highly Compensated Employee" threshold: **$134,004**

What Happened Next?

Fifth Circuit Enjoins Final Rule

- On Sept. 20, 2016, 21 states and a coalition of business organizations (*55 business groups*) filed separate lawsuits in the Eastern District of Texas.
- Intent: to invalidate the Final Rule and seek injunctive relief to block the DOL's Dec. 1, 2016 effective date
- On Nov. 22, 2016, U.S. District Judge Amos Mazzant, III issued a **nationwide preliminary injunction** blocking the DOL from implementing the Final Rule.
- Practical effect: businesses did not need to move forward with plans to implement the Final Rule's requirements.

Key Provisions of Court's Opinion

- Likelihood of success on merits
  - DOL exceeded congressional authority by raising salary threshold so high that it supplanted duties test for exempt status
  - Court focused on language of statute – no language regarding a salary-level requirement
- Irreparable harm
  - Plaintiffs presented evidence that Final Rule would deplete state budgets, cause layoffs and hamper government services.

And Then What?

- DOL appealed the decision.
- On Dec. 9, 2016, Fifth Circuit Court of Appeals announced that it would "fast track" appeal and complete all briefing by **Jan. 31, 2017** (after administration changed)
- Not surprisingly, there were delays …
  - Extensions for briefing requested and granted …
- On April 14, Justice Department, on behalf of DOL, asked for another extension until **June 30** to allow time for new labor secretary to be confirmed and finalize an approach to the litigation.

New Secretary of Labor

- Alexander Acosta
  - Confirmed as labor secretary in late April 2017
  - Background:
    - Dean of Florida International University's law school
    - Attended law school with Ted Cruz
    - Law clerk to J. Samuel Alito
    - Practiced law privately – focus on labor and employment
    - Taught at George Mason University School of Law
    - Chairman of U.S. Century Bank
    - Served in four positions for Bush administration

What is Acosta's Position?

- Clues given during Acosta's senate confirmation hearing:
  - Signaled support for increasing number of low-income employees working overtime, but shied away from defending Final Rule
  - He suggested that OT pay hike is due (at least to point where it would cover inflation): "If you were to apply a straight inflation adjustment, I believe the figure if it were to be updated would be somewhere around $33,000, give or take."
  - Also noted that separate question is whether dollar threshold supersedes duties test and, as a result, is not in accordance with the law.

What Could Happen Next?

- Secretary Acosta could choose not to keep minimum salary level at $47,476 per year, which would result in DOL dismissing its appeal and starting the process over (i.e., dropping defense of Final Rule)
- Secretary Acosta could propose minimum salary level somewhere between current level of $23,660 per year and proposed $47,476 per year.
- Few expect Secretary Acosta to support Final Rule, as written by Obama administration

What to do Now?

- Audit
- Anticipate
- Monitor

Conduct an Internal Audit

- Changes could come **QUICKLY**
- If you haven't already: conduct an internal wage and hour audit
  - Identify employees whose status may be affected by a change to salary threshold
    - Identify employees who may oscillate between exempt/non-exempt.
  - Analyze job duties of any "borderline" employees.
    - Err on side of non-exempt status (it is employer's burden of proof).

Reverse Previous Changes?

- Be cautious when unraveling changes made in anticipation of Dec. 1, 2016 effective date.
- Before moving employees back to exempt status, **make sure** they meet **job duties requirements** for exemption.
- Consider practical effects: taking away salary increases can lead to morale issues – consider slowing future increases or reversing changes over a set period of time.
  - Employee relations issues could outweigh financial impact.

Remember the Silver Linings!

- Opportunity to fix past inadvertent mis-classification mistakes and update timekeeping procedures
- Allows employers to reconsider whether classifications are accurate in light of potential changes to job duties/descriptions
- Provides employers with incentive to ensure compliance with all FLSA recordkeeping requirements

Shifting Gears…

- While we wait to hear from Secretary Acosta and DOL, it's important to keep our eye on other FLSA developments …

Recent & Notable Court Rulings

- *Monroe v FTS USA, LLC and UniTek USA, LLC* (March 2016)
  - Critical question: whether plaintiffs were "similarly situated"
  - Sixth Circuit rejected Seventh Circuit's application of stricter Federal Rule 23 class action standard.
  - Implication: it is much easier for plaintiffs in Sixth Circuit to keep collective actions certified under FLSA than other circuits.

Continued

Recent & Notable Court Rulings

- *Craig v Bridges Bros. Trucking, LLC* (May 2016)
  - Sixth Circuit held that employer has constructive knowledge of its employees' overtime hours, if it "should have" discovered overtime by exercising "reasonable diligence."
  - Employee cannot voluntarily waive her right to OT pay by miscalculating it.
  - Reminder that FLSA requires overtime, even if employer: did not request that employee work overtime; or, prohibited employee from working overtime.

Status of Collective Action Waivers

- Class action waiver:
  - Agreement executive by employee agreeing **not** to pursue claims against their employer on class or collective basis.
  - Only avenue for relief: single-plaintiff arbitration
  - Generally found:
    - Retail agreements
    - Consumer agreements
    - Employer agreements

Recent History of Collective Action Waivers

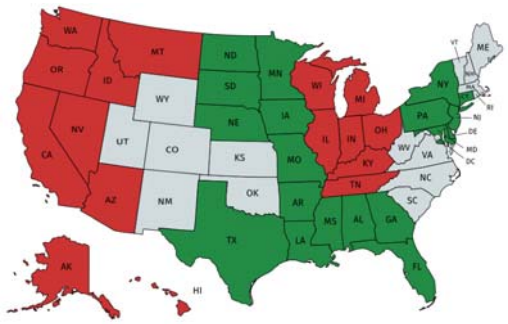
- 2011: *AT&T Mobility LLC v Concepcion*
  - Upheld enforceability of class action waiver in a consumer arbitration agreement
  - Decision applauded by employers who believed that it paved the way for class action waivers in employment agreements.
- 2012: NLRB issues opinion in *D.R. Horton* and found that arbitration agreements are **unlawful** if they prevent employees from filing class/collective actions

Fifth Circuit Disagrees with NLRB

- On appeal, Fifth Circuit agreed with D.R. Horton and ruled that Federal Arbitration Act (FAA) trumps NLRA to extent that NLRA renders unlawful an arbitration agreement, precluding employees from bringing class-action claims.
- Court noted: conclusion consistent with Supreme Court cases, **holding that use of class action procedures is not a substantive right.**
- NLRB not dissuaded: continues to attack class-action waivers whenever possible.

What Then?

- **Circuit Court Split**
- After the Fifth Circuit's ruling, Second Circuit (in 2013), Eighth Circuit (in 2013/2014) and Eleventh Circuit (in 2014) came to same conclusion and upheld class action waivers.
- Other circuits disagree:
  - Notably, Seventh Circuit issued a landmark decision and sweeping opinion in *Lewis v Epic Systems* in May 2016.



What about the Sixth Circuit?

- On May 26, Sixth Circuit **rejected** class waivers
- ***NLRB v Alternative Entertainment, Inc.***
  - Employee James DeCommer was fired by AEI (a company that provides Dish Network installation and services)
  - When DeCommer was hired, he signed an agreement titled "OPEN DOOR POLICY AND ARBITRATION PROGRAM"
    - "Disputes between you and AEI … relating to your employment," must be resolved "exclusively through binding arbitration."
    - "[Y]ou ... Also agree that a claim may not be arbitrated as a class action ... "

What about the Sixth Circuit?

- DeCommer filed charges against AEI with NLRB.
- ALJ ruled, in pertinent part, that "compelling employees, as a condition of employment, to sign arbitration agreements waiving their right to pursue class or collective actions in all forums, arbitral and judicial" violated Section 8(a)(1) of the National Labor Relations Act.
- Sixth Circuit noted: whether federal law permits employers to require individual arbitration of employees' employment-related claims is a question of **first impression** in this circuit.

What about the Sixth Circuit?

- Sixth Circuit conclusively held:
  - "The NLRA prohibits mandatory arbitration provisions barring collective or class action suits because they interfere with employees' right to engage in concerted activity, not because they mandate arbitration."
  - "Because the NLRA makes such a contractual provision illegal ... The FAA does not require enforcement."
  - At the very least, NLRB's determination that the right to concerted legal activity is substantive is entitled to ***Chevron* deference**.

What about the Sixth Circuit?

- Sixth Circuit conclusively held:
  - Previous Supreme Court cases (*American Express Co. v Italian Colors Restaurant* and *AT&T Mobility LLC v Concepcion* (in particular) do not compel the conclusion that it is lawful to forbid employees from pursuing collective legal action regarding their employment-related claims.
    - *Concepcion:* consumer contracts/hostility towards arbitration
    - *Italian Colors*: antitrust laws and conflict with FAA

Sixth Circuit's Ultimate Conclusion

" ... we join the Seventh and Ninth Circuits in holding that an arbitration provision requiring employees covered by the NLRA individually to arbitrate all employment-related claims is not enforceable. Such a provision violates the NLRA's guarantee of the right to collective action and, because it violates the NLRA, falls within the FAA's saving clause."

Another Sixth Circuit Case on the Horizon …

- *Gaffers v Kelly Services*
  - Involves approximately 1,600 home-based customer care workers, alleging Kelly Services owes them overtime for time they spent remotely logging into work computer systems, shutting computers down and dealing with technical issues.
  - District court judge denied Kelly Services' motion to compel arbitration (which relied on provisions in workers' employment contracts).
  - That decision contradicted by *Colley v Scherzinger Corp.*
  - Ruling appealed by Kelly Services; decision will be issued this year.

What about the Supreme Court?

- Jan. 13, 2017, U.S. Supreme Court granted *certiorari* in three cases regarding lawfulness of class/collective action waivers in arbitration agreements
- Three cases are consolidated and Supreme Court will allow a total of **one hour** of oral argument
  - *Epic Systems Corp v Lewis* (invalid)
  - *Ernst & Young, et al v Morris* (invalid)
  - *NLRB v Murphy Oil USA, Inc.* (valid)

New Supreme Court Justice

- Justice Scalia wrote majority opinion in *Concepcion* (decided by a 5-4 majority) and in *American Express v Italian Colors* (also upholding class action waivers in a commercial setting, decided by a 5-3 majority).
- His seat is now occupied by Justice Neil Gorsuch

Clues from Justice Gorsuch?

- Previously served as a judge on Tenth Circuit Court of Appeals
  - Appointed by George W. Bush
  - Known as a "textualist" and an "originalist"
  - Often ruled in favor of employers, but ruled on few class/collective actions.
  - In 2014 joined an opinion finding that an FLSA collective action *was* subject to an arbitration.
  - Opposed to ***Chevron*** **deference**

Previous Rulings …

- In *American Express v Italian Colors* (a case involving a maritime shipping dispute), Supreme Court noted that it would uphold mandatory class arbitration provisions absent an **express congressional statement** that class proceedings were so necessary to federal claim as to preempt the FAA.

- Question becomes ... Is this a sufficient "Express congressional statement"?
  - Employees shall have right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]. (*See* Section 7 of NLRA)

Other 'Trending' Topics

- FLSA litigation trends …
  - # of filings decreased, values increased
    - *Expect this to change*
  - Misclassification of employees as independent contractors
  - Scrutiny of joint employment relationships
  - Less DOL vigilance, **more from plaintiffs' bar**

Questions?

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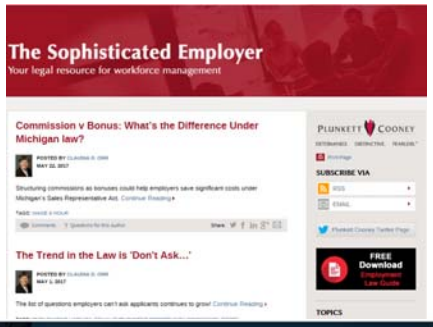

Thank You!