CORPORATE PRACTICE SERIES

Guide to Wage and Hour Regulation

. . . A PRACTICAL GUIDE FOR THE CORPORATE COUNSELOR

Betty Southard Murphy
Elliot S. Azoff

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Mrs. Murphy and Mr. Azoff co-authored 41 C.P.S. (BNA), *Practice and Procedure Before the National Labor Relations Board.*

FOREWORD

This book offers a quick and analytical guide to the Fair Labor Standards Act ("FLSA" or "Act") — the venerable federal statute that governs the payment of minimum wages and overtime in the workplace. It also contains an overview of basic pay and child labor law requirements, as well as other federal laws that deal with the payment of minimum wages and overtime by government contractors.

Initially enacted in 1938, the FLSA — in a very real sense — is a very effective civil rights statute. In its steadfast regulation of wages and hours, the Act has helped safeguard the economic well-being of millions of workers for almost 50 years.

Among other things, the guide discusses questions of coverage under the FLSA, exemptions from FLSA minimum wage and/or overtime provisions, calculation of the minimum wage and overtime payments, and the administration and enforcement of the Act.

We acknowledge the competent and well-respected individuals who comprise the Department of Labor's Wage and Hour Division, both in Washington, D.C., and in the field. These dedicated government employees are always willing to assist employers and employees alike in a realistic and practical furtherance of the Act's mission.

We also express appreciation to Debra Fagher, David A. Grant, D. Brent Gunsalus, and Ronald S. Okada for their assistance in the preparation of this guide.

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COVERAGE OF THE FAIR LABOR STANDARDS ACT

A. PURPOSE

The Fair Labor Standards Act ("FLSA" or "Act") provides for the establishment of fair labor standards in employment in and affecting interstate commerce by regulating the hours and wages of employees. Specifically, the Act places a floor under wages and a ceiling over hours of employment.[1] Employers subject to its provisions must pay their employees specified minimum wages [2] and overtime compensation.[3] Notwithstanding FLSA coverage, regulated employers must still comply with state and local laws since the Act does not preempt local laws beneficial to employees.[4]

The FLSA's coverage is broad; the U.S. Supreme Court has held that it should be liberally construed.[5] It is, however, important to remember that many commonplace employment practices are not regulated by the FLSA. These include:

- vacation, holiday, severance, and sick pay;
- rest periods, holidays off, and vacation time;
- premium pay for weekend or holiday work; and
- pay raises and fringe benefits.

B. DEFINITION OF EMPLOYER

The Act defines an employer as anyone directly or indirectly acting in the interest of an employer in relation to an employee.[6] The trial court has broad discretion in restraining any employer from violating the

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[1] Helena Glendale Ferry Co. v. Walling, 132 F.2d 616 (8th Cir. 1942).

[2] 29 U.S.C. § 206 (1982).

[3] 29 U.S.C. § 207 (1982).

[4] *See* San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 454 (W.D. Tex. 1983), *rev'd on other grounds sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985); Dove v. Chattanooga Area Regional Transp. Auth., 539 F. Supp. 36, 40-42 (E.D. Tenn. 1981).

[5] Powell v. United States Cartridge Co., 339 U.S. 497, 516 (1950); Usery v. Mohs Realty Corp., 424 F. Supp. 20, 26 (W.D. Wis. 1976).

[6] 29 U.S.C. § 203(d) (1982).

FLSA.[7] Intentionally broad,[8] the term "employer" is construed more liberally under the Act than the traditional common-law definition.[9] For example, an officer of a corporation controlling an employee's working conditions and company policy is an employer under the Act.[10] An individual may be an employer of separate corporations constituting a single enterprise.[11] In addition, a person may be employed by several employers at the same time, any one of which may be liable as an employer in a given situation.[12]

C. Definition of Employee

The term "employee" is defined in the broadest sense to include any individual employed by an employer.[13] The Act's definition encompasses many persons and relationships that would not have been considered employer-employee relationships prior to the Act.[14] When a person "suffers or permits" another to work, an employment relationship results under the FLSA, even if the parties never intended to create an employment relationship.[15] In addition, "readiness to serve may be hired, quite as much as service itself . . . [so] that inactive duty may be duty nonetheless." [16] In applying the FLSA, courts decide whether an employer-employee relationship exists on a case-by-case basis, according to the particular facts surrounding each relationship.

1. Employee vs. Independent Contractor

In determining whether an individual is an employee or an independent contractor, the Supreme Court has noted that the "underlying economic realities" of the relationship comprise the test, not the tradi-

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[7] Hodgson v. Humphries, 454 F.2d 1279, 1284 (10th Cir. 1972).

[8] *See* Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979); Shultz v. Falk, 439 F.2d 340, 344 (4th Cir. 1971), *vacated on other grounds sub nom.* Falk v. Brennan, 414 U.S. 190 (1973).

[9] Real v. Driscoll Strawberry Assocs., 603 F.2d at 754.

[10] *See, e.g.*, Shultz v. Mack Farland & Sons Roofing Co., 413 F.2d 1296, 1300 (5th Cir. 1969); United States v. Stanley, 416 F.2d 317, 318 (2d Cir. 1969).

[11] *See, e.g.*, Shultz v. Mack Farland & Sons Roofing Co., 413 F.2d at 1300; United States v. Stanley, 416 F.2d at 318. See also *Enterprise Coverage, infra* pages 7-9. In 1947, Congress amended the FLSA by enacting the Portal-to-Portal Act, 29 U.S.C. §§ 251-262 (1982). The Portal-to-Portal Act exempts an employee's activities that occur either before or after the employee's performance of his or her principal activities in a workday unless these activities are "an integral and indispensable part of the principal activities" of the employee. *See, e.g.*, Steiner v. Mitchell, 350 U.S. 247, 256 (1955); 29 U.S.C. § 154(a) (1982). See notes 100-107 to *Minimum Wages and Maximum Hours, infra* Chapter III, and accompanying text.

[12] Hodgson v. Arnheim & Neely, Inc., 444 F.2d 609, 611-612 (3d Cir. 1971), *reh'g denied*, 411 U.S. 940 (1973).

[13] 29 U.S.C. § 203(e)(1) (1982).

[14] Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979).

[15] Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974). L. Weiner, Federal Wage and Hour Law 186 (1977).

[16] Armour & Co. v. Wantock, 323 U.S. 126, 133 (1945).

tional common-law analysis.[17] Labeling a worker, whether by contract or otherwise, as an independent contractor will not remove the person from the Act's protection if the work performed is that of an employee.[18] A variety of factors are relevant in this determination:

- the degree to which the alleged employer has a right to control the manner in which the work is performed;
- the degree to which the alleged employee's opportunity for profit or loss depends upon his/her managerial skill;
- the alleged employee's investment in equipment or materials or his/her employment of other helpers;
- whether the service rendered requires a special skill;
- the degree of permanence of the working relationship; and
- whether the service rendered is an integral part of the alleged employer's business.[19]

The circumstances of the whole activity must be considered because the Act provides little guidance. For example, a lessee can be an employee despite exercising managerial discretion.[20] An agent may be an employee, depending on whether the agent or the alleged employer exercises control over meaningful aspects of the business.[21]

2. Employee vs. Trainee

Persons who, without any compensation agreement, voluntarily work for their own advantage on the premises of another in order to learn a skill or trade are not necessarily employees.[22] The Labor Department has established six criteria to determine whether an individual is a trainee. This is the case if:

- the training is similar to that of a vocational school;
- the training is for the benefit of the trainees;
- the trainees do not displace regular employees and work under their observation;
- the employer derives no advantage;
- the trainees are not necessarily entitled to a job at the end of the training period; and

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[17] Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947).
[18] *Id.*; Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979).
[19] Real v. Driscoll Strawberry Assocs., 603 F.2d at 754 n.14; Donovan v. Gillmor, 535 F. Supp. 154, 160 (N.D. Ohio 1982).
[20] Marshall v. Truman Arnold Dist. Co., 640 F.2d 906, 909 (8th Cir. 1981).
[21] Donovan v. Sureway Cleaners, 656 F.2d 1368, 1371 (9th Cir. 1981).
[22] Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

- the employer and trainees understand that the trainees are not entitled to wages during this time.[23]

The courts have not adopted a single set of standards, but rather analyze all the facts and circumstances of the particular case. For example, individuals who trained at an employer's place of business as a matter of convenience, and did not displace regular employees, were trainees and not employees.[24]

3. Volunteers and Related Matters

Workers paid by the week, by the hour,[25] or by the piece[26] are considered employees, while prison inmates,[27] persons serving on jury duty, and volunteers are not employees. Whether or not individuals have volunteered their services is determined by considering such factors as receipt of benefits from those for whom the services are performed, whether the activity is less than full time, and whether the services are of the kind typically associated with volunteer work.[28] Nuns, monks, priests, and others who serve pursuant to their religious obligations in schools and hospitals operated by their church or religious order are not employees, while mentally handicapped persons who are gainfully employed are considered employees.[29]

D. Individual or Traditional Coverage

While employees claiming FLSA coverage carry the burden of proof with respect to this issue,[30] the courts have been liberal in extending coverage to employees "engaged in commerce" or in the production of goods for commerce.[31] This traditional coverage is based on the type of work performed by the individual employee; as a result, particular workers can be afforded FLSA coverage while other employees of the same employer are not afforded such protection.[32]

The test established by the Supreme Court to determine if an employee is "engaged in commerce" is "whether the work is so directly and vitally

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[23] Wage and Hour Division, U.S. Department of Labor, Field Operations Handbook (hereinafter cited as "FOH"). These criteria do not necessarily reflect the standard enunciated by the courts, but they were derived from two Supreme Court cases. Walling v. Portland Terminal Co., 330 U.S. 148 (1947); Walling v. Nashville, Chattanooga & St. Louis Ry., 330 U.S. 158 (1947).

[24] Donovan v. American Airlines, 668 F.2d 267, 272 (5th Cir. 1982).

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

[26] United States v. Rosenwasser, 323 U.S. 360 (1945).

[27] Wentworth v. Solem, 548 F.2d 773, 775 (8th Cir. 1977); Alexander v. Sara, Inc., 559 F. Supp. 42, 43-44 (M.D. La. 1983).

[28] Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953, 1962 n. 25 (1985).

[29] FOH §10b03(b), (j).

[30] 6 Wage & Hour Manual (BNA) 91:2.

[31] 29 U.S.C. §§ 206(a)(1), 207(a)(1) (1982).

[32] Weiner, *supra* note 15, at 57.

related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." [33] Employees whose work closely relates to the instrumentalities of interstate commerce,[34] *i.e.*, bridges, canals, ships, roads, and other transportation facilities, as well as employees actually using or operating them [35] are considered as being "engaged in commerce." Moreover, employees are deemed "engaged in commerce" if their work involves or is essential to the actual movement of interstate commerce.[36] For example, the warehousing of goods traveling across state lines has been held to be essential to the actual movement of commerce. As a result, warehouse employees handling out-of-state goods whose journey had not yet terminated are within the ambit of the FLSA.[37] The goods do not lose their interstate character until delivered to the retailer or ultimate consumer.[38]

An employee is also covered by the FLSA whenever engaged in the production for commerce of goods as defined by § 3(i) of the FLSA.[39] This section defines "goods" most broadly and, as a result, the term has been extended to include articles of trade and even intangible property.[40] Likewise, the Supreme Court has broadly interpreted "production" in § 3(j) to include "all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce," and "every kind of operation preparatory" thereto.[41]

Finally, the determination of what is produced "for commerce" rests on a subjective foreseeability test. The Supreme Court has construed "for commerce" to include "at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce." [42]

E. Enterprise Coverage

The FLSA also covers employees of an *enterprise* engaged in commerce or in the production of goods for commerce.[43] This coverage differs from the individual approach discussed earlier [44] as it focuses on the

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[33] Mitchell v. C.W. Vollmer & Co., 349 U.S. 427, 429-30 (1955).
[34] Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959).
[35] 29 C.F.R. §§ 776.10(b), 776.11 (1986).
[36] Walling v. Consumers Co., 149 F.2d 626 (7th Cir. 1945).
[37] A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945).
[38] *Id.*
[39] 29 U.S.C. §§ 206(a)(1), 207(a)(1) (1982).
[40] Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).
[41] Western Union Tel. Co. v. Lenroot, 323 U.S. 490 (1945).
[42] United States v. Darby, 312 U.S. 100, 118 (1941).
[43] 10 East 40th Street Bldg., Inc. v. Callus, 325 U.S. 578 (1945).
[44] See *supra* pp. 6-7.

nature of the employer's business rather than on the particular work performed by the employee. Once the enterprise is shown to employ at least some persons engaged in some interstate activity, the fact that not all segments or employees are involved in such work does not prevent FLSA coverage of the entire enterprise. If the respective interstate activity is regular and recurrent, the FLSA extends coverage to even those segments of the enterprise totally devoid of such activity.[45]

An enterprise is defined as consisting of "related activities performed, either through unified operation or common control, by any person for a common business purpose, whether performed in one or more establishments or by one or more corporate or other organizational units, including departments of an establishment operated through leasing arrangements." [46] Whether an enterprise exists for the purposes of the FLSA depends on the facts and circumstances surrounding each case.[47] Common control, for example, may exist despite separate management.[48]

Related activities need not be performed by the same employer as long as a "common business purpose" is shared. This requirement may be met despite the presence of diverse operations. Manufacturing, wholesaling, and retailing may be performed for a "common business purpose" where directed toward the ultimate goal of distributing goods through retail stores.[49] On the other hand, common control over activities or common ownership of the facilities in which the activities are carried out does not necessarily constitute a common purpose.[50] The relationship existing between the particular activities and the business purpose of the enterprise as a whole controls.

In addition, the enterprise must meet at least one of six definitional standards set forth in the FLSA. It must have an annual gross volume of sales of not less than $250,000, or in the case of retail or service establishments, not less than $362,500. In the alternative, the enterprise must be engaged in

- laundering, cleaning, or repairing clothing or fabrics;
- the construction or reconstruction business;
- the operation of a hospital, an institution for the care of the sick, aged, or mentally ill, a school for handicapped children, a preschool, elementary or secondary school, or an institution of higher learning; or
- the activity of a public agency.[51]

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[45] WEINER, *supra* note 15, at 91; Wirtz v. Melos Constr. Corp., 408 F.2d 626, 628-629 (2d Cir. 1969); Childress v. Earl Whitley Enterprises, 388 F.2d 742, 745 (4th Cir. 1968).

[46] 29 U.S.C. § 203(r) (1982).

[47] Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843 (8th Cir. 1975).

[48] Shultz v. Mack Farland & Sons Roofing Co., 413 F.2d 1296, 1301 (5th Cir. 1969); 29 C.F.R. §§ 779.21, 779.221, 779.223 (1986).

[49] Wirtz v. Barnes Grocer Co., 398 F.2d 718 (8th Cir. 1968).

[50] Hodgson v. Arnheim & Neely, Inc., 444 F.2d 609 (3d Cir. 1971), *reh'g denied*, 411 U.S. 940 (1973).

[51] 29 U.S.C. § 203(s) (1982).