WAGE AND HOUR PITFALLS: TARGETED ISSUES UNDER THE FAIR LABOR STANDARDS ACT

Arthur A. Hartinger
Partner
Renne Public Law Group

Spencer J. Wilson
Senior Associate
Renne Public Law Group

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PRESENTATION OVERVIEW

- Very brief history of the FLSA and its application to public employers
- Overview of the *Flores* decision and its impact on
  - Calculation of the regular rate
  - Liquidated damages and the statute of limitations
- Targeted examination of Common FLSA claims post-*Flores* and how to avoid or address them
- Recent and future changes from the U.S. Supreme Court and the Department of Labor
- Best practices for ensuing compliance and addressing inadvertent FLSA violations

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BRIEF HISTORY OF THE FLSA

- FLSA originally passed by Congress in 1938.
- Establishes minimum wage, overtime pay, recordkeeping, and child labor standards.
- Part of New Deal legislation aimed at helping the unemployed and the nation in recovering from the Great Depression.
- Purpose was to limit work to 40 hours a week and to spread job opportunities among the workforce.

MINIMUM WAGE UNDER THE FLSA

- FLSA original established the following minimum wage rates

Oct 24, 1938	$0.25
Oct 24, 1939	$0.30
Oct 24, 1945	$0.40
Jan 25, 1950	$0.75
Mar 1, 1956	$1.00

- Today the federal minimum wage is $7.25, but in California . . .

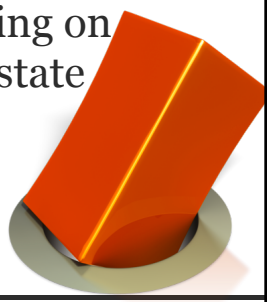
DATE	Min. Wage for Employers with 25 or fewer Employees	Min. Wage for Employers with 25 or More Employees
Jan. 1, 2018	$10.50	$11.00
Jan. 1, 2019	$11.00	$12.00
Jan. 1, 2020	$12.00	$13.00
Jan. 1, 2021	$13.00	$14.00
Jan. 1, 2022	$14.00	$15.00
Jan. 1, 2023	$15.00	

OVERTIME UNDER THE FLSA

- FLSA initially applied to small sector of workforce—did not cover public agencies.
- Congress tried to pass amendments to the Act in 1974 to regulate minimum wage and overtime of public agencies.
- These amendments were ruled unconstitutional by the U.S. Supreme Court. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

SUPREME COURT OVERRULES *USERY*

- In 1985, Supreme Court overturns the *Usery* decision. *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985).
- Extends reach of FLSA overtime and minimum wage requirements to local government agencies, relying on Congress' Constitutional ability to regulate interstate commerce.



FLSA OVERTIME REQUIREMENTS

- Employers must compensate non-exempt employees overtime for all hours actually worked in excess of 40 in a one-week period.
- Longer work period and maximum work hours available for police, fire, and certain other employees.
- Governed by Section 7 of the FLSA (29 USC § 207).
- Wage and Hour division of DOL issues implementing regulations.

FLSA OVERTIME REQUIREMENTS

- Overtime must be paid at 1-1/2 times the FLSA "regular rate" of pay.
- The Regular rate must include all remuneration paid to employee but there are statutory exclusions, defined in Section 207(e), including:

STATUTORY OVERTIME EXCLUSIONS

- Gifts (§ 207(e)(1))
- Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work; expense reimbursements; other similar payments (§ 207(e)(2))
- Discretionary bonuses (§ 207(e)(3))
- Payments to third-parties or trustees for a bona fide insurance or pension plan (§ 207(e)(4))
- MOU daily and weekly overtime (§ 207(e)(5))
- Premiums for working certain days (§ 207(e)(6))
- Clock-time premiums (§ 207(e)(7))
- Stock Options (§ 207(e)(8))

FLORES V. CITY OF SAN GABRIEL

- Police officers sued their employer alleging that the City failed to include medical "cash-in-lieu" payments in the regular rate.
- These were cash payments made directly to employees for either:
  - Foregoing medical benefits
  - Choosing a plan that cost less than the plan maximum

PLAINTIFFS' ARGUMENT

- Police officers argued that the cash-in-lieu payments needed to be included in the regular rate
  - Cash portion of the payments were not properly excluded from the FLSA because they were paid directly to the employees with no restrictions
  - Entire portion of Plan paid to third parties also should be included
    - Flexible Benefit Plan was not bona fide
    - Large portion of payments went to cash and not third parties

SAN GABRIEL'S POSITION

- City argued that the payments did not need to be included in the regular rate because the payments constituted:
  - 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; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; **and other similar payments to an employee which are not made as compensation for his hours of employment**;29 USC 207(e)(2); OR
  - contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees. 29 USC 207(e)(4)

NINTH CIRCUIT RULING

- Ninth Circuit rejects City's argument that cash-in-lieu was properly excluded from regular rate
  - Described the questions as a "close question."
  - The Supreme Court's decades old precedent that FLSA exemptions "are to be narrowly construed against employers seeking to assert them," was a "command" the court could not ignore.
  - Concluded "that the City has failed to carry its burden to demonstrate that its cash-in-lieu of benefits payments 'plainly and unmistakably' constitute excludable payments under [section] 207(e)(2)."

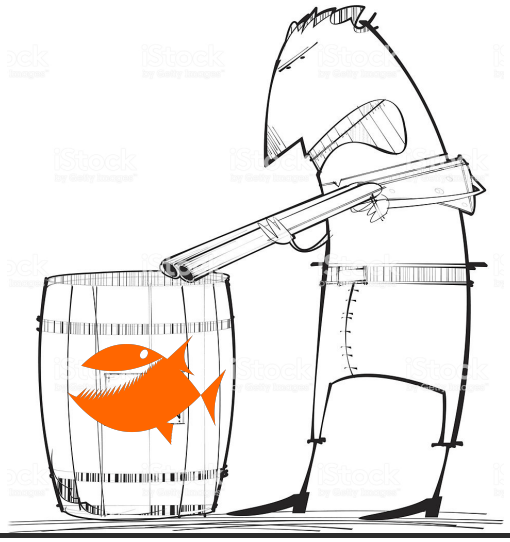
NINTH CIRCUIT RULING

- Entire value of cafeteria plan needed to be included in regular rate—not just the cash portion.
  - Cash payments constituted more than 40% of the payments under the plan, rendering it a non-bona fide plan.
  - Court declined to establish bright-line rule regarding what percentage would be permissible.
- Employees entitled to liquidated (double) damages because City failed to demonstrate good faith.
- 3 year statute of limitations applied because violation was willful.

NEW WILLFULNESS STANDARD

- An employer need not violate the statute knowingly for its violation to be deemed willful.
- The three-year statute of limitations applies "where an employer disregarded the very 'possibility' that it was violating the statute."
- An employer's violation of the FLSA is "willful" when it is "on notice of its FLSA requirements, yet [takes] no affirmative action to assure compliance with them."

FLORES' AFTERMATH



- Flood of litigation brought by plaintiffs throughout the state

FLORES' AFTERMATH

- New FLSA claims not limited to cash-in-lieu
- Other claims presenting **"close question"** under the FLSA, including:
  - Holiday-in-Lieu
  - Sick Leave Incentive Pay
- Plaintiffs also using post-*Flores* lawsuits to include other common FLSA violations, such as:
  - Callback Pay
  - Standby Pay
  - Off-the-Clock Work
  - Canine Pay
  - Work Period Challenges
- Emboldened positions with respect to statute of limitations

MEDICAL CASH-IN-LIEU

- Must be included in Regular Rate under Flores
- Consider eliminating cash benefit component of cafeteria plans.
- At the the very least, try to minimize risk that your cafeteria plan may be treated as non-bona fide.
  - ➢ Make sure only a small portion of total contributions to cafeteria plan are paid in cash.

HOLIDAY-IN-LIEU

- Type of holiday pay provided to employees who work a set schedule irrespective of whether their regular work day falls on a holiday.
- Common with safety employees, healthcare workers, and other workers who work in an industry requiring around the clock service throughout the year.

HOLIDAY-IN-LIEU

- Section 207(e)(2) excludes "payments made for occasional periods when no work is performed due to vacation, ***holiday***, illness . . . and other similar payments to an employee which are not made as compensation for his hours of employment" (emphasis added).
- Does pay provided to an employee for a holiday, unconditioned on whether the employee works or not, constitute compensation for hours of employment?

HOLIDAY-IN-LIEU

Certain payments made to an employee for periods which he performs no work because of a holiday or vacation are not required to be included in the regular rate because they are not regarded as compensation for working. Suppose an employee who is entitled to such a paid idle holiday or paid vacation foregoes his holiday or vacation and performs work for the employer on the holiday or during the vacation period. *If under the terms of his employment, he is entitled to a certain sum as holiday or vacation pay, whether he works or not, and receives pay at his customary rate (or higher) in addition for each hour that he works on the holiday or vacation day, the certain sum allocable to holiday or vacation pay is still to be excluded from the regular rate.*

- 29 C.F.R. § 778.219(a)

HOLIDAY-IN-LIEU

- Despite the statutory and regulatory guidance, the law regarding HIL pay remains muddled
  - DOL Handbook excludes HIL pay from the regular rate
  - Two conflicting DOL Opinion letters
  - Two federal district court cases from California found that HIL pay must be included in the regular rate. Neither of these cases provide in-depth analysis

HOLIDAY-IN-LIEU BEST PRACTICES

- Include language in MOU clarifying that HIL payments are "due to" holidays.
- Avoid lump-sum payments or pro-rata payments paid in equal amounts each pay period.
- Structure the HIL Payments so they coincide with pay periods when a Holiday occurs.
- Eliminate HIL Benefits

SICK LEAVE INCENTIVE PAY

- Payments to employee for using a limited number of sick days
  - Split in the circuits regarding inclusion
  - Regulations require inclusion
  - DOL Handbook excludes SLI from regular rate
- Cases in favor of inclusion treat SLI as an attendance bonus
- Consider pooling sick leave with vacation and including a buy-back provision. *See Balestrieri v. Menlo Park Fire Protection Dist.*, 800 F.3d 1094 (9th Cir. 2015).

CALLBACK PAY

- Many MOUs provide that an employee will be provided a minimum amount of pay (*e.g.*, 2 hours) if they are called in to work outside their regular schedule
- Must include in regular rate any payments for time actually worked.
- Payments for time beyond the time actually worked are excluded from regular rate.
- Any premium portion of pay also excluded.
- Your payroll system should differentiate between hours actually worked and minimum call-back guarantee.

CALLBACK PAY CASE STUDY

- Ariana is an employee at the City of Calamity, California. She works a set schedule Monday-Friday but is occasionally required to work certain events on the weekend. Under the MOU governing her employment, whenever she is required to work on one of her days off, the City pays her a minimum of 4 hours at time-and-a-half, regardless of the number of hours she actually works that day and regardless of the number of hours worked that week. Ariana's normal hourly rate of pay is $10/hour. One Saturday, Ariana is called in to work on her day off, but only ends up working two hours that day.
- How Much is she owed?
  - Under the MOU she is entitled to $60 for his call-in work (1.5 x 4 x$10).
- How much of this payment is included in the regular rate of pay?
  - $20 of this payment would be included in the regular rate—*i.e.*, the straight time payment for the two hours actually worked.

STANDBY PAY

- The general rules is that time spent by a police-officer in an "On Call" status is non-compensable if the employee can effectively use the time for his or her own purposes. 29 C.F.R. section 785.16.
- BUT, if an employer compensates its employees for "On Call" time, those payments must be included in the regular rate of pay. *See* 29 CFR § 778.223.
- AND, in certain circumstances the entire standby period can constitute compensable work time if employee could not effectively use the time for his or her own purposes. Courts will look to:
  - frequency of call-backs
  - the required response time
  - travel restrictions
  - disciplinary consequences of not responding to a call

OFF-THE-CLOCK WORK

- Employer must compensate employee for all time an employee performs work if employer knew or reasonably should have known employee was working.
- Fact that work was unauthorized does not excuse employer from paying overtime.
- Best Practice is to adopt a written policy:
  - Prohibiting work outside of regular schedule absent prior written approval
  - Requiring employees to promptly report any overtime work, regardless of whether they had prior approval
- Employees must be paid for unapproved overtime, but they can be disciplined for violating policy requiring prior approval.

K-9 Pay

- Time spent outside an officer's work schedule caring for their animal counts as compensable hours worked. This includes: feeding, training, cleaning, grooming, exercising, and medicating.
- "It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration of the pertinent facts will be accepted." 29 C.F.R. § 785.23
- Can agree to pay police officers at rate lower than they are paid for their police work. 29 U.S.C. § 207(g)(2).
  - If doing so, should be written in MOU.
- Work must be compensated at time and a half the agreed-upon rate.
- If regular amount is included in each paycheck (e.g., additional 5% pay), MOU should specify the approximate number of hours this is meant to compensate for and the rate at which it is intended to compensate.
  - This is not required, but is helpful if employees sue and claim they were not adequately compensated for k-9 work.

WORK PERIOD ISSUES

- Work Periods should be defined with specificity in the MOU.
- If you have adopted a 7(k) partial exemption for safety employees, the work period should be defined in terms of days (e.g., 14, 24, or 28-day).
- Ideally, MOU should also identify start of 7(k) period (e.g., "The most recent 28-day work period began June 1, 2018 and ended June 24, 2008.")
- Each employee's payroll record should be indicate the length of the work period and the start time.29 CFR § 553.51
- Plaintiffs may argue 7(k) is invalid if memorialized in MOU but not actually utilized by payroll.
- Avoid agreeing to treat all paid time as hours worked.

9/80 SCHEDULES

- 9/80 schedule typically involves an employee working 9 days every two weeks. A typical 9/80 schedule will require an employee to work 9-hour days Monday through Thursday and on Fridays will alternate between an 8-hour work day and a day off.
- This creates challenges because:
  - Each workweek stands alone – "The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks." 29 C.F.R. § 778.104.
  - "An employee's workweek is a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods." 29 C.F.R. § 778.105.

9/80 SCHEDULES CONTD…

- Solution is to adopt a work period that starts and ends at the mid-point of the day on which the employee works 8 hours or has the day off.
- For example, if an employee works every other Friday from 8 to 5, with a 1 hour lunch break from 12-1, you should make the work week start at 12:30 pm on Fridays.

Sat	Sun	Mon	Tues	Wed	Thurs	Fri
		9	9	9	9	4 4
		9	9	9	9	

IS THERE ANY RELIEF?

DEMISE OF THE NARROW CONSTRUCTION DOCTRINE

- *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018)
  - Reviewed a 9th Circuit Decision Holding that FLSA exemptions need to be construed narrowly.
  - Rejected the narrow construction doctrine as a "useful guidepost for interpreting the FLSA."
  - "[T]he FLSA gives no 'textual indication' that its exemptions should be construed narrowly," so "there is no reason to give them anything other than a fair (rather than a 'narrow') interpretation."
  - "The narrow-construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs."
  - Dissent Noted that the decision unsettled more than a half century of Supreme Court precedent.

ENCINO TAKEAWAYS

- Tie no longer goes to employees.
- Enormous portion of FLSA case doctrine subject to criticism.
- Potential for appeal/rehearing in pending cases.
- Change in law coincides with wave of conservative judicial appointments.

DOL PROPOSES RULEMAKING

- DOL recently announced it will propose to amend 29 CFR part 778, to clarify, update, and define regular rate requirements under section 7(e) of the Act.
- Rulemaking announcement notes that many of the regulations have not been updated in more than 60 years and acknowledges that many of the regulations need to be clarified for the modern workplace.
- This rulemaking represents the first update to the regulations since the Supreme Court extended the reach of the FLSA to public employers in *Garcia*.

SCOPE OF DOL RULEMAKING

- Opportunity to provide comments.
- Proposed Rules due sometime this month.
- Rulemaking has potential to impact:
  - Medical Cash-in-Lieu
  - Holiday-in-Lieu
  - Sick Leave Incentive Payments
  - Any other item included in the regular rate of pay

PROPOSED RULEMAKING TAKEAWAYS

- Unclear at this time whether the new DOL rules will benefit employers or employees, **BUT**
  - Employers have more leverage when negotiating settlements of threatened FLSA claims.
  - Courts may be more cautious to issue rulings where regulations are unclear.
    - The Northern District of California recently stayed a case pending rulemaking.

BEST PRACTICES

- FLSA audit
  - Know when to ask counsel
- Consider FLSA during labor negotiations
  - Keep it Simple
  - Memorialize parties' intent
  - Keep clear channels of communication between labor negotiators, Payroll, and counsel
- Document efforts to comply with FLSA
  - Consider confidentiality and privilege
- Be careful about out-of-court settlements
- Consider including an FLSA savings clause

QUESTIONS?

e-mail Art at **art@publiclawgroup.com**
or call him at **415.848.7231**

e-mail Spencer at **swilson@publiclawgroup.com**
or call him at **415.848.7249**