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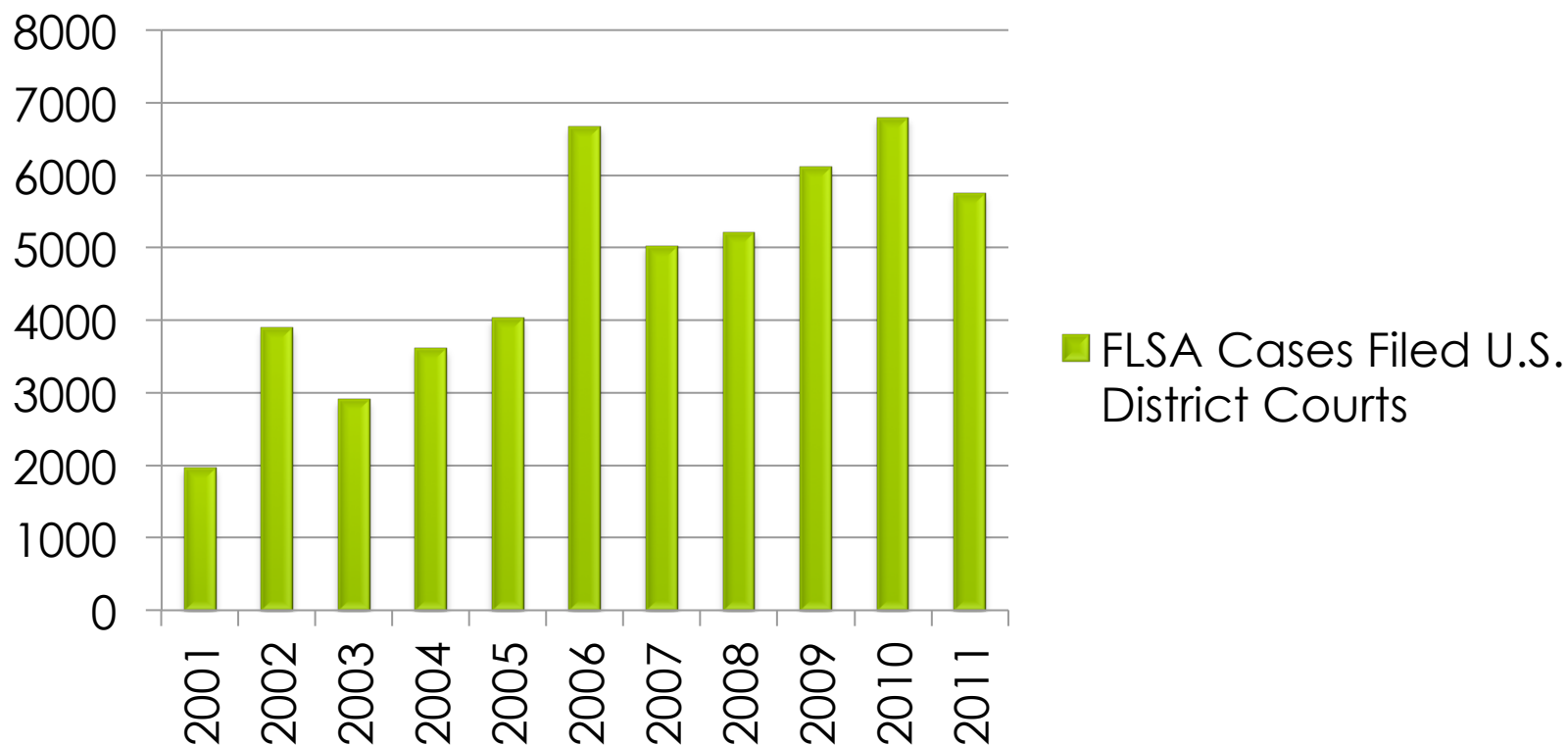
The FLSA

How to Prosecute or
Defend Wage and Hour
Cases



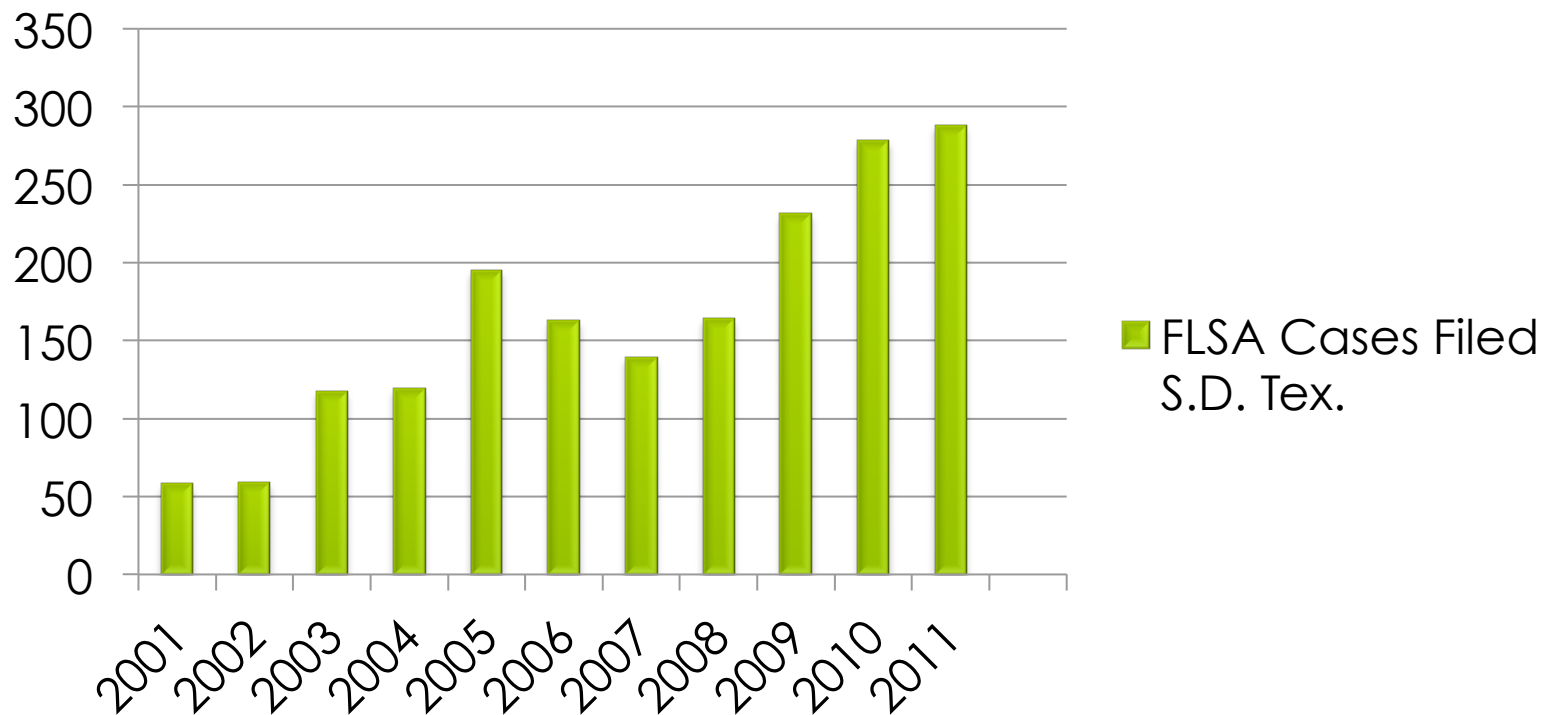
The Great Overtime Discovery

FLSA Cases Filed U.S. District Courts



The Great Overtime Discovery

FLSA Cases Filed S.D. Tex.



Topics Covered

- Broad Overview of the FLSA
- Misclassification Cases – White Collar Exemptions
- Collective Actions
- Detailed Damages Discussion

FLSA BROAD OVERVIEW

Purpose of the FLSA

- Depression era statute meant to regulate hours of work
- Meant to eliminate substandard pay through minimum wage and maximum hour provisions



Covered Employers



- 2 or more employees who handle goods in interstate commerce; and
- Have gross annual sales of at least \$500,000

Individual Liability?

- “‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee ...”
29 U.S.C. 203(d)
- “[M]ust be liberally construed to effectuate Congress’ remedial intent.”
Reich v. Circle C Investments, Inc., 998 F.2d 324, 328 (5th Cir. 1993)
- The person must effectively **dominate the company’s administration** or **independently exercise control over the work situation**



Covered Employees?



- In general, an employee is any individual who is “suffered” or “permitted” to work for an employer. 29 U.S.C. 203(g).
- Does not include *bona fide* independent contractors, volunteers, and trainees

Who Is An Independent Contractor?

- “To determine if a worker qualifies as an employee [under the FLSA], we focus on whether, as a matter of economic reality, the worker is **economically dependent** on the alleged employer or is instead in business for himself.” *Hopkins v. Cornerstone Am.*, 545 F. 3d 338, 343 (5th Cir. 2008).
- Five non-exhaustive factors: (1) degree of control exercised by the alleged employer; (2) extent of the relative investments by each party; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.” *Id.*

Who Is An Independent Contractor?

- “The determination of whether an individual is an employee or independent contractor is highly dependent on the particular situation presented.” *Thibault v. Bellsouth Telecom., Inc.*, 612 F.3d 843, 848 (5th Cir. 2010) (finding that a telephone splicer was an independent contractor)



Three Broad Types of FLSA Lawsuits

- **Misclassification Cases.** Employee claims that the employer improperly classified him/her as (a) exempt from the FLSA; or (b) an independent contractor.
- **Off-the-clock Cases.** Employee claims that the employer did not pay him for all overtime hours worked.
- **Tip-Pool Cases.** “Tipped” employees claim that they are forced to share tips with non-tipped employees.

Burdens

- **For Non-Exempt Employees –**
Employer must keep track of hours worked
- **For Exempt Employees –**
Employer must plead and prove entitlement to an exemption
- These burdens become especially important in misclassification cases



Statute of Limitations

- 2 years. 29 U.S.C. 255(a)
- In a cause of action that arises out of a “willful violation,” then there is a 3 year statute of limitations. *Id.*
- Plaintiff bears burden of showing a “willful violation” *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 356 (5th Cir. 1990). Plaintiff “must show the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the [FLSA].”
- Must be more than mere “negligence.” *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 511 (N.D. Tex. 1988).

Damages (in general)

- **Unpaid wages.** 29 U.S.C. 216(b).
- **Liquidated Damages.** “Any employer who violates the [FLSA] shall be liable to the employee ... in an additional equal amount as liquidated damages.” 29 U.S.C. 216(b) (emphasis added).
 - To avoid liquidated damages, the *employer* must show “to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds” for violating FLSA. 29 U.S.C. 260.
 - Burden is on employer, *Stokes v. BWXT Pantex, LLC*, 424 Fed. Appx. 324, 326 (5th Cir. 2011). “[E]mployer faces a ‘substantial burden’ of demonstrating good faith.” *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 267 (5th Cir. 1998).
- **Reasonable attorneys’ fees.** 29 U.S.C. 216(b). Lodestar used. *Singer v. City of Waco*, 324 F.3d 813, 829 (5th Cir. 2003); *Howe v. Hoffman-Curtis Partners*, 215 Fed. Appx. 341 (5th Cir. 2007) (affirming award to plaintiff of \$23,357 in damages and \$129,805 in attorney fees).

Releases

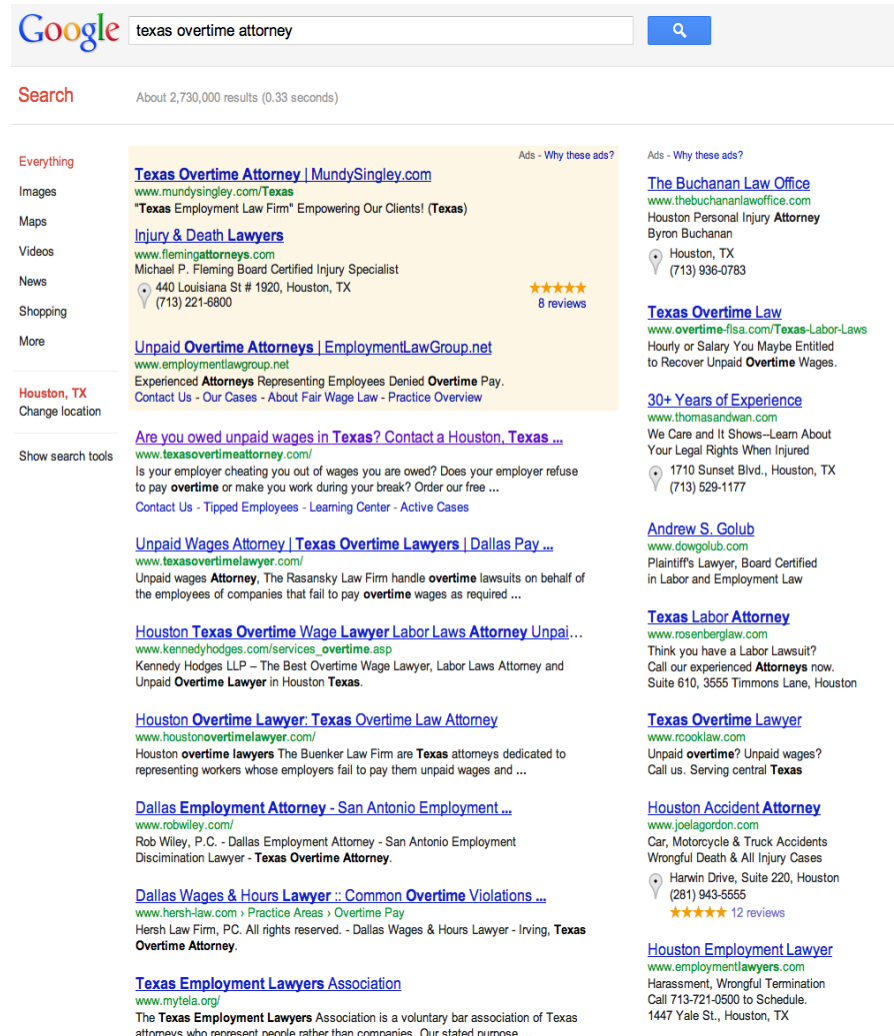
- Typically not considered enforceable unless approved by the Department of Labor or court
- But See Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608 (W.D. Tex. 2005) (finding a waiver of claim arising under the FLSA when there was a bona fide dispute as to the hours worked and the parties entered a compromise)

Arbitration?

- There is a downside for employers to agree to arbitrate
- There are also issues of class-wide arbitration waivers in light on the Supreme Court's *Stolt-Nielsen* decision that Plaintiffs and Defendants must consider

Litigation Points

- Employee Friendly Statute
- Plaintiff does not have to prove intent
- Defense lawyers must evaluate liability early and advise client of potential risks



Google search results for "texas overtime attorney". The search bar shows "texas overtime attorney" with a magnifying glass icon. Below the search bar, it says "Search" and "About 2,730,000 results (0.33 seconds)".

On the left side, there are filters: "Everything", "Images", "Maps", "Videos", "News", "Shopping", "More", "Houston, TX", "Change location", and "Show search tools".

The search results are listed on the right. The first result is "Texas Overtime Attorney | MundySingley.com" with a link to "www.mundysingley.com/Texas" and a description: "Texas Employment Law Firm" Empowering Our Clients! (Texas). It has a location pin for Houston, TX and 8 reviews.

Other results include "The Buchanan Law Office", "Texas Overtime Law", "30+ Years of Experience", "Andrew S. Golub", "Texas Labor Attorney", "Houston Overtime Lawyer", "Dallas Employment Attorney", "Dallas Wages & Hours Lawyer", and "Texas Employment Lawyers Association".

MISCLASSIFICATION CASES –
THE WHITE COLLAR
EXEMPTIONS – 29 CFR Part
541.0, et seq.

The White Collar Exemptions

- Executive
- Administrative
- Professional
- Computer Employees
- Outside Sales
- Highly Compensated Employees

In General

- Employer Must Typically Satisfy Three Tests to Claim a White Collar Exemption
 - **Salary Basis Test.** A salary is a predetermined amount of compensation not reduced because of the quantity or quality of work.
 - **Salary Level Test.** Employee earns a minimum of \$23,660 annual salary (\$455 per week)
 - **Duties Test.** Is the person working in a bona fide executive, administrative, professional, or outside sales capacity. Job titles are irrelevant. 29 C.F.R. 541.2.

Salary Basis Test

- Is the “salary” tied to hours worked?
- Then generally it isn’t a salary: “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.” 29 C.F.R. 541.602(a).
- Some deductions to salary are permitted. 29 C.F.R. 541.602 (b) (permitting deductions for full day absences for personal reasons, sickness or disability, violating major safety rules, jury fees, disciplinary suspensions, or unpaid FMLA leave).
- What about reducing salary due to economic downturn?

Executive Exemption – Job Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Must customarily and regularly direct the work of two or more other employees
- Must have the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

29 C.F.R. 541.100-106

Primary Duty

- “[M]eans the principal, main, major or most important duty that the employee performs.”
29 CFR 541.700.



Customarily and Regularly

- “[M]eans a frequency that must be greater than occasional but which, of course, may be less than constant.”
29 C.F.R. 541.701



“Particular Weight”

- Multi-factor test
- Generally, one must examine if the employee’s job is to make suggestions and recommendations about other employees, and whether those suggestions and recommendations are relied upon.
- 29 C.F.R. 541.105.

Administrative Exemption – Job Duties

- Primary duty is 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.
- Primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.
- 29 C.F.R. 541.200-204.

“Directly related to management or general business operations”

- “To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business ...” 29 C.F.R. 541.201 (a).
- Includes, but isn’t limited to tax, finance, accounting, budgeting, human resources, marketing, etc. 29 C.F.R. 541.201 (b).

“Discretion and Independent Judgment with respect to matters of significance”

- “involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.”
- “The term ‘matters of significance’ refers to the level of importance or consequence of the work performed.”
- 29 C.F.R. 541.202



Hot areas for Administrative Exemption

- Mortgage Brokers
- Financial Service Industry
- Paralegals
- Customer/Business service workers

“Financial Services”

- “Employees in the financial services industry **generally meet the duties requirements for the administrative exemption** if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. **However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.**”
- 29 C.F.R. 541.203(b) (emphasis added)

Settlements



- In May, 2005 Countrywide Home Loans, Inc. agreed to pay **\$30 million** to settle the claims of approximately 400 account executives who worked at Countrywide's California call center responding to consumer telephone inquiries about home loan products.
- In February, 2006, UBS settled for **\$89 million** a series of FLSA collective actions concerning approximately 25,000 financial advisors and trainees nationwide who claimed to have been misclassified.
- In May, 2006, Citigroup's Smith Barney brokerage unit agreed to pay **\$98 million** to settle claims on behalf of thousands of current and former brokers that they are owed overtime pay and other reimbursements.

Source: <http://www.mbtlaw.com/pubs/Fslaanninst.pdf>

Professional Exemption – Job Duties

- Primary duty (i) requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- 29 C.F.R. 541.300



Computer Employees – Job Duties

- Computer systems analysts, programmers, or software engineers or similarly skilled workers are eligible for the exemption.
- Employee's primary duty must include "application of systems analysis techniques and procedures," or "design, development, ... of computer systems,"
- Must be paid a salary or hourly rate of at least \$27.63.
- 29 C.F.R. 541.400.



Outside Sales – Job Duties

- Primary duty is (i) making sales, and (ii) who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty. 29 C.F.R. 541.500
- “any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.” 29 C.F.R. 541.502.



Pharmaceutical Sales Reps

- November 28, 2011 – Supreme Court granted cert. on whether pharmaceutical sales representatives are entitled to overtime pay
- Are they outside sales, or do they simply promote products to doctors?

Highly Compensated Employees

- Employees whose total annual compensation is at least \$100,000 (includes at least \$455 per week on a salary) and who perform office or non-manual work and customarily and regularly perform one or more of the exempt duties of an executive, administrative, or professional employee are exempt from overtime requirements.
- 29 C.F.R. 541.601.



COLLECTIVE ACTIONS

29 U.S.C. 216(b)

- “An action ... may be maintained ... by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”
- “No employee shall be a party to any such action unless he gives his consent in writing to become such a party and such consent is filed in court in which such action is brought.”

Collective Actions v. FRCP 23

- Rule 23 is mostly opt-out. Collective actions are opt-in.
- Rule 23 has a preclusive effect. Collective actions do not.

Collective Action Phases

- **First Stage.** Notice and conditional certification (sometimes discovery is before – but it isn't mandatory).
- **Second Stage.** Defense motion for decertification.
- **Trial**

Stage One – Conditional Certification

- Some courts require less proof than others (declarations or affidavits)
- A minority of courts require Plaintiffs to satisfy Rule 23

Stage One – Conditional Certification

- Generally, a plaintiff must show that:
 - (1) there is a reasonable basis for crediting the assertion that aggrieved individuals exist;
 - (2) those aggrieved individuals are similarly situated to the plaintiff in relevant respects given the claims and defenses asserted

Villarreal v. St. Luke's Episcopal, 2010 WL 4604453, at *10 (S.D. Tex. Nov. 3, 2010).

Stage One – Conditional Certification

- Some courts identify a third factor – a demonstration that putative collective action members want to join the suit.
- *Simmons v. T-Mobile USA, Inc.*, 2007 WL 210008, at *5 (S.D. Tex. Jan. 24, 2007)

Dukes v. Wal-Mart

- In *Dukes*, the Supreme Court determined that Plaintiffs in a sex discrimination lawsuit against Walmart failed to establish commonality under Rule 23(a).
- Many defendants have argued, and some successfully, that the commonality standard under Rule 23(a) is akin to “similarly situated” under Rule 216(b). *Lessard v. Skywest Airlines* (C.D. Cal. Oct. 24, 2011) (denying certification while citing but not relying on *Dukes*)

Notice Contents

- Provide potential opt-in plaintiffs with neutral and complete information
- Courts should prevent misleading communications

Stage Two - Decertification

- Courts generally examine three factors
 - Commonality
 - Defenses to individual plaintiffs
 - Fairness and procedural considerations

CALCULATING DAMAGES

Understanding How to Calculate Damages Is A Critical Skill

- **Hourly Employees.** Simply multiply the hourly rate times 1.5. 29 CFR 778.110.
- **Day Rate Employees.** “If the employee is paid a flat sum for a day’s work or for doing a particular job ... and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.” 29 C.F.R. 778.112.

Can the day rate be blown?

- Employee must be paid a “flat sum”
- Employee must receive “no other form of compensation for services” *Winget v. Corporate Green, LLC*, No. Civ. A. 09-0229, 2010 WL 2985546, at *4 (M.D. La. July 26, 2010) (“Unlike the worker identified in § 778.112, it is undisputed that plaintiff received compensation not just for the particular jobs performed, but also for travel time and for the weekly meeting. Thus, § 778.112 is inapplicable.”)
- Employee’s day rate is reduced. *Solis v. Hooglands Nursery L.L.C.*, 372 Fed. Appx. 528, 529, 2010 WL 1404022, at *1 (5th Cir. Apr. 7, 2010) (employer did not have a valid day rate plan under 29 C.F.R. § 778.112 where employees’ pay was reduced when they worked less than a full day).

Salaried Employees

- Two ways to calculate:
- Take weekly salary – divide by the hours it was intended to compensate, and calculate overtime at 1.5
- Fluctuating workweek – take weekly salary, divide by all hours worked in the workweek, divide by 2, and then multiply by hours worked in the workweek over 40

Large Variance in Damage Model

- Example: Employee has a \$1,000 per week salary, and worked 50 hours per week.
- Method One: Employee's regular rate is \$25 per hour, and he is owed \$37.5 for each hour of OT per week (or \$375).
- Fluctuating Workweek: Employee's regular rate is \$20 per hour. The OT rate is \$10 per hour of OT per week (or \$100).

Fluctuating Workweek Method

- When can employers use it?
 - Employee must be paid a fixed salary
 - There must be a clear mutual understanding that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number
 - Must be over the minimum wage

29 C.F.R. 778.114

What's the right way of thinking about FWW?

- Defendants would point to *Blackmon v. Brookshire Grocery*, 835 F.2d 1135 (5th Cir. 1988) (applying FWW retroactively); *Urnkikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 679 (7th Cir. 2010)
- Plaintiffs point to *In re EZPawn*, 633 F. Supp. 2d 395 (W.D. Tex. 2008) (rejecting FWW method as a damage method in a misclassification case)
- Latest: *Ransom v. Patel*, Case 1:10cv857 (W.D. Tex. Nov. 1, 2011) (regular rate is a factual determination to be decided on a case by case basis as to the parties intent)

More Problems: Bonuses & Fluctuating Workweek

- What happens when an employee receives a bonus? Is the salary still fixed entitling the employer to the fluctuating workweek method?
- *O'Brien v. Town of Agawam*, 350 F.3d 279, 288 (1st Cir. 2003); *Brumley v. Camin Cargo Control, Inc.*, 2010 WL 1644066 (D.N.J. Apr. 22, 2010) (bonuses invalidated fluctuating workweek)
- *But See Soderberg v. Naturescape*, Case No. 10:-cv-3429 (D. Minn. Nov. 3, 2011) (bonus not tethered to hours worked does not violate FWW).

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