Office of Congressional Workplace Rights

Office of the General Counsel

FAIR LABOR STANDARDS ACT:
PROPOSED REGULATIONS AND RECENT CASE LAW
APRIL 27, 2022

Introduction

The Fair Labor Standards Act of 1938 (FLSA) is one of 14 statutes applied to the legislative branch through the Congressional Accountability Act (CAA), which is administered by the Office of Congressional Workplace Rights (OCWR). The current regulations implementing the FLSA in the legislative branch were issued in 1996; the OCWR Board of Directors has proposed changes to those regulations, which are currently open for public comment. Below we summarize the Board's proposed regulatory updates, along with some federal case law addressing various issues that may arise under the FLSA.

FLSA Overview

Section 203 of the CAA, 2 U.S.C. § 1313, applies certain provisions of the FLSA to employing offices and covered employees in the legislative branch:

- Section 6(a)(1) – 29 U.S.C. § 206(a)(1) – minimum wage
- Section 6(d) – 29 U.S.C. § 206(d) – prohibition of sex discrimination
- Section 7 – 29 U.S.C. § 207 – maximum hours and overtime
- Section 12(c) – 29 U.S.C. § 212(c) – oppressive child labor
- Section 16(b) – 29 U.S.C. § 216(b) – damages

In 1996 the Board of Directors of the OCWR (then known as the Office of Compliance) adopted – and Congress approved – three sets of regulations implementing the FLSA in the legislative branch. The H series applies to the House of Representatives, the S series applies to the Senate, and the C series applies to the instrumentalities of Congress covered by the CAA.

The statute and regulations establish certain fundamental principles regarding overtime, including:

- Every employee is covered unless specifically excluded. The scope of coverage for FLSA purposes is defined in the substantive regulations at S501.102, H501.102, and C501.102.
- Every covered employee is presumed to be "non-exempt" – i.e., entitled to overtime premium pay at a rate of one-and-a-half times the regular rate for all hours worked above 40 hours in a given workweek, as provided in the maximum hours provisions. 29 U.S.C. § 207(a)(1).
- Certain exemptions based on job duties eliminate the requirement to pay overtime, as set forth in the substantive regulations at Parts S541, H541, and C541.[1]
- Under the statute, "'Employ' includes to suffer or permit to work." 29 U.S.C. § 203(g). Unauthorized work time still counts as hours worked – and is therefore compensable – if the employer knows or has reason to believe that the work is being performed, even when the work is performed off-site. 29 C.F.R. §§ 785.11-785.12.
- In general, only time spent actually working is considered when determining whether an employee has exceeded 40 hours worked in a given workweek. Short rest periods typically count as hours worked, but bona fide meal periods of half an hour or more do not, unless the employee is required to continue working while eating. Paid leave time also does not count as hours worked. The regulations issued by the Department of Labor (DOL) contain other principles governing training, waiting, traveling, etc. *See* 29 C.F.R. Part 785.[2]

Proposed Regulations

The OCWR Board of Directors has published a Notice of Proposed Rulemaking (NPRM) in the Congressional Record that would replace the overtime provisions in Part 541 of the FLSA regulations.[3] These proposed regulations mirror the current Department of Labor overtime regulations, which were updated in 2019.

The primary purpose of the proposed changes is to bring the OCWR regulations for the legislative branch in line with the DOL regulations, especially with regard to the financially outdated salary test. Key changes include:

- Replacing the "short test" and "long test" from the 1996 regulations with a single test for each exemption;
- Significantly increasing the salary threshold for exempt employees;

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[1] The proposed changes to the FLSA regulations primarily concern these exemptions, as discussed below.
[2] Where the Board's regulations do not cover certain topics, the DOL regulations are instructive.
[3] Police officers and firefighters are covered in a different part of the regulations, and those existing regulations would remain unchanged by the proposed updates.

- Expanding the concept of a "professional" employee to include different sub-categories, including general professionals, learned professionals, lawyers, doctors, teachers, and creative professionals;
- Adding an exemption for computer employees; and
- Eliminating the category of "outside sales employees," which the Board has determined is inapplicable in the legislative branch.

Employees are determined to be exempt based on several factors, including:

- The employee must primarily perform executive, administrative, professional, or computer-related duties as provided in the regulations;
- In most cases, the employee must be paid on a "salary basis" – i.e., a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed; and
- In most cases, the employee must meet a certain salary threshold – specifically, $684 per week.

Additionally, there is an exemption for "highly compensated employees": an employee with total annual compensation of at least $107,432 is deemed exempt if the employee customarily and regularly performs one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

For full details about each of the exemptions, please see the Notice of Proposed Rulemaking as published in the Congressional Record.

Regulatory Process

The process for issuing regulations implementing the FLSA and other laws in the legislative branch is set forth in section 304 of the CAA, 2 U.S.C. § 1384. The OCWR Board will welcome public comments on the proposed FLSA regulations for 30 days after they are published in the Congressional Record.[4] After consideration of the comments received, the Board will adopt regulations, which will also be published in the Congressional Record along with a request for congressional approval. Those regulations will not become effective until approved by Congress – through a one-house resolution, a joint resolution, or a concurrent resolution – and issued by the OCWR Board via publication in the Congressional Record.

Comments must be submitted in writing to the OCWR Executive Director via email at rule-comments@ocwr.gov. All comments received will be made available for review on the OCWR web site.

[4] The Notice of Proposed Rulemaking can also be made available in large print, Braille, or other alternative formats. Requests for the NPRM in an alternative format should be made via email to adaaccess@ocwr.gov.

Recent Case Law

Below is a collection of some recent opinions issued by the U.S. Courts of Appeals concerning various FLSA topics. *Note* – to the extent the courts' analysis relies upon DOL regulations, especially concerning overtime and the categories of exempt employees, those regulatory provisions may differ from the existing OCWR substantive regulations implementing the FLSA. Those opinions will be more instructive once the OCWR Board's proposed amended regulations, which are more similar to the current DOL regulations, are adopted by Congress and issued by the Board through publication in the Congressional Record.

Exemptions

- *Brown v. Nexus Bus. Sols., LLC*, 29 F.4th 1315 (11th Cir. 2022) – Business development managers qualified for the administrative exemption because they exercised discretion in the performance of their duties. The plaintiffs' primary role was to find new corporate customers and persuade them to purchase General Motors vehicles, luring them away from GM's competitors. The employees argued that they did not have enough discretion to be exempt from the FLSA's overtime provisions, because among other things, they were provided with scripted language and canned presentation materials to use with prospective customers. They claimed that the decisions they were able to make regarding how to pursue each customer had only a de minimis effect on the performance of their duties, and that they had little or no discretion in any matters of significance, but the court disagreed, noting that employees need not have "limitless discretion" or a "total lack of supervision" in order to qualify for the exemption. As the court saw it, "Business development managers, it seems, are tasked with building relationships and developing leads—enterprises that require creative thinking and tailoring to each individual customer." The Eleventh Circuit therefore affirmed the district court's grant of summary judgment in favor of the employer.

- *Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289 (5th Cir. 2021) (en banc), *petition for cert. filed*, No. 21-984 (U.S. Jan. 11, 2022) – Employee sued for unpaid overtime, alleging he was paid a day rate – i.e., a set amount for each day he worked regardless of the number of hours worked. The employer argued that this was a "salary" and thus no overtime payment was required. The Fifth Circuit addressed whether a day rate could qualify as a salary. Initially a three-judge panel of the court created a new two-factor test for determining whether a daily-rate employee can be regarded as being paid on a salary basis and therefore exempt from overtime pay under the FLSA. However, after a rehearing en banc, on September 9, 2021 the full Fifth Circuit explained that "[t]his appeal requires us to do nothing more than apply the plain text of the [Department of Labor FLSA] regulations." Applying 29 C.F.R. § 541.604(b), the court held that a daily-rate worker can only be exempt if the employee is paid a minimum guaranteed amount and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The court concluded that "respect for text forbids us from ignoring text." In so doing, the Fifth Circuit rejected the employer's argument that a highly paid employee in the energy industry is always exempt.

- *Isett v. Aetna Life Ins. Co.*, 947 F.3d 122 (2d Cir. 2020) – The Second Circuit concluded that a nurse who did not work in a clinical setting, but who reviewed files to make

medical necessity determinations for her medical insurance company employer, was nonetheless performing exempt professional work. Although the plaintiff was not actually treating patients, the court concluded that she was in fact using her education and nursing skills to review medical records and claims, with minimal oversight, and although claim denials required further physician involvement, plaintiff could approve claims without further review.

- *Emmons v. City of Chesapeake*, 982 F.3d 245 (4th Cir. 2020) – Fire Department Battalion Chiefs sued their employer for non-compliance with the FLSA's overtime pay requirement. Plaintiffs' day-to-day duties included staffing, which consisted of apportioning work and deciding how to allocate personnel, and supervising firefighters, which required training and disciplining them. Though they participated in responding to certain fires and other emergencies, their role in doing so was to strategize and command. The court held that the plaintiffs were not categorically excepted from the FLSA's system of exemptions, because their primary duty was management, rather than frontline firefighting, and so the first responder regulation, pursuant to which first responder employees could not be exempted from the FLSA's overtime compensation requirement, did not apply to plaintiffs' claim.

- *Owens v. Neovia Logistics, LLC*, 816 F. App'x 906 (5th Cir. 2020) – Performing some manual work does not automatically remove an employee from FLSA-exempt administrative status so long as the manual work is directly and closely related to the work requiring the exercise of discretion and independent judgment. Here, Plaintiff argued that he did not qualify as an exempt administrative employee because his job consisted primarily of manual labor in a warehouse. He worked as a Continuous Improvement Supervisor for Defendant's logistics services company, where his duties were to lead workshops, travel to client facilities, and analyze clients' operations and report on how to improve them. The Fifth Circuit held that the district court fairly categorized the warehouse-labor work as collateral to his primary duty of being a trainer and assisting facilities with becoming compliant with National Occupational Standards and making the facility more efficient.

- *Bigger v. Facebook, Inc.*, 947 F.3d 1043 (7th Cir. 2020) – Plaintiff was a Client Solutions Manager (CSM) for Facebook. CSMs were generally tasked with some mix of giving potential advertising customers recommendations and actually selling advertisements. Lower-level CSMs were eligible for overtime, but Facebook considered higher-level CSMs like Bigger exempt. In defending against Bigger's lawsuit, Facebook invoked the "highly compensated employee" test, which is less stringent than the 3-prong test for the FLSA's administrative exemption. To show that an employee is exempt under the highly compensated test, an employer needs to demonstrate only that the employee makes above a certain salary threshold and that she "customarily and regularly performs any one or more of the exempt duties or responsibilities of an ... administrative ... employee." The two types of exempt duties and responsibilities of administrative employees are those that are "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" and those that involve "the exercise of discretion and independent judgment with respect to matters of significance." The court held that genuine issues of material fact existed as to whether

Bigger customarily and regularly performed either the "directly related" variety of exempt administrative duties or the "discretion and independent judgment" kind. It was unclear to what extent her duties involved *supporting* Facebook's core function, which would favor applying the administrative exemption, or actually *performing* the core function, which would not necessarily qualify her for the administrative exemption. The court also could not determine based on the factual record whether Bigger customarily and regularly did more than apply well-established techniques, procedures, or specific standards prescribed by Facebook in the performance of her duties, such that she would be exempt based on the exercise of discretion and judgment. The Seventh Circuit therefore affirmed the district court's denial of summary judgment to Facebook.

Overtime

- *Conner v. Cleveland Cty., N.C.,* 22 F.4th 412 (4th Cir. 2022) – Plaintiff, an emergency medical services provider, alleged that Defendant county underpaid her for straight (i.e., non-overtime) hours worked during weeks in which she also worked overtime. The Fourth Circuit held, as a matter of apparent first impression, that "overtime gap time" claims were cognizable under the FLSA. As the Court noted, there is no cause of action under the FLSA for pure gap time, which seeks to recover unpaid straight time in a week in which the employee worked no overtime, when there is no evidence of a minimum wage or maximum hour violation by the employer. But the FLSA ensures employees are adequately paid for all overtime hours; to do this, courts must ensure employees are paid all of their straight time wages first under the relevant employment agreement, before overtime is counted. An overtime gap time violation under the FLSA is thus a species of overtime violation: an employee who has not been paid all the straight time compensation she is owed before the overtime compensation is calculated has not been properly paid her overtime.

- *McPhee v. Lowe's Home Ctrs., LLC*, 860 F. App'x 267 (4th Cir. 2021) – Employer's "Give Back Time" policy provided eligible employees with paid leave to spend time volunteering with charitable organizations of their choice. Plaintiff employees alleged that the employer violated the FLSA by excluding payments made to employees pursuant to this policy from the employees' regular rate for overtime purposes. The Fourth Circuit found the Plaintiffs failed to allege facts tending to show that their volunteer work for third-party non-profits was for the primary benefit of the employer so as to constitute "work" under FLSA, and therefore employees failed to state a FLSA violation claim.

- *Bennett v. McDermott Int'l, Inc.*, 855 F. App'x 932 (5th Cir. 2021) (per curiam) – Plaintiffs alleged that their employers forced them to spend hours waiting for and riding on buses to access a rural worksite. Plaintiffs wanted to be compensated for this time and argued that the unique nature of the mandatory transportation system rendered their commute time compensable under the FLSA. The Fifth Circuit acknowledged that the employees spent a great deal of time on the mandatory bus system and that the busing system was inefficient for many employees, but held that those factors did not turn commute time into compensable work time under the FLSA. As the Court explained, generally speaking, work-related activities that take place before and after hours are

compensable only if they are integral part of and essential to an employee's principal activities. Time that Plaintiffs had to spend waiting for and riding buses to the worksite was not integral and indispensable to their work as welding foremen or pipefitters. The Court further explained that the time Plaintiffs spent waiting for and riding on the buses was not compensable travel time since no work was performed. Plaintiffs' allegation that "[u]pon information and belief, employees are, at times, required to accept work calls and/or discuss job duties for that particular day while on the buses" did not cross the compensability line – even at the motion to dismiss stage.

- *Hobbs v. EVO Inc.*, 7 F.4th 241 (5th Cir. 2021) – Field engineers alleged that Defendant employer failed to pay overtime, in violation of the FLSA. In addition to finding that Plaintiffs were not exempt and discussing a fluctuating workweek matter, the Fifth Circuit held that Plaintiffs' testimony as to the amount of time they generally worked each day was the best evidence of overtime due. Defendant failed to keep accurate time records for Plaintiffs, likely because it assumed field engineers were exempt. The Court reasoned that since Defendant created the problem of proof, it must bear some of the resulting uncertainty. Given the impossibility of proving the exact number of overtime hours, the question was whether the evidence here – i.e., Plaintiffs' testimony as to the amount of time they generally worked each day – adequately estimated them. The Court noted that it assesses employees' evidence under a lenient standard rooted in the view that an employer shouldn't benefit from its failure to keep required payroll records, thereby making the best evidence of damages unavailable, leading the Court to accept estimates of weekly overtime hours derived from plaintiffs' testimony as adequate evidence of damages.

- *Chagoya v. City of Chicago*, 992 F.3d 607 (7th Cir. 2021) – Members of the Chicago Police Department's SWAT team alleged that the city violated the FLSA by failing to compensate them for the off-duty time required to transport, load, unload, and store their SWAT gear inside of their residences. The plaintiffs alleged that they had to bring the equipment home in their department-issued vehicles in case they were called upon to respond to an incident while off-duty, but they were not allowed to leave the gear inside their vehicles. The city contended that the SWAT operators were permitted to store their gear in their lockers at work, but the plaintiffs argued that this would prevent them from responding in timely fashion to critical incidents, given how long it would take them to get from home to their workplace and the resulting delays in responding to the scene. They argued that transporting and storing their gear at home was integral and indispensable to their ability to maintain "mission readiness" and directly respond to critical incidents. The district court granted summary judgment to the employer, holding that the time spent transporting and securing gear at home was not compensable, and the Seventh Circuit affirmed, explaining: "SWAT operators may be able to perform their jobs *better* if they bring their weapons and other gear home, but… [they] still are able to perform their principal activities if they do not bring their equipment home but rely on other arrangements. Indeed, the record establishes that the officers who were unable to store their rifles at home would pick up their weapons from the weapons truck when it arrived on site. An activity that allows a reduced response time is an activity that promotes greater efficiency, but greater efficiency alone does not turn an activity into an integral and indispensable one."

- *Rapp v. Network of Cmty. Options, Inc.*, 3 F.4th 1084 (8th Cir. 2021) – An employer is liable for failure to pay overtime only if it knew or reasonably should have known that an employee worked overtime. In this case, the plaintiffs – direct support professionals for developmentally disabled individuals who resided in their homes – failed to show that their employer had constructive knowledge that they worked more than 40 hours per week. The plaintiffs alleged that they worked around the clock because their clients lived in the plaintiffs' homes, and that the employer should have known this; however, the plaintiffs did not produce records showing for how many extra hours they provided the specific support services for which they were employed, or that their employer knew they were working overtime. Simply because they lived at the same residences as their clients did not necessarily mean that the employer should have known they were spending more than 40 hours per week performing duties that were an integral and indispensable part of their principal work activities.

- *Clarke v. AMN Servs., LLC*, 987 F.3d 848 (9th Cir. 2021), *cert. denied*, 142 S.Ct. 710 (2021) – Clinicians' per diem pay functioned as wages – i.e., remuneration for hours worked – rather than as reimbursement for work-related expenses, and was therefore improperly excluded from their regular rate of pay, which in turn improperly decreased their wage rate for overtime hours.

- *Peterson v. Nelnet Diversified Sols., LLC*, 15 F.4th 1033 (10th Cir. 2021) – Call center representatives sued their employer for unpaid overtime, alleging that the employer improperly failed to compensate them for pre-shift time spent booting up their computers and launching software that was integral to their work. Before the employees were able to clock in on their computers – the act that started the time for which they got paid – they had to wake up the computer, insert a security badge, enter credentials, and wait for Citrix software to load so they could enter their timekeeping system and clock in. Whether pre-shift activities are compensable depends on whether they are integral and indispensable to the employees' principal duties; while the parties in this case agreed that the plaintiffs were employed to perform the principal activity of servicing student loans, which they did by interacting with debtors over the phone and through email, they disagreed as to whether the acts of booting up the computer and launching software were integral and indispensable to those principal duties. Both the district court and the Tenth Circuit concluded that they were: the data that allowed the employees to service student loans, such as borrower information and payment history, resided within the computer system, and so the employees could not dispense with the acts of booting up the computer and launching software because they necessarily needed to access the electronically stored information in order to communicate with the borrowers. Those preliminary activities were therefore intertwined with the employees' substantive performance of their principal duties. However, the district court held that the time spent doing these activities was de minimis, based on the de minimis doctrine in the regulations, which provides that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." The Tenth Circuit disagreed with the district court's de minimis holding, using a 3-factor balancing test that focused on (1) the practical administrative difficulty of recording the additional time, (2) the size of the claim in the aggregate, and (3) whether the employees performed the work on a regular

basis. The court found that it would not be administratively burdensome to estimate how much time employees spent on these activities, the aggregate amount of the claim would actually be fairly significant for many employees, and the activities were performed regularly. Therefore, the Tenth Circuit reversed the district court's grant of summary judgment in favor of the employer and remanded for further proceedings.

- *Dean v. Akal Sec., Inc.,* 3 F.4th 137 (5th Cir. 2021) and *Gelber v. Akal Sec., Inc.*, 14 F.4th 1279 (11th Cir. 2021) – In two separate lawsuits against the same company, the courts applied different methods of analysis to reach opposite conclusions as to whether meal periods were compensable under the FLSA. The plaintiffs in both cases were employees of a security company that contracted with the federal government to monitor deportees on flights to foreign countries. The employer's policy was to automatically deduct an hour of pay on return flights that exceeded 90 minutes and had no deportees, and the plaintiffs alleged that this policy violated the FLSA. The company argued that these were "bona fide meal periods" and thus not compensable.

  In *Dean*, the Fifth Circuit used the predominant-benefit test – i.e., whether the employer received the predominant benefit from a meal break – to determine whether the break was compensable or whether it was a "bona fide meal period." Factors examined by the court included: (1) whether the employees are subject to real limitations on their personal freedom which inure to the benefit of the employer; (2) whether restrictions are placed on the employee's activities during those times, such as whether or not the employee may leave the work site if he chooses; (3) whether the employee remains responsible for substantial work-related duties; and (4) how frequently the time is actually interrupted by work-related duties. The Fifth Circuit found that the meal breaks at issue were predominantly for the benefit of the employees, rather than employer, and thus such meal periods were not required to be compensated under the FLSA. Employees' activities were not restricted during the meal period, except for such restrictions that were inherent to working on an airplane, and there was no showing that employer benefited from the meal break or that employees were not free from their work-related duties during the meal period. The court noted that many cases acknowledge that some limitations on an employee are acceptable during a meal period, such as requiring them to remain in uniform, on the jobsite, and available to respond to emergencies if needed. The Fifth Circuit therefore affirmed the district court's grant of summary judgment for the employer.

  By contrast, in *Gelber* – which was decided 3 months after *Dean* – the Eleventh Circuit applied a burden-shifting rule and reached the conclusion that the employer had indeed violated the FLSA. The plaintiffs carried their initial burden to show that idle time on return flights was compensable: because *all* of the time on the empty, deportee-free return flights was idle time, the fact that the company paid the employees for most of the flight anyway was sufficient to establish that it considered idle time to be compensable. The burden then shifted to the employer to show that the one hour for which it deducted the employees' pay was somehow different, but as the court explained, it could not do so: "It follows, then, that the meal breaks must also be compensable—because, so far as we can tell, nothing distinguishes the 'meal breaks' from other idle—but compensable—time on the flight. Given that Akal admits that idle time on the flights was compensable, Gelber

has discharged his initial burden to show that the meal breaks—also idle time—were compensable, and the burden thus shifts to Akal to prove otherwise. To show that it can exclude one-hour meal breaks, Akal must point to something *other than* the fact that the [employees] were idle on the flights." Because the company did not point to any distinguishing feature of the one-hour meal period, it failed to satisfy its burden to show that the hour was non-compensable. Deducting an hour of pay therefore violated the FLSA.

- *Hernandez v. Plastipak Packaging, Inc.*, 15 F.4th 1321 (11th Cir. 2021) – Paying an employee bonuses on top of his fixed salary did not preclude the employer from using the "fluctuating workweek" method for calculating overtime pay. The fluctuating workweek method applies to workers who receive a fixed salary but work variable hours from week to week. Under this approach, the employer calculates the employee's regular rate by dividing the employee's weekly salary by the number of hours actually worked that week; the employer must still pay the employee for overtime worked, but only at one-half the employee's regular rate (not one-and-a-half times the regular rate, as in the standard method for calculating overtime). Although the rate of overtime pay is lower, the trade-off is that the employee still earns their full weekly salary even in weeks when they work fewer than 40 hours. In this case, the plaintiff received a fixed salary and worked variable hours, but could also receive extra compensation beyond his regular salary in the forms of shift premiums and holiday pay. He argued that because of those bonuses, he did not in fact receive a "fixed salary" and therefore the employer was not entitled to use the fluctuating workweek method, meaning he was entitled to time-and-a-half for his overtime. The district court sided with the plaintiff, but the Eleventh Circuit reversed, explaining that "providing an employee with additional compensation, like production bonuses or holiday pay, on top of his fixed salary is not inconsistent with the fluctuating workweek method. Plastipak's payment of additional bonuses on top of Hernandez's fixed salary did not make his fixed salary any less fixed." The court reasoned that "The compensation an employee receives is not the same as the fixed salary; the salary is a subset of the employee's compensation." Therefore the employer did not violate the FLSA by paying the employee less than one-and-a-half times his regular rate of pay for his overtime hours worked.

- *Akpeneye v. United States*, 990 F.3d 1373 (Fed. Cir. 2021) – Pentagon security and law enforcement officers asserted an entitlement to overtime pay because, they alleged, neither of their two daily breaks was a bona fide meal break, as they were required to work during both breaks. The court applied the "predominant benefit test" – i.e., whether the break is predominantly for the employer's or employee's benefit. Examining the totality of the circumstances, the court rejected the employees' argument that they were on "standby status" during their breaks, an argument based on the fact that they were required to remain vigilant, carry a radio, remain in a state of readiness, and respond to emergencies and contingencies as necessary. The court found that because they were not required to remain at their post (instead being relieved by other employees known as "breakers") or to carry out their regular job duties, and because if one break period got interrupted they could use the other break period as their meal period, they were not entitled to overtime under the FLSA.

- *Thomas v. Bed Bath & Beyond Inc.,* 961 F.3d 598 (2d Cir. 2020) – Department store managers alleged that their employer was not entitled to apply the fluctuating workweek (FWW) method to calculate overtime, and thus failed to pay overtime owed to them in violation of the FLSA. The court held that the employees' weekly wages were fixed (as required for application of the FWW method) where there were only six occasions out of over 1,500 combined paid weeks where a plaintiff's fixed salary was not paid, five of which had plausible reasons. Additionally, the court found no FWW violation for providing additional paid time off for later weeks when an employee works a holiday or previously scheduled day off, confirming that giving additional paid time off is not inconsistent with a valid FWW pay plan as long as the salary is not docked.

- *Tyger v. Precision Drilling Corp.,* 832 F. App'x 108 (3d Cir. 2020) – Pursuant to the employer's policies and OSHA regulations, employees who worked on oil and gas drilling rigs were required to wear various forms of personal protective equipment (PPE) while operating oil rigs, including flame-retardant coveralls, steel-toed boots, gloves, goggles, hardhats, and earplugs. Employees brought a collective action against the employer under the FLSA, seeking compensation for time spent donning and doffing, and for time spent walking between donning and doffing PPE and pre- and post-shift safety meeting locations. The court held that expert testimony was not necessary to prove that donning and doffing the PPE was integral and indispensable to their work drilling oil and gas wells (as would be required for donning and doffing to be compensable under FLSA) – a plaintiff may attempt to satisfy the integral and indispensable requirement with lay witness testimony and documentary evidence concerning worksite safety risks and the nature of the job and PPE at issue.

- *Wallace v. City of San Jose*, 799 F. App'x 477 (9th Cir. 2020) – If the employer did not comply with the FLSA in calculating the regular rate of pay, but nonetheless paid employees at least as much as the FLSA entitled them to receive, then the employer is not liable. Here, several firefighters sued the city for underpaying them, alleging among other things that the city miscalculated their regular rate of pay, and so they were paid less for their overtime than they would have been if that overtime payment had been based on the correct regular rate of pay. Explaining that the FLSA establishes a statutory floor for overtime pay, the court pointed out that even if the city did miscalculate the regular rate of pay, the amount of overtime the city had actually paid the firefighters was still more than what the FLSA would have required if the overtime had been based on plaintiffs' proffered regular rate of pay. Therefore the city was not liable, even if it the firefighters were paid less than they would have been if the city had not miscalculated the regular rate of pay.

- *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020) – The court held that detention officers were entitled to overtime pay for pre- and post-shift activities. The security screening which began the day, and the checking in of specialized keys and equipment at the end of the day, were deemed to be integral and indispensable to the officers' principal duties and greater than de minimis, and therefore compensable under the FLSA. Because the pre- and post-shift activities that occurred in between – including a pre-shift briefing, walking to and from the officers' posts, and a post-shift passdown

briefing – were part of the officers' continuous workday, those were also deemed compensable.

Equal Pay

- *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460 (5th Cir. 2021) – Plaintiff, a food and beverage director at a hotel, alleged that her employer violated Title VII and the EPA when it paid her less than three men who preceded her as food and beverage director of Defendants' other locations. Under the EPA, a plaintiff must show that the pay violation occurred within a single "establishment." Since each location functioned separately, Defendants hired on a property-by-property basis and had no wage agreement, and job duties of each food and beverage director differed by location, the Plaintiff could not establish a prima facie case under the EPA. The Fifth Circuit noted that Title VII contains no such "establishment" requirement, so it remanded the case to the District Court to determine if the Plaintiff could establish a prima facie case with respect to those three comparators under Title VII.

- *Briggs v. Univ. of Cincinnati*, 11 F.4th 498 (6th Cir. 2021) – Plaintiff, a Black male, alleged that his employer violated both Title VII and the Equal Pay Act by paying him less than a White female colleague for doing the same work. In a succinct summary of the different analysis required under each of the two laws, the Sixth Circuit explained that once the plaintiff established a prima facie case of disparate treatment, "[W]ith respect to the EPA, we ask whether [the employer] has proven that the wage differential was based on a factor other than sex that was applied for a legitimate business reason; with respect to Title VII, we ask only whether [the employer] has produced evidence from which a reasonable jury could infer it had a legitimate, non-discriminatory reason for its actions." In this case, the district court had granted summary judgment in favor of the employer on both counts, but the Sixth Circuit reversed, holding that genuine issues of fact remained as to whether "factors other than sex" were the reason for the pay disparity between the two employees, and that although the employer had "satisfied its lower Title VII burden of articulating a legitimate business explanation for the disparity," the plaintiff had produced sufficient evidence to create a genuine issue of material fact as to whether the employer's proffered reason was pretextual.

- *Kellogg v. Ball State Univ.*, 984 F.3d 525 (7th Cir. 2021) – The plaintiff was hired as a teacher in 2006, and when she tried to negotiate a higher starting salary, the school's director told her she didn't need it because her husband worked. Twelve years later, in 2018, she filed a complaint alleging Title VII and Equal Pay Act violations, based on her allegation that similarly situated male colleagues were receiving higher salaries. The school offered gender-neutral explanations such as "salary compression" to justify the disparity, but the plaintiff argued that those explanations were pretextual, citing the director's 2006 comment as evidence that the real reason for her lower pay was discriminatory. The Seventh Circuit rejected the employer's attempt to characterize the director's statement as "offhand" or a "stray remark," finding instead that "It was a straightforward explanation by the [school's] director, who had control over setting salaries, during salary negotiations that Kellogg did not need any more money 'because'

her husband worked at the University. Few statements could more directly reveal the [school's] motivations." Importantly, the Seventh Circuit also rejected the school's argument that the director's statement could not be considered because it occurred outside the statute of limitations. In its opinion, the Seventh Circuit clarified that the "paycheck accrual rule" applies not only to wage discrimination claims under Title VII, but also to Equal Pay Act claims; this rule, as codified by the Lilly Ledbetter Fair Pay Act of 2009 (which amended Title VII and other statutes), provides that a new cause of action for pay discrimination arises every time an employee receives a paycheck resulting from an earlier discriminatory compensation practice, even if that earlier practice occurred outside of the limitations period. Despite the fact that the Ledbetter Act did not amend the FLSA, the Seventh Circuit held that "the paycheck accrual rule applies to 'allegations of unlawful discrimination in employee compensation' under the EPA" and therefore that the 2006 statement regarding the plaintiff's starting salary could be used to support her claims under both statutes.

- *Freyd v. Univ. of Ore.*, 990 F.3d 1211 (9th Cir. 2021) – A female psychology professor sued the university on several bases including Equal Pay Act violations, because her pay was lower than that of four male colleagues of equal rank and seniority. The district court granted summary judgment in favor of the university, but the Ninth Circuit reversed with respect to the Equal Pay Act claims, holding that the district court erred in analyzing whether the plaintiff's job was "substantially equal" to those of the male professors. Noting that "substantially equal" does not necessarily mean "identical," the court explained that the relevant inquiry is whether the jobs share a "common core" of tasks, and then whether any additional tasks incumbent upon one job but not the other make them substantially different. The court held that, viewed in the light most favorable to the plaintiff, a reasonable jury could find that her job was substantially equal to those of the comparators. Although they supervised different laboratories or projects, a reasonable jury could find that they shared the same "overall job," as they were all full professors who conducted research, taught classes, advised students, and served actively on committees and in other roles in service to the university.

- *Rivera v. E. Bay Mun. Util. Dist.*, 799 F. App'x 481 (9th Cir. 2020) – Plaintiff, a Gardener Foreman who was responsible for supervising the work of gardeners performing maintenance work, alleged that she was paid less than male employees in other supervisory positions including those of Electrical Supervisor, Mechanical Supervisor, Instrument Supervisor, and Carpenter Supervisor. The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the employer, because the different supervisory positions did not share a common core of duties; despite having "superficially similar supervisorial skills and responsibilities, the underlying work that the comparator positions monitor requires additional journey-level training and technical knowledge." Moreover, even if the positions had shared a common core of duties, the comparator positions had additional duties that the plaintiff's did not, such as leading apprenticeship programs and being required to be on emergency standby every other week throughout the year, which made the positions substantially different.

- *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 189 (2020) – The Ninth Circuit joined the majority of its sister Circuits in holding that under the Equal Pay

Act, prior pay does not qualify as "any other factor other than sex" that could defeat a prima facie EPA claim. The court first determined that the "other factors" must be related to the job itself, and then reasoned that "Prior pay—pay received for a different job—is necessarily not a factor related to the job for which an EPA plaintiff must demonstrate unequal pay for equal work." The court went on to explain: "[T]he history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex. And allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities. We acknowledge that prior pay could be viewed as a *proxy* for job-related factors such as education, skills, or experience related to an employee's prior job, and that prior pay can be a *function* of factors related to an employee's prior job. But prior pay itself is not a factor related to the work an employee is currently performing, nor is it probative of whether sex played any role in establishing an employee's pay."

- *Savignac v. Jones Day*, 539 F. Supp. 3d 107 (D.D.C. 2021) – Plaintiff, an associate attorney at a large international law firm, brought an action against her employer alleging sex-based discrimination in violation of the EPA. The district court held, as matter of first impression, that a prima facie EPA claim has two elements: unequal pay and working in a substantially similar (i.e., substantially equal) job. The employer argued that EPA plaintiffs bear the additional burden of pleading (and later showing) that they actually performed "equal work" on the equivalent job. That is, in the firm's view, EPA plaintiffs bear the burden of pleading (and showing) both that their jobs and their comparators' jobs required equal efforts and that they and their comparators actually performed substantially equal work. The court explained that "equal work" and work on a job requiring "equal skill, effort, and responsibility performed under similar working conditions" are not two separate requirements to state a claim under the EPA, but rather an operative term and its definition.

Liquidated Damages

- *Gelber v. Akal Sec., Inc.*, 14 F.4th 1279 (11th Cir. 2021) – Liquidated damages are usually available to plaintiffs who successfully show that their employers violated the FLSA, but if an employer demonstrates that the act or omission giving rise to the violation was made in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FLSA, the court has discretion to not award liquidated damages. Here, the employer was found to have violated the FLSA when it failed to compensate employees for meal periods, having erroneously determined that its employees were completely relieved from duty during those breaks; however, the employer successfully avoided having to pay liquidated damages. Because a company executive sought advice from outside counsel regarding the meal-breaks policy and was advised that the policy comported with the FLSA, the district court found (and the Eleventh Circuit agreed) that the employer acted in good faith; nor was the employer's decision objectively unreasonable, especially given that the Eleventh

Circuit had never decided a question similar to the one at issue in this case, and that its case law had not clearly settled either the allocation of burdens or the standard for judging the compensability of meal breaks.

- *Shea v. United States*, 976 F.3d 1292 (Fed. Cir. 2020) – Liquidated damages may be denied in cases where the employer demonstrates that its classification decision, though erroneous, was made in good faith and was made with reasonable grounds for believing that its act or omission was not a violation of the FLSA. The good faith prong requires a subjective showing, whereas the reasonable grounds prong is objective. In this case the Naval Criminal Investigative Service (NCIS) was found to have misclassified an Investigations Specialist's position as exempt, erroneously determining that his primary duty was management when it was in fact conducting surveillance, which did not qualify him for the administrative exemption. The trial court denied liquidated damages, however, finding that the NCIS had acted reasonably and in good faith. The Federal Circuit agreed, noting that the position description could reasonably have been interpreted as qualifying for the administrative exemption, that the employee's supervisor testified he believed the managerial aspects of the position qualified the employee as exempt, and that the NCIS had a formal process for classifying positions and reviewing decisions, evincing its intent to comply with the FLSA, but that the position description in this case had not been flagged as having changed, so it didn't trigger the review process. Notably, the court emphasized the importance of determining good faith and objective reasonableness with respect to the specific misclassification at issue in a given case, warning that a trial court "would likely abuse its discretion by making findings of good faith and reasonable belief… solely resting on non-specific evidence or only on the employer's actions after an employee files suit."

Retaliation

- *Velazquez v. Yoh Servs., LLC,* 803 F. App'x 515 (2d Cir. 2020) – The Second Circuit held that the district court correctly dismissed Velazquez's FLSA retaliation claim because she failed to provide evidence sufficient to permit a reasonable jury to find that she engaged in activity protected by the statute – that is, that she complained about not being paid overtime. Velazquez described making various informal complaints about her pay while assigned through Yoh, a staffing agency, to work at CNBC (such as texting her CNBC supervisor, "I better get paid in the next week"). Although Velazquez characterized these statements as informal complaints about overtime, the court held that a reasonable jury could only find that no reasonable employer would have understood the statements to be an assertion of her statutory rights to overtime under the FLSA. Moreover, Velazquez acknowledged below that her regularly scheduled hours rarely exceeded 30 a week, nowhere near the 40-hour threshold for overtime under the FLSA. Against this backdrop, a reasonable juror could only conclude that Velazquez's employers understood Velazquez to be seeking to reconcile discrepancies between her pay and her own recollection of hours worked, but not that she was asserting her federally protected right to overtime under the FLSA.

- *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460 (5th Cir. 2021) – Plaintiff, a food and beverage director at a hotel, could not establish a prima facie case of retaliation under the Equal Pay Act. The Fifth Circuit held that she did not suffer an adverse employment action that would support her retaliation claim when a general manager emailed Plaintiff's team giving team a deadline without allowing Plaintiff to speak to her team directly; that instance did not amount to a material change in job duties, much less one likely to dissuade a reasonable worker from making charge of discrimination. Neither was it an adverse employment action when her supervisor was hostile to her (including on one occasion screaming at her, slamming her office door, and banging his fists on her desk) since his conduct was not because of her discrimination charge but in response to her concerns about directions given to her team without her present. The Fifth Circuit noted that criticism, such as oral threats or abusive remarks, does not rise to the level of an adverse employment action.