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The Fair Labor Standard Act:

An Overview of the Basic Provisions and Recent Developments

By: Sheila B. Gladstone
Thanks to Emily Linn, Attorney at Lloyd Gosselink,
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Author Contact Information:

Sheila B. Gladstone
Lloyd Gosselink Rochelle &
Townsend, P.C.
Austin, Texas 78701
sgladstone@lglawfirm.com
512-322-5863

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Introduction

The Fair Labor Standards Act ("FLSA") is a federal employment law that establishes many of the workplace wage and hour standards employers should be familiar with, including minimum wage, overtime pay, record keeping requirements related to tracking hours worked, and child labor standards. There are also special rules that apply to public employers, including municipalities, regarding guidance on fire and police activities, volunteer work, and the offering of compensatory time instead of cash overtime payment.

The Department of Labor's ("DOL") Wage and Hour Division administers the FLSA and frequently issues regulations and other guidance for employers on how to comply with the wage and hour rules. Over the last year, there have been a number of updates from the DOL, which are outlined below. While many of the recent rules involve revising or rescinding policies of the Trump Administration, including a proposed test for independent contractor classification and a revised rule on joint employer status, there has also been progress in establishing new final rules and other guidance on topics including volunteer time, calculating regular rate of pay for the purpose of overtime pay, and assessing minimum wage and overtime pay for tipped employees.

This paper first discusses the basic provisions of the FLSA, highlighting considerations and common pitfalls for municipal employers, followed by a brief update on the current status of the DOL's new rules and other guidance.

Overview of the Fair Labor Standards Act

Federal Minimum Wage.

The FLSA established a federal minimum wage, which is currently set at $7.25/hr. 29 U.S.C. § 206(a)((1)(C). This is a floor, meaning that states and other local entities can adopt a higher minimum wage, though Texas has not. There is a separate minimum wage for tipped employees. Tipped employees must be paid at least $2.13/hr in direct wages, however, their total pay when taking into account a tip credit must still equal the $7.25/hr federal minimum. 29 U.S.C. § 203(m).

Recently there has been a legislative push to increase the minimum wage, including through the Raise the Wage Act of 2021 and in a House version of the American Rescue Plan Act. While the final version of the stimulus package did not include any increase, the Biden Administration and Democratic lawmakers have indicated they will continue to push for an increased minimum wage.

While legislative change has proven to be slow moving, consumer demand, as well as a tight labor market, has prompted many employers to increase their hourly minimum wages. Examples include Bank of America which has stated it plans to increase its minimum wage to $25/hr by 2025, and retail outfits like Amazon and Target, which have promised an increase to $15/hr.

Overtime Pay.

The FLSA requires that covered, non-exempt employees be paid overtime pay at time and a half, for hours worked over 40 hours in any seven-day work week (with some work period differences for police, fire, and hospital staff – see section on police and fire later in this paper). 29 U.S.C. § 207. Employers should define their seven-day work period in writing, preferable in an employment manual or other personnel policies. Employers should also clearly indicate whether an employee can or must flex their time within the same work week to avoid overtime, and for public sector employees, whether they will offer time and one-half compensatory time, rather than cash overtime pay for hours worked over 40 hours in a week.

For municipal employers that allow compensatory time in lieu of overtime pay, remember that non-public safety personnel are capped at 240 hours of compensatory time before cash overtime must he paid (public safety personnel are permitted a total of 480 hours of compensatory time before an employer must revert back to overtime pay). 29 U.S.C. § 207(o). Public employers can require employees use their compensatory time before other accrued leave or when they are getting close to their applicable 240/480 hr. maximum compensatory time thresholds.

<u>Exempt vs. Non-Exempt Status.</u>

When classifying workers as either exempt or non-exempt from overtime requirements, an employer must first determine whether an employee is paid on a salaried, and not hourly basis, and meets the salary minimum to be considered exempt under the FLSA's executive, administrative and professional exemptions, also known collectively as the "white collar exemptions." 29 U.S.C. § 213. The salary threshold for the white collar exemptions was recently updated to **$35,568 a year ($684 per week)**. 29 C.F.R. § 541.600.

Employees earning more than the minimum salary must also meet a "primary duties" test in order to be classified as exempt. The test requires that the employee's main, major or most important duty that the employee performs be one that fits into one of exempt classifications. 29 U.S.C. § 213(1).

- To qualify for the **executive exemption**, the person must manage the enterprise or a department within the enterprise, must regularly supervise 2+ employees, and have the authority to hire or fire other employees (or their recommendations as to hiring/firing are given particular weight). Examples of municipal positions qualifying under the executive exemption might include: a City Manager, department heads and other supervisory employees. Leads and foremen must not have as their primary duty the same non-exempt work that those they supervise perform. 29 C.F.R. §§ 541.100–106.

- To qualify for the **administrative exemption**, the worker's primary duty must be the performance of non-manual work directly related to the management or general operations of the employer, and the employee must exercise discretion and independent judgment on matters of significance. Examples of municipal positions qualifying under the administrative exemption might include: City Human Resource Manager, upper-level

employees working in payroll or benefits management and certain marketing and public relations positions. 29 C.F.R. §§ 541.200–204.

- There are two types of **professional exemptions**, the learned professional and creative professional. To qualify for the learned professional employee exemption, the person's primary duty must be performing work requiring advanced knowledge, defined as work predominantly intellectual in character and requiring consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning and must be customarily acquired by prolonged, specialized instruction. To qualify for the creative professional employee exemption, the person's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized artistic or creative field. Examples of municipal positions qualifying under the professional exemption might include: attorneys in municipal legal departments, doctors, statisticians, CPAs, and City engineers and planners. 29 C.F.R. §§ 541.300–304.

Notably, the 'white collar' exemptions do not apply to employees who perform manual labor or other repetitive tasks with their bodies, or to most police, fire fighters, paramedics or other first responders, even if the employee is high ranking. Titles alone are not enough to guarantee exemption; rather, the position must truly be a policy-making desk job. 29 C.F.R. § 541.2. Foremen who primarily do the non-exempt work of those they supervise are not exempt. This issue is also commonly seen with certain members of the fire and police departments who have both leadership roles, as well as traditional field work. Employers need to look at the breakdown of the job duties for that position, to ensure that the primary duties is a policy-making desk job.

There are several other types of exemptions, including a computer employee exemption and an outside sales exemption, each which come with their own list of primary duties that must be met to qualify.

To qualify for the exemption for employees in computer-related occupations, an employee's primary duties must consist of the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or a combination of the above duties, the performance of which requires the same level of skills. 29 C.F.R. §§ 541.400–402.

To qualify under the outside sales exemption, an employees' primary duties must be making sales (as defined in the FLSA as "any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition and it includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and the employee must customarily and regularly engage away from the employer's place of business. 29 C.F.R. §§ 541.500–504.

Finally, there is also a highly compensated employee exemption ("HCE"). Salaried employees whose total compensation is more than a prescribed minimum threshold are considered exempt from the FLSA's overtime requirements if they meet at least one of the factors of any of the white collar exemptions described above. The salary minimum for HCEs was recently updated to **$107,432 per year**. 29 C.F.R. § 541.601.

Calculating Hours Worked.

In order to calculate overtime pay, employers must understand how to compute the total hours worked. The FLSA defines the term "employ" as "to suffer or permit to work" and working hours include all time during which an employee is necessarily required to be on the employer's premises, performing work duties, or at a prescribed work place.

Problems arise for employers when they don't accurately recognize hours worked. Below is a list of common situations where employers have struggled with calculating hours worked:

- *Waiting Time*: While generally waiting time is not considered hours worked, there is an exception to this general rule when an employee has been engaged or directed to wait. For example, a firefighter who watches TV while waiting for an emergency call. In these positions, the employee is being engaged to wait and the time is compensable hours worked.

- *On-Call Time:* An employee who is required to remain on call on the employer's premises is working while on call. However, an employee who is required to remain on call at home, and may be subject to travel and behavioral restrictions, is not working in most cases while on call. However, employers should be careful on placing too many restrictions on on-call employees, as significant constraints on employee's freedom could require the time to be compensated.

- *Meal Times and Breaks:* Rest breaks of 20 minutes or less are considered paid working time. If an employer has a policy expressly outlining the maximum break time and consequences for exceeding that time, time in excess of the authorized break time does not have to be counted as hours worked. For meal times of 30 minutes or more, the time is not considered working time when an employee is completely relieved from their duty for the purpose of eating their meal. However, if an employee is performing some duties while eating, such as answering the phone or watching charges, that time needs to be included as hours worked. To prevent employees from working during meal times, employers might consider including a specific prohibition in their employment policies and have a separate area available for employees to eat away from their workspace.

- *Breaks for Nursing Mothers:* Employers are required to provide reasonable break time for an employee to express breast milk for nursing children for one year after the child's birth. Employers are further required under federal law to provide a place (other than a bathroom) that is private and may be used by an employee to pump. The FLSA does not require that these nursing breaks are compensated breaks. However, employees who take nursing breaks should be compensated in the same manner that other employees are compensated

for break time, and breaks of less than 20 minutes must be compensated. In other words, employers should not treat nursing employees worse than other employees who ask to take breaks throughout the day. Finally, the rule that an employee must be completely relieved from duty when on a non-compensable break applies to nursing employees. If an employee is able to continue their job duties while pumping, the time should be counted as compensable hours worked.

- *Sleeping Time and Other Personal Activities*: An employee who is required to be on duty for less than 24 hours is working even though the employee is permitted to sleep or engage in other personal activities during periods of inactivity. In contrast, an employee who is required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked regularly scheduled sleeping periods of no more than eight hours, provided adequate sleeping quarters are provided by the employer, and the employee can regularly enjoy uninterrupted sleep. No reduction of hours worked for sleep time is permitted when an employee sleeps less than five hours.

- *Meetings and Training Time*: Attendance at lectures, meetings and training programs during regular working hours should generally be counted as hours worked. However, training time is not considered compensable time under the FLSA if the following four criteria are met: 1) the meeting is outside working hours; 2) is voluntary; 3) is not related to the employee's current job; and 4) no other work for the employer is concurrently performed during the meeting.

- *Travel Time*: Whether travel time is considered compensable under the FLSA depends on the type of travel:

    - Commuting from home to work and back is not working time, unless the employee is called back to work after returning home for an emergency.

    - Commuting from home to work and back to or from a location in another city that is not the employee's regular place of work is considered working time, however, employers can deduct regular commuting time from the total travel time.

    - Travel that is part of an employee's work day (e.g., traveling between different job sites) is work time and must be counted as hours worked.

    - Overnight travel time is considered compensable time when it occurs during normal working hours (even on non-working days). For example, if an employee is traveling Friday through Saturday, even though Saturday is not a typical working day, any travel as a passenger occurring during the employee's normal working hours on Saturday must be counted as hours worked. If the employee is driving, however, the employee is working, and all time spent driving is compensable. Meal breaks during travel are not compensable, and once the employee arrives at the destination, any non-working time is not compensable.

See DEP'T OF LAB., WAGE & HOUR DIV., Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs22.pdf.

Calculating Regular Rate of Pay.

The other component to calculating overtime pay is understanding an employee's regular rate of pay. An employee's regular rate of pay must at least meet the minimum wage threshold. When calculating overtime pay, employers multiply the employee's regular rate of pay by the number of hours worked over forty hours.

Under the FLSA, regular rate of pay is defined as "all remuneration for employment paid to, or on behalf of, the employee." The FLSA provides an exhaustive list of types of payment that can be excluded from the regular rate of pay calculation. 29 U.S.C. § 207(e). Broadly, these types of excludable payments fall into the following categories:

- Gifts and payments in the nature of gifts on holidays or special occasions;
- Payments for occasional periods when no work is performed due to vacation, holidays, or illnesses; reimbursable business expenses and other similar payments;
- Discretionary bonuses;
- Profit-sharing plans;
- Employer contributions to benefit plans;
- Premium payments for non-FLSA overtime; and
- Stock options.

The general rule is that all compensation for hours worked, services rendered or performance must be included in the regular rate, including when a payment is a wage supplement, even if such payment is not directly related to an employee's performance or hours worked. 29 U.S.C. § 207(e). Non-discretionary bonuses based on a formula or other objective criteria must be included in regular rate of pay. The DOL recently issued additional guidance on calculating regular rate of pay, which is outlined in Section II, below.

For employees who work irregulars hours, the FLSA permits an employer to outline a regular rate of pay for the purposes of overtime in an employment contract or agreement, so long as the rate is not less than the federal minimum wage and the employer provides a weekly guarantee of pay for not more than 60 hrs based on the rates so specified. 29 U.S.C. § 207(f).

Recordkeeping and Posting Requirements.

Under the FLSA, employers are responsible for keeping accurate timekeeping and pay records of all non-exempt employees. While the FLSA does not identify particular records that must be maintained, it does specify a list of employee information that should be maintained. *See* DEP'T OF LAB., WAGE & HOUR DIV., Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs21.pdf.

Specifically, employers should be maintaining the following information:

- Personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age;
- Hour and day when workweek begins;
- Total hours worked each workday and each workweek;
- Total daily or weekly straight-time earnings;
- Regular hourly pay rate for any week when overtime is worked;
- Total overtime pay for the workweek;
- Deductions from or additions to wages;
- Total wages paid each pay period; and
- Date of payment and pay period covered.

These records should be maintained for two to three years, depending on the type of records (i.e., three years for payroll records, and two years for time cards, wage rate tables, schedules, records of additions/deductions from wages, etc.). Municipal employers should refer to their record retention schedules for additional guidance on how long to keep these FLSA-related records.

The FLSA does not mandate a particular timekeeping method, however, it does require that whichever method an employer chooses, it be complete and accurate, calculating employees' precise in and out times and the total hours worked. For employees who are on fixed schedules which rarely vary, it is sufficient to keep a record showing the exact schedule of daily and weekly hours and then indicating only when the employee does not follow that fixed schedule (i.e., recording the hours worked on an exception basis when the employee varies from his or her fixed schedule).

Further, employers must display official posters outlining the provisions of the FLSA in a conspicuous place in all their establishments. 29 C.F.R. § 516.4. Employers can download FLSA posters and other required notices, along with guidance regarding the same, here. *See* DEP'T OF LAB., WAGE & HOUR DIV., Workplace Posters, https://www.dol.gov/agencies/whd/posters.

Child Labor Rules.

The FLSA includes workplace protections for minors. 29 U.S.C. § 212. The FLSA regulations outline the number of hours that youth under 16 years of age can work, including prohibiting work during school hours, and includes a list of hazardous job duties prohibited for young workers. 29 C.F.R. part 570. The Texas Workforce Commission ("TWC") has issued additional rules about child labor that employers should be cognizant of if they are employing workers who are under 18 years old. TEX. WORKFORCE COMM'N, Texas Child Labor Laws, https://www.twc.texas.gov/jobseekers/texas-child-labor-law#lawRules.

Law Enforcement and Fire Protection Employees.

The FLSA outlines special overtime pay rules for law enforcement personnel[1] and fire protection employees.[2]

For employees engaged in these public service fields, overtime can be paid on a "work period" basis. A work period may be anywhere from 7 to 28 consecutive days in length. Overtime pay is required during these work periods when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28. 29 U.S.C. § 207(k). As an example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement must receive overtime after 86 hours worked during a 14-day work period.[3]

Employees can perform both law enforcement duties and some unrelated duties and remain exempt from the usual overtime rules so long as they do not spend more than 20% of the workweek on non-exempt tasks (i.e., other activities besides law enforcement). 29 C.F.R. § 553.212. There is not a similar limitation on non-exempt duties for fire protection personnel.

DOL Employer Investigations.

The DOL's Wage and Hour Division is responsible for administering and enforcing a number of federal laws regarding labor standards, including the FLSA. One of the ways the DOL enforces the FLSA is through employer investigations and audits. Sometimes DOL investigations are prompted by complaints, and other times the DOL might engage in targeted investigations looking at a particular industry or business.

The FLSA authorizes representatives of the Department of Labor to investigate and gather data concerning wages, hours, and other employment practices, as well as enter and inspect an employer's premises and records and question employees to determine compliance with the FLSA provisions. 29 U.S.C. § 211.

When a DOL investigator arrives onsite at an employer's premises, the investigator should identify himself/herself and present their official credentials, and then explain how the investigation will work and what, if any, records they will need.

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[1] Law enforcement personnel are defined under the FLSA as employees who are empowered by State or local ordinances to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes, and who have the power to arrest and who have undergone training in law enforcement. Jail, prison and locked facility guards also fit this definition. 29 C.F.R. § 553.211.

[2] Fire protection employees are defined as firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous material workers who are trained in fire suppression, have the legal authority and responsibility to engage in fire suppression, are employed by a fire department of a municipality, county, fire district, or State and are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk. 29 C.F.R. § 553.210.

[3] Certain hospital employees may work on a 14-day work period. 29 U.S.C. § 207(j).

The general steps of a DOL investigation are as follows: 1) the investigator will examine relevant records to determine applicable laws/exemptions; 2) the investigator will then examine payroll and time records and any other records relevant to the investigation; 3) the investigator then interviews relevant employees in private; and 4) once all the fact-finding and investigation is complete, the investigator will meeting with the employer or other representative, and the investigator will present any violations and corrective action. *See* DEP'T OF LAB., WAGE & HOUR DIV., Fact Sheet #44: Visits to Employers, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs44.pdf.

Consequences for Minimum Wage and Overtime Violations.

The DOL has the authority to recover the following damages from employers[4] who violate minimum wage, overtime and other FLSA provisions:

- Back wages (i.e., the difference between what the employee was paid and the amount they should have been paid under the FLSA) for two years, or three years if the violation is found to be "willful";
- Liquidated damages owed to the employees (in an equal amount to employee's back wages);[5] and
- Civil money penalties to be paid to the government (up to $1,000 for each violation, for employers who willfully or repeatedly violate FLSA minimum wage/overtime pay requirements; up to $10,000 for each violation of the child labor provisions).

See 29 U.S.C. § 216.

These damages can be recovered in pre-litigation administrative processes, as well through the DOL filing a lawsuit in a U.S. District Court on behalf of employees. In additional to back wages and liquidated damages, the DOL can also seek an injunction enjoining the employer in question from future violations of the FLSA, as well as a court order preventing shipment of any affected goods. 29 U.S.C. § 217. This means the DOL can halt distribution for employers who violate wage and hour rules.

[4] "Employer" is defined broadly, not just as the employing entity, but also any individual "acting directly or indirectly in the interest of an employer in relation to any employee." See 29 U.S.C. § 203(d). This could include an owner, officer, manager or supervisor who has exerted sufficient operational control over the employee's wages and hours. So a supervisor who tells employees to work "off the clock" could be individually liable, as well as a general manager who may not have been directly involved in the violation, but maintains control over the organization.

[5] Effective April 9, 2021, the DOL returned to pursuing pre-litigation liquidated damages after the Trump Administration paused the use of the enforcement tool in June 2020. Liquidated damages are intended to supplement back wages, and compensate workers for damages they may have incurred as the result of not having been paid timely for all wages legally earned. Pre-litigation liquidated damages have been a successful enforcement tool in the past, incentivizing the settlement of cases in lieu of litigation. *See Liquidated Damages in Settlements in Lieu of Litigation*, DEP'T OF LAB. BLOG (Apr. 9, 2021), https://blog.dol.gov/2021/04/09/liquidated-damages-in-settlements-in-lieu-of-litigation.

Employees have a private right of action against an employer and can recover their back wages and liquidated damages, plus reasonable attorney's fees and court costs.

Finally, employers who willfully violate the FLSA may be subject to criminal prosecution, including not only fines up to $10,000, but also possible imprisonment. 29 U.S.C. § 217(a).

New FLSA Rules and Guidance

Below is an update on some of the DOL's latest wage and hour rules and guidance, as well as recent observations about how employers can ensure compliance with the FLSA provisions during the COVID-19 pandemic and remote work arrangements.

New Guidance on Employees' Volunteer Time (effective Mar. 14, 2019).[6]

In March 2019, the DOL issued an opinion letter on volunteer time (and whether the time should be included in hours worked for the purposes of calculating overtime pay). The DOL has indicated that it is okay to not pay employees for volunteer work representing the employer outside of work hours, so long as several conditions are met:

- The volunteer work must be truly optional, with no pressure to participate and no employment consequences for employees who choose not to volunteer.
- The volunteer work must not be of the same nature as the work the employee is employed to perform. For example, a payroll employee who volunteers to cut the checks for vendors and contractors used to staff a charity event, would be performing volunteer work identical to her normal job functions for the employer.
- The volunteer work must be for a civic or charitable purpose
- An employee cannot waive or otherwise volunteer to work overtime.

Calculating Regular Rate of Pay for Overtime Calculation (effective January 15, 2020).

Last year, the DOL clarified that certain employee perks and benefits are not included in the regular rate of pay when calculating overtime rate. Such benefits include:

- Nominal non-cash gifts (*e.g.*, coffee, snacks, coffee cups, t-shirts, raffle prizes).
- The value of "perks" and conveniences for the employee (*e.g.*, on-site massages, recreational facilities, wellness programs, tuition payments).
- Discretionary bonuses not based on some pre-established, objective criteria.
- Payments for time not worked (*e.g.*, paid time off, on-call pay, etc.).
- Reimbursements for business expenses.
- Retirement and insurance plan contributions.

[6] Public sector and charitable non-profit employers may have volunteers, if they are solely volunteers, with no expectation of compensation. However, if the individual is also an employee of the same organization, then these rules apply.

Revised Tipping Regulations Coming Later this Year.

Although unlikely to apply to cities, which normally do not employ tipped employees, the DOL published a final rule regarding tipping on December 30, 2020. If the municipality runs, for example, a café, it is possible this could be relevant. The tipping rule prohibits employers from keeping tips received by their employees, regardless of whether the employer takes a tip credit. The rule further restricts employers from authorizing managers or supervisors to keep any portion of the employee's tips. Finally, it affirms previous guidance about tip credits, particularly how to apply a tip credit to employees who perform some non-tipped duties.

This final rule was set to become effective on March 1, 2021, but was delayed until April 30, 2021. On April 28, 2021, before the 2020 Tip final rule became effective, the DOL announced a final rule delaying the effective date of three portions of the 2020 Tip final rule until December 31, 2021. The three delayed provisions concern the assessment of civil money penalties under the FLSA and the application of the FLSA tip credit to tipped employees who perform tipped and non-tipped job duties. 86 FR 22597.

The remaining provisions of the 2020 Tip final rule became effective on April 30, 2021, including portions addressing the keeping of tips and tip pooling, recordkeeping, and minor technical changes made to update the regulation to reflect new statutory language.

On June 21, 2021, the DOL announced a separate rulemaking titled "Tip Regulations Under the Fair Labor Standards Act (FLSA); Dual Jobs," proposing to revise the portion of the 2020 Tip final rule addressing the tip credit provision to tipped employees who perform dual jobs. Public comment on this new proposed rule is ongoing.

Further information about the tipping rule and recent NPRMs can be found here. *See* DEP'T OF LAB., WAGE & HOUR DIV., Tip Regulations under the Fair Labor Standards Act (FLSA), https://www.dol.gov/agencies/whd/flsa/tips.

Proposed Independent Contractor Rule Rescinded.

On January 7, 2021, under the Trump administration, the DOL published a final rule clarifying the standard for employee versus independent contractor status under the FLSA. As a reminder, the FLSA provisions only apply to employees, not independent contractors. The standard was more lenient for employees to classify workers as independent contractors excluded from the FLSA. The rule was set to take effect on March 8, 2021, however, pursuant to President Biden's regulatory freeze, the final rule was delayed and the DOL announced that it planned to rescind the rule. On May 6, 2021, the Independent Contractor Rule was officially withdrawn. The Department of Labor explained that the proposed Independent Contractor Rule was rescinded because it was "inconsistent with the FLSA's text and purpose, and would have had a confusing and disruptive effect on workers and businesses alike due its departure from longstanding judicial precedent."

In its place, we anticipate a more stringent independent contractor test may be introduced classifying more workers as employees, possibly similar to California's "ABC" test, which has

been adopted in some iteration by almost two-thirds of the states.[7] However, until a new rule is introduced by the Biden Administration, the Department of Labor has said that its longstanding guidance on differentiating between independent contractors and employees, found in the DOL's Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act, is still effective. The full Fact Sheet can be found here. *See* DEP'T OF LAB., WAGE & HOUR DIV., Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf.

Under this existing guidance, when considering whether a person is an employee or an independent contractor, employers should ask whether the person is engaged in a business of his or her own, or, whether as a matter of economic reality, the person follows the usual path of an employee and is dependent on the business which he or she services. The test is one of "economic reality," and the Supreme Court has noted on numerous occasion that there is no single rule or test to be applied in all cases. Rather, the Court has considered a number of factors important in this analysis, including:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

There are also factors which the Supreme Court has deemed immaterial to the economic reality test. Such factors include:

1. The place where work is performed.
2. The absences of a formal employment agreement.
3. Whether an alleged independent contractor is licensed by State/local government.
4. Time or mode of pay.

March 2020 Joint Employer Status Rule Rescinded.

On March 16, 2020, the DOL's final rule revising and updating regulations interpreting joint employer status under the FLSA went into effect. As a reminder, entities that meet the joint employer test are jointly and severally liable to employees for any FLSA violations. The rule established a four-factor balancing test for deciding whether two entities were considered joint

[7] The "ABC" test requires that in order to be classified as an independent contractor, the worker must meet all three of the following factors:

- The worker is free from control or direction in the performance of the work;
- The work is done outside the usual course of the company's business and is done off the premises of the business; and
- The worker is customarily engaged in an independent trade, occupation, profession, or business.

employers. The DOL has since rescinded this joint employer rule, and in its place, we anticipate the DOL adopting a more expansive definition of joint employer status. Such a rule would make it harder for companies to escape liability when employees are employed by franchisees or contractors. This would be relevant to cities if, for example, the city controlled the work of an individual employed by a temporary agency or by a construction contractor.

The 'Protecting the Right to Organize ("PRO")' Act is Congress's latest attempt to pass a broader joint employer rule. The likelihood of passage is unknown, as the legislation has a number of controversial provisions and is currently held up in the Senate.

Deference to the DOL.

Traditionally, FLSA exemptions have been construed narrowly with deference to the DOL. This all changed when the United States Supreme Court in *Encino Motorcars, LLC v. Navarro*, held that despite a DOL rule to the contrary, the automotive sales exemption applied to service advisors (i.e., employees at car dealerships who consult with customers about their service needs, and sell services). 138 S. Ct. 1134, 1143 (2018). In its holding, the Court rejected the principle of narrowly reading exemptions and full deference to DOL. Instead the Court held that a "fair interpretation" of the exemption, looking at the ordinary meaning of the text, required the finding of exempt classification.

While the specific interpretation of the automotive sales exemption is not relevant to municipal employers, more broadly, the Court's decision means that employers now have a better chance to persuade courts on exempt status under this new "fair reading" standard.

Tracking Remote Work.

With the onset of the COVID-19 pandemic in March 2020, employers were faced with the challenge of transitioning employees to remote work. Fast forward to present day, employers may be considering providing remote work as a regular employee perk. Below are a number of FLSA considerations that employers should keep in mind concerning telework:

<u>Tracking Compensable Time in Remote Work.</u>

On August 24, 2020, the DOL issued a Field Assistance Bulletin discussing employers' obligations under the FLSA to ensure that employees are accurately tracking their hours of compensable work while working from home. The Bulletin explicitly states that "[t]he employer bears the burden of preventing work when it is not desired" noting that having a policy or other rule against such work is not enough.

The DOL clarified in its Bulletin that even if an employer does not request work, if the employer knows or should have known about the work, they must pay the employee for all compensable time. *Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017) (citations omitted). In contrast, the FLSA does not require an employer to pay for work it did not know about, **<u>and</u>** have no reason to know about. *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011) (emphasis added).

This means that employers have an obligation to compensate employees for time they have actual or constructive knowledge of. The FLSA's standard for constructive knowledge in the overtime context is whether an employer has reason to believe work is being performed or should have acquired knowledge about the work through reasonable diligence, such as noting the time that emails are sent, when an employee is on the employer's system, or if an unreasonable amount of work is performed. The DOL is using these tools to audit remote and after-hours work. One way an employer can satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding an employee's unscheduled hours of work is by establishing a reasonable process for an employee to report uncompensated work time.

A copy of the Field Service Bulletin can be found at this link. *See* DEP'T OF LAB., WAGE & HOUR DIV., Field Assistance Bulletin No. 2020-5 (Aug. 24, 2020), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf.

Work from Home Expenses.

Employers should not require employees to pay for items that constitute business expenses if doing so reduces the employee's earnings below the required minimum wage or overtime compensation due in any workweek. Generally, we recommend paying for any business expenses which are necessary for employees to successfully perform their jobs remotely.

Flexible Work Schedules.

While the FLSA does not address flexible work schedules, allowing employees to have more flexible work hours has become increasingly prevalent (and sometimes necessary). The Equal Employment Opportunity Commission noted that allowing flexible work schedules was a best practice for employers during the COVID-19 pandemic, and under the Americans with Disabilities Act providing a flexible work schedule can be a reasonable accommodation.

For municipal employers that wish to allow flexible scheduling, employers should have a policy that outlines the specifics of any flexible work time, how to go about requesting an alternative schedule, and any other requirements that the municipality may want to put into place for employees who are working a flexible schedule.