

Chapter 9

WAGES, HOURS AND OVERTIME

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9:1. FEDERAL FAIR LABOR STANDARDS ACT

A. HISTORICAL CONTEXT

The Fair Labor Standards Act (“FLSA”) sets the federal minimum wage and establishes federal standards for maximum hours, overtime pay, and child labor. See 29 U.S.C. §201; 29 C.F.R. §§778.0, 779.1, 780.1, 783.1, 784.1, 794.1. In order to understand the FLSA, it is important to understand the context in which it was enacted. Congress passed the FLSA in 1938, as part of the New Deal legislative program. Its purpose was to eliminate substandard wages and working conditions. See *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 739 (1981); *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974). Congress designed the FLSA to help the unprotected, unorganized, and lowest paid workers — “those employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage.” *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 277 (W.D. Pa. 1947). This congressional intent manifests itself in, among other things, issues of coverage and burdens of proof that favor the employee, and, in certain circumstances, in a presumption favoring liquidated (punitive) damages. Court rulings also have emphasized that the purpose of the FLSA is “to assist employees in maintaining a decent standard of living.” *Fleming v. A. H. Belo Corp.*, 121 F.2d 207, 215 (5th Cir. 1941).

B. COVERAGE

The FLSA casts a wide net. In general, its provisions apply to all employers and cover all employees who are not expressly exempt and who are either (i) engaged in interstate commerce or in the production of goods for interstate commerce, (ii) employed by an “enterprise” engaged in such activities, or (iii) employed as a private household domestic servant.

Recently, however, the Supreme Court put a hole in this net. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court ruled that for constitutional reasons, state employees are not covered by the FLSA. Also see *Bunt v. Texas Gen. Land Office*, 72 F. Supp.2d 735 (S.D. Tex. 1999) (state employee’s FLSA suit barred by Eleventh Amendment to U.S. Constitution). How big this hole gets — *i.e.*, who is a “state” employee — remains to be seen.

1. Employer - Employee Relationship

The FLSA applies only to employment relationships. See 29 U.S.C. §206(a) (describing minimum wage rates “employers” must pay “employees”); 29 U.S.C. §207(a) (describing maximum hours “employers” may employ “employees”). Thus, those outside of an employment relationship, *e.g.*, independent contractors, are not covered by the FLSA. See *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330 (5th Cir. 1993); *Donovan v. Tehco, Inc.*, 642 F.2d 141, 144 (5th Cir. Unit A 1981) (concrete subcontractor not “employee” for FLSA purposes).

a. Employer Defined

The FLSA broadly defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee....” 29 U.S.C. §203(d). The definition of “person” includes individuals. 29 U.S.C. §203(a). Thus, though it does not happen often, individuals can be held liable under the FLSA. See, *e.g.*, *Donovan v. Sabine Irrigation Co.*, 531 F. Supp. 923, 928 (W.D. La. 1981) (company president “employer” for FLSA purposes); see also *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 679 (1st Cir. 1998) (remanding for consideration of whether corporate officers were “employers” for purposes of FLSA); see also *Barfield v. Madison County, Miss.*, 212 F.3d 269 (5th Cir. 2000) (declining to address whether sheriff in his individual capacity was FLSA “employer”). Traditionally, whether an individual was an “employer” for FLSA purposes was considered a question of fact. See *Wirtz v. Lone Star Steel Corp.*, 405 F.2d 668, 669 (5th Cir. 1968); *Wirtz v. Soft Drinks of Shreveport, Inc.*, 336 F. Supp. 950, 957 (W.D. La. 1971). Later cases, however, seem to view this question as a legal one. See *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985) (citing cases). Whether the “employer” status question is a “legal” or “factual” one becomes important on appeal, for the answer to that question determines the appropriate standard of review. See generally §9:3.B (Practice Note).

b. “Suffer or Permit to Work”

In *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992), the Supreme Court compared the definitions of the word “employee” in the FLSA and the federal Employee Retirement Income Security Act (“ERISA”). The Court found the FLSA definition reaches beyond the conventional master-servant relationship governed by common law agency principles. The Court stated:

While the FLSA, like ERISA, defines an “employee” to include “any individual employed by an employer,” it defines the verb “employ” expansively to mean “suffer or permit to work.” 52 Stat. 1060, §3, codified at 29 U.S.C. §§203(e)(g). This latter definition, whose striking breadth we have previously noted, [citation omitted], stretches the meaning of “employee” to cover some parties who might not qualify as such under strict application of traditional agency law principles.

Id. at 326; see also *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 450 (5th Cir. 1994) (applying common law test set forth in *Darden* to Title VII cases).

The phrase “suffer or permit to work” gives the FLSA “striking breadth.” *Darden*, 503 U.S. at 326. It applies to all work that is allowed, for whatever reason, provided, however, that the employer is aware the work is being performed. 29 C.F.R. § 785.11; *Holzappel v. Town of Newburgh*, 145 F.3d 516, 524 (2d Cir. 1998). A review of cases from the Fifth Circuit underscores this “striking breadth.” See *Reich v. Circle C. Inv., Inc.*, 998 F.2d 324 (5th Cir. 1993) (topless dancers); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987) (attendants at seasonal fireworks stands); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985) (migrant workers); *Castillo v. Givens*, 704 F.2d 181 (5th Cir.), cert. denied, 464 U.S. 850 (1983) (migrant farm laborers); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662 (5th Cir. 1983) (welders). But see *Reimonenq v. Foti*, 72 F.3d 472 (5th Cir. 1996) (prison inmate on work-release program); *Atkins v. General Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983) (noncompensated trainees); *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982) (same).

c. Economic Realities Test

To determine whether an employment relationship exists under the FLSA, the Fifth Circuit focuses on “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which he or she renders his or her services.” *Herman v. Express 60-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1999) (italics added). Accord *Reich v. Circle C. Inv., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993). See generally Ch. 1 (Employment Relationship Defined). The “economic realities” test requires the court to consider the following five factors, none of which is dispositive:

- The degree of control exercised by the alleged employer;
- The extent of the relative investments of the worker and alleged employer;
- The degree to which the worker’s opportunity for profit and loss is determined by the alleged employer;
- The skill and initiative required in performing the job; and
- The permanency of the relationship.

Herman, 161 F.3d at 303; *Reich*, 998 F.2d at 327. See generally *Herman v. RSR Security Serv.*, Docket No. 97-6255, ___ F.3d __ (2d Cir. March 19, 1999).

The economic realities test is universally acknowledged as broader than the more traditional, common law “right to control” test. See *Diggs v. Harris Hosp.-Methodist, Inc.*, 847 F.2d 270, 272 n. 1 (5th Cir. 1988) (calling the economic realities test “a more expansive standard for determining employee status”); *Mares v. Marsh*, 777 F.2d 1066, 1067 n. 1 (5th Cir. 1985) (observing that the common-law test has not been applied to federal social welfare legislation, of which the FLSA is one example). See generally Ch. 1 (Employment Relationship Defined) (discussing “right to control” test). Consequently, the “economic realities” test increases the likelihood of a finding of covered “employee” status under the FLSA.

d. Volunteers

Volunteers are not “employees” for FLSA purposes. The Department of Labor (“DOL”) has defined the following as “volunteer” activities:

- The spouse of a doctor who volunteers a few hours per week as a nurse.
- A housewife who donates her services as a secretary to local hospitals.
- Volunteer workers in a head start program operated by a non-profit school system.
- People who participate in city-sponsored recreation programs for civic or personal motives, without promise or expectation of compensation, at hours that suit their own convenience, and who do not replace regular employees in the performance of their normal duties.

Wage & Hour Op. WH-282, Wage & Hour Manual (BNA) 99:1173. In *Roman v. Maletta Constr. Co.*, 147 F.3d 71 (1st Cir. 1998), for example, a welder for a construction company spent weekends with the owner’s son racing stock cars, including working as crew chief. Based at least in part on the welder’s own

testimony (“I was a volunteer”), the court found that the welder was not entitled to any FLSA relief for the time he spent in this activity.

2. Engaged in Commerce

The FLSA applies to industries that affect commerce. 29 U.S.C. §202, 81 Cong. Rec. 7648 (1937). Since the New Deal, courts have held that virtually all economic activity, no matter how remote or trivial, “affects commerce,” both for constitutional purposes and for purposes of the FLSA. See *United States v. Darby*, 312 U.S. 100 (1941) (holding the FLSA is a valid exercise of constitutional authority under the commerce clause where the power of Congress “extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them an appropriate means to the attainment of a legitimate end”); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). See also *Marshall v. Rose*, 616 F.2d 102, 104 (4th Cir. 1980) (holding night watchmen who patrolled buildings and grounds of estate and called repairmen as appropriate were “employees” for FLSA purposes, even where activity in question was “wholly intrastate”).

The FLSA wage and hour provisions apply to any employee who in any work week is:

- Engaged in “commerce,” as defined by 29 U.S.C. §203(b); or
- Engaged in “the production of goods for commerce;” or
- Employed in “an enterprise engaged in commerce,” or “an enterprise engaged in the production of goods for commerce;” or
- Employed in domestic service in a household and in compliance with the criteria set forth in 29 U.S.C. §206(f).

29 U.S.C. §206(a); see also *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218, 225-29 (3d Cir. 1991); *Murray v. R.E.A.C.H. of Jackson County, Inc.*, 908 F. Supp. 337 (W.D.N.C. 1995).

For FLSA purposes, the word “commerce” is understood better as *interstate* commerce. The phrase “engaged in commerce” means performing an activity involving or relating to the interstate movement of people, goods, and services. 29 C.F.R. §776.8. The U.S. Department of Labor defines the phrase “engaged in the production of goods for commerce” as any activity essential to the production of goods (including any part or ingredient thereof) where it reasonably can be

anticipated that some part of the goods will move in interstate commerce. 29 C.F.R. §776.14.

An “enterprise” is any group of related activities performed through a unified operation or other common control for a common business purpose, that has a total gross volume of business of \$500,000 or more, and that has two or more employees (i) engaged in commerce or the production of goods for commerce, or (ii) engaged in handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person. See 29 U.S.C. §§203(b), (r); 29 C.F.R. §§776, 779.21, 779.200.

Practice Note

As with most economic matters, courts interpret “commerce” expansively. The practical result is a finding of coverage. See, e.g., *Archie v. Grand Cent. Partnership, Inc.*, 997 F. Supp. 504, 529-31 (S.D.N.Y. 1998).

3. Enterprise

The FLSA definition of an “enterprise” has the effect of lumping together what might otherwise be considered separate businesses. As discussed above, the Act defines an enterprise as “the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose” 29 U.S.C. §203(r)(i). This definition has three distinct elements, listed below.

a. “Related” Activities

For purposes of the FLSA, activities are “related” when they are “the same or similar or when they are auxiliary or service activities such as warehousing, bookkeeping, purchasing, advertising, including, generally, all activities which are necessary to the operation and maintenance of the particular business” 29 C.F.R. §779.206. “[R]elated, even if somewhat different, business activities can frequently be part of the same enterprise, and activities having a reasonable connection with the major purpose of an enterprise would be considered related.” *Reich v. Bay, Inc.*, 23 F.3d 110, 114 (5th Cir. 1994) (quoting 29 C.F.R. §779.206 and finding “the two entities’ operations were inextricably linked,” and “related” for FLSA purposes).