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Strategic Developments Under the FLSA

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I.
INTRODUCTION

Fair Labor Standards Act ("FLSA") collective actions continue to be one of the most prevalent types of employment actions in the United States today. According to the Federal Judicial Center 8,126 FLSA actions were filed from April 1, 2013 to March 31, 2014, up nearly five percent from the preceding 12-month period. The increase in FLSA collective actions can be attributed to a number of factors. First, compliance with the FLSA is often counterintuitive. This is primarily because the FLSA is filled with fact-sensitive determinations with very few bright-line rules – for example, what activities count as "work." As a result, even sophisticated employers often make mistakes, and one minor miscalculation can affect multiple employees within a payroll system, giving rise to a potentially expensive collective action. In addition, liberal FLSA damage and attorneys' fee provisions often lead to very high awards or settlements.

II.
THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act was enacted on June 15, 1938 during the New Deal era to regulate wages, working hours and child labor. *See* 29 U.S.C. §§ 201-19. The FLSA: (1) requires payment of a minimum wage; (2) requires payment of overtime wages to covered employees for hours worked in excess of 40 per week; (3) mandates equal pay for males and females doing equal work; (4) restricts employment of child labor; and (5) requires certain recordkeeping with respect to wage and hours. *Id*. It is administered and enforced by the Wage and Hour Division ("WHD") of the United States Department of Labor ("DOL"). Significantly, however, the FLSA also has a private enforcement mechanism, which allows employees to sue their employers for FLSA violations, either individually or as collective actions on behalf of others similarly situated. 29 U.S.C. § 216(b) (2005).

Historically, the most common FLSA violations have involved improper classification of employees as exempt, improperly docking the pay of exempt employees, not paying employees for preliminary or postliminary work and requiring employees to work off the clock. Julia Matheny, Chari Thomas, and Theresa S. Valderrama, *FLSA Claims and Collective Actions: How to Avoid Claims and Defend Them,* at 1 (January 31, 2008). Recently, FLSA actions have focused more on two major issues: (1) whether an employee has received all overtime to which he is entitled; and (2) whether an employee has been properly characterized as exempt. Scott Lemond and Rob Carty, *The Suddenly En Vogue FLSA: After 50 Years as a Wallflower, She's Finally Ready to Dance*, 44 HOUSTON LAWYER 10, 12 (2006). Subsumed within these two issues is the recurrent question, which has received significant attention in recent years, of whether an employee is entitled to overtime pay for preliminary and postliminary work.

FLSA actions are generally subject to a two-year statute of limitations. 29 U.S.C. § 255(a); *Lima v. Int'l Catastrophe Solutions, Inc*., 493 F. Supp. 2d 793, 802-03 (E.D. La. 2007). Accordingly, FLSA actions normally must be filed within two years after the cause of action accrued. *Id*. However, if the violation is "willful," the statute of limitations increases to three years from the date the cause of action accrued. *Id*. To establish a "willful violation," a plaintiff must prove "that the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the [FLSA]." *Lima*, 493 F. Supp. 2d at 803; *See Reich v. Bay, Inc*., 23 F.3d 110, 117 (5th Cir. 1994). Moreover, for purposes of the statute of limitations, a cause of action "accrue[s] at each regular payday immediately following the work period during which the services were rendered for which the wage or overtime compensation is claimed." *Lima*, 493 F. Supp. 2d at 803 (*quoting Halferty v. Pulse Drug Co., Inc*., 821 F.2d 261, 272 (5th Cir. 1987), *modified on other grounds*, 826 F.2d 2 (5th Cir. 1987)).

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