WAGE-HOUR 2020: U.S. DEPARTMENT OF LABOR AND PRIVATE ENFORCEMENT OF THE FLSA

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In Texas, unlike some other large states, employee compensation standards and enforcement is overwhelmingly federal. As to employers operating in interstate commerce, the Texas Legislature has ceded minimum wage and overtime pay law to federal control.[1] That means of course that most issues and claims involving minimum wage and overtime pay in Texas arise solely under the Fair Labor Standards Act of 1937 ("FLSA"), 29 U.S.C. § 201, *et seq.*

I. The Statute And Administration By The U.S. Department of Labor

A. Structure Of The FLSA

Four sections of the FLSA account for most issues and claims. Three are substantive in nature and one is procedural. To begin with, section 6(a), 29 U.S.C. § 206(a) requires that employees be paid a minimum hourly rate (presently $7.25/hour) and section 7(a), 29 U.S.C. § 207(a) prescribes a forty (40)-hour maximum work week and requires one-and-one-half (1½) times an employee's regularly hourly rate for hours worked in excess of forty (40) hours/week. "Regular rate" is defined in section 7(c) of the Act, 29 U.S.C. § 207(c), and that definition has been the subject of considerable litigation as well as recent rulemaking by the Department of Labor.[2]

Section 13(a) of the Act, 29 U.S.C. § 213(a) sets out a long list of positions that are exempt from federal minimum wage and overtime pay requirements. By far the most comprehensive exemption is for executive, administrative, and professional employees set forth in section 13(a). Applicability of this exemption accounts for a large percentage of FLSA litigation and this exemption, like "regular rate," is a subject of recent DOL rule-making. (*See* Sec. V(A) *infra*). The remaining exemptions in sections 13(a)(2)-(a)(18) range from relatively broad industry exemptions (e.g., "agriculture") to very specific occupations (e.g., "border patrol agent)."

One important feature of the FLSA is the statutory enforcement mechanism for *collective actions* set out in Section 16(b) of the Act, 29 U.S.C. § 216(b). FLSA claims cannot be brought as *class actions* under Rule of the Federal Rules of Civil Procedure. Rather, Section 16(b) allows aggregation of plaintiffs into a single case via a class notice procedure that serves only as an invitation to opt in, whereas all members of a class certified under Rule 23 are included in a case unless they elect to opt out. Unlike Rule 23 class actions where a motion for class certification usually follows extensive discovery, in FLSA collective actions a motion for *conditional certification*, for purposes of allowing notice to be disseminated to the class, is usually heard early in the litigation before discovery. The standard for conditional certification is more lenient than the demanding standard for certification under Rule 23. FLSA conditional certification requires only a modest demonstration through the plaintiffs' pleadings and supporting declarations that the class members are "similarly situated" with regard to the alleged wage violations. After discovery,

[1] Texas does not have a state overtime statute. The Texas Minimum Wage Act (TMWA) keys the minimum wage to the FLSA, as the minimum wage is increased from time to time. *See* Tex. Lab. Code § 62.051. The TMWA only covers certain employees who are *not* covered by the FLSA. *See* Tex. Lab. Code § 62.151.

[2] The DOL's recent rule addressing elements of compensation included in "regular rate" of pay is discussed *infra* Section II(A)(5).

the defendant may move to decertify the collective action. Decertification does not dismiss the claims of class members who opted in to the lawsuit, but requires them each to prove their individual claims, rather than relying on representative evidence at trial.

Other aspects of Section 16(b) litigation designed to attract competent counsel for plaintiffs with meritorious claims are availability of liquidated (double) damages and award of attorneys' fees. Liquidated (double) damages are the default, but defendants can avoid liquidated damages through a "good faith" affirmative defense. Additionally, the statute of limitations is extended from two (2) years to three (3) if the plaintiff proves that the violations were committed willfully, which is easier to satisfy than the malice requirement for award of punitive damages in other civil litigation. With a three (3) year statute of limitations for willful violations of the FLSA, double actual damages, inclusion of multiple plaintiffs in a single case, and award of attorneys' fees—financial exposure for employers faced with an FLSA collective action can be and often is substantial.

B. Role Of The U.S. Department Of Labor

Over the past generation, enforcement of the FLSA has steadily moved from government to the private sector. Multiple reasons account for that, most notably continuing population growth of lawyers in the United States and a corresponding decrease in DOL resources to investigate and litigate. Nonetheless, the DOL retains an important role in interpretation and enforcement of the FLSA.

As to minimum wage and overtime pay requirements under the Act, the Wage and Hour Division ("WHD") of the DOL has primary responsibility. The WHD is also responsible for administering and enforcing recordkeeping requirements, child labor provisions in the FLSA, the Polygraph Protection Act, the Family and Medical Leave Act, wage and employment standards under federal contracts, protections for migrant and seasonal agricultural workers, and the labor standards protections for immigrants under guestworker and other visa programs. Rulemaking to set out the DOL's official positions about interpretation and enforcement of the FLSA have been a major focus of both the current and immediately previous Administration.

As of September 30, 2019, Eugene Scalia became U.S. Secretary of Labor. Secretary Scalia previously was a partner at Gibson, Dunn & Crutcher LLP in Washington, D.C. and before that he was Solicitor of Labor under the Administration of President George W. Bush. As discussed below, the Trump Administration DOL under both Secretaries Acosta and Scalia have been active in formal rulemaking as well as interpretive guidance via opinion letters.

II. Rulemaking And Opinion Letters—2019 And 2020

Despite turnover in leadership at the DOL in recent years, the Department has been prolific with promulgation of rules and release of Opinion Letters placing the Administration's stance on some key FLSA issues. Wage-hour Opinion Letters released by the WHD run the gamut of issues and have been far more frequent than has been customary for many years. The subjects of new and pending rules include the salary threshold for overtime exemptions, joint employer status, tipped

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