

## Wage and Hour Update



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## US DOL WHD - 2021 Activity

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- Wage and Hour Division's tally totaled 24,727 cases.
  - Down from last year
  - Most were minimum wage and overtime issues
    - 7,287 cases with minimum wage violations (down 10%)
      - employers paid almost \$26 million in back wages
    - 7,159 cases with overtime violations (down 15%)
      - employers paid almost \$139 million in back wages.

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## US DOL WHD - 2021 Activity

- “Low wage, high violation industries”
- The top offenders:
  - Food Services -
    - 4,237 cases
    - 29,209 employees
    - over \$34.7 million in back wages

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## US DOL WHD - 2021 Activity

### Top Offenders

- Construction
  - 3,034 cases
  - 21,341 employees
  - over \$36 million in back wages
- Retail
  - 2,705 cases
  - 14,734 workers
  - over \$13.4 million in back wages

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## US DOL WHD - 2021 Activity

### Top Offenders

- Health Care
  - 1,194 cases
  - 17,079 employees
  - almost \$14 million in back wages
  
- Agriculture
  - 1,000 cases
  - 10,379 workers
  - Nearly \$8.4 million in back wages

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## FLSA Lawsuits - Fewer Filed

- Wage and hour cases filed under the FLSA dropped to a decade low of 5,786 cases in 2021
  - 81 filed in North Carolina federal courts in last 12 months
- Filings reached a high in 2015, with 9,386
- Decrease due in part to use of arbitration which has increased since 2015

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## DOL Focuses on FLSA Retaliation

- March 10, 2022 - Field Assistance Bulletin No. 2022-02
  - Anti-retaliation protections safeguard the basic rights afforded to workers
  - “Retaliation, or the fear of it, prevents the most vulnerable workers including those making the lowest wages, immigrant workers, workers of color, and women from exercising their workplace rights”

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## DOL Focuses on FLSA Retaliation

- Retaliation occurs when an employer, including through a manager, supervisor, administrator or other agent, takes an **adverse action** against an employee because they engaged in a **protected activity**

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## DOL Focuses on FLSA Retaliation

- Examples of “protected activity”:
  - making a complaint to a manager, employer, or WHD
    - Oral and written complaints are protected
  - cooperating with a WHD investigation
  - requesting payment of wages
  - refusing to return back wages to the employer

## DOL Focuses on FLSA Retaliation

- Examples of “Protected Activity”
  - complaints by a third party on behalf of an employee
  - consulting with WHD staff
  - exercising rights or attempting to exercise rights, such as requesting OT
  - testifying at trial

## DOL Focuses on FLSA Retaliation

- Employee can be protected even if the employee's complaint is based on a mistaken belief
  - For example, if a worker believes, and tells an employer, that he is owed overtime pay for the hours he worked, the worker has engaged in a protected activity, even if the worker's belief that he is due overtime turns out to be mistaken because he has been correctly paid.

## DOL Focuses on FLSA Retaliation

- “Adverse action” is any action that could dissuade an employee from raising a concern about a possible violation or engaging in other protected activity.
- Examples:
  - termination
  - disciplinary actions
  - threats to employees, their families or co-workers

## DOL Focuses on FLSA Retaliation

- Examples of “Adverse Action”
  - reduction of work hours or rate of pay
  - shift changes or elimination of premium pay
  - blacklisting
  - demotion
  - excluding an employee from a regularly scheduled meeting

## DOL Focuses on FLSA Retaliation

- An employer’s actions may constitute retaliation even if the employer has a mistaken belief that the worker participated in a protected activity.
  - For example, if an employer suspects that a worker filed a complaint with WHD and terminates the worker’s employment, the employer engaged in retaliation even if the worker never actually filed a complaint

## DOL Focuses on FLSA Retaliation

- FLSA also requires that employers provide:
  - “reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth each time such employee has need to express the milk”
  - “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”  
29 U.S.C. § 207(r)

## DOL Focuses on FLSA Retaliation

- Example: Employee asks for additional break time to express breast milk.
 

Aisha is a new mother who works for a call center. She uses her lunch break to express breast milk and needs additional time to finish pumping before she is able to return calls at her work station. Her boss complains when she is late returning from lunch and tells her she cannot use any time beyond her meal break for “personal stuff.” When Aisha asks if she has a right to take another break for pumping later in the day, her boss sends her home for the rest of her shift without pay.
- After investigating, WHD, in addition to requiring the employer to provide the requisite time and space for nursing mothers in compliance with the law, determines Aisha may also be entitled to back pay and liquidated damages for wages she lost when her boss sent her home in retaliation for requesting a break



## DOL Focuses on FLSA Retaliation

- WHD may pursue administrative or legal remedies, including:
  - lost wages
  - reinstatement or front pay
  - liquidated damages (2x back wages) and civil money penalties
  - compensatory and punitive damages

## DOL Focuses on FLSA Retaliation

- Emotional distress damages likely are recoverable
  - No limit
  - 4<sup>th</sup> Circuit has not decided this issue yet
  - 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Cir. have expressly allowed (Louisiana, Mississippi, Texas, Kentucky, Michigan, Ohio, Tennessee, Illinois, Indiana, Wisconsin)

## Private Settlement of Individual FLSA Claims?

- Courts have generally held that FLSA claims can only be released with authorization by: (1) the U.S. Department of Labor (“DOL”); or (2) judicial approval by a federal judge
- FLSA does not say this
- Eleventh (Florida, Georgia, Alabama) and Second Circuit (New York, Connecticut, Vermont) expressly require approval
- Fourth (North Carolina, South Carolina, Virginia, Maryland, West Virginia), Seventh (Illinois, Indiana, Wisconsin) and Ninth (Alaska, Arizona, California, Hawaii, Guam) also have indicated approval is required

## Private Settlement of Individual FLSA Claims?

- Fifth Circuit (Texas, Louisiana, Mississippi) allows private settlements of “bona fide disputes” as opposed to a compromise of guaranteed rights
- Some district courts in Colorado, Utah, New Mexico, Oklahoma (all Tenth Circuit), Kentucky (Sixth Circuit) and Pennsylvania (Third Circuit) also allow

## Private Settlement of Individual FLSA Claims?

- Where parties agree that Plaintiff is receiving full compensation on the FLSA claim, no approval is necessary

## Private Settlement of Individual FLSA Claims

- Employer may want to avoid the public disclosure of the settlement
  - Copycat claims
  - Plaintiffs' lawyers may see as a target
  - Adverse publicity
  - Desire for ancillary settlement terms (no reemployment, nondisparagement)
- Calculated risk if do not seek court approval
- Settlement Agreement should detail the facts in dispute

## Remote Work

- Fertile ground for allegations of off-the-clock work
- Similarly situated employees = class/collective action
- Risk Mitigation
  - Have a meal and rest break policy for remote employees
  - State in their remote work policy that off-the-clock work is not permitted, condoned or expected – and then ensure that managers are trained on this matter
  - Requiring employees to record or report all time worked, even if away from the office or performed on personal device

## State Law MW/Salary Changes

- 10 states scheduled for minimum wage increases - Alaska, Arizona, Colorado, Maine, Minnesota, Montana, Ohio, South Dakota, Vermont and Washington
- Will also affect salary thresholds
- Check local laws

## Salary Thresholds/Minimum Wage Increases - Select States

- California - \$64,480 annually (\$5,373.33 monthly); \$15.50/hour; computer professionals - \$112,065.20 annually/\$53.80/hour
- Colorado - \$961.54 per week (\$50,000 per year); \$112,500 for persons that meet the duties for “highly compensated employees”; \$13.65/hour
- New York - \$58,500 (\$1,125 per week -except professionals same as federal) in New York City, Nassau County, Suffolk County, and Westchester County; \$55,328 (\$1,064 per week) in the rest of the state effective December 31, 2022; \$14.20 effective December 31, 2022, everywhere (except NYC, Nassau, Suffolk and Westchester County where it already is \$15/hour)
- Washington - Small employers (1-50) - \$57,293.60 (\$1,101.80 per week); large employers (51+) - \$65,478.40 (\$1,259.20 per week); \$55.09 per hour for hourly computer professionals; \$15.74/hour

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## ‘Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Overtime is at least 1.5 times the employee’s regular rate of pay for all hours worked over 40 in a workweek
- Regular rate of pay generally includes all compensation for employment
- Bonuses
  - discretionary bonuses can be excluded from calculating the regular rate
    - employer must retain sole discretion to determine both the fact of payment and the amount
    - payment cannot be made as part of a contract, agreement, or promise that would cause employees to expect the payments

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## 'Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Non-discretionary bonuses
  - Hiring/sign on
  - recognize attendance
  - based on production or quality goals
  - for continued employment for a specific time
  - made as part of an earlier contract, agreement, or promise
  - because of collective bargaining

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## 'Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Gifts can be excluded
- A gift *cannot* be:
  - A payment made under a contract or other legal obligation
  - Measured by an employee's production or efficiency
  - So much that an employee would consider it part of their wages
- A gift *could* be:
  - holiday bonus equal to a weeks' salary for all employees
  - discounts on merchandise not based on hours worked
  - longevity payments not paid under an employment contract or agreement
  - a reward for service that does not depend on the employee's wages, efficiency, or production

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## 'Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Holiday Pay
  - Paid holidays off are excluded
  - Holiday pay for working on a holiday is excluded when employee receives it in addition to compensation at their customary rate for the work performed on that day

## 'Tis the Season: Bonuses, Gifts, Paid Holidays and the Regular Rate

- Premium rate for working on the holiday
  - If the premium rate is more than 1.5 times the employee's customary rate this compensation qualifies as a true overtime premium
  - It can be excluded from the regular rate and credited toward OT compensation



THANK YOU!

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Kerry A. Shad  
October 25, 2022

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