WAGE AND OVERTIME QUARTERLY

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U.S. SUPREME COURT CLARIFIES BURDEN OF PROOF APPLICABLE TO FLSA OVERTIME EXEMPTIONS

The federal Fair Labor Standards Act ("FLSA") generally entitles workers to overtime premium pay equaling 150% of the "regular" pay rate. *See* 29 U.S.C. § 207(a)(1). However, the FLSA also contains various "exemptions" to this general rule. *See id.* at § 213. The most prominent exemptions apply to workers employed "in a *bona fide* executive, administrative, or professional capacity," *id,.* at § 213(a)(1), certain "outside salesmen," *id.*, most tractor trailer drivers, *id.* at § 213(b)(1), and certain "commissioned" salespeople, *see id.* at § 207(i). If a worker falls within an exemption, then she is not entitled to overtime premium pay.

In litigation, the *employer* bears the burden of proving that the worker falls within an overtime exemption. That makes good sense. FLSA exemptions, after all, are affirmative defenses raised by the employer.

Over the years, some federal courts have held that the employer's burden is *heightened* due to the important public policy goals underlying the FLSA's overtime pay mandate. The Fourth Circuit Court of Appeals' opinion in *Carrera v. E.M.D. Sales Inc.*, 75 F.4th 345 (4th Cir. 2023), was such a case. There, the panel affirmed a trial court holding that the employer was required to pay overtime wages because it failed to prove by "*clear and convincing*" evidence that the worker was exempt.

The employer disagreed and appealed to the U.S. Supreme Court. According to the employer, the burden of proof applicable to an FLSA exemption defense should be the "preponderance of the evidence" standard that generally applies to most civil litigation.

On January 15, 2025, the Supreme Court agreed with the employer and reversed the Fourth Circuit. In a unanimous

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SALARIED WORKERS WILL PAY THE PRICE FOR BIDEN DOL'S FOOT-DRAGGING

As some readers of this Newsletter know, the federal Fair Labor Standards Act ("FLSA") "exempts" from its overtime-pay mandate salaried employees who qualify as "executive," "administrative," or "professional" employees. Under existing regulations, a purportedly exempt employee must, among other things, earn a salary of at least $684 per week.

When Joe Biden took office in January 2021, many worker's rights advocates agreed that raising the $684/week threshold was the highest priority. Also, many of these same advocates urged the U.S. Department of Labor to move quickly so that any legal challenges could be finally resolved *before* the end of the Biden Administration.

Unfortunately, it took the Biden DOL's Wage and Hour Division ***over three years*** to issue its Final

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ABOUT WINEBRAKE & SANTILLO, LLC

Workers deserve to get paid for ***all time spent working***, and most workers are entitled to valuable ***overtime pay*** when they work over 40 hours in a workweek. Unfortunately, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and overtime laws.

Wage and overtime violations hurt working families. When a company violates the law, it should be held accountable. ***No one is above the law.***

Winebrake & Santillo, LLC believes workers pursuing their wage and overtime rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

Winebrake & Santillo, LLC goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Our attorneys have negotiated settlements in wage and overtime lawsuits worth many millions of dollars to workers and their families.

The wage and overtime laws are complicated. Don't hesitate to contact ***Winebrake & Santillo, LLC*** for a ***free consultation*** if you believe the wage and overtime rights of you or one of your clients may have been violated. Your clients never pay a fee unless they recover, and ***we always pay a fair referral fee.***

U.S. SUPREME COURT CLARIFIES BURDEN OF PROOF APPLICABLE TO FLSA OVERTIME EXEMPTIONS cont...

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opinion drafted by Justice Kavanaugh, the Court held "that the preponderance-of-the-evidence standard applies when an employer seeks to show that an employee is exempt from the minimum-wage and overtime-pay provisions of the [FLSA]." *E.M.D. Sales, Inc. v. Carrera*, __ U.S. __, 2025 U.S. LEXIS 364, *12 (Jan. 15, 2025).

The Court emphasized that "the preponderance-of-the-evidence standard has remained the default standard of proof in American civil litigation," *id.* at *6-7, and that deviation from the standard is limited to three very narrow circumstances: (i) where the statute explicitly adopts a different standard; (ii) where a different standard is mandated by the U.S. Constitution; and (iii) where a different standard is necessary to protect against "unusual coercive action" by the government, *see id.* at *7-9. Since none of these circumstances apply to FLSA litigation, "the default preponderance standard governs." *Id.* at *9.

The Supreme Court's holding will come as no great surprise to most FLSA litigators. In fact, it is consistent with the Court's previous observation that "the FLSA gives no 'textual indication' that its exemptions should be construed narrowly." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88 (2018). In this writer's view, application of a "preponderance" standard to FLSA exemption litigation will have little bearing on case outcomes. – PW

ANDY SANTILLO APPOINTED TO WESTERN DISTRICT OF PENNSYLVANIA ADR PANEL

In December 2024, Andy Santillo was appointment to the Alternative Dispute Resolution ("ADR") Panel of the United States District Court for the Western District of Pennsylvania by the Judges of the Court. Andy is now eligible to serve as an ADR Arbitrator, Mediator and Early Neutral Evaluator for parties with pending cases in the District. Andy also successfully completed the American Arbitration Association's ("AAA") training to be a mediator earlier last year. – AS

QUARTERLY QUOTE

> "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."
>
> - Justice Felix Frankfurter, dissenting in *Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600 (1949)

SALARIED WORKERS WILL PAY THE PRICE FOR BIDEN DOL'S FOOT-DRAGGING cont...

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Rule increasing the minimum weekly salary threshold from $684 to $1,128. *See generally* 89 FR 32824-32973 (Apr. 26, 2024).

The regulation's legality was challenged in the U.S. District Court for the Eastern District of Texas (one of Corporate America's favorite venues for challenging laws that benefit workers and consumers). Not surprisingly, in November 2024, the district court judge entered an order vacating the Final Rule. *See State of Texas v. U.S. Dept. of Labor*, __ F. Supp. 3d __, 2024 U.S. Dist. LEXIS 207864 (E.D. Tx. Nov. 15, 2024). The Biden DOL has appealed the district court's order. But that's a futile gesture. The Trump DOL will certainly withdraw the appeal. This will leave the district court's order in place. The Final Rule will remain vacated. – PW

A SEASONED DISTRICT COURT JUDGE ASKS "WHY?"

The right to a jury trial is supposed to be precious. Yet, as many readers of this Newsletter know, this right has been decimated by mandatory "arbitration agreements" that workers "sign" (often by clicking "accept" on a computer screen or cell phone) when they take a job.

Few commentators have written as eloquently on this subject as U.S. District Court Judge William G. Young, who sits in Boston, MA. Here is what Judge Young had to say after being required to enforce an arbitration agreement against a worker who accused his employer of wage theft:

> Congress is not impotent here. Where the arbitration bar frustrated legitimate claims of sexual harassment, a bipartisan majority of Congress simply removed it. *See* 9 U.S.C. § 402. Yet what about racial, gender, age, and disability discrimination? What about wage theft? Are they not just as deserving of the access to courts and juries that they enjoyed when Congress passed landmark legislation to guarantee worker rights in each of these areas?
>
> These, of course, are policy questions beyond the power of a district judge to address. When these issues arise in litigation before the Court, I can only ask "Why?"
>
> I'm asking.

Fraga v. Premium Retail Servs., Inc., 704 F. Supp. 3d 289, 304 (D. Mass. 2023). – PW

THIRD CIRCUIT CLARIFIES THAT FLSA REQUIRES PAYMENT FOR "ACTUAL" – NOT "REASONABLE" – WORK TIME

In December 2024, the Third Circuit Court of Appeals issued an important opinion in *Secretary of Labor v. East Penn Manufacturing Co.*, 123 F.4th 643 (3d Cir. 2024). The underlying lawsuit arose out of a Pennsylvania factory that makes and recycles lead-acid batteries. The factory workers were required to put on uniforms and protective gear at the beginning of the workday and to undress and shower at the end of the workday. As compensation for these activities, the company provided the workers with paid "grace periods" of five minutes at the beginning of the day and ten minutes at the end of the day. The company "did not record how much time workers actually spent changing and showering." *Id.* at 647.

The U.S. Department of Labor sued the company, alleging that it failed to pay workers for all changing and showering time under the federal Fair Labor Standards Act ("FLSA"). In response, the company asserted, among other things, that the paid five-minute and ten-minute "grace periods" sufficiently compensated the workers by capturing the time that a worker would "*reasonably*" spend changing and showering.

The Third Circuit disagreed in a unanimous opinion by Stephanos Bibas. The Court explained that the FLSA's text "focuses on actual time" and "say[s] nothing about a reasonableness limit." *Id.* at 647. Thus, the Court held, liability under the FLSA must be "based on the *actual* time that workers spend" performing the allegedly unpaid activity. *Id.* at 647.

Notably, the Court rejected the employer's argument that compensating workers based on "actual" rather than "reasonable" time would "reward employees for dragging their feet or tending to personal matters." Relying on prior Third Circuit precedent, the Court explained: "If a worker lollygags, 'the employer's recourse is to discipline or terminate the employee – not to withhold compensation.'" *Id.* at 647. – PW

THIRD CIRCUIT CLARIFIES TEST FOR DETERMINING WHETHER COLLEGE ATHLETES ARE "EMPLOYEES" UNDER FLSA

The federal Fair Labor Standards Act ("FLSA") provides "employees" with important rights, including the right to be paid a minimum wage of $7.25/hour and the right to "time and one-half" overtime pay for hours worked over 40 per week. But these wage rights only apply to "employees," and the FLSA defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). This circular definition is not too helpful.

Regardless, it's well-understood that the FLSA's conception of "employment" is especially broad. Before being appointed to the Supreme Court, the great Hugo Black was a Senator from Alabama and was the moving force behind the FLSA. He characterized the FLSA's definition of employment as "the broadest . . . that has ever been included in any one act." 81 Cong. Rec. 7657 (1937). Many courts have repeated this quotation in opinions addressing the scope of FLSA employment. *See, e.g., United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945). Moreover, in 1992, the Supreme Court acknowledged the "striking breadth" of the FLSA's definition of employment and observed that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992).

This brings us to *Johnson v. NCAA*, 108 F.4th 163 (3d Cir 2024), a case in which Division I college athletes from various universities sought to be paid as "employees" under the FLSA. The Third Circuit did not resolve this thorny issue. However, it did set forth the various factors that trial courts must weigh in determining whether college athletes are "employees" under the FLSA. Specifically, in a split-opinion authored by Judge L. Filipe Restrepo, the Court held "that college athletes may be employees under the FLSA when they (a) perform services for [the university], (b) 'necessarily and primarily for the [university's] benefit,' (c) under [the university's] control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits.'" *Id.* at 180 (internal citations omitted). The Court emphasized that, in applying this multi-factor test, "the touchstone remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal an economic reality that is that of an employee-employer." *Id.* at 180.

Notably, in adopting the above test, the Circuit Court rejected the use of an alternative test (known as the "*Glatt* test") that places a particular emphasis on the purported "benefits" that student athletes accrue through their participation in sports. *See id.* at 179-80. In this regard, the Court observed that "the educational and vocational benefits of college athletics cited by [the NCAA] as alternative forms of remuneration (increased discipline, a stronger work ethic, improved strategic thinking, time management, leadership, and goal setting skills, and a greater ability to work collaboratively) are all exactly the kinds of skills one would typically acquire in a work environment." *Id.* at 180.

Finally, the Circuit Court flatly rejected the NCAA's argument that "the history and tradition of amateurism" requires a finding that student athletes be deemed non-employees. See id. at 181. The Court explained: "the argument 'that colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid,' is circular, unpersuasive, and increasingly untrue." Id. at 181 (quoting NCAA v. Alston, 594 U.S. 69, 109 (2021) (Kavanaugh, J. concurring)). – PW