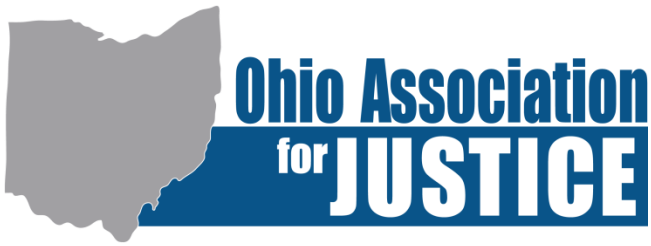
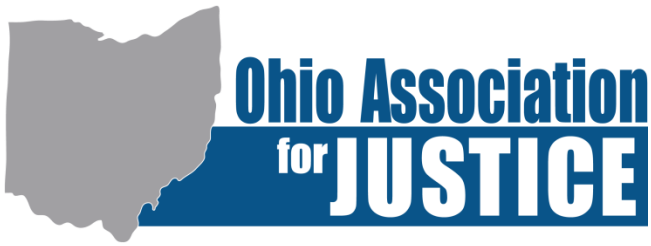


Labor & Employment Law

2011 Annual Convention

Thursday, May 12, 2011

Hilton at Easton, Columbus, Ohio



Defense Lawyer's Perspective on Common Plaintiff Pitfalls

Lee Hutton, Esq.
Littler Mendelson, PC
Cleveland, Ohio

Top 10 Things That Plaintiff Lawyers Do Wrong

Lee J. Hutton, Esq.
Littler Mendelson, PC

What Do Plaintiff Lawyers Do Wrong?

What Do Plaintiff Lawyers Do Wrong?

- **Answer:**
  - File, prosecute and win lawsuits against innocent defendants
  - Annoy defense counsel
  - Have too much fun
  - Bruise Lee Hutton's inflated ego

Questions?

Thank You

#1 – Inflammatory Demand Letters with Unrealistic Demands

- Consider the impact of your words and your audience, then craft a letter designed to make the employer reassess and evaluate
- Tough letters for show serve little purpose and cement positions
- Create a climate for early resolution

#2 – Handling Cases Outside of their Expertise

- Employment law can be technical, counter-intuitive and fast changing
- Claims are easily missed and nuances overlooked
- Get help if you don't know

#3 – Pleading Mistakes

- Too many claims detract from strong claims and create contradictions
- Too many defendants create unnecessary distractions
- Missing the best claims entirely

#4 – Failure to Recognize that E-Discovery is a Two-Way Street

- Most large corporate defendants now have a process for preserving information
- Many plaintiffs don't preserve electronic evidence, and don't appreciate its scope
- Plaintiffs aren't careful about e-mails and social media exchanges

#5 – Not Identifying and Pursuing Comparables

- In a discrimination case without direct evidence, finding and using good comparables can give a claim legs

#6 – Not Adequately Preparing the Plaintiff for Deposition

- Understanding the process
- Prior familiarization of theories and details
- Role playing

#7 – Shorting Themselves When Taking Depositions of Corporate Witnesses

- Many plaintiff's attorneys don't seem to have a plan
- Many plaintiff's attorneys don't listen, elicit the story, and weave it into their theme
- Scoring points is not enough

#8 – Expert Witnesses – Common Mistakes

- Not using enough
- Not feeding the witness correctly, careless communications, and draft reports
- Not anticipating weaknesses in foundation of expert's opinion
- Treating physicians – not making time to understand the testimony prior to deposition

#9 – Short-Term Focus on Avoiding Summary Judgment

- Pulling out all stops to avoid summary judgment may result in an untenable case for trial
  - Contradictions and overblown affidavits create ammunition for trial
  - Incredible stories and explanations make sympathetic witnesses look bad
  - A lousy case that survives summary judgment is a lousy case for trial

#10 – Not Objectively Assessing the Merits or Value of the Case

- And/or not finding a way to communicate problems to the plaintiff
- Knowing how and when to fold is as important as knowing when to fight

Extra Bonus

*Extra Bonus – Common Mistakes of Both Plaintiff and Defense Lawyers

- Making the litigation mean and nasty

THANK YOU

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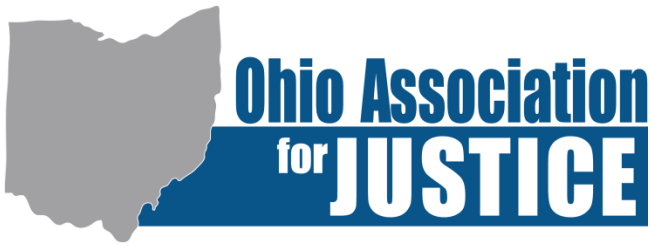
Littler



Employment Law Overview, Recognizing the Cause of Action and Protecting the Statute of Limitations

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CATHLEEN BOLEK
EMPLOYMENT LAW OVERVIEW
RECOGNIZING THE CAUSE OF ACTION AND
PROTECTING THE STATUTE OF LIMITATIONS

RECOGNIZING THE CAUSE OF ACTION

AT WILL EMPLOYMENT (*see, e.g., Wright v. Honda of Am. Mfg.* (1995); 73 Ohio St. 3d 571; *Kulch v. Structural Fibers, Inc.*(1997), 78 Ohio St. 3d 134; *Leininger v. Pioneer Nat'l Latex* (2007); 115 Ohio St. 3d 311; *Bickers v. W. & S. Life Ins. Co.* 92007).

An "at will" employee can quit his job anytime for any reason or for no reason. His employer can fire him at any time for any reason or no reason.

The employer cannot fire an employee because of an illegal reason.

There is a long list of "illegal" reasons, that includes because the employee is over 40 or disabled; because the employer thinks (s)he is disabled; because of his or her race, sex, religion, or national origin; because (s)he complained about illegal discrimination or illegal harassment; because (s)he filed a workers compensation claim or took a medical or family leave; because (s)he complained that the employer has broken the law; because (s)he complained that (s)he was not properly paid; and many other reasons.

Generally, it is not illegal for an employer to be unfair, dishonest, rude, or harassing, unless the employer treats the employee a certain way because of an illegal reason. Not all harassment is illegal; harassment is illegal only if it is motivated by some illegal reason such as those listed.

DISCRIMINATION See, *e.g.*, Title VII of the Civil Rights Act of 1964; Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act Amended (ADAA, formerly the ADA), Ohio Revised Code Chapter 4112; *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St. 3d 578, 664 N.E.2d 1272, *Barker v. Scovill, Inc.* (1983), 6 Ohio St. 3d 146; *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 575 N.E.2d 439.

Absent direct evidence of discrimination, a claim for discrimination may be proven by evidence that employee:

1) was qualified for the job,

2) was harassed by severe or pervasive conduct, denied a job or promotion, or was terminated from a job ("suffered an adverse job action"),

3) was replaced by someone "outside the protected class," i.e., of a different race, religion, national origin or sex; not disabled; or substantially younger (at least 6 years younger, and the potential plaintiff must be over the age of 40), or someone outside the protected class who was "similarly situated" was treated more favorably (not harassed, not given the job, etc.); and

4) the employer's stated reason for the denial or termination is untrue or not the real reason ("pretext").

RETALIATION See cases and statutes cited above; *Greer-Burger v. Temesi* (2007), 116 Ohio St. 3d 324; *Burlington Northern & Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53).

A claim for retaliation may be proven by evidence that employee:

1) was qualified for the job,

2) "engaged in protected activity" – mostly commonly, complaining that (s)he or a co-worker was being harassed, discriminated against, or was otherwise being treated unfairly because of his or her race, religion, national origin, sex, disability, or age over 40, or for some other illegal reason.

3) "suffered an adverse job action;"

4) was replaced by (or treated less favorably than) someone who did not engage in protected activity; and

5) the employer's stated reason for the adverse job action is untrue or not the real reason ("pretext").

Evidence that the adverse job action immediately followed the protected activity is evidence of pretext when the other criteria is met. *DiCarlo v. Potter*, 358 F.3d 408, 422 (6th Cir. 2004; *Hamilton v. General Elec. Co.*, 556 F.3d 428, 435-36 (6th Cir. 2009).

DISABILITY DISCRIMINATION See ADAA, Ohio Revised Code §4112.02, *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St. 3d 279; *Talley v. Family Dollar Stores of Ohio, Inc.* (2008 U.S. App. LEXIS 19342; 2008 FED App. 0344 (6th Cir.); 20 Am. Disabilities Cas. (BNA) 1697; 13 Accom. Disabilities Dec. (CCH) P13-152; 542 F.3d 1099.

A claim for disability discrimination may exist if employee:

1) has an impairment that substantially limits one or more "major life activities," has a "record" of such an impairment, or the employer "regards" the employee as having such an impairment;

2) the employer is aware of the impairment or regards the employee as having one;

3) the employer is able to perform the "essential functions" of the job, or would be able to perform the essential functions with a reasonable accommodation, or

   An accommodation is necessary, the employee has requested an accommodation (the employee does not have to use those specific words, but need only let the employer know that the employee has some condition, impairment or disability and could do the job if the employer made some change);

4) the employer refused to provide a reasonable accommodation or otherwise treated the employee differently than non-disabled employees, and as a result the employee "suffered an adverse job action," i.e., was denied the job, promotion or was terminated from the job, and

5) the employee was replaced by someone who was not disabled, and

6) the employer's stated reason for the adverse job action is untrue or not the real reason ("pretext").

FAMILY AND MEDICAL LEAVE ACT (29 U.S.C.§2615)

The FMLA applies only to employers with 50 or more employees within 75 miles of the worksite); to employees who were employed by that employer for at least one year before the leave; and employees who worked for that employer 1250 hours during the year before leave was needed.

Leave may be taken for the following reasons:

The employee's own serious medical condition;

To care for a spouse, child, or parent;

Pregnancy, childbirth, adoption;

To care for an injured service member; or

To give care for a spouse, child, or parent because of an emergency due to servicemember deployment.

A cause of action exists if the employer:

Refused to grant leave;

Interfered with an effort to take leave;

Retaliated against an employee because (s)he took leave or asked for leave;

Refused to allow an employee to return to work after leave;

Used dates of FMLA qualifying leave against the employee with regard to attendance issues;

The FMLA allows up to 12 weeks each year, taken together or intermittently. Employees may not be required to take more time than needed.

ISSUES INVOLVING PAYMENT OF WAGES (Fair Labor Standards Act, 29 U.S.C. §215(a)(3); Ohio Minimum Wage Act, O.R.C. §4111.01 et seq.)

Employees are often misclassified as "exempt." Exempt employees are **not** entitled to overtime pay. Nonexempt employees **are** entitled to overtime pay, at time and one half their regular rate of pay for ever hour over forty hours worked in any workweek.

"Executives"

- Are paid the same salary each week, not less than $455 per week;

- Their "primary duty" is managing the business or one of its departments or subdivisions;

- Routinely direct the work of at least two or more other full-time employees or their equivalent; and

- Have the authority to hire or fire other employees or their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

If any of these criteria are absent, the employee is not an exempt Executive.

"Administrative Employees"

- Are paid the same salary each week, not less than $455 per week;

- Their "primary duty" is office or non-manual work directly related to the business' or its customers' management or general operations;

- Their "primary duty" includes the exercise of discretion and independent judgment with respect to matters of significance;

If any of these criteria are absent, the employee is not an exempt Administrative Employee. Generally, secretaries are NOT exempt and ARE entitled to overtime pay.

"Professionals"

- Are lawyers or teachers, **or** were paid the same salary each week, not less than $455 per week;

- Their "primary duty" includes the performance of work requiring advanced knowledge, predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment;

- Their "advanced knowledge"is in a field of science or learning; and

- Their "advanced knowledge" is customarily acquired by a prolonged course of specialized intellectual instruction

If any of these criteria are absent, the employee is not an exempt Professional.

"Creative Professionals"

- Are paid the same salary each week, not less than $455 per week;

- Their "primary duty" includes the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

If either criteria is absent, the employee is not an exempt Creative Professional

"Computer Employee"

- Are paid the same salary each week, not less than $455 per week, OR are paid on an hourly basis, at a rate not less than $27.63 an hour?

- Are employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the following duties:

1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The Fair Labor Standards Act and the Ohio Minimum Wage Act are complicated. This list includes only some of the most common exemptions. Other exemptions may apply.

In general, blue collar workers are not exempt and should be paid at least minimum wage, and overtime of one and one half times their regular hourly rate for each hour over forty worked in one work week.

The law does not permit employers to offer "comp time" in lieu of overtime, where the "comp time" is in a different work week.

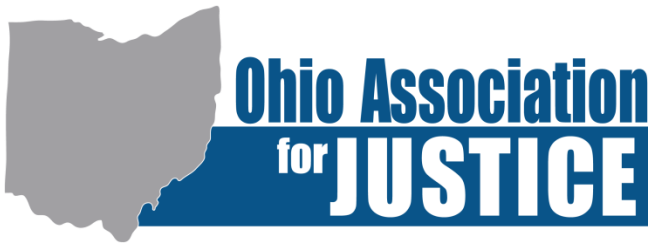
TABLE OF STATUTES OF LIMITATIONS

CAUSE OF ACTION	REFERENCE	STATUTE OF LIMITATION
Age discrimination or retaliation for a complaint of age discrimination. Ohio law: EITHER file a lawsuit in common pleas court OR file a charge of discrimination with the Ohio Civil Rights Commission (OCRC). Charges of discrimination filed with the Equal Employment Opportunity Commission (EEOC) are automatically cross-filed with the OCRC, and vice versa. Federal law – Age Discrimination in Employment Act (ADEA): file a charge with the Equal Employment Opportunity Commission (EEOC) or the Ohio Civil Rights Commission(OCRC), wait for Notice of Right to Sue, and file a complaint in federal district court within 90 days of the receipt of the Notice of Right to Sue.	ORC §4112.14 29 U.S.C. §623(d).	180 days to file a lawsuit (Ohio law) or file a charge (federal law). Count from the date the plaintiff learns he or she will be terminated, denied a promotion, etc.

Whistleblower – Sarbanes Oxley Act (SOX). Complaint is filed with OSHA.	18 U.S.C. §1514A	180 days.
Hybrid §301 claim (wrongful discharge by union employee)	*Robinson v. Cent. Brass Mfg. Co.* 987 F.2d 1235 (6th Cir. 1993); *Overstreet v. Mack Indus.*, 260 Fed. Appx. 883 (6th Cir. 2008)	6 months (from date the union declines to pursue grievance, or grievance is denied).
Whistleblower – Ohio law	O.R.C. §4113.52	180 days.
Workers' Compensation Retaliation (section titled, "Discrimination against alien dependents unlawful")	O.R.C. §4123.90	Must provide written notice of violation to employer within 90 days of retaliatory act, AND suit must be filed within 180 days of retaliatory act.
Title VII of the Civil Rights Act of 1964 (harassment or discrimination on the basis of gender, race, national origin or religion, or on the basis of an "association" with another of a particular race, color, religion, sex, or national origin.)	42 U.S.C. §2000e *et seq.*	300 days to file a charge of discrimination with the EEOC or OCRC. (45 days for federal employees).
Americans With Disabilities Act, Amended (ADAA).	42 U.S.C. §12203(a)	300 days to file a charge of discrimination with the EEOC or OCRC.
Assault or battery (including in context of sexual harassment)	R.C. 2305.111	1 year
False imprisonment	R.C. 2305.11	1 year
Malicious prosecution	R.C. 2305.11	1 year
Defamation (libel or slander)	R.C. 2305.11	1 year
Fair Labor Standards Act (FLSA) (minimum wage and overtime violations)	29 U.S.C. §215(a)(3); O.R.C. §4111.01 *et seq.*	2 years. 3 years for a "willful" violation.

Family and Medical Leave Act (FMLA)	29 U.S.C.§2615	2 years. 3 years for a "willful" violation.
Fraud, Promissory estoppel	R.C. 2305.09	4 years
Discrimination on the basis of race, color, religion, sex, military status, national origin, disability, age, or ancestry – Ohio law.	O.R.C. §§4112.02, 4112.99.	6 years.
Contract - not in writing	R.C. 2305.07	6 years
Contract - in writing	R.C. 2305.06	15 years
Discrimination against members of the armed forces: Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)	38 U.S.C. §4301 *et seq.*	None.

***STATUTE OF LIMITATIONS MAY BE SHORTENED BY VIRTUE OF CONTRACTUAL AGREEMENT:** An employer may shorten the statute of limitation by placing notice of the shortened time period in its employment application, and requiring the employee to sign it as a condition of employment. *Thurman v. Diamler Chrysler*, 397 F.3d 352 (6th Cir. Mich. 2004). This case applies Michigan law, and approved an employer mandated six month statute of limitations for employment claims.



Wage & Hour: What Every Practitioner Should Know

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A NUTS AND BOLTS GUIDE TO THE FAIR LABOR STANDARDS ACT

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OVERTIME COVERAGE UNDER THE FLSA

This paper is intended to provide lawyers with a very brief and general overview of the federal Fair Labor Standards Act ("FLSA") and which workers are covered by the FLSA's overtime provisions. Of course, what follows does not come close to addressing the many coverage issues arising under the FLSA and similar state statutes. If you are interested in learning more, an especially excellent overview of the substantive law can be found in Betty Southard Murphy and Elliot S. Azoff, Guide to Wage and Hour Regulation, 2d Ed. (BNA 1998). Other generalized information can be found at the website for the Wage & Hour Division of the United States Department of Labor ("ww.dol.gov/esa/whd/") and in Robert N. Covington and Kurt H. Decker, Employment Law in a Nutshell (West 2002). More detailed analysis can be found in Les A. Schneider and J. Larry Stein, Wage and Hour Law: Compliance and Practice (West 2000).

I. Why Should I Care About the FLSA and the Overtime Pay Requirement?

The FLSA, codified at 29 U.S.C. § 201, *et seq.*, is the primary source of this Nation's minimum wage, overtime, and child labor protections. With respect to overtime, the FLSA generally prohibits companies from requiring workers to work over forty hours in a workweek unless the worker is compensated for all overtime hours at a rate not less than one-and-one-half times his regular rate of pay. See 29 U.S.C. § 207(a)(1).

Enacted in 1938 by President Franklin D. Roosevelt, the FLSA overtime provision reflects the progressive values underlying so much of the New Deal legislation. The legislative purpose behind the time-and-one-half overtime premium was two-fold. First, the overtime premium was intended "to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of overwork as well as underpay.'" Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728, 739 (1981) (quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt)). Second, "[i]n a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work." Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942). In other words, Congress intended that, by making overtime prohibitively expensive, the FLSA would force companies to hire more workers instead of requiring existing workers to work overtime.

II. Are My Clients Covered?

According to the Department of Labor, over eighty million American workers are covered by the FLSA. See DOL Wage and Hour Division Fact Sheet No. 14 (available at "www.dol.gov/esa/whd/"). For purposes of coverage, the FLSA interprets the term "employee" in the broadest sense to include "any individual employed by an employer." 29 U.S.C. § 203(e). Covered employees can include, among others, independent contractors, see Johnson v. Unified Govt. Wyandotte Cty., 371 F.3d 723, 729 (10th Cir. 2004) (describing factors to be considered in deciding whether worker is covered employee or independent contractor), and even trainees, see Chelen v. John Pickle Co., 344 F. Supp. 2d 1278, 1291-92 (N.D. Okla. 2004) (describing factors to be considered in determining whether trainee is covered employee).

Workers fall within the FLSA's reach so long as they are engaged in covered activity. Covered activity can be established under either the "individual/traditional coverage" doctrine or the "enterprise coverage" doctrine. Under individual/traditional coverage, workers are covered if, based on their job function, they are engaged in commerce or in the production of goods for commerce. See 29 U.S.C. §§ 206(a)(1) and 207(a)(1). Under enterprise coverage, workers, regardless of their job function, are covered if their company is part of a business enterprise that is engaged in commerce or the production of goods in commerce. See id. at §§ 203(r)-(s). In order to qualify for enterprise coverage, the company generally must do at least $500,000 in annual business, see id. at § 203(s)(1)(A)(ii), but this threshold can be reached by combining the company with other business partners in a "common business purpose, see Chao v. A-One Med. Serv., Inc., 346 F.3d 908, 914-15 (9th Cir 2003) (citing 29 U.S.C. § 203(r)(1)). Also, exceptions are made for various non-profit and public entities. See 29 U.S.C. § 203(s)(5)-(6).

Given the extraordinarily broad parameters of the individual/traditional and enterprise coverage doctrines, you generally can assume that most of your clients are covered by the FLSA. Furthermore, in Ohio workers are covered by the Ohio Minimum Fair Wage Standards Act ["the Ohio Wage Act"]codified at Ohio Rev. Code §4111 *et seq.* The Ohio Wage Act adopts the federal standards as its own by numerous references to the FLSA. The Ohio Wage Act provides more minimum wage protection to employees than the federal regulations but mandating treble damages without the need to show the employer engaged in "willful" conduct.

There are 22 states that provide additional protections beyond the FLSA. The attached table, derived from information in Attorney Barbara Kate Repa's excellent handbook entitled Your Rights in the Workplace 6th Ed. (Nolo 2002), lists states that provide their own statutory overtime protections.

III. Specific Ohio Requirements, different from the FLSA.

Ohio regulates the wages of employees of employers whose gross volume of sales are more than $150,000, but less than $500,000. An employer that falls in this category must pay overtime at a rate of one and one half the employee's hourly rate after 40 working hours in a week.

On November 7, 2006 Ohio passed the Ohio Fair Minimum Wage Amendment. Effective January 1, 2011 the minimum wage in Ohio is $7.40 per hour for employees of employers with gross annual receipts of $250,000 or more. If the employer makes less than $250,000 in gross annual receipts, it can still pay the federal minimum wage of $7.25 an hour. Employers may also pay tipped employees, such as waiters and waitresses, less than the new minimum wage, but no less than half, provided that the tips received by the worker, combined with his wage, add up to at least equal or more than the new minimum wage.

Under Ohio law, employers must pay employees at least two times in a month. Contrary to popular belief, an employer does not have to pay bonuses or give vacation in Ohio.

IV. Are "Salaried" Employees Entitled to Overtime?

One of the myths of the American workplace is that "salaried" workers are not entitled to overtime. Exploiting this myth, some companies promote workers from "hourly" to "salaried" positions with the understanding that, in exchange for the salary, the worker gives up her right to overtime pay. Because these "salaried" job titles often carry an elevated status within the workplace, working without overtime may seem reasonable to the worker.

But the FLSA does *not* exempt all salaried workers from overtime pay. Rather, where a salaried worker is covered by the overtime provision, her salary is usually calculated by dividing her weekly salary by the number of hours the salary is intended to compensate. See 29 C.F.R. § 778.113(a). However, many variations on this general rule exist, see id. at §§ 778.107, *et seq.*, and these variations are too detailed for coverage here.

V. Are "Salaried" Employees Ever Exempt From Overtime?

The FLSA exempts certain executive, administrative, professional, outside sales, and computer employees from the entitlement to time-and-one-half overtime benefits. See 29 U.S.C. §§ 213(a)(1) and 213(a)(17). These exemptions commonly are referred to as the "white collar" exemptions, and they have spawned substantial litigation as some American companies choose to push the envelope in increasingly aggressive efforts to deny overtime pay to workers and their families.

The white-collar exemptions – like all FLSA exemptions – are narrowly construed against the employer. See Arnold v. Ben Kanowski, Inc., 361 U.S. 388, 392 (1960); A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

To utilize a white-collar exemption, a company generally must clear two independent hurdles:

A. The "Salary Basis" Requirement

First, the employee must be paid on a "salary basis" at a salary of at least $455 per week. See 29 C.F.R. § 541.600(a); see generally Auer v. Robbins, 519 U.S. 452 (1997) (discussing "salary basis" concept). "An employee will be considered to be paid on a 'salary basis' . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). Generally, the employee "must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." Id. However, under appropriate circumstances (which are described in the regulation), deductions may be made for full-day absences attributable to, *inter alia*, illness or disciplinary suspensions. See id. at 541.602(b).

Historically, many misclassification cases have been won because companies made improper deductions from a salaried employee's pay. See, e.g., Takacs v. Hahn Automotive Corp., 246 F.3d 776 (6th Cir. 2001) (managers and assistant managers of retail establishment not exempt from overtime entitlement because company subjected them to improper deductions for certain disciplinary infractions); Oral v. Aydin Corp., 2001 U.S. Dist. LEXIS 20625 (E.D. Pa. Oct. 31, 2001) (workers not exempt from overtime entitlement because company subjected them to improper deductions for partial-day sick absences). However, seeking to protect business from large damages awards, the Department of Labor recently expanded regulations allowing companies to escape some liability for "inadvertent" pay deductions that are voluntarily reimbursed by the company. See 29 C.F.R. § 541.603.

Deductions are permissible in certain limited circumstances.

1. An employee is not required to be paid for any week in which she performs no work. See, C.F.R. § 541.118(a).
2. An employee is not required to be paid for a day where she missed a full day for personal reasons. See, C.F.R. § 541.118(a).
3. An employee is not required to be paid for any day occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. See, C.F.R. § 541.118(a) (3).

4. The Family Medical Leave Act of 1993 created some limited exceptions permitting employers to place otherwise exempt, salaried, employee on unpaid leave. See, C.F.R. § 825.206(a).
5. Employees can be docked pay for major safety violations. See, C.F.R. § 541.118(a) (5)

B. The "Job Duties" Requirement

Even if the worker is paid on a "salary basis," an analysis of the worker's job duties must reveal that she actually works as an executive, administrative, professional, outside sales, or computer employee, as those terms are defined under the FLSA. Before turning to each of these exemptions, three preliminary points are in order.

First, in 2004, the Department of Labor expanded the reach of the white-collar exemptions in its business-friendly amendments to the overtime regulations. The amended regulations appear at 29 C.F.R. 541.0, *et seq.*[1]

Second, even where the revised regulations disadvantage particular employees, advocates should remember that many states have their own overtime laws and regulations and that some state regulations contain language that mirrors the pre-2004 federal regulations. In Ohio, the OMFWSA incorporates the definitions and tests of the FLSA. See, Ohio Rev. Code § 4111.01(D) (4). Importantly, the FLSA does not preempt state laws that offer workers more protection than the FLSA. See 29 C.F.R. § 541.4 ("Employers must comply with any Federal, State, or municipal laws, regulations, or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act"); DeAsencio v. Tyson Foods, Inc., 342 F.3d 301 (3d Cir. 2003) (recognizing that overtime lawsuits may be litigated under both federal and state laws). Also, workers cannot waive their FLSA rights through individual employment contracts or collective bargaining agreements. See 29 C.F.R. § 541.4.

Third, even the new regulations confirm the well-established principle that "[a] job title alone is insufficient to establish the exempt status of an employee." 29 C.F.R. § 541.2; see also Martin v. Indiana Michigan Power Co., 381 F.3d 574, 585-86 (6th Cir. 2004) ("The FLSA requires the employer to make FLSA exemption decisions based on the employee's actual job duties, not the employee's job title."); Barth v. Wolf Creek Nuclear Operating Corp., 125 F. Supp. 2d 437, 439 (D. Kan. 2000) (quoting previous regulatory language for proposition that "[t]itles can be had cheaply and are of no determinative value"). In other words, a company cannot escape its overtime obligations by giving a worker a salary and a glamorous title but requiring her to perform the same work as her non-exempt co-workers.

[1] For a good discussion of how and why these amendments harm American workers, the reader is referred to the Economic Policy Institute's June 26, 2003 Briefing Paper entitled "Eliminating the Right to Overtime Pay" and available at the Institute's web site ("www.epinet.org").

With the above in mind, we turn to the FLSA's various white-collar exemptions.

1. The Executive Employee Exemption

To qualify for the "executive" employee exemption, the following criteria must be established: (i) the worker's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise; (ii) the worker must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and (iii) the worker must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. See 29 C.F.R. § 541.100(a). The concurrent performance of executive and non-executive work does not necessarily disqualify a worker from classification as an executive employee. See id. at § 541.106.

In applying the executive exemption, the devil is in the details. Before deciding whether a worker meets the above criteria, one must carefully study the definitions of applicable terms such as "primary duty," see id. at § 541.700, "customarily" and "regularly," see id. at § 541.701, "management," see id. at § 541.102, "department or subdivision," ," see id. at § 541.103, "two or more other employees," see id. at § 541.104, and "particular weight," see id. at § 541.105. In issuing the 2004 amendments, the Department of Labor generally altered these definitions for the benefit of corporate America. However, there remains ample room to argue that workers do not fall within the revised executive exemption, and, like many regulatory changes, the amended exemption probably is neither as beneficial as business hopes nor as harmful as workers fear. See, e.g., Beauchamp v. Flex-N-Gate, LLC, 2005 U.S. Dist. LEXIS 3108, *10 N. 3 (E.D. Mich. Feb 23, 2005) (suggesting that 2004 regulations did not significantly alter analysis of whether production supervisor was exempt executive employee).

2. The Administrative Employee Exemption

To qualify for the administrative employee exemption, the employee's primary duty (i) must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and (ii) must include the exercise of discretion and independent judgment with respect to matters of significance. See 29 C.F.R. § 541.200(a). The regulations, as amended in 2004, define in great detail key terms, such as "primary duty," see id. at § 541.700, "directly related to management or business operations," see id. at § 541.201, and "discretion and independent judgment," see id. at § 541.202.

Also, the 2004 amendments include various "examples" of positions that "generally" fall within the administrative exemption. See id. Not surprisingly – given the pro-business tenor of the 2004 amendments – these examples read like a "who's who" of

job titles that have been the subject of recent class action lawsuits. However, at least one court has observed that a job title's inclusion in the Department of Labor's list of examples does not preclude the judiciary from finding that, in reality the worker is not exempt from overtime benefits. See Robinson-Smith v. Government Employees Ins. Co., 323 F. Supp. 2d 12, 21-22 (D.D.C. 2004) (insurance claims adjustors not exempt from overtime notwithstanding new regulatory language that "[i]nsurance claims adjustors generally meet the duties requirement for the administrative exemption . . ."). This same court has observed that "[t]he general criteria for employees employed in a bona fide administrative capacity are essentially the same under the August 2004 Regulations as under the current regulations." Id. at 18.

3. The Professional Employee Exemption

Workers are classified as exempt "professional employees" if their "primary duty is the performance of work (i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or (ii) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." 29 C.F.R. § 541.300. Similarly, workers are classified as exempt "learned professionals" if their primary duty is "the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." Id. at § 541.301. Finally, workers are classified as "creative professionals" if their primary duty is "the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work." Id. at § 541.302.

As with the administrative exemption, the 2004 regulations gratuitously suggest that various job titles generally fall within the professional exemptions. These include, among others, certain "medical technologists," 29 C.F.R. § 541.301(e)(1), "registered nurses" (but not "licensed practical nurses"), id. at § 541.301(e)(2) certain "dental hygienists," id. at § 541.301(e)(3), certain "physician assistants," id. at § 541.301(e)(4), most "chefs and sous chefs" (but not "cooks who perform predominantly routine mental, manual, mechanical or physical work"), id. at § 541.301(e)(6), some (but not nearly all) paralegals, id. at § 541.301(e)(7), most teachers, id. at § 541.303(b), and medical interns and residents, 29 C.F.R. § 541.304(c). The current Department of Labor apparently is not concerned with the fact that these examples disrespect the well-established principles that a worker's job title is not determinative of his coverage status under the FLSA and that coverage should be determined on a case-by-case basis depending on the worker's *actual* job duties. See, e.g., 29 C.F.R. § 541.2 ("A job title alone is insufficient to establish the exempt status of an employee."). One is left with the distinct impression that the Department's expansive regulations are intended to usurp the judicial function of interpreting the FLSA's meaning.

4. Computer Employees, Outside Salesmen, and Highly Compensated Employees

The regulations also exempt "[c]omputer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field," 29 U.S.C. § 541.400(a), as well as most "outside salesmen," see id. at § 541.500, et seq., and most employees with a total annual compensation in excess of $100,000, id. at 541.601. Because such individuals probably do not make up a substantial portion of your client base, these exemptions are not discussed further.

5. "Blue Collar" Workers and Public Safety Employees

Even though there never was much doubt about the non-exempt status of "blue collar" workers, the 2004 regulations explicitly state that the exemptions do *not* apply to "manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy." 29 C.F.R. § 541.3(a). More significantly, the new regulations assert that the following public safety providers generally are *not* exempt from receiving overtime: "police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work." Id. at § 541(b)(1).

Apparently, local governments could not match big business' success in impacting the regulatory drafting process. But the outcome is one of the only bright spots in the 2004 regulations, and you should carefully review your client base to ensure that your law enforcement and other public safety clients are receiving full overtime benefits. If these workers are unionized, be especially mindful that FLSA rights cannot be waived by collective bargaining agreements that provide less generous overtime benefits. See 29 C.F.R. § 541.4.

VI. Are any Other Employees Exempt From Overtime Under the FLSA?

In addition to the white-collar exemptions discussed above, the FLSA contains various statutory exemptions for other types of workers. These exemptions, some of which are quite broad, include, *inter alia*:

1. Workers (such as truck drivers) employed by common carriers and whose qualifications and maximum hours are dictated by the federal Motor Carrier Act;

2. Most newspaper delivery drivers;

3. Many chartered bus drivers;

4. Taxicab drivers;

5. Most railroad and airline employees

6. Workers employed in certain "amusement or recreational establishment[s], organized camp[s], or religious or non-profit educational conference center[s];"

7. "Seamen" and certain workers employed in the fishing and seafood industry;

8. Most agricultural workers;

9. Most workers employed by small-market news publications; and

10. Babysitters and certain domestic service workers "employed on a casual basis."

See generally 29 U.S.C. § 213.

In Ohio;

1. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;

2. A member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state;

3. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a nonprofit organization or group of organizations described in Section 501(c)(3) of the "Internal Revenue Code of 1954," and exempt from income tax under Section 501(a) of that code;

4. Any individual employed directly by the House of Representatives or directly by the senate.

See generally Ohio Rev. Code §4111.01(D).

VII. Some Specific Examples of Jobs.

1. **Mortgage Loan Officers:** Some mortgage companies illegally classify their loan officers as ineligible for overtime pay, even though these workers routinely work over 40 hours per workweek. In fact, most mortgage loan officers who spend the majority of their time working inside the mortgage company's facility are entitled to overtime. Click here to contact us if you are a mortgage loan officer and would like a free attorney consultation.

2. **Call Center Workers:** Many call center workers are required to perform duties before and after the beginning of their paid shift. For example, some companies require call center workers to prepare and submit reports at the conclusion of their workday. These kinds of company-mandated activities generally are compensable work. If you are a call center employee and believe you have not been paid for all work time, contact us for a free and confidential attorney consultation.

3. **Independent Contractors:** Some companies refuse to pay workers overtime by calling them "independent contractors" instead of "employees." But whether a worker truly is an independent contractor depends on the specific, real-life circumstances of his employment. A worker is not an independent contractor just because the company says so. If you regularly work over 40 hours in a workweek and are denied overtime because the boss says you are an "independent contractor," you should contact us for a free and confidential attorney consultation.

4. **Outside Sales:** If you are employed in the capacity of an outside sales person and your primary duties include; making sales or obtaining orders or contracts for services or the use of facilities that a customers pays for and you are regularly away from your employer's place of business; you are not entitled to receive overtime. However, you must have personal contact with the customer away from your employer's place of business. Outside sales do not include sales by mail, telephone or the internet if you never meet the customer in person. If you set up the promotional materials and/or displays for someone else who actually makes the sales, you may be entitled to overtime.

5. **Social Workers/Caseworkers:** Social workers who have Master's degrees who work in the area of their advanced degree generally meet the learned professional exemption and are not entitled to overtime. However, Caseworkers will generally not qualify for the learned professional exemption and are due overtime.

6. **Substitute Teachers:** Do not automatically meet the teacher exemption from overtime. The courts have held that substitute teachers must be evaluated on a "case-by-case" basis. Much of the review will focus on the primary duties. If the primary duty is teaching then they are not eligible for overtime. On the other hand, if the duties perform were solely clerical or administrative then they could qualify for overtime.

7. **Insurance Claim Adjusters**: Adjusters that have actual claims handling duties meet the administrative exemption and are not eligible for overtime. The duties would include but is not limited to interviewing the insured, witnesses and physicians, inspecting property damage, reviewing factual information, evaluating and recommending coverage of claims, negotiating settlements and making recommendations as to litigation the exemption would apply. However, the "insurance claims adjuster" title is insufficient if the duties are not administrative in nature.

VIII. What is work under the FLSA?

As discussed in the accompanying paper, the Fair Labor Standards Act ("FLSA") generally prohibits companies from requiring workers to work over forty hours in a workweek unless the worker is compensated for all overtime hours at a rate not less than one-and-one-half times his regular rate of pay. See 29 U.S.C. § 207(a)(1). The FLSA also requires that covered employees be compensated for every hour worked in a workweek. See 29 U.S.C. § 206(b).

A. What is "Work"?

In view of the above, it's surprising that "work" is not defined in the FLSA. Congress left that job to the courts, and – fortunately for workers – the New Deal Supreme Court wasted little time in laying down worker-friendly precedent and establishing that "work" under the FLSA should be liberally construed in furtherance of the statute's "remedial and humanitarian" purposes. See, e.g., Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

An activity constitutes work under the FLSA if it (i) is controlled or required by the employer and (ii) is pursued necessarily and primarily for the benefit of the employer and its business. See Tennessee Coal, 321 U.S. at 598. The United States Department of Labor puts it this way:

> The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.

> "Workday", in general, means the period between the time on any particular day when such employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

DOL Fact Sheet #22, entitled "Hours Worked Under the FLSA" (available at "www.dol.gov").

B. Measuring Work

Based on the above, the time clock is not always an accurate measure of a worker's compensable work time. In fact, the Supreme Court has

> generally recognized that time clocks do not necessarily record the actual time worked by employees. Where the employee is required to be on the premises or on duty at a different time, or where the payroll records or other facts indicate that work starts at an earlier or later period, the time clock records are not controlling. Only when they accurately reflect the period worked can they be used as an appropriate measurement of the hours worked.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690 (1946).

Moreover, because *the company* – not the worker – is obligated to maintain accurate records reflecting work hours, the lack of reliable data or recordkeeping benefits the worker's in litigation. See Anderson, 328 U.S. at 688 ("The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [Act's] requirements.") As stated by the Supreme Court:

> where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated

> and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687-88.

C. Common Violations

The Department of Labor gives the following examples of common instances in which workers might be shortchanged under the above-described principles:

> **Waiting Time:** Whether waiting time is time worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."
>
> **On-Call Time:** An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.
>
> **Rest and Meal Periods:** Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be

compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

Sleeping Time and Certain Other Activities: An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

Lectures, Meetings and Training Programs: Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

Travel Time: The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

Home To Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

> **Travel Away from Home Community:** Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

DOL Fact Sheet #22, entitled "Hours Worked Under the FLSA" (available at "www.dol.gov").

D. "Donning and Doffing" and the Supreme Court's Recent Decision in IBP, Inc. v. Alvarez

Under Supreme Court cases, activities "such as the donning and doffing of specialized protective gear, that are 'performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." IBP, Inc. v. Alvarez, 546 U.S.21, 30 (2005) (quoting Steiner v. Mitchell, 350 U.S. 247, 256 (1956)).

In November 2005, the Supreme Court decided IBP, Inc. v. Alvarez, supra., unanimously holding that workers in a beef processing plant are entitled to be paid for the time spent traveling between the donning and doffing changing area and the workers' assigned locations on the production line. See Franklin v. Kellogg Co., 619 F. 3d 604 (6th Cir. 2010).

V. Conclusion

Enforcement of our Nation's wage and hour laws is a noble undertaking that may be rewarding and profitable for plaintiffs' attorneys. As discussed above, many of your existing clients may be entitled to overtime, and, as more companies violate the overtime laws, it becomes increasingly likely that your clients will have legitimate overtime claims.

Overtime lawsuits often are commenced and resolved as class action lawsuits. The next "big" overtime case might be right under your nose. But you will never know if you do not ask.

APPENDIX

LISTING OF STATE OVERTIME LAWS[2]

Alaska – Alaska Stat.§§ 23.10.055; 23.10.060; 23.10.410. Applicable to employers of 4 or more employees.

Arkansas – Ark. Code Ann. §§ 11-4-211; 11-4-203. Applicable to employers of 4 or more employees, but excludes employment that is subject to the FLSA

California – Cal. Lab. Code §§510, 511 and Orders of the Industrial Welfare Commission, 8 Cal. Admin. Code § 11010, *et seq.* Overtime generally is due after 8 hours per day or 40 hours per week. 10 hours was established prior to 7/1/99.

Colorado – Colo. Rev. Stat. § 8-12-101, *et seq.*

Connecticut – Conn. Gen. Stat. Ann. §§ 31-58, *et seq*.; Conn. Admin. Code §§ 31-60-1, *et seq*.

District of Columbia – D.C. Code Ann. § 32-1003

Hawaii – Haw. Rev. Stat. § 387-3.

Illinois – 820 Ill. Comp. Stat. §105/4a. Applicable to employers of 4 or more employees.

Indiana – Ind. Code Ann. § 22-2-2-4(j). Applicable to employers of 2 or more employees, but excludes employment that is subject to the FLSA.

Kansas – Kan. Stat. Ann. § 44-1204. Not applicable to employment that is subject to the FLSA.

Kentucky – Ky. Rev. Stat. Ann. §§ 337.050; 337-285.

Maine – Me. Rev. Stat. Ann. Tit. 26, § 664.

Maryland – Md. Code Ann., [Lab. & Empl.] § 3-420.

Massachusetts – Mass. Gen. Laws ch. 151, § 1A.

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[2] The information herein is derived from a very useful table contained in Barbara Kate Repa, Your Rights in the Workplace 6th Ed. (Nolo 2002). More information can be found on the Department of Labor's website, http://www.dol.gov/whd/minwage/america.htm.

Michigan – Mich. Comp. Laws § 408.384a. Applicable to employers of 2 or more employees, but may exclude employment that is subject to the FLSA.

Minnesota – Minn. Stat. Ann. § 177.25.

Missouri – Mo. Rev. Stat. §§290.500 and following. Not applicable to employment that is subject to the FLSA.

Montana – Mont. Code Ann. § 39-3-405.

Nevada – Nev. Rev. Stat. Ann. § 608.018.

New Hampshire – N.H. Rev. Stat. Ann. § 279:21. Does not apply to employees covered by the FLSA.

New Jersey – N.J. Stat. Ann. § 34:11-56a4.

New Mexico – N.M. Stat. Ann. § 50-4-22.

New York – N.Y. Lab. Law § 651.

North Carolina – N.C. Gen. Stat. § 95-25.4.

North Dakota – N.D. Admin. Code 46-02-07-02

Ohio – Ohio Rev. Code Ann. § 4111.03

Oregon – Or. Rev. Stat. §§ 653.261, 653.265.

Pennsylvania – 43 Pa. Cons. Stat. Ann. § 333.104(c).

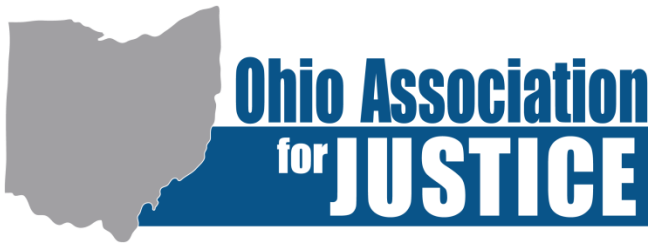
Rhode Island – R.I. Gen. Laws §§ 28-12-4; 5-23-2.

Vermont – Vt. Stat. Ann. Tit. 21, § 384.

Washington – Wash. Rev. Code Ann. § 49.46.130.

West Virginia – W.Va. Code § 21-5c-3. Applicable to employers of 6 or more employees at one location, but excludes employment that is subject to the FLSA.

Wisconsin – Wis. Stat. Ann. § 104.02.



ADA and FMLA for the Personal Injury Lawyer

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BASIC FMLA AND ADA ISSUES FOR THE PERSONAL INJURY LAWYER

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I. INTRODUCTION

This presentation sets forth a basic understanding of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq*., as well as the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* as amended. My hope is that information will be useful for two reasons: first, the identification of viable lawsuits and, second, the protection of the employment of personal injury victims and other clients.

Whether due to an accident or other reason, we all have clients who suffer from medical limitations that either prevent them from performing their job for a period of time or prevent them from doing their job without some help from their employer. At an extremely basic level, the FMLA gives clients time off to recover, and the ADA provides the ability to ask for assistance in doing their job.

Both of these laws are complex and regulation heavy (the FMLA somewhat more so than the ADA). The FMLA deals exclusively with employment issues, while the ADA has provisions regarding public accommodations as well. These materials focus exclusively on employment issues.

II. FMLA

The FMLA gives employees time off for 12 weeks per year for (1) the birth of a child; (2) the adoption of a child; (3) the care of a seriously ill spouse, child, or parent; or (3) a serious health condition of the employee. "Serious health condition" means that the employee is medically incapacitated from doing the important parts ("essential functions") of their regular job.

Although we tend to think of it as a block of time, FMLA leave may also be taken intermittently or as "reduced schedule" leave. For example, and employee who suffers from incapacitating migraine headaches once a month can take intermittent leave for the day or two that the employee is suffering symptoms. Another example of intermittent leave is leave to attend doctor's visits, prenatal care, or physical therapy. If medically necessary to work less than a normal work schedule, an employee can use FMLA to reduce their weekly hours. Intermittent leave and reduced schedule leave is taken proportionally from the leave entitlement. If you work six days a week and miss one day, you lose 1/6 of a week from your entitlement.

The 12 weeks of leave entitlement can be calculated in several ways. The most typical (because it is the most advantageous to employers) is a "rolling" period, which measures the amount of leave taken in the prior 12 months from the date leave commences. Alternatively, employers can give 12 weeks per calendar year, or 12 weeks per hire date anniversary year. If the employer does not choose, it is the one most advantageous to the employee.

In determining whether there is an FMLA issue, you first need to make sure that the employee is eligible under the act. This is a checklist:

- Must have worked for one year
- Must have worked 1,250 hours in any preceding year
- Employers must have at least 50 employees within a 75-mile radius at some time during the preceding year *and* at the time leave is requested (not taken).
- If not pregnancy leave, employee or person employee is needed to take care of must have a serious health condition which incapacitates them, or prevents them from doing the

essential functions of their position. If taking care of a child or a family member, incapacitated from attending school or taking care of themselves.

- Must not have exceeded 12 weeks in the relevant period (seems obvious, but with the rolling year method it may not be obvious to the employee).

What is a serious health condition? Basically, something which requires you to be out of work (or school) for **three or more** days and see a doctor, usually (but not always) more than once. Employees who have a cold or the flu and who are out for a three or less days are *not* protected by the act. Ironically, it is possible you can be fired for missing 2 days, but not 4. Alternatively, an employee can meet this burden by showing a chronic health condition, one which causes "periodic" periods of incapacity and doctor's treatment.

There are myriad paperwork requirements under the FMLA, both notice to the employee and an employee requirement to get the health condition certified by their medical provider. Most of the time employees are required to take a Department of Labor form to their doctors to have them certify that they were incapacitated by a serious health condition, or that they will be intermittently prospectively. Employers ability to ask for more is very limited, and they are further limited in how frequently certification can be asked for. These requirements are somewhat byzantine, and the regulations at 29 C.F.R § 825 should be studied closely if there is an issue here.

Understand that FMLA leave is not necessarily a paperwork issue for the employee. If they have a need for leave and give proper notice to the employer, they are on legally protected leave whether it is so designated or not. The only real requirement that an employee has is that of "notice." This is interpreted by the regulations as giving enough information to reasonably appraise the employer that FMLA leave is needed. "I'm sick" will not get us there. "I need FMLA for my back," or "my doctor says I need to take a week off" will probably get it done. Note that they are not required to say "FMLA." Employees are generally required to give notice

as soon as they can unless there are extenuating circumstances. "I was comatose" or "I was in an ambulance" gets it, "I was hanging out in the emergency room" very well might not. Use your own judgment here, a smart employee would make a real effort.

Finally, employees are required to follow their employer's call-off procedures unless something makes that impossible. The might even need to do so even if redundant and/or stupid (why call a line when you are looking at your manager? Do it anyway to be safe). If you are ever in a position to advise an employee in advance, especially regarding intermittent leave, tell them to follow all procedures, make a separate call to management and avalanche everybody with information.

Employers can violate the FMLA in one of two ways, the first being the obvious firing or demoting an employee because of their leave. This will generally be analyzed with the McDonnell Douglas burden shifting known to most employment attorneys. The second cause of action is an interference claim, which has, more or less, strict liability. Basically, it's a showing that the employer failed to meet their obligations or comply with all the requirements in the regulations. There is no need to show motivation here, but there is still a need to show *prejudice* pursuant to *Ragsdale v. Wolverine Worldwide Inc.*, 535 U.S. 85 (2002). Basically, you need to show that the employee was harmed by the violation.

One of the obvious examples of interference with prejudice is a refusal to reinstate an employee following leave. An employer may not replace you when you are gone, and must hold your job open. The only exception to this is if they find that your job was unnecessary, or that you were violating company policies during your absence, or something to that effect.

As we will see, damages under the FMLA are limited to economic damages -- wage loss for being fired or demoted to a lower paying position. Prejudice, therefore, has to come in some sort of economic form. You cannot do a hostile work environment claim, for example, under the FMLA. For example, you could have a plaintiff who was never notified in writing (as required by the regulations) that she only had 8 weeks of leave left. Therefore, she came back in 9 weeks

and was terminated for exceeding leave. A court would say this is unfortunate, but as she was medically unable to return before 9 weeks, she would have exceeded leave even if proper notice had been given and her firing was an inevitability.

The classic example is an employee who scheduled elective surgery with incorrect information about her leave allotment. Otherwise, the surgery would have been put off until leave was available. A closer question is employees who now state they could have returned to work had they known. Difficult in the face of a doctor's note saying they should be off. Of course, a doctor will probably say that they can could have come back, although it would not have been ideal. I have not seen much litigation on this issue.

Remedies under the FMLA are limited, and do not include compensatory or punitive damages. Instead, they include economic damages, attorney fees, interest, costs and "liquidated damages." Liquidated damages are double the economic damages, unless the defendant can prove that it acted in good faith and that had an objective legal basis for acting as they did. I have never understood how they can prove the second.

Finally, the FMLA interacts heavily with other laws. First, if an employee is on Temporary Total Disability under Workers Compensation, it is highly likely they are simultaneously taking FMLA leave (whether they know it or not). Although post-*Coolidge* they can be fired for not returning to work while on TT, under the FMLA they are still protected, at least for 12 weeks.

Obviously, FMLA interacts well with pregnancy discrimination laws. It can be easier to prove than pregnancy discrimination, and its remedies make a nice cocktail with the compensatory and punitive offered under the discrimination laws.

Finally, the FMLA interacts with the ADA in many respects. As it is mandated by Federal law, it seems fairly clear that FMLA leave is by definition a reasonable accommodation, to the extent that an employee is disabled. Again, an opportunity to seek punitives and compensatory damages with another law.

FMLA claims have a 2 year statute of limitations, and there is no requirement that an administrative charge be filed first (although it is possible to do so through the United States Department of Labor).

III. ADA

The Americans with Disabilities Act protects individuals with disabilities from being discriminated against in the workplace. It covers more employers than the FMLA, as the minimum number of employees for jurisdiction is 15 as opposed to 50. There are several forms of discrimination that are prohibited, including: segregating individuals because of their disability, denying equal job opportunities or benefits because of an individual's disability, and failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee. To be considered an individual with a disability, an individual must (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such an impairment; or (3) be regarded as having such an impairment.

In English, the ADA basically provides two things in the employment context. It protects individuals from discrimination who are either disabled, regarded as disabled or have a record of disability. "Disabled" individuals are also referred to as "qualified person with a disability," meaning that they have a disability but can still perform the important parts of their job, with or without a reasonable accommodation. Those who are regarded as disabled or have a record of disability can be seen as regular employees who do the job, but who have an actual or perceived impairment which is not "transitory and minor" -- they are *not* entitled to reasonable accommodation.

Basically, if I am an accountant who has lost the use of his legs, this would be considered to be a disability. I could still perform my core job as an accountant of preparing tax returns. In order to do this, I might need a reasonable accommodation of an access ramp or assistance in moving files, a non-essential function of my position (lawyers, for example, may occasionally

move file boxes around, but the essential function of their position is practicing law). Of course, a typical office building these days is wheelchair accessible, and many individuals confined to a wheelchair would have no trouble moving files around. Either way, I am a qualified person with a disability -- I can either perform the essential functions of their position with an accommodation or in some instances without one.

Continuing with the example, were I an accountant with an occasional slight limp I would not be disabled, and would plainly be able to perform the position. If management believed, however, that my condition rose to the level of a disability, I would be regarded as disabled. If management was aware that I had suffered paralysis in the past (and perhaps feared I would do so again), I would have a record of disability.

The first type of action under the ADA is discrimination against any of the above individuals because of their disability/regarded disability/record of disability. The second type is failing to accommodate an individual with a disability. Individuals who are regarded as disabled or have a record of disability are *not* entitled to accommodation.

A disability is defined as a substantial impairment of an individual's "major life activities." This used to be the most difficult part of litigating a disability claim, as courts took an incredibly narrow view of this issue. Major life activities were limited to such things as walking, talking, working and breathing. Even if you were able to show a limitation on one of these activities, it was still a difficult road. Courts would say, for example, that if you were too disabled to do your existing job, this did not necessarily mean the you were disabled from doing all jobs. If you could still do a broad range of jobs your ability to work would not be "substantially impaired."

Fortunately, the ADA was recently amended expanding the kinds of physical and mental impairments and limitations that constitute a "disability' caring for oneself, giving an explicitly non-exhaustive list of major life activities including performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. The amendments also list *major bodily*

functions in addition to *major life activies*, including, but not limited to, functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

This expanded group of individuals who have disabilities have the right to request a reasonable accommodation under the ADA, to the extent that one is needed. Such an accommodation would be used to allow the individual to perform the essential functions of the position -- the functions that really matter. For instance, a cashier who needed to sit could request a lowered cash register or an employee who had trouble climbing could be excused from changing light bulbs if this was a non-essential function of the job performed once a month.

Another potential accommodation could be leave from work. As noted above, the FMLA is a floor (to the extent an employee is eligible). For a large employer with leave of absence polices, additional leave might be allowed. Keep in mind that

An employee has the duty to initially request an accommodation from an employer. As with the FMLA, an employee making this request need not explicitly state that he or she needs a "reasonable accommodation," but if you are involved in the case early make sure the client is crystal clear as to what they are asking for. An employee does not even necessarily propose a specific accommodation (indeed, they may not be able to), they should if they can.

Once an employer has been notified of a request for a reasonable accommodation, they are obligated to engage in an interactive process with the employee to determine if a reasonable accommodation is available. Employers may reject a accommodation if it is unreasonable or would cause an undue hardship. Employees do not have the right to choose their accommodation, including their proposed accommodation. That said, by all means an employee should propose an accommodation if possible.

If no reasonable accommodation which does not require an undue hardship is available, the employer may reject the employee's request for an accommodation. Generally, this will result in the employee's inability to perform the essential functions of the position and will inevitably lead to the employees demotion or termination.

Lawsuits in this area will generally result from one of 4 things:

- Discrimination against a disabled/regarded as disable/record of disability individual who has no trouble performing the job as a result of attitudes and prejudice.

- Dispute as to whether job functions that employee cannot perform (even with accommodation) are in fact essential functions of the position. To terminate an individual because they could not perform non-essential functions will likely be discrimination as above.

- Employer's refusal to enter into an interactive process to accommodate a disability.

- In the event that an employer enters into the process and determines that it is not able to accommodate an employee's disability, dispute as to whether an accommodation proposed by the employee is reasonable and/or would pose an undue hardship.

Unlike the FMLA, when brought in tandem with its Ohio law equivalent, Ohio Rev. Code § 4112 *et seq*., the ADA offers a full spectrum of damages, including economic, compensatory, punitive, and attorney fees. Damages under the ADA proper are capped in the same fashion as Title VII damages. Therefore, unlike the FMLA you can bring a hostile work environment claim for intentional discrimination.

In order to bring an ADA claim, a charge must be filed with the Equal Employment Opportunity Commission within 300 days of the improper act. Once the EEOC has kicked out a right to sue letter, a federal lawsuit must be brought within 90 days of the receipt of the letter. Both of these claims should be brought, whether separately or together.