

Primer on Minimum Wage and Overtime Issues under the Fair Labor Standards Act for Low Wage Workers and their Advocates

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I. Introduction

For many critics of public assistance, the solution to poverty is to make people work. But what about the millions of people who work and are still poor?

This article addresses some of the most common minimum wage and overtime issues under the Fair Labor Standards Act (FLSA) for the millions of people who work at low-paying jobs, the people described as the working poor. These issues will increase in importance as the severe cutbacks in the traditional income support assistance programs for the impoverished and disabled like Supplemental Security Insurance and Aid to Families with Dependent Children force more people into the low-wage economy.

A preliminary word of caution is in order. /1/ This article is intended to be a primer on the FLSA issues of minimum wage and overtime for low wage workers and their advocates. It cannot cover every issue. This article will best be utilized as a starting point for effective advocacy with the working poor.

II. The Working Poor

People who work and still remain mired in poverty are more prevalent than commonly thought. In 1990, 5.5 percent of all persons in the labor force, 6.6 million workers, lived in families whose income fell below the poverty level; 3.4 million of those workers were employed full-time. /2/ Those who are working but still poor are usually so because of low earnings, involuntary part-time work or periods of unemployment. /3/

Who are these workers? In general, the full-time working poor are more male than female. /4/ African American and Hispanic workers were much more likely to be working and poor than whites, even though in raw numbers there were more working whites in poverty than any other race. /5/

Many of the working poor labor for minimum wages. While there is some dispute over exactly how many people actually earn the minimum wage, with some saying only a few million /6/, others point out there are at least 14 million people who either labor at or within one dollar of the minimum wage. /7/ Relative to other workers, those whose wages are affected by an increase in the minimum wage are three times more likely to live in poverty. /8/

While only workers below the official government poverty line /9/ are officially counted as poor, there are millions of other workers who can fairly be described as poor or near-poor. /10/ The vast majority of those workers who earn low-wages are not counted as poor mostly because other people in their household also work. /11/

While low-wage workers in general are found in many occupations and industries, they are disproportionately present in service work, low-skill blue collar work, and sales. /12/ Minimum wage workers are concentrated in retail trade and the restaurant industry. /13/

III. Creation of the Fair Labor Standards Act

On May 24, 1937, Senator Hugo Black of Alabama, with the full backing of the Roosevelt administration, introduced Senate Bill S.2475, the Fair Labor Standards Act (FLSA). /14/ The FLSA was passed by both House and Senate on June 14, 1938, signed into law by Franklin D. Roosevelt on June 25, 1938, and became effective on October 24, 1938. /15/

The FLSA was considered, at the time, to "...have more far-reaching effects on American industry than any other single piece of legislation." /16/ The new law imposed a \$.25 per hour federal minimum wage on some employees working in interstate commerce. /17/

Due to the political considerations necessary to insure passage, the FLSA was much more of a promise of fair labor than actual protection. /18/ Only eleven million workers were actually covered by the FLSA. /19/

The FLSA was politically crafted in such a way to leave many workers out of its coverage, particularly women and African American southern workers, by excluding agricultural workers /20/, domestic workers /21/, and others in the statutory definition of employee. Also excluded from coverage were many predominately female occupations: hotel workers such as waitresses and chambermaids /22/; retail clerks performing customer service; and cleaners and nurses in hospitals. /23/ And despite the pleas of Eleanor Roosevelt for "extension of the law to define some standard of employment for domestic servants and farm laborers" /24/ both groups were left out of FLSA coverage.

The Fair Labor Standards Act was unanimously held constitutional in *U.S. v. Darby*. /25/

IV. Coverage Under the Fair Labor Standards Act

A. Who Is Covered?

The Fair Labor Standards Act applies to all employees "engaged in commerce or in the production of goods from commerce" unless specifically exempted from the Act. /26/ It is clear that Congress intended the FLSA to be broad in its scope. "Breadth of coverage is vital to its mission." /27/

Note that FLSA coverage for minimum wage, maximum hours, overtime, and child labor laws, while largely overlapping, are not exactly the same in each occupation. Thus, when checking on the legality of FLSA practices it is wise to check the coverage for the specific type of work involved.

B. Who Is Exempted from Coverage?

Exemptions to the FLSA remain to a larger extent than most people think. /28/ Over 13 million workers are still exempt from minimum wage protection, with an estimated 2.4 million of these actually earning less than the minimum wage. /29/

A word of caution is in order. A primer like this article cannot detail all the exemptions nor all of the possible combinations of what part of the FLSA is exempted. Some exempt employees from only overtime requirements and others from only minimum wage. If an exemption applies to the occupation being examined it is necessary to fully check the specifics of coverage.

1. Executive, administrative and professional exemptions

Those employees who work in a "bona fide executive, administrative, or professional capacity" are exempted from minimum wage and overtime provisions. /30/. These are frequently called the "white collar" exemptions. These exemptions, like many of the others which will be discussed later in the article, have been severely criticized as too broad and consequently exempting people who truly need the protections of the FLSA. /31/

In Title 29 of the Code of Federal Regulations, Section 541, the Department of Labor defines these exemptions in detail. These regulations should be consulted if the exemption is in question.

One part of determining whether an employee is exempted under the "white collar" rules is the salary test. If an employee earns more than \$250 per week and meets the definition for an executive, a professional, or an administrator, the employee is exempted. /32/ If an employee earns less than \$250 per week, a more extensive test, known as the "long test," applies to determine whether she or he is an executive, administrative, or professional employee. /33/ An employee who meets the long test can be deemed an executive or administrative employee even if paid as little as \$155 per week, /34/ or, in the case of a professional, as little as \$170 per week. /35/ Since most employees in these categories earn at least \$250 per week, the salary test is of minimal practical value in determining whether an employee is exempt from FLSA or not. The true test is whether the type of work performed meets the definitions for executive, administrator, or professional.

a. Executive exemption

An "executive" is an employee who makes over \$250 per week and whose "primary duty consists of the management of the enterprise in which employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other employees." /36/

Under the Wage and Hour Division's definitions and interpretations, the exemption from the FLSA for executives will in most cases be easily determined because that employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption. /37/

b. Administrative exemption

An employee earning more than \$250 per week falls under the definition of "administrative employee" if the employee's "primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers." /38/

c. Professional exemption

A "professional" is an employee earning more than \$250 per week "whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning" or "work requiring invention, imagination, or talent in a recognized field of artistic endeavor." /39/

2. Exemption for school administrators and teachers

Employees who are academic administrative personnel or teachers in elementary or secondary schools are exempted from minimum wage and overtime provisions of the FLSA. /40/

3. Employees in outside sales

An employee who is engaged in making sales and who is customarily and regularly engaged away from the employer's place of business is exempted from minimum wage and overtime provisions of the FLSA. /41/

4. Exemption of agricultural workers

Workers in agriculture are exempted from many of the FLSA guarantees of minimum wage, overtime compensation and protections for child labor. /42/ Agriculture workers have been treated differently since the FLSA was enacted and their different treatment continues. /43/ Wage and hour issues for agricultural workers are beyond the scope of an introductory article because of the

breadth and complexity of laws, rules and regulations involved. /44/ In addition to FLSA issues, any review of farmworker labor issues should consult the provisions of the Migrant and Seasonal Agricultural Worker Protection Act. /45/

5. Other exemptions

Employees of state and local government have some particular FLSA rules and will be treated as a category later in this article. The same is true for employees of service and retail establishments, domestic workers, and children who work.

There are people in other lower-wage jobs who are also exempted from all minimum wage and overtime protection, including: seafood workers, /46/ employees of seasonal amusement businesses, /47/ casual babysitters, /48/ seamen on non-American vessels, /49/ and some employees of small newspapers. /50/

A complete list of occupations exempted from minimum wage and overtime is found at 29 U.S.C. Sec. 213(a)(1)-(16). A complete list of the occupations exempted from overtime regulations is found at 29 U.S.C. Sec. 213(b)(1)-(30).

C. How Should the Exemptions Be Interpreted?

In construing exemptions the Supreme Court has said:

Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. /51/

An employer who claims an exemption from the FLSA has the burden of showing that such an exception exists in the statute. /52/

V. Minimum Wage

A. What Is the Minimum Wage?

The present minimum wage is \$4.35, and has been in effect since March 31, 1991. /53/

B. Are Workers Paid on a Weekly or Monthly Basis Entitled to Minimum Wage?

Whatever the basis on which the workers are paid, be it monthly or weekly, they must receive at least the equivalent of the minimum hourly rate. /54/

C. Are Employees Compensated With a Commission or a Salary Entitled to Minimum Wage?

Whatever the basis on which the workers are paid, be it salary or commission, they must receive at least the equivalent of the minimum hourly rate. /55/

D. Are "Tipped" Employees Entitled to Minimum Wage?

Employees who are paid in tips are entitled to earn at least minimum wage. /56/ The FLSA speaks specifically about tipped employees. A tipped employee is defined as anyone who regularly receives more than \$30 a month in tips. /57/ This would cover occupations such as waiters, taxi drivers, barbers or beauty operators who regularly receive tips over \$30 a month but not other employees who may receive over \$30 a month in tips at limited times of the year such as Christmas. /58/

If the employee is a "tipped employee," the employer may credit tips actually received for up to 50 percent of the minimum wage, as long as the employer informs the employee that this is the way that the minimum wage is being paid. /59/ The credit for tips can be less than 50 percent of the minimum wage, but it cannot be more than 50 percent. /60/

E. Are Piecework Employees Entitled to Minimum Wage?

If the employee is paid a "piece-rate" for work performed, the piece-rate earnings must average at least the minimum wage for those hours worked. /61/ The fact that some workers are slower than others does not relieve the employer from paying every employee at least minimum wage. /62/

F. Is There a "Training Wage" for Teens?

The FLSA had established a "training wage" of 85 percent of the minimum wage for workers below the age of 20. /63/ This training wage expired on April 1, 1993. /64/

G. Are Prisoners Entitled to Minimum Wage?

A majority of courts have decided that prisoners are not "employees" within the meaning of the FLSA and are thus not entitled to minimum wage for the work they perform. /65/

H. Are Illegal Aliens Entitled to Minimum Wage?

Yes. Even though the Immigration and Reform Control Act /66/ prohibits the employment of illegal aliens, a U.S. Court of Appeals ruled that FLSA minimum wage laws applied because, otherwise, the employer would be unjustly enriched. /67/

VI. Overtime

A. What Is Overtime and How Much Must Be Paid?

Originally set at 44 hours, the standard workweek is now set at 40 hours. /68/ FLSA requires employers to pay employees a premium overtime wage of not less than one and one-half times the employee's regular hourly wage for each hour worked beyond the standard workweek. /69/ This requirement can be altered by contract between employer and employee if the contract meets FLSA criteria. /70/

B. For Employees Not Paid by the Hour, How Is Overtime Pay Calculated?

The Code of Federal Regulations goes into considerable detail explaining and giving examples of how overtime is calculated for different types of work. /71/ In summary, the average wages paid to an employee for a regular 40 hour workweek are divided by 40 and then the employee is given 150 percent of the basic rate for each hour worked over 40. /72/

Employees who earn their wages based on "piece rates" are entitled to one and one-half times their usual rate for overtime work. /73/ Employers are required to maintain adequate time-keeping records for accurately calculating regular and overtime pay. /74/

A number of employees are exempted from the coverage for overtime laws. These workers are: drivers of and mechanics who work on vehicles which cross state lines; some radio and television employees; salespeople, mechanics and parts people who work in the selling of cars, trucks, farm equipment, boats, planes, and trailers; taxi drivers; agricultural workers; motion picture theater employees; and local drivers who are paid by the trip.

C. When Must Overtime Be Paid?

Overtime should be paid in the pay period in which it is earned absent exceptional circumstances. /75/

D. If an Employee Works 30 Hours One Week and 50 Hours the Next, Can the Employer Average the Hours at 40 and Refuse to Pay Overtime?

No. The employee must receive overtime compensation for the hours worked over 40 in the week even though the average number of hours worked is 40. /76/ The key is the number of hours worked in a fixed seven consecutive day period. /77/

In no cases may the earnings of hourly or piece-rate employees be averaged over a period more than one week's time. /78/ A workweek under the FLSA is a 168 hours comprising of seven consecutive 24 hour periods. /79/

E. Must Overtime Be Paid for Work on Saturdays, Sundays or Holidays?

The FLSA does not require that overtime compensation be paid for work on Saturdays, Sundays or holidays unless the employee has worked for more than 40 hours in the last week. /80/ The key is not the days worked, but rather the number of hours worked.

F. Does the Employee Have the Right to Refuse to Work More than 8 Hours per Day or 40 Hours per Week?

No. Other than for children, there is no limitation in the FLSA on the number of hours that an employer can require that an employee work as long as the employer pays overtime compensation for hours in excess of 40 per week. /81/

G. Can the Employer Require Employees to Work More than 8 Hours per Day and Not Pay Overtime?

There is no requirement in the FLSA that hours worked in excess of 8 per day be compensated as overtime if no more than 40 hours are worked in a week. /82/

H. What Is the Rule for Government Employees?

There is a special set of laws in the FLSA for public employees. These laws allow the employer to give compensatory time instead of overtime if there is agreement on that between the employer and the union for the employees or with the individual employee. /83/

I. Do Retail or Service Workers on Commission Receive Overtime?

Employees who work at retail or service businesses who earn over half of their wages by commissions and whose basic rate of pay is one and one-half times the minimum wage, are not entitled to time and a half for overtime work. /84/

J. What Are the Rules on Rest Periods, On-Call Time, Meal Periods and Sleep Time?

Rest periods of short duration, called by the employer, are hours worked and must be compensated. /85/ On-call time must be counted as hours worked if the employee is required to stay on the work premises. However, if the employer allows the employee to leave work but merely requires the employee to provide a phone number so the employee can be called into work if needed, that is not compensable time. /86/

Meal periods are not compensable if the employee is completely relieved of duty so that she can eat. However, if the worker must stay at her desk to eat or is required to perform duties, this time is compensable. /87/

Sleep time is work time if done at work and the employee is not on 24 hour duty. /88/ If the employee is required to be on 24 hour duty, the employee and employer may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from the hours worked, provided adequate sleeping facilities are furnished by employer and the employee can usually enjoy an uninterrupted night's sleep. /89/ If the sleep time of an employee on 24 hour duty is interrupted for work, the work time is compensable. /90/ However, if there is no express or implied agreement between the employer and employee about not compensating 8 hours of sleep time, the 8 hours of sleep time and the meal periods constitute hours worked and are compensable. /91/ If the employee actually resides on employer's premises, then the Department of Labor will usually honor any reasonable agreement for less than 24 hours a day actually worked. /92/

VII. Issues Affecting Certain Categories of Workers

A. Service Industry and Retail Workers

Employees in the retail or service establishments were originally exempted but are now covered by the FLSA requirements of minimum wages, and overtime compensation. /93/ The general rule is that these employees are like all other employees and entitled to the same FLSA protections for minimum wage and overtime as all other employees. However, as noted earlier, both "tipped employees" and retail employees who earn their wages primarily by commission are treated differently under FLSA.

Employees who are paid in tips are entitled to earn at least minimum wage. /94/ For tipped employees, the employer may credit tips actually received for up to 50 percent of the minimum wage, as long as the employer informs the employee that this is the way that the minimum wage is being paid. /95/

Also, employees who work at retail or service businesses who earn over half of their wages by commissions and whose basic rate of pay is one and one-half times the minimum wage, are not entitled to time and a half for overtime work. /96/

There are, however, other significant statutory exceptions from minimum wage and/or overtime coverage for some establishments that are engaged in interstate commerce. /97/ Notable exceptions include: workers at motion picture theaters are not covered by either the minimum wage or overtime requirements; /98/ employees of seasonal amusement or recreational establishments are exempted from coverage for both minimum wage and overtime. /99/

Minors as young as 14 are allowed to work in retail and service establishments in specific jobs like bagging and carrying out customers' orders, errand work, dishwashing, and cleaning if their employers meet the other requirements for child labor. /100/

B. Domestic Workers

1. Are domestic workers entitled to minimum wage?

Since 1974, domestic workers have been entitled by the FLSA to earn minimum wage. /101/ Domestic workers are covered if they earn more than \$50 per year or work more than 8 hours in a workweek. /102/ The title "domestic workers" covers cooks, waiters, butlers, valets, maids, housekeepers, nurses, janitors, handymen, gardeners, grooms, and chauffeurs. /103/ This also includes babysitters who are employed on more than a "casual basis," i.e. sitters whose employment is irregular and intermittent. /104/

Employers of domestic service workers must keep detailed records for the working hours of all such workers for the previous three years. /105/

2. Are domestic workers entitled to overtime?

Domestic workers are covered by the overtime protections of the FLSA if they work for the same employer for more than 40 hours a week. /106/

3. How are live-in domestic workers protected?

Live-in domestic service employees are also covered by minimum wage protection and must be paid at least the minimum wage for all hours worked but are not eligible for overtime. /107/ Employers can agree with the employee to deduct the time the employee spends sleeping, eating or uses for personal time. /108/ However, if the meals, sleeping or personal time is interrupted for work purposes, the work time must be compensated at least at the minimum wage rate. /109/

C. Students and Children

1. How old must a person be to work?

The general rule is that workers in every non-hazardous field except agriculture must be at least 16 years of age to work. /110/

2. When must young people get a work permit?

All people under 18 must obtain work certificates from either the U.S. Department of Labor, Wage and Hour Division or the state Department of Labor prior to working. /111/

3. What is the rule for child labor in agriculture?

Unfortunately, in agriculture, very young children are allowed to work by the FLSA. Teenagers as young as 14 and 15 can work under very limited circumstances. Even children under 12, as young as 10 and 11 years of age, can be employed on a farm, under limited circumstances, with their parent's permission. /112/

4. What is the rule for child labor in retail, food service and gasoline establishments?

Teenagers as young as 14 are allowed to work outside of school hours in retail, service and gasoline service establishments doing office work, errands, bagging, clean up work, kitchen work and other work as specified by the regulations. /113/

5. What is the rule for students?

Full-time students, who work less than full-time, can be hired for 85 percent of the minimum wage in retail or service establishments or agricultural work if their employers apply for and receive a certificate from the Wage and Hour Division of the U.S. Department of Labor. /114/

Full-time students cannot work more than 20 hours a week when school is in session nor more than 40 hours a week when school is out. /115/ An employer cannot have this type of student work account for more than 10 percent of the total number of hours worked by all employees. /116/

D. Sweatshops

1. What is a sweatshop?

Sweatshops are usually defined as businesses that regularly violate wage, child labor, safety and health laws. /117/ The evils associated with sweatshops were forcibly brought to the public's attention in 1911 by the tragic fire at the Triangle Shirtwaist Factory in New York City where 150

women died because they were trapped inside the factory. /118/ A substantial problem still exists with thousands of workers, primarily immigrants, laboring in sweatshop conditions in the USA. /119/

2. Where do sweatshops operate?

The garment industry utilizes numerous subcontractors, some of whom have created sweatshops that primarily utilize immigrant laborers who work at below minimum wage without overtime compensation. /120/ Some in the garment industry rely on an unsupervised system of subcontractors for the cutting and sewing of garments. These subcontractors are often small companies that take advantage of immigrants who are afraid to complain for fear of losing their jobs.

New York City alone is reported to have as many as 2000 sweatshops. /121/ California has substantial problems with sweatshops. /122/ There were also 1995 Department of Labor investigations resulting in citations of contract sewing shops in Chicago, Cincinnati, Cleveland, Indianapolis and South Bend, Ind. /123/

One recent report found: as many as half of all women's garments made in America, a \$38 billion-a-year business, are produced in whole or part by factories that violate labor laws mandating minimum wages, overtime compensation and workplace safety; of the estimated 50,000 sewing contractors nationwide, fully a third are believed to operate with no licenses or permits and workers are paid in cash; of 83 garment factories inspected by the California Department of Labor in one week, 77 were cited for violations of wage, hour and record-keeping laws. /124/

Recent publicity about garment industry subcontractors who appear to utilize sweatshops has spurred litigation between the retail sellers of such garments and their subcontractors. /125/

3. What does the FLSA say about sweatshops?

In addition to previously mentioned prohibitions on child labor, and provisions for minimum wages and overtime compensation, an additional provision deters sweatshops. The FLSA prohibits the transportation, delivery or sale of any goods produced by employees who were not paid minimum wages and overtime. /126/

This is the "hot goods" liability provision of the FLSA. /127/ It was enacted for two purposes: to improve labor conditions and to eliminate the competitive advantage enjoyed by goods produced under substandard labor conditions. /128/ As the Supreme Court has concluded, preventing the shipment "of goods produced under substandard conditions is not simply a means to enforce other statutory goals; it is itself a central purpose of the FLSA." /129/

4. What can the Department of Labor do about sweatshops?

Anyone who is found to willfully violate the "hot goods" provisions of the FLSA is subject to fines of up to \$10,000 and/or imprisonment up to six months pursuant to 29 U.S.C. Sec. 216(a). Fines can be imposed on a daily basis against the corporation and its employees. /130/

Additionally, injunctive relief, only by the Department of Labor, is available. /131/ The Department of Labor can seek an injunction prohibiting the shipping, selling or transporting of the "hot goods" until the unpaid wages are paid. /132/ Congress, in effect, established the payment of minimum wages and overtime compensation as conditions precedent to the shipment of manufactured goods. /133/

In 1994, more than 80 companies in California's garment industry were hit with fines totalling more than \$1 million after a Department of Labor investigation. /134/ The Department of Labor secured a \$573,000 settlement against Guess Jeans after finding that its \$60 jeans were being made in a Los Angeles sweatshop by workers who made less than \$1 an hour. /135/ The Labor Department, pursuant to the "hot goods" provision, is seeking \$5 million from clothing manufacturers who bought goods from an El Monte, California sweatshop under the "hot goods" provision of the FLSA that makes manufacturers liable for minimum wage violations. /136/

Despite the good work that has been done by the Department of Labor, weak enforcement continues to be quite a problem. One attorney with the Asian Law Caucus estimates that in California alone, hundreds of thousands of workers are cheated out of billions of dollars in wages due to them under federal minimum wage and maximum hour laws, primarily because of weak FLSA enforcement. /137/

E. State and Local Government Employees

The FLSA now covers virtually all state and local government employees. /138/ The most significant difference in the FLSA between the treatment of state and local employees and others is the option given to the government to provide compensatory or comp time in lieu of cash payments for overtime work. /139/

The government can only give comp time in lieu of paid overtime compensation pursuant to an agreement or understanding between the government and the employee reached prior to the overtime worked. /140/ If the employee designates a representative, the government must bargain with that representative in order to determine whether comp time or cash will be paid for overtime work. /141/ There is also a cap on the amount of comp time that public employees can accumulate. /142/

VIII. Other Issues

A. Deduction of Meals, Lodging or Debts

Employers can deduct from a minimum wage worker's paycheck the reasonable cost of fair value (not retail value) of meals, lodgings and other facilities. /143/ But if the employee owes a legitimate debt to the employer, a deduction from the paycheck will be allowed only if the deduction does not result in the remaining wages being lower than minimum wage. /144/

B. Timely Payment of Wages

The Ninth Circuit has ruled that paying wages late is a violation of the FLSA, and entitles workers to prejudgment interest and liquidated damages. /145/

IX. Enforcement

The U.S. Labor Department inspects 2 to 3 percent of all establishments subject to the FLSA each year. Mostly in response to employee complaints, the Department identified \$29 million in back wages due because of minimum wage violations and forced payment of \$21 million owed to 124,000 employees in fiscal 1989. /146/ Enforcement by the Department of Labor has been declining in recent years because of significant reductions in the number of investigators for FLSA violations. /147/

A. Where to Complain

The Wage and Hour Division of the U.S. Department of Labor was created to interpret and enforce the provisions of the FLSA. /148/ The Department can impose fines on employers who violate minimum wage laws. /149/ The nearest office can be found by contacting the Wage and Hour Division at 202-219-8305.

B. Enforcement by Department of Labor

The Department of Labor can bring civil actions on behalf of employees to recover unpaid minimum wages and overtime compensation and recover an equal additional amount as liquidated damages. /150/ The Department can bring action for injunctive relief for back wages and to stop the shipment of goods thought to be the product of labor working in contravention of FLSA protections. /151/

The Department can bring actions for civil money penalties of up to \$1000 per FLSA violation for repeated and willful violations. /152/ And, the Department can bring criminal actions for "willful" violations of FLSA. Punishment includes fines up to \$10,000 or even the possibility of imprisonment for repeat offenders. /153/

C. Private Enforcement

Litigation by individuals can be brought in state or federal court to recover damages under the FLSA pursuant to 28 U.S.C. Sec. 216.

1. What kinds of relief are available?

Employees are entitled to: recovery of unpaid wages or overtime compensation; and, in certain cases, liquidated damages in an amount equal to the amount of unpaid wages or overtime compensation. /154/

2. When are liquidated damages available?

Liquidated damages, in an amount equal to the amount of unpaid wages and/or overtime compensation due, are available pursuant to 29 U.S.C. Sec. 216(b). However, 28 U.S.C. Sec. 260 provides an opportunity for the employer to avoid liquidated damages if the court finds the FLSA violations were in "good faith." If the employer shows the court that the violations of the FLSA were in good faith and the employer had reasonable grounds for believing the act or omission was not a FLSA violation, then the court may, in its sound discretion, refuse to award liquidated damages. /155/

3. Are attorney fees recoverable?

Prevailing plaintiffs are entitled to recover attorney fees and costs. /156/ The award of attorney fees to a prevailing party plaintiff in an FLSA action is mandatory, but the amount awarded is within the discretion of the judge. /157/ There is no provision for awarding attorney fees to prevailing defendants. /158/

4. Is prejudgment interest recoverable?

Prejudgment interest on overdue wages is recoverable. /159/

5. Are class actions allowed?

Actions can be brought not only by individual employees but by individuals on behalf of all others similarly situated, but the other employees must give written consent. /160/

6. Is there a right to a jury trial?

A right to a jury trial exists in private actions to enforce the FLSA. /161/

7. Can private attorneys seek injunctions?

Injunctive relief is only available in actions brought by the Department of Labor. /162/

8. Can employers retaliate against employees who raise FLSA complaints?

28 U.S.C. Sec. 215 (a)(3) prohibits discharging or discriminating in any way against an employee who files an FLSA complaint or testifies in any FLSA proceeding. Further, any employer who retaliates against any employee for filing an FLSA complaint is liable for reinstatement, compensation for lost wages, promotion, liquidated damages, and any other equitable relief that is appropriate. /163/

9. What is the statute of limitations?

The statute of limitations for recovery of unpaid minimum wages, overtime, or liquidated damages under the FLSA is two years unless the employer's action are a willful violation, then the statute of limitations is three years. /164/

X. Conclusion

The minimum wage, overtime, and child labor laws of the FLSA affect millions of people who earn poverty level wages. Knowledge of the laws and advocacy efforts to enforce the laws can bring the nation closer to the promise outlined by President Roosevelt: "Our Nation so richly endowed with natural resources and with a capable and industrial population, should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. /165/

Footnotes

/1/ There is substantial caselaw on each of the following statutory subparts and individual regulations. Entire articles can be and in some cases have been written about many of the following individual issues which are treated here in a sentence or paragraph.

/2/ Jennifer Gardner and Diane E. Herz, Working and Poor in 1990, 115 Monthly Labor Rev. 20, 23 (Dec. 1992).

/3/ Bruce W. Klein and Philip L. Rones, in A Profile of the Working Poor, 112 Monthly Labor Review 3-13 (Oct. 1989).

/4/ Gardner and Herz, *supra* note 2, at 20-21, note that while the working poor include more men than women, the poverty rate for women in the labor force was higher than that for men. The higher rate for women was largely the result of two factors: women were much more likely to head families on their own; and, on average, women supported their families with lower earnings than did men.

/5/ Gardner and Herz, *supra* note 2, at 20, note that while there are more whites among the working poor than other races, black workers (12 percent) were 2 1/2 times as likely to be poor as white workers (4.8 percent); Hispanic workers (13.1 percent) were even more likely to be poor than black workers. at 21-22.

/6/ Earl F. Mellor, *Workers at Minimum Wage or Less: Who Are They and What Jobs They Hold*, 110 *Monthly Labor Rev.* 34 (July 1987).

/7/ Estimates suggest over 14 million workers earn the minimum wage or within a dollar per hour of the minimum, and that when the minimum moves, so do their wages. Sar A. Levitan, Frank Gallo & Isaac Shapiro, *Working But Poor: America's Contradiction* 46 (1993).

/8/ David Card & Alan B. Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* 277 (1995).

/9/ The official government poverty threshold was initially created by Mollie Orshansky for the Social Security Administration in the 1960s. Orshansky used a 1955 food consumption survey that found food costs consumed roughly one-third of total family expenditures. Orshansky used Department of Agriculture food budget calculations for minimally adequate nutrition and multiplied the cost of that food by three. As a result, any family whose income was less than three times the food budget was classified as poor. Mollie Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, 28 *Soc. Security Bull.* 3-26 (Jan. 1965).

/10/ Patricia Ruggles, *Measuring Poverty*, 14 *Focus* 1-9 (Spring 1992) points out that the official poverty rates that presently hover around 13 percent may substantially underestimate the number of poor people. Other measures of poverty, based on costs of housing, updated nutrition costs, or in relation to the overall median income can almost double poverty rates in the U.S.

/11/ Shapiro, Gallo & Levitan, *supra* note 7, at 28-29.

/12/ Shapiro, Gallo & Levitan, *id.* at 31, point to unpublished data from the 1990 Current Population Survey supplied by Professor Andrew Sum of Northeastern University to show Occupation of poor workers (1989).

| Occupation | All workers | Poor workers |
|-----------------------|-------------|--------------|
| Total (millions) | 131.6 | 8.3 |
| Service | 14.2% | 29.5% |
| Low-skill blue-collar | 15.4 | 22.2 |
| Sales | 12.5 | 12.4 |

| | | |
|-------------------------------------|------|-----|
| Skilled blue-collar | 11.4 | 9.9 |
| Managerial, professional, technical | 27.7 | 8.9 |
| Farming, forestry, fishing | 3.1 | 8.6 |
| Administrative support | 15.8 | 8.4 |

/13/ Card & Krueger, *supra* note 8, at 140-142, found 47 percent of minimum wage workers in retail trade and slightly more than 20 percent in restaurants. Those in retail trade were more likely than the overall work force to be younger (40 percent were between 16 and 24 versus 18 percent of this age in overall work force), less-educated (24 percent high school dropouts versus 15.7 percent overall) and female (53 percent versus 47 percent overall). Workers in the restaurant industry were even more likely than the overall work force to be young (49 percent between 16-24), less-educated (34 percent high school dropouts) and female (57 percent).

/14/ For a more detailed history of the enactment of the FLSA, see William P. Quigley, *A Fair Day's Wage For a Fair Day's Work: Time to Raise and Index the Minimum Wage*, St. Mary's L. J. (forthcoming 1996).

/15/ Fair Labor Standards Act of 1938, 52 Stat. 1060, now found at 29 U.S.C. Sec. 201.

/16/ Comment, *The Federal Wages and Hours Act*, 52 Harv. L. Rev. 646 (1939).

/17/ Fair Labor Standards Act of 1938, Sec. 6(a), 52 Stat. 1060, 1062.

/18/ "So many exemptions had been written into the bill that at one point during the congressional debate Martin Dies filed a satirical amendment calling on the Labor Department to report back to Congress within 90 days after the bill's passage on whether any worker was covered by the act." Sar A. Levitan & Richard S. Belous, *More Than Subsistence: Minimum Wages For The Working Poor* 41 (1979 Johns Hopkins Press).

/19/ Carroll R. Daugherty, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Study*, 5 *Law & Contemporary Problems* 406 (1939).

/20/ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 *Texas L. Rev.* 1335, 1371-1380 (1987) provides an excellent legislative and economic history of the racial issues in the passage of the FLSA.

/21/ Not until 1974 was the FLSA amended to apply to domestic servants. 29 U.S.C. Sec. 202(a) was then amended to add the Congressional finding that "employment of persons in domestic service in households affects commerce." Pub. Law No. 93-259, Sec. 29(a), 88 Stat. 62 (1974).

/22/ Ironic in light of the Supreme Court victory by a chambermaid named Elsie Parrish that largely created the judicial basis for the FLSA. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Elsie Parrish, who worked as a chambermaid for the Cascadian Hotel in Wenatchee, Washington, sued her ex-employer for back pay of \$216.19 due under Washington state minimum wage law. The state district court threw out the legislation creating minimum wages as unconstitutional based on *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923). Shocking almost

all observers of the Court, the Supreme Court, on March 29, 1937, decided in favor of Parrish by reversing its earlier decisions in *Adkins and Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) and announced that minimum wage laws were, indeed, appropriate subjects of legislation: "The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community... The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest."

/23/ Phyllis Palmer, *Domesticity and Dirt: Housewives and Domestic Servants in the United States, 1920-1945*, 121 (1989).

/24/ Vivien Hart, *Bound By Our Constitution: Women, Workers and the Minimum Wage* 166 (1994).

/25/ *U.S. v. Darby*, 312 U.S. 100 (1941).

/26/ The Fair Labor Standards Act, 29 U.S.C. Secs. 201, 202. 29 C.F.R. Secs. 776.1 et seq. give the general interpretative guidelines for FLSA coverage used by the Department for Labor. "It should be observed that the term commerce is very broadly defined." 29 C.F.R. Sec. 776.8(b).

/27/ *Powell v U.S. Cartridge Co.*, 339 U.S. 497 (1950).

/28/ A helpful chart showing current exemptions to minimum wage coverage by industry or occupation can be found in the [91:202 Wage & Hours] Lab. L. Rep. (BNA). Detailed summaries of the law involving each industry or occupation exempted follow the chart.

/29/ Shapiro, Gallo & Levitan, *supra* note 7, at 49-50 calculate that 2.9 million outside sales workers and 10.8 million private nonsupervisory employees are outside the protection of the FLSA. Of these, 2.4 million workers paid by the hour earned less than minimum wage in 1991.

/30/ 29 U.S.C. Sec. 213 (a)(1).

/31/ Marc Linder, *Closing the Gap between Reich and Poor: Which Side is the Department On?* 21 N.Y.U. Rev. of L. & Social Change 1 (1993-1994). Linder points out that the salaried manager exclusion exempts many store managers and assistant managers in the convenience store and fast-food industries who end up making minimum wages or less despite, or more accurately because of, their fancy titles. Also see Peter DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 Am. U. L. Rev. 139 (1993) where he argues that the FLSA should be amended to reach executive, administrative and professional employees, at least insofar as providing them with compensatory time off from work for hours worked beyond the normal 40 hour work week.

/32/ The \$250 salary test is found at 29 C.F.R. Sec. 541.1(f) for executives, 29 C.F.R. Sec. 541.2(e)(2) for administrators, and 29 C.F.R. Sec. 541.3(e) for professionals. The \$250 line creates

many problems for workers who earn right at or slightly above the threshold. The AFL-CIO points out that the \$250 a week salary test (last revised in 1975) exempting those workers classified as executive, professional or administrative results in less than minimum wages for those workers if they work more than 60 hours a week. "Statements Adopted by AFL-CIO Executive Council at Mid-Winter Meeting," Daily Labor Report, Feb. 17, 1993, page 4.

/33/ See 29 C.F.R. Sec. 541.1-.3 which establishes the long tests for executive, administrative, and professional employees.

/34/ See 29 C.F.R. Sec. 541.1(f) for executive employee and 29 C.F.R. Sec. 541.2(e)(1) for administrative employee.

/35/ See 29 C.F.R. Sec. 541.3(e) for executive employee. One hundred seventy dollars per week, at 40 hours per week, breaks down to \$4.25 per hour, the current federal minimum wage. 29 U.S.C. Sec. 206(a)(1).

/36/ 29 C.F.R. Sec. 541.1 defines the term executive for FLSA purposes. See also 29 C.F.R. Sec. 541.101-119 for interpretations of when an employee is considered a bona fide executive.

/37/ 29 C.F.R. Sec. 541.102(a).

/38/ 29 C.F.R. Sec. 541.2 defines administrators and 29 C.F.R. Sec. 541.201-215 gives the interpretations of who are administrators for the Department of Labor.

/39/ The definition of a professional is found at 29 C.F.R. Sec. 541.3 and the interpretations of the Department of Labor are found at 29 C.F.R. Sec. 541.300-315.

/40/ 29 U.S.C. Sec. 213(a)(1) and 29 C.F.R. Sec. 541.215.

/41/ 29 U.S.C. Sec. 213(a)(1). Outside sales is defined at 29 C.F.R. Sec. 541.5 and the interpretations of the Department of Labor can be found at 29 C.F.R. Secs. 500-508.

/42/ 29 U.S.C. Sec. 213(a)(6) and Sec. 213(b)(12)-(16)(28).

/43/ Marc Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Texas L. Rev. 1335, 1371-1380 (1987) provides an excellent legislative and economic history of the racial issues in the passage of the FLSA.

/44/ E.g. see 29 U.S.C. Sec. 213(a)(6) general exemption from overtime and minimum wages for agriculture workers; 29 U.S.C. Sec. 213(b) exemption from overtime protections for (12) agricultural irrigation workers; (13) livestock workers; (14) grain elevator workers; (15) maple sugar workers; (16) fruit and vegetable transportation workers; and (28) timber workers; 29 U.S.C. Sec. 213(c)(1)(2) and (4) exemptions from child labor laws for children working in agriculture; 29 U.S.C. Sec. 213 (h) and (i) overtime exemption for workers in cotton ginning; and 29 U.S.C. Sec. 213(j) overtime exemption for employees in sugar processing. See also regulations at 29 C.F.R. Sec. 500, Migrant and seasonal agricultural protection; 29 C.F.R. Sec. 501, Enforcement of

contractual obligations for temporary alien agricultural workers admitted under section 216 of the Immigration and Nationality Act; 29 C.F.R. Sec. 502, Reporting and employment requirements for employers of certain workers employed in seasonal agricultural services; and 29 C.F.R. Sec. 780, Exemptions relating to agriculture under FLSA.

/45/ 29 U.S.C. Secs. 1801 et seq. It would also be wise to consult Marc Linder, *Migrant Workers and Minimum Wages* (1992 Westview Press). Professor Linder, more than any other legal scholar, has focused on the challenges of the working poor. As a lawyer, as a teacher, and as a writer, he has advocated for migrant farmworkers and other people upon whose work this nation depends, and in many cases, exploits.

/46/ 29 U.S.C. Sec. 213(a)(5).

/47/ Id. Sec. 213(a)(3).

/48/ Id. Sec. 213(a)(15).

/49/ Id. Sec. 213(a)(12).

/50/ Id. Sec. 213(a)(8).

/51/ A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

/52/ Walling v. General Indus. Co., 330 U.S. 545 (1947); Mitchell v. Kentucky Fin. Co., 359 U.S. 290 (1959). See also 29 C.F.R. Sec. 780.3.

/53/ 29 U.S.C. Sec. 206(a)(1).

/54/ 29 C.F.R. Sec. 776.5.

/55/ Id.

/56/ 29 C.F.R. Sec. 531.59.

/57/ 29 U.S.C. Sec. 203(t) and 29 C.F.R. Sec. 531.50.

/58/ 29 C.F.R. Sec. 531.57.

/59/ 29 U.S.C. Sec. 203(m) and 29 C.F.R. Sec. 531.59. See also *Martin v. Tango's Restaurant, Inc.*, 969 F.2d 1319 (1st Cir. 1992) for a discussion of the percentage of tips that may be applied to minimum wages and the requirement of employer notice. There the lack of notification of employees that employer planned to include the waiter's tips in the minimum wage was found to violate FLSA.

/60/ 29 C.F.R. Sec. 531.59.

/61/ U.S. v. Rosenwasser, 323 U.S. 360, 363 (1945): A worker is as much an employee when paid by the piece as he is when paid by the hour. The time or mode of compensation, in other words, does not control when the determination of whether one is an employee within the meaning of the Act and no court is justified in reading in an exception based upon such a factor. See also 29 C.F.R. Sec. 776.5.

/62/ Rosenwasser, 323 U.S. at 363. See also 29 C.F.R. Sec. 776.5.

/63/ 29 C.F.R. Sec. 517.1(b).

/64/ Id. Sec. 517.3.

/65/ Harker v. State Use Indus., 990 F. 2d 131 (4th Cir. 1993). The best recent analysis of decisions on this point can be found in Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage? Comment, 67 Temple L. Rev. 295 (1994).

/66/ Pub. L. No. 99-603, 100 Stat. 3359, 8 U.S.C. Sec. 1324a are the sanctions on employers who hire undocumented workers.

/67/ Patel v. Quality Inn South, 846 F. 2d 700 (11th Cir. 1988). The court noted that the Department of Labor has interpreted the FLSA to cover undocumented aliens since 1942, even issuing an opinion that alien prisoners of war were entitled to be paid the minimum wage. The court went on to note that enforcing the FLSA to cover illegal aliens actually discourages illegal immigration:

We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job-at any wage-that prompts most illegal aliens to cross our borders. By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA. Patel, 846 F. 2d at 704.

/68/ 29 U.S.C. Sec. 207(a) and 29 C.F.R. Sec. 778.101.

/69/ 29 U.S.C. Sec. 207(a) and 29 C.F.R. Sec. 778.107.

/70/ Moreau v. Klevenhagen, 113 S.Ct 1905 (1993) and 29 C.F.R. Secs. 778.401 et seq.

/71/ Overtime calculations for hourly rate employees are found at 29 C.F.R. Sec. 778.110; pieceworkers at 29 C.F.R. Sec. 778.111; employees paid by the day or by the job at 29 C.F.R. Sec. 778.112; people working on commission at 29 C.F.R. Sec. 778.117; and salaried employees at 29 C.F.R. Sec. 778.113.

/72/ 29 C.F.R. Sec. 548 establishes procedures for computing overtime pay.

/73/ 29 U.S.C. Sec. 207(g) and 29 C.F.R. Sec. 778.111.

/74/ 29 C.F.R. Secs. 516.1 et seq.

/75/ Dominici v. Board of Educ. of City of Chicago, 881 F. Supp. 315 (N.D. Ill. 1995). Careless accounting is not an excuse for failing to pay overtime in pay period when earned. See also 29 C.F.R. Sec. 778.106.

/76/ 29 C.F.R. Sec. 778.104.

/77/ Id. Sec. 778.105.

/78/ Id. Sec. 778.104

/79/ 29 C.F.R. Sec. 778.105.

/80/ Id. Sec. 778.102.

/81/ Id.

/82/ Id.

/83/ 29 U.S.C. Sec. 207(o)(2)(A).

/84/ Id. Sec. 207(i) and 29 C.F.R. Sec. 779.412.

/85/ 29 C.F.R. Sec. 785.16.

/86/ S.E.I.U. Local 102 v. County of San Diego, 35 F. 3d 483 (9th Cir. 1994) nurses and probation officers who are required to be at the worksite are entitled to overtime for standby time. See also 29 C.F.R. Sec. 785.17.

/87/ 29 C.F.R. Sec. 785.19.

/88/ Id. Sec. 785.21.

/89/ Id. Sec. 785.22.

/90/ Id.

/91/ Id.

/92/ Id. Sec. 785.23

/93/ Prior to the 1961 amendments to the FLSA, workers in retail and service establishments were ordinarily exempt from coverage. Since the 1961 and 1966 amendments to the FLSA, these workers are now generally covered. 29 C.F.R. Sec. 779.100-102.

/94/ Tipped employees are defined as anyone who regularly receives more than \$30 a month in tips. 29 U.S.C. Sec. 203(t) and 29 C.F.R. Sec. 531.50. See also 29 C.F.R. Sec. 531.59.

/95/ 29 U.S.C. Sec. 203(m) and 29 C.F.R. Sec. 531.59. See also *Martin v. Tango's Restaurant, Inc.*, 969 F.2d 1319 (1st Cir. 1992) for a discussion of the percentage of tips that may be applied to minimum wages and the requirement of employer notice. There the lack of notification of employees that employer planned to include the waiter's tips in the minimum wage was found to violate FLSA.

/96/ 29 U.S.C. Sec. 207(i) and 29 C.F.R. Sec. 779.412.

/97/ See the discussion at 29 C.F.R. Secs. 779.300 et seq.

/98/ 29 U.S.C. Sec. 213(b)(27).

/99/ *Id.* at Sec. 213(a)(3) and 29 C.F.R. Sec. 779.385.

/100/ 29 C.F.R. Sec. 570.34 sets out the specific jobs allowed. See part VII. C. on child labor for other employer requirements.

/101/ 29 U.S.C. Sec. 206(f).

/102/ *Id.* and 29 C.F.R. Sec. 552.2(b).

/103/ 29 C.F.R. Sec. 552.3

/104/ *Id.* Secs. 552.4 and 552.5.

/105/ *Id.* Sec. 552.110.

/106/ *Id.* Sec. 552.100(a)(2).

/107/ Minimum wage guarantee for live-in domestic workers is found at 29 C.F.R. Sec. 552.102. The method of calculating the number of hours worked by those residing on the premises can be found at 29 C.F.R. Sec. 785.23. Overtime is exempted for these employees by 29 U.S.C. Sec. 213(b)(21).

/108/ 29 C.F.R. Sec. 552.102(a).

/109/ *Id.*

/110/ 29 U.S.C. Sec. 203(l) and 29 C.F.R. Sec. 570.2(a). The prevalence of work, even dangerous work, by children is disturbing. For more details see Michael A. Pignatella, The Recurring Nightmare of Child Labor Abuse-Causes and Solutions for the 90s, 15 B.C. Third World L. J. 171 (1995).

/111/ 29 U.S.C. Sec. 203(l) and 29 C.F.R. Sec. 570.5.

/112/ 29 U.S.C. Sec. 203(l) and 29 C.F.R. Secs. 570.2(b), 570.126 and 575.1(b)(4) and (5).

/113/ 29 C.F.R. Sec. 570.34.

/114/ Id. Sec. 519.1(a).

/115/ Id. Sec. 519.6(f).

/116/ Id. Sec. 519.6(e).

/117/ R.M. Perlman v. New York Coat, Suit, Dresses, Rainwear & Allied Workers's Union, 33 F.3d 145, 147 (2d Cir. 1994).

/118/ Id.

/119/ Leo L. Lam, Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops, 141 U. Pa. L. Rev. 623 (1992).

/120/ For historical perspective see Greenstein v. National Skirt & Sportswear, 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed 274 F.2d 430 (2d Cir. 1960). For contemporary examples see Susan Headden, Made in the U.S.A., U.S. News & World Rep., Nov. 22, 1993, at 48.

/121/ Alan Finder, Despite Tough Laws, Sweatshops Flourish, N. Y. Times, Feb. 6, 1995, at A1, reports sweatshops are prevalent in 1995, with as many as 2000 in New York City alone: "A 44 year-old immigrant from China works 12 hours a day, seven days a week, in a windowless garment shop in Sunset Park, Brooklyn, earning \$200 on a good week - or less than \$2.50 an hour." Sweatshop conditions continue in part because of a cutback in federal enforcement efforts resulting from a cutback in federal labor investigators from 970 in 1989 to 804 in 1993 according to the General Accounting Office.

/122/ Kenneth B. Noble, Thai Workers Held Captive, Officials Say, N. Y. Times, Aug. 4, 1995, at A1 reports that nearly 70 foreign workers were found working in El Monte, California in "near involuntary servitude" for about half of the minimum wage. Kenneth B. Noble, Los Angeles Sweatshops Are Thriving, Experts Say, N. Y. Times, May 6, 1995, at A6, notes that some labor officials, economists, and labor organizers think as many as one-fifth of the garment industry workers in Los Angeles may be working in unregulated sweatshop conditions. A random survey of garment manufacturers performed in 1994 by the California State Labor Department, found 50 percent of employers violated minimum wage laws and 68 percent violated overtime laws.

/123/ FLSA: Sweep of Midwest Sweat Shops Nets Minimum Wage Violations, Daily Labor Report (BNA), Apr. 19, 1995.

/124/ Headden, *supra* note 120, at 48.

/125/ See e.g. *Montgomery Ward & Co., Inc., v. New Boys, Inc.* 1995 WL 683595 (N.D.Ill. 1995).

/126/ 29 U.S.C. Sec. 215(a).

/127/ *Brock v. Rusco Indus.*, 842 F.2d 270 (11th Cir. 1988), cert. den. 488 U.S. 889.

/128/ *Citicorp Industrial Credit v. Brock*, 483 U.S. 27 (1987).

/129/ *Citicorp Industrial Credit*, 483 U.S. at 27.

/130/ *McLaughlin v. McGee Bros. Co., Inc.* 681 F. Supp. 1117, 1123 (W.D. N. C. 1988). Compliance fines of \$5,000 a day against the corporation and \$500 a day against the owners for employing minors imposed.

/131/ *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (Clearinghouse No. 20,871).

/132/ *Citicorp Industrial Credit*, 483 U.S. at 27.

/133/ *Brock*, 842 F.2d at 274.

/134/ Edward Iwata, *Garment Firms Fined for Labor Violations*, Orange County Register, April 15, 1994, C2.

/135/ Headden, *supra* note 120, at 48.

/136/ *Labor Department Asks \$5 Million For Alleged Enslavement*, Wall St. J., Aug. 16, 1995, at B5.

/137/ Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale L. J. 2179, 2180, (see particularly footnote 7 (1994) citing the 1991 California Employment Development Department, *Garment and Hospitality Industry Survey*) sees a pervasive, largely unchecked problem with sweatshops, primarily for subcontractors in the garment industry who consistently underpay and overwork their employees.

/138/ 29 U.S.C. Sec. 203 (e)(2)(C) and 29 C.F.R. Sec. 553.

/139/ 29 U.S.C. Sec. 207(o) and 29 C.F.R. Sec. 553.20. Fire protection and law enforcement employees are subject to yet a different set of special overtime rules under FLSA. The state or local government employer can establish a work period or "tour of duty" of not less than 7 nor more than

28 consecutive days of work and make rules to limit cash overtime payments. 29 U.S.C. Sec. 207(k) and 29 C.F.R. Sec. 553.220-233.

/140/ 29 U.S.C. Sec. 207(o)(2)(A) and 29 C.F.R. Sec. 553.23.

/141/ Firefighters IAFF Local 2203 v. West Adams County, 877 F.2d 814 (10th Cir. 1989) and 29 C.F.R. Sec. 553.23(b).

/142/ 29 U.S.C. Sec. 207(o)(3)(A) and 29 C.F.R. Sec. 553.

/143/ See 29 U.S.C. Sec. 203(m) and 29 C.F.R. Sec. 531.27. For special recordkeeping requirements for these employers, see 29 C.F.R. Sec. 516.27.

/144/ Brennan v. Veterans Cleaning Serv., 482 F.2d 1362 (5th Cir. 1973).

/145/ Biggs v. Wilson, 1 F.3d 1537 (9th Cir. 1993), cert. denied, 114 S.Ct. 902 (1994). As explained in a prior Clearinghouse article, National Employment Law Project, Employment Law Developments, 28 Clearinghouse Rev. 1002, 1017 (Jan. 1995), the court found an implied right of timely payment under the FLSA.

/146/ Shapiro, Gallo & Levitan, *supra* note 7, at 50.

/147/ Brian Dumaine, Illegal Child Labor Comes Back, *Fortune*, April 5, 1993, 86. Dumaine points out that in 1980 the Department of Labor had 1,059 investigators. By 1993 it had declined to 833 agents to enforce minimum wage, overtime, child labor and dozens of other laws. The article goes on to note that, according to the National Safe Workplace Institute, a Chicago nonprofit group funded by foundations and corporations, a business can expect a visit by a federal labor inspector every 50 years. The Associated Press reports that in 1995 the Department of Labor had only 800 investigators to police the nation's 6.5 million workplaces, including 22,000 registered sewing and garment shops. Associated Press, Anti-Sweatshop Coalition Announced, Nov. 21, 1995.

/148/ 29 U.S.C. Sec. 204(a).

/149/ 29 U.S.C. Sec. 216(e) and 29 C.F.R. Sec. 578.1-4.

/150/ 29 U.S.C. Sec. 216(c), see Patel, 846 F. 2d at 702.

/151/ 29 U.S.C. Sec. 217 and 29 C.F.R. Sec. 570.127.

/152/ 29 U.S.C. Sec. 216(e) and 29 C.F.R. Secs. 578.1 et seq.

/153/ 29 U.S.C. Sec. 216(a).

/154/ 28 U.S.C. Sec. 216(b).

/155/ *Avitia v. Metropolitan Club of Chicago*, 49 F. 3d 1219 (7th Cir. 1995) liquidated damages available when employer has history of FLSA violations sufficient to rebut claim that it acted in good faith.

/156/ 28 U.S.C. Sec. 216 (b).

/157/ *Fegley v. Higgins*, 19 F. 3d 1126, 1134 (6th Cir. 1994). \$40,000 attorney fee upheld.

/158/ *Fegley*, 19 F.3d at 1135.

/159/ *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993) and *Ford v. Alfaro*, 785 F.2d 835 (9th Cir. 1986).

/160/ 29 U.S.C. Sec. 216(b).

/161/ *Lorillard*, 434 U.S. at 580. Jury trials are not available when the Department of Labor sues to enforce the FLSA.

/162/ *Id.* at 581.

/163/ 28 U.S.C. Sec. 216(b).

/164/ *Id.* at Sec. 255(a).

/165/ President Franklin Delano Roosevelt, in his message asking for the enactment of the Fair Labor Standards Act, 81 Cong. Record 4960 (1937).

Litigation to Raise Minimum Wage

In *SEIU, Local 150 v. Department of Industry*, (No. 93 CV 3675) 2 Wage & Hour Cases 2d. 1105; 1995 WL 366052, (Mar. 27, 1995), a Wisconsin circuit court judge ruled that the Wisconsin Department of Industry violated a 1913 state law requiring the state to set a "living wage" when it set the state minimum wage at \$4.25 in 1992. The 1913 law required minimum wages to be set at a level at which the worker is assured of "reasonable comfort, reasonable physical well-being, decency, and moral well-being." The court found that \$4.25 was too low to provide a "decent standard of living" and therefore the state violated the 1913 statute. As a result Wisconsin was ordered by the court to set a new minimum wage that was truly a "living wage" by November 1, 1995.

Unfortunately, after the ruling, Wisconsin legislators passed new legislation and administrative rules effectively overturning the decision. As a result, the minimum wage in Wisconsin remains the same as the federal minimum of \$4.25. According to counsel for the plaintiffs, California, Colorado, Illinois, New Jersey and New York have similar state wage laws.

For more information contact plaintiffs' counsel Larry Englestein, SEIU, 1313 L Street, NW, Washington, D.C. 20005, (202) 898-3465.

State and Local Legislation to Raise Minimum Wage

Efforts are underway in cities and states to legislatively raise the minimum wage. In 1994, a church-based civic group persuaded the Baltimore City Council to approve legislation raising the minimum wage for service workers hired by city contractors from \$4.25 to \$6.10. The workers and civic groups continue to lobby for annual raises to meet a goal of \$7.70 an hour in four years.

Several other cities are considering raises in minimum wage for city contractors: New York City, Jersey City, New Jersey; Buffalo and Albany, NY. In Houston a petition drive was started in fall 1995 to put on the ballot a raise in minimum wages for all employees. In Chicago a coalition is forming to set wages for companies which receive city contracts and subsidies. A coalition effort in St. Paul requiring employers who receive more than \$25,000 in city aid to pay their employees a "living wage" was defeated at the ballot in November 1995.

Massachusetts just raised its minimum wage in two steps, to \$4.75 on January 1, 1996 and to \$5.25 in January 1997. Union and low-income advocacy groups are involved in similar state-wide efforts in Arizona (raise the minimum wage to \$5.80), and Idaho (raise minimum wage in steps to \$6.25 by July 2000). Organizing efforts are also underway in Missouri and Montana.

Additional Resources on the Fair Labor Standards Act

The Labor Relations Reporter (BNA) provides in depth reporting of legislative, administrative and judicial developments in all areas of labor law. It is a 19 volume, looseleaf service that is updated frequently.

Fundamentals of Employment Law, by Littler, Mendelson, Fastiff, Tichy & Mathiason (1994) gives an overview of employment discrimination, compensation, wrongful discharge, and workplace safety issues. It is available in paperback.

Joseph E. Kalet's, Primer on Fair Labor Standards Act Laws (BNA 1994) summarizes the Fair Labor Standards Act and other basic labor laws.

Minimum Wages and Overtime Pay, Issue No. 379, # 235, (Apr. 5, 1991) is a brief pamphlet outlining substance of wage and overtime laws. It is published by Commerce Clearing House, 4025 W. Peterson Avenue, Chicago, IL 60646.

The Continuing Decline in the Minimum Wage: Is It Time to Raise and Index It?

The value of the minimum wage has been declining for decades. The general public wants single parents on welfare to get a job and work themselves out of poverty. However, working full-time at minimum wage does not guarantee a person will not also remain poor.

A decent, living wage would give a clear incentive to all workers. Practical and historical reasons support raising the minimum wage to at least \$6.05/hour and indexing it for inflation.

A full-time minimum wage worker earns \$8,840 per year, 30 percent below the 1995 poverty threshold for a family of three, even below the threshold for a family of two. A raise to \$6.05/hour would insure that a single parent with two children who works full-time would not still be under the poverty line.

1995 Federal Poverty Levels

| Household Size | Annual Income |
|----------------|---------------|
| 1 | \$ 7,470 |
| 2 | 10,030 |
| 3 | 12,590 |
| 4 | 15,150 |

[Source: USDA Poverty Income Guidelines for 1995-1996: 60 Fed.Reg. 12909, 12910, 1995 WL 93938, March 9 1995].

Working full-time and thereby pulling the family out of poverty is not a new idea. In the 1960s and 1970s full-time minimum wage workers earned more than the poverty line for a family of three. However, the value of the minimum wage since the 1960s has declined.

Full-time Minimum Wage As Percentage of Poverty Line

| Period | 1992 dollars | family of three |
|--------|--------------|-----------------|
| 1960s | \$5.65 | 104.7% |
| 1970s | 5.54 | 102.6 |
| 1980s | 4.52 | 83.9 |
| 1992 | 4.25 | 78.8 |

[Source: Sar Levitan, WORKING BUT POOR: AMERICA'S CONTRADICTION 48 (1993)]

While in the 1960s and 1970s the full-time minimum wage worker earned more than enough to meet the poverty threshold for a family of three, today's full-time minimum wage worker does not even meet the poverty threshold for a family of two.

The minimum wage could be phased in over a few years to reach parity with the poverty line and minimize economic disruption. Raising and indexing the minimum wage could help make work pay and insure that those who work full-time do not remain in poverty.