

## FAIR LABOR STANDARDS ACT - IMPACT ON EMPLOYERS INCREASES

By Marlene S. Garvis

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 (1938) was enacted in 1938 to address mounting concern about the health and well-being of workers. Congress' stated rationale for passing the FLSA was "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers ...." *Id.* at § 202. It was Congress' goal, in having the FLSA, "to correct and as rapidly as practicable to eliminate the [difficult] conditions . . . in such industries without substantially curtailing employment or earning power."<sup>i</sup> The FLSA is "alive and well" today.

*Who is an employee?* The FLSA considers an employee to be any worker who is employed by the employer. The United States Supreme Court ("Supreme Court") has concluded "that the economic realities test is the appropriate measure of employee status under this statute."

*What does this mean?* The **economic realities test** applies the term "employee" in broad terms, so that most workers are included within its scope. Six factors are especially important in assessing the nature of the employment relationship: (1) the degree of control over the manner in which the work is performed; (2) the worker's opportunity for profit or loss depending on his managerial skill; (3) the worker's investment in equipment or materials or his employment helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the employer's business.<sup>ii</sup>

No one factor is determinative of the issue; rather, consideration is made as to whether the circumstances as a whole show the worker to be dependent upon the business which the employer serves.

*Who is an employer?* The same **economic realities test** has been applied to the term "employer," expanding its application to companies that control or share a worker's services. The factors considered in assessing employer status include the power to hire and fire employees; the right to supervise and direct work schedules or conditions of employment; the rate and method of payment; and whether the employer maintains employment records for the employees.

The key to FLSA enforcement is its prescription of standards for minimum wage and overtime pay,

which affects most private and public employment. Employers must pay covered employees at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay for all hours worked over 40 in a workweek.

For nonagricultural operations, the FLSA restricts the hours that children under 16 years of age can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. For agricultural operations, it prohibits the employment of children under age 16 during school hours and in certain jobs deemed too dangerous.

### ENFORCEMENT OF FLSA

The Department of Labor ("DOL") may recover back wages, either administratively or through court action, for employees who have been underpaid in violation of the law. Violations may result in civil or criminal action. Fines of up to \$11,000 per violation may be assessed against employers who violate the child labor provisions of the law and up to \$1,100 per violation against employers who willfully or repeatedly violate the minimum wage or overtime pay provisions. The FLSA prohibits discriminating against or discharging workers who file a complaint or participate in any proceedings under the Act.

### BASIC WAGE STANDARDS

On May 25, 2007, President Bush signed a spending bill that included a provision amending the FLSA to increase the federal minimum wage in three steps: \$5.85/hour beginning July 24, 2007; \$6.55/hour beginning July 24, 2008; and \$7.25/hour beginning July 24, 2009.<sup>iii</sup> As an exception, employees under 20 years of age may be paid \$4.25 per hour during their first 90 consecutive calendar days of employment.

**FLSA Impact continued on Page 3**

IN THIS

*issue*

FLSA - Impact on Employers Increases . . . . .	1
2007 Legislative Update . . . . .	2
Firm News . . . . .	2

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*Comments or inquiries may be directed to Shannon Banaszewski.*

## 2007 Legislative Update by Jason A. Koch

The 2007 legislative session brought many changes significant to the insurance industry.

### CONSTRUCTION LAW

The 2007 Legislature amended Minn. Stat. § 541.051. The amendment's purpose is to close a loophole created by the Minnesota Supreme Court Decision in *Weston v. McWilliams & Associates, Inc.*, 716 N.W.2d 634 (Minn. 2006). In *Weston*, the plaintiff brought an action against the general contractor for the construction of the plaintiff's home. The action was commenced nine years after substantial completion of the home. The general contractor attempted to bring contribution/indemnity claims against the subcontractors who constructed the plaintiff's home. A third-party action was commenced more than ten years after substantial completion of the home. Under the 2006 version of Minn. Stat. § 541.051, the Court held that the general contractor's contribution/indemnity claims were barred because they were brought more than ten years after substantial completion of the plaintiff's home.

The amended 2007 version of Minn. Stat. § 541.051 does not "limit the time for bringing an action for contribution or indemnity." Therefore, if a homeowner brings a cause of action in the ninth or tenth year after substantial completion, a direct defendant may subsequently bring a third-party action seeking contribution or indemnity more than ten years after substantial completion.

The Legislature also amended Minn. Stat. § 326B.02 by transferring the responsibilities of the Commissioner of Commerce relating to residential contractors to the Commissioner of Labor and Industry.

### EMPLOYMENT LAW

Significant legislation was also enacted effecting employment law.

The 2007 Legislature passed a "safe patient handling program." The program, designed to reduce workplace injuries as well as reducing the risk of injury to patients, will reduce manual lifting, transferring, and repositioning of health care facility patients and residents.

The program requires licensed health care facilities to adopt a written safe patient handling policy by July 1, 2008. The health care facility's program must be established by January 1, 2011, and the program should have the goal of minimizing manual lifting of patients by nurses and other direct patient care workers. The program must also address the acquisition of safe patient handling equipment and initial and ongoing training of nurses and other direct

patient care workers on the use of safe patient handling equipment. Health care facilities that fail to comply with the requirements of Minn. Stat. § 182.6553 will be subject to the penalties provided under Minn. Stat. § 182.666.

The 2007 Legislature made it more difficult for contractors to hire workers as independent contractors. Under Minn. Stat. § 181.723, individuals performing public or private sector commercial or residential building construction or improvement services will be deemed employees unless they hold an Independent Contractor Exemption Certificate. An employer-employee relationship will exist if an individual is performing services for a person that is in the course of the person's trade, business, profession, or occupation. To obtain an Independent Contractor Exemption Certificate the individual must complete and submit an application to the Commissioner of Labor and Industry. Upon approval by the Commissioner, the individual will be deemed an independent contractor while performing services under the Independent Contractor Exemption Certificate.

A person for whom an individual is performing services must obtain a copy of the individual's Independent Contractor Exemption Certificate before services commence. The person must also maintain a copy of the Independent Contractor Exemption Certificate for five years from the date of receipt. Any individual who violates the provisions of Minn. Stat. § 181.723, Subd. 7 is subject to a penalty of up to \$5,000.00 for each violation.

The 2007 Legislature also included a new provision to Chapter 181. The new provision requires an employer to provide written notice to employees, upon hiring, of the rights and remedies set forth in Minn. Stat. §§ 181.960 to 181.965.

### MISCELLANEOUS

The 2007 Legislative session passed a statewide smoking ban that goes into effect October 1, 2007. The Act, referred to as the "Freedom to Breathe Act of 2007," was enacted to "protect employees and the general public from the hazards of secondhand smoke by eliminating

smoking in public places, places of employment, public transportation, and at public meetings."

A new provision to Chapter 13D will allow open meetings to be conducted by telephone or other electronic means as long as certain conditions are met. A member participating in a meeting by telephone or other electronic means is considered present at the meeting for purposes of determining a quorum and participating in all proceedings.

An amendment to Minn. Stat. § 65B.49, Subd. 5A requires insurers to extend an insurance policy's basic economic loss benefits, residual liability insurance, and uninsured and underinsured motorist coverages to the operation or use of a rented motor vehicle. This section also requires that notice of this provision be attached to a rental car contract.

Finally, the 2007 Legislature enacted Minn. Stat. § 144.291, which takes the place of the current "Access to Health Records" statute, § 144.335. The new law provides many provisions, which are not found in Minn. Stat. § 144.335. The new provisions include more definitions under Minn. Stat. § 144.291, and a few more exceptions to consent. No consent is now required to a health care facility when a patient is returning to the health care facility and unable to provide consent; or who resides in the health care facility, has services provided by an outside resource under Code of Federal Regulations, Title 42, § 483.75(h), and is unable to provide consent. Minn. Stat. § 144.293, Subd. 5(3).

Also, under Minn. Stat. § 144.293, Subd. 8, no consent is required for identifying information about the location of the patient's health records to a record locator service, unless the patient has elected to be excluded from the service under paragraph (d). Under Minn. Stat. § 144.298, Subd. 3, if a health information exchange maintaining a record locator service, or an entity maintaining a record locator service for a health information exchange, negligently or intentionally violates the provisions of § 144.293, Subd. 8, a patient is entitled to receive compensatory damages plus costs and reasonable attorney fees.

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## Firm News

The Firm **Welcomes** our newest Associate **Darwin S. Williams** and our latest Paralegal **Ellen F. Dorow**, who have recently started at the Firm.

**Congratulations** to **Darwin S. Williams**, who has been appointed as the Chair of the Minnesota State Bar Association's Professionalism Committee.

**Upcoming Seminar:** On September 11, 2007, **Jessica E. Schwie** will be presenting at National Business Institute's Legal Issues Involving Local Governments. For more information, please visit National Business Institute's web site at [www.nbi-sems.com](http://www.nbi-sems.com).

## FLSA Impact continued from page 1

Also, certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

*When are wages due?* Wages required by FLSA are due on the regular payday for the pay period covered. Deductions taken from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade are not legal to the extent that they reduce the wages of employees below the minimum wage rate required by FLSA or reduce the amount of overtime pay due under FLSA.

While FLSA does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are certain practices which the FLSA does not regulate: (1) vacation, holiday, severance, or sick pay; (2) meal or rest periods, holidays off, or vacations; (3) premium pay for weekend or holiday work; (4) pay raises or fringe benefits; (5) discharge notice, reason for discharge, or immediate payment of final wages to terminated employees; and (6) the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours, if the employee is at least 16 years old. Further, the FLSA does not provide wage payment or collection procedures for an employee's usual or promised wages or commissions in excess of those required by the FLSA.<sup>iv</sup> These areas are left to be mutually agreed to by the employer and employee or their authorized representatives.

All employees of certain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person, are covered by FLSA. A covered enterprise is the related activities performed through unified operation or common control by any person or persons for a common business purpose and:

- whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated);
- is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit); or
- is an activity of a public agency.<sup>v</sup>

Employees of companies that are not covered enterprises under FLSA still may be subject to its minimum wage, overtime pay, recordkeeping, and child labor provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production. This may include employees who work in communications or transportation; regularly use the mails, telephones, or telegraph for interstate communication, or keep records of interstate transactions; handle, ship, or receive goods moving in interstate commerce; regularly cross State lines in the course of employment; or work for independent employers who contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce.

Domestic service workers such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters are covered if their cash wages from one employer in calendar year 2007 are at least \$1,500 (this calendar year threshold is adjusted by the Social Security Administration each year); or they work a total of more than 8 hours a week for one or more employers.

Tipped employees are individuals engaged in occupations in which they customarily and regularly receive more than \$30 a month in tips. The employer may consider tips as part of wages, but the employer must pay at least \$2.13 an hour in direct wages.

The performance of certain types of work in an employee's home is prohibited under the Act unless the employer has obtained prior certification from the Department of Labor.<sup>vi</sup>

### SUB MINIMUM WAGE PROVISIONS

Notwithstanding its basic standards, the FLSA does allow the employment of certain individuals at wage rates below the statutory minimum. They include student-learners (vocational education students); full-time students in retail or service establishments, agriculture, or institutions of higher education; and individuals whose earning or productive capacity is impaired by a physical or mental disability for the work to be performed. Such employment is permitted only under certificates issued by Wage-Hour.

### TIME SPENT DONNING AND DOFFING

The FLSA has come under significant scrutiny recently, especially following the Supreme Court's 2005 decision in *IBP v. Alvarez*.<sup>vii</sup> The *IBP* decision focused on whether employees should be compensated for the time spent walking between the place where they put on and took off their protective equipment required for their jobs. In view of that decision, the DOL in its Wage and Hour Advisory Memorandum (No. 2006-2) of

May 31, 2006, stated that "the time, no matter how minimal, that an employee is required to spend putting on or taking off gear on the employer's premises is compensable 'work' under the Fair Labor Standards Act [FLSA]." In addition, one federal regulation relating to labor, 29 C.F.R. § 785.24, states the following:

*Among the activities included as an integral part of a principal activity [which is compensable] are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, can not perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the work day would be an integral part of the employee's principal activity ... [and not] merely a convenience to the employee and not directly related to his principal activities ... considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity ....*

§ 785.24 at (c) (emphasis added). Thus, the decision to compensate employees for time spent at the beginning and end of each day, for changing into and out of the uniforms required as indispensable to the performance of their jobs, is necessary to be in compliance with the FLSA.

<sup>i</sup> The Act is administered by the Employment Standards Administration ("ESA"), Wage and Hour Division within the U.S. Department of Labor.

<sup>ii</sup> See 29 U.S.C. § 203 (FLSA); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2nd Cir. 2003); *Catani v. Chiodi*, 2001 WL 920025\* (D. Minn. 8/13/2001); *Bonnett v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). See also U.S. DOL, ESA, Fact Sheet #13.

<sup>iii</sup> U.S. DOL, ESA. "Compliance Assistance-Fair Labor Standards Act."

<sup>iv</sup> Some states, however, do have laws under which such claims (sometimes including fringe benefits) may be filed.

<sup>v</sup> Any enterprise that was covered by FLSA on March 31, 1990, and that ceased to be covered because of the revised \$500,000 test, continues to be subject to the overtime pay, child labor and recordkeeping provisions of FLSA.

<sup>vi</sup> If you have questions on whether a certain type of work is restricted, or who is eligible for a homework certificate, or how to obtain a certificate, you may contact the local Wage-Hour office.

<sup>vii</sup> *IBP v. Alvarez*, 126 S.Ct. 514 (2005). •

Look for  
Who is Exempt from the FLSA  
in our upcoming Fall 2007 issue.

**Jardine, Logan & O'Brien, P.L.L.P.**, is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. All of our attorneys are qualified to handle matters in Federal Court. We are trial lawyers dedicated to finding litigation solutions for our clients.

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*If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.*

**Coming in the Fall 2007 Issue...**

*Employment Law - FLSA Exempt Employees*

*Construction Law*

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