

**The Fair Labor Standards Act and Higher Education:
An Overview of Function and Recent Developments**

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I. History of the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) of 1938 is the most seminal piece of legislation affecting compensation in the workplace. Upon its signing, President Franklin D. Roosevelt said, “it is the most far reaching, far-sighted program for the benefit of workers ever adopted in this or any other country.”¹ The FLSA was an important piece of President Franklin Roosevelt’s New Deal, which was a series of federal programs, public work projects, financial reforms, and regulations enacted in the United States throughout the 1930s in response to the horrible economic conditions brought about by the Great Depression.² The FLSA addresses three broad issues to include: Minimum Wage, Overtime Pay, and Child Labor Provisions. While the economic conditions of the Great Depression were the primary motivation for the passage of the FLSA, there were other significant conditions as well that played a part in its passage including the move by many individuals from working on farms and in small, family owned businesses to working in factories and the desire by factory owners to maximize profit, which led to very low wages and poor working conditions for factory workers.³

Prior to the passage of the FLSA, there was no legal requirement to pay workers any type of minimum wage, no prohibition against the number of hours a worker could work in a day or week, and very little protection for child laborers. In the early 20th century, the courts often invalidated state and federal legislation

¹ Fair Labor Standards Act, United States History, <http://www.u-s-history.com/pages/h1701.html>.

² Johnathan Grossman, Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage U.S. Department of Labor, <http://https://www.dol.gov/general/aboutdol/history/flsa1938>.

³ Joseph Martocchio, Strategic Compensation 27-28 (7 ed. 2013).

that restricted business, including laws on minimum wage, child labor, and health and safety of workers. This era of refusal by the courts to uphold minimum wage laws, as well as any other laws restricting the rights of business, was known as the *Lochner* era.⁴

The *Lochner* era was a period of judicial history from 1897 to 1937 in which the U.S. Supreme Court struck down numerous state statutes as unconstitutional based on due process grounds found in the Fifth and Fourteenth amendments to the U.S. Constitution. The various state statutes that were invalidated by the U.S. Supreme Court dealt with economic issues such as minimum wage, maximum hours of work allowed, and health and safety of workers.⁵ According to Matthew Lindsay in his article “In Search of Laissez-Faire Constitutionalism”

“According to progressive scholars, American judges steeped in laissez-faire economic theory, who identified with the nation’s capitalist class and harbored contempt for any effort to redistribute wealth or otherwise meddle with the private marketplace, acted on their own economic and political biases to strike down legislation that threatened to burden corporations or disturb the existing economic hierarchy. In order to mask this fit of legally unjustified, intellectually dishonest judicial activism, the progressive interpretation runs, judges invented novel economic “rights” — most notably “substantive due process” and “liberty of contract” — that

⁴ Peter Cole, *The Law That Changed the American Workplace* Time (2016), <http://time.com/4376857/flsa-history>.

⁵ Steven Emmanuel, *Emanuel Law Outlines-Constitutional Law* 133-136 (7 ed. 1983).

they engrafted upon the Due Process Clause of the Fourteenth Amendment.⁶

The *Lochner* era gets its name from ***Lochner v. New York***, 198 U.S. 45 (1905), the most well known case in which the U.S. Supreme Court struck down a state statute protecting individuals in the workplace. In the *Lochner* case itself, the state statute in question was a New York state statute that limited the number of hours a bakery employee could work to 10 hours per day and 60 hours per week. The state of New York defended the statute on two grounds: First, it was a valid labor law and second, it protected the health and safety of the workers. The Court rejected the first argument based on the notion that the law infringed on the “liberty of contract” of the bakery owner. The Court rejected the second argument based on its finding that the bakers were not an especially endangered group, and that working long hours did not affect the public health nor make the baked goods any less fit to eat.⁷

The American political landscape changed dramatically upon the election of Franklin D. Roosevelt in 1932 as the 32nd President of the United States. In the 1932 presidential election, Roosevelt ran on the promise to provide economic relief to the millions of American negatively affected by Great Depression. Though many Americans still remained unemployed by the 1936 presidential election, Roosevelt was popular as many of his New Deal policies were beginning

⁶ Matthew J. Lindsay, *In Search of 'Laissez-Faire Constitutionalism'*, SSRN Electronic Journal (2010).

⁷ Steven Emmanuel, *Emanuel Law Outlines-Constitutional law* 133-136 (7 ed. 1983).

to take effect and showing positive results, and he was re-elected in a landslide.⁸ Wage-hour legislation was a campaign issue in the 1936 presidential race. The Democratic platform called for higher labor standards, and in campaign speeches, Roosevelt often mentioned the need for protection of children in the workplace, minimum wages, and maximum hours in a workweek. It was within this political context that the FLSA was passed.⁹

The FLSA was first proposed in 1937 by Democratic Senator Hugo Black of Alabama. Senator Black was an ardent supporter of President Roosevelt's New Deal policies and in 1935 became the chairman of the Committee on Education and Labor.¹⁰ The original bill proposed in 1937 was called the Black-Connery Bill, and it proposed a national minimum wage and a 30 hour workweek. In addition to Senator Black, the bill was co-sponsored by Democratic House Representative William Connery of Massachusetts. The original bill in 1937 was rejected by the United States House of Representatives.¹¹

However, an amended version of this bill that extended the workweek to 40 hours and provided for a minimum wage was ultimately passed in 1938, becoming the Fair Labor Standards Act. By 1938, Senator Black had left the U.S. Senate upon his appointment and confirmation to the U.S. Supreme Court in late 1937. Senator Black's appointment to the U.S. Supreme Court was significant as

⁸ William Leuchtenburg, *Franklin D. Roosevelt: Campaigns and Elections* UVA-Miller Center, <https://millercenter.org/president/fdroosevelt/campaign-and-elections>.

⁹ Johnathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage* U.S. Department of Labor, <http://https://www.dol.gov/general/aboutdol/history/flsa1938>.

¹⁰ Nicandro Iannacci, *Hugo Black, Unabashed Partisan for the Constitution* Constitution Daily (2018), <https://constitutioncenter.org/blog/hugo-black-unabashed-partisan-for-the-constitution>.

¹¹ Johnathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage* U.S. Department of Labor, <http://https://www.dol.gov/general/aboutdol/history/flsa1938>.

he would be a critical vote in upholding the constitutionality of many of Roosevelt's New Deal policies.¹²

Working with Senator Black and Representative Connery on the legislation was Secretary of Labor, Frances Perkins. There was no more vocal and ardent supporter of workers in the Roosevelt cabinet, especially in the fight to help underpaid workers and exploited children in the workplace than Frances Perkins. Perkins had spent her adult life fighting for the rights of workers and came to know Roosevelt through her pro-labor work in New York state. As governor of New York, Roosevelt appointed Perkins as Commissioner of the New York State Department of Labor. In 1933, Roosevelt appointed Perkins as U.S. Secretary of Labor. She was the first female cabinet member in history, and she held the position for twelve years, still a record for any U.S. Labor Secretary.¹³

In the years leading up to the passage of the FLSA, Perkins and Roosevelt initiated many of the provisions with federal contractors that would later become the cornerstone of the FLSA. The Walsh-Healy Act, for example, required government contractors to adopt an 8-hour day and a 40-hour workweek, prohibited the hiring of minors under the age of 16, and had to pay a "prevailing minimum wage" to be determined by the Secretary of Labor. An amended Black-Connery Bill of 1937 proposed a 40-cent an hour minimum wage, a 40-hour maximum workweek, and a minimum working age of 16, and a five-member labor standards board which could, in certain instances, authorize

¹² Franklin D. Roosevelt: Day by Day, Pare Lorentz Center at the FDR Presidential Library, <http://www.fdrlibrary.marist.edu/daybyday/event/22124/>.

¹³ Her Life: The Woman Behind the New Deal, Frances Perkins Center, <http://francesperkinscenter.org/life-new/>.

higher wages. While this version of the bill passed the Senate, it did not make it out of the House Rules Committee due to opposition by Republicans and conservative Democrats.¹⁴

Roosevelt was, of course, upset and angry that the bill was not brought up for a vote in the House of Representatives. In response, Roosevelt called a special session of Congress in November of 1937 to take immediate action. Summing up Roosevelt's feelings on the topic is this quote, "The exploitation of child labor and the undercutting of wages and stretching the hours of the poorest paid workers in periods of business recession has a serious effect on buying power."¹⁵ Roosevelt continued to be personally involved with the legislation in early 1938. The bill, though, still had opposition both in the Senate and the House of Representatives. However, two important Congressional elections occurred in 1938 that helped the passage of the legislation. Two ardent pro "New Dealers" won important elections in the South. Representative Lister Hill won a Senate primary election in Alabama in January of 1938 and Representative Claude Pepper won a Senate primary election in Florida in May of 1938. Both ran against staunch anti "New-Dealers", so it was clear that Roosevelt had public support on his side on these pro-worker initiatives. Both men would go on to win election to the U.S. Senate and, as expected, were extremely supportive of President Roosevelt's New Deal policies, including the FLSA. After more compromises that sought to weaken the original bill were made in order to get the required votes needed for passage, the bill was finally passed by Congress in June of 1938 and signed into law by

¹⁴ Johnathan Grossman, Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage U.S. Department of Labor, <http://https://www.dol.gov/general/aboutdol/history/flsa1938>.

¹⁵ *Id.*

President Roosevelt on June 25, 1938. The final bill had a minimum wage of 25 cents an hour, a 40 hour workweek, and protection of minors in the workplace.¹⁶

II. Current Provisions of the Fair Labor Standards Act and

Applicability of the Law

There have been many amendments to the FLSA since its original passage in 1938. However, the current provisions of the FLSA are as follow:

Minimum Wage: The federal minimum wages is \$7.25 per hour effective July 24, 2009. ¹⁷ Currently 29 states and Washington, D.C. have a minimum wage above the federal minimum wage, with California being the highest at \$10.50 per hour. Five states have not adopted a minimum wage: Alabama, Louisiana, Mississippi, South Carolina and Tennessee. In these five states, plus sixteen others, the federal minimum wage is applicable. Additionally, some municipalities such as New York City and San Francisco have a higher minimum wage than the state minimum wage or federal minimum wage. In instances where an employee is subject to multiple wage laws, the employee is entitled to the higher minimum wage.¹⁸

Overtime Pay: Covered non-exempt employees must receive overtime pay for hours worked over a 40 hour workweek at a rate of not less than one and one-half times the regular rate of pay. A workweek can be defined by the

¹⁶ *Id.*

¹⁷ Joseph Martocchio, Strategic Compensation 28-29 (7 ed. 2013).

¹⁸ Janna Herron, *What States Pay Minimum Wage Higher than Federal Government's \$7.25 an Hour*, USA Today, 2018, <https://www.usatoday.com/story/money/2018/10/02/minimum-wage-states-pay-higher-hourly-rate-than-federal/1497425002/>.

employer by it must be a fixed a recurring seven consecutive 24-hour periods over a period of 168 hours. There is no requirement to pay overtime for hours worked on the weekends, holidays, or regular days of rest, unless working on those days pushes an employee over the 40 hour threshold for overtime payment.¹⁹

Hours Worked: Hours worked ordinarily include all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace. A compensable hour includes the following: hours worked for the employer's benefit, controlled by the employer, permitted by the employer, and in an activity requested by the employer.²⁰

Recordkeeping: Employers must display an official poster outlining the requirements of the FLSA. Employers must also keep employee time and pay records. Most of the information required to be kept is the kind that is generally maintained by employers in ordinary business practice to include items such as: hour and day when workweek begins, total hours worked each week, regular hourly rate of pay, total overtime pay for the workweek, deductions from or addition to wages, total wages of each pay period, and day of payment and pay period covered. The records do not have to be kept in any particular format nor do time clocks have to be used.²¹

Child Labor: The FLSA provisions on child labor are designed to protect the educational opportunities of minors and prohibit their employment in jobs

¹⁹ Wage and Hour Division- Compliance Assistance-Wages and the Fair Labor Standards Act (FLSA), Department of Labor, <https://www.dol.gov/whd/flsa/>.

²⁰ *Id.*

²¹ *Id.*

and under conditions detrimental to their health or well being.²² No children 13 and under can work at all. Children between 14 and 16 may be employed outside of school hours in a non hazardous occupation, but cannot work more than three hours on a school day and no more than eight hours on a non-school day. There is no prohibition on the number of hours children between the ages of 16 and 17 can work, regardless of whether it is a school or non-school day. However, children between the ages of 16 and 17 cannot work in hazardous occupations.²³

III. Coverage

The FLSA applies to all enterprises with employees, who are engaged in interstate commerce, produce goods for interstate commerce, or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce. While the FLSA does not apply to businesses that have revenues of less than \$500,000 some enterprises are exempt for this revenue threshold including: hospitals, enterprises that care for the sick or mentally ill on premises, K-12 schools, institutions of higher learning, and federal, state, and local governmental agencies.²⁴

The FLSA is administered by the Wage and Hour Division of the Department of Labor. Enforcement of the provision of the FLSA is carried out by Wage and Hour Division investigators. Wage and Hour Division investigators are authorized to conduct investigations in which they gather data on wages, hours and other employment conditions to determine if an employer is in compliance of

²² *Id.*

²³ Joseph Martocchio, Strategic Compensation 31 (7 ed. 2013).

²⁴ Wages and Hours Worked: Minimum Wage and Overtime Pay, Department of Labor, <https://www.dol.gov/compliance/guide/minwage.htm>.

the provisions of the FLSA. If violations of the FLSA are proven, then the Department of Labor or an employee can recover back wages and an equal amount in liquidated damages where minimum wage and overtime violations exist. There is a statute of limitations of two years for the recovery of back wages and liquidated damages and a statute of limitations of three years in cases involving willful violations. Remedies can be recovered through administrative procedures, litigation, and/or criminal violations.²⁵

IV. Exemptions

Some employees are exempt from the overtime provisions or both the minimum wage and overtime pay provisions. In order to be exempt from the provisions of the FLSA, an employee must meet both a salary threshold and a duties test. In 2004, the salary threshold of an annual salary of \$23,660 (\$455 per week) was added to the duties test in order for an employee to be exempt from the provisions of the FLSA, except for outside sales, teacher, doctor, lawyer, or dentist.²⁶

The main categories for an employee to be exempt from the FLSA based on duties include the following:

²⁵ Wage and Hour Division (WHD)- Handy Reference Guide to the Fair Labor Standards Act, Department of Labor, <http://https://www.dol.gov/whd/regs/compliance/hrg.htm>.

²⁶ Fact Sheet #17S: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA), United States Department of Labor, <https://www.dol.gov/whd/regs/compliance/whdcomp.htm>.

Executive- Management of the enterprise or a recognized department or subdivision. Additionally, must direct the work of at least two or more employees and have the ability to hire and fire employees.²⁷

Administrative- Primary duty must be the performance of office work directly related to the management or general business operation of the employer and have the ability to exercise discretion and independent judgment in matters of significance.²⁸

Learned Professional- Performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by such alternative means as an equivalent combination of intellectual instruction and work experience.²⁹

Computer- Employers as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.³⁰

Outside Sales- Making sales or obtaining orders or contracts for services or future use of facilities for which a consideration will be paid by the client or

²⁷ Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer, and Outside Sales Employee Under the Fair Labor Standards Act (FLSA), United States Department of Labor, https://www.dol.gov/whd/overtime/fs17a_overview.htm.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

customer. Customarily and regularly engaged away from the employer place of business.³¹

V. Sovereign Immunity

As recent court cases have shown, public universities are successfully asserting sovereign immunity as a defense to violations under the FLSA. Sovereign immunity is defined as the doctrine that precludes litigants from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to be sued.³² Further, sovereignty in government is defined as the public authority that directs or orders what is to be done by each member associated in relation to the end of the association. The necessary existence of the state and that right and power which necessarily follow is “sovereignty.” In its most broad sense, sovereignty is the supreme, absolute, uncontrollable right to govern.³³

The principle of sovereign immunity is found in the Eleventh Amendment to the U.S. Constitution. The Eleventh Amendment was passed by Congress in 1794 and ratified by the states in 1795. The wording of the Eleventh Amendment is as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

³¹ *Id.*

³² Henry Campbell Black, Black's law dictionary 1252 (5 ed. 1989).

³³ *Id.*

*against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*³⁴

While the text of the Eleventh Amendment does not mention suits brought against a state by its own citizens, the U.S. Supreme Court in *Hans v. Louisiana*³⁵ interpreted the amendment more broadly to include that states were immune to lawsuits brought by citizens of its own state. While there have been challenges to this interpretation over the years, the U.S. Supreme Court has reaffirmed as recently in the 1996 in *Seminole Tribe v. Florida*³⁶ that Congress, for the most part, has limited ability to subject states to suit in federal court, unless Congress acts pursuant to its powers to enforce the Fourteenth Amendment (in part on the theory that it was adopted *after* the Eleventh Amendment, or for some bankruptcy issues).³⁷ Therefore, unless a state explicitly and with unambiguity gives up its Eleventh Amendment protection, a citizen of that state will not be able to sue for violations of the FLSA, regardless of Congress' intent.

VI. Current Issues Related to the Fair Labor Standards Act

In 2014, the United States Department of Labor under President Barack Obama proposed a new rule to increase the salary threshold under the FLSA in order for an employee to be exempt. After a period of notice of proposed rule making and comment period, the Obama administration in May of 2016

³⁴ Common Interpretation- The Eleventh Amendment, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xi>.

³⁵ 134 U.S. 1 (1890).

³⁶ 517 U.S. 44 (1996).

³⁷ Bradford Clark & Vicki Jackson, The Eleventh Amendment National Constitution Center, <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xi>.

amended the FLSA to include a new salary threshold of \$47,476 annually (\$913 per week).³⁸ That is, any employee making less than \$47,476 would be non exempt under the FLSA, regardless of duties, and would be eligible for overtime pay. The increased salary threshold would have extended overtime protection to approximately 4.2 million workers across the country.³⁹ In addition to the salary threshold increasing to \$47,476, the new rule would also raise the salary threshold for the highly compensated employee (HCE) to \$134,004 from \$100,000. The highly compensated employee exemption is one for high paid workers who do not fully meet one of the duties exemptions.⁴⁰

The salary threshold change to the FLSA was to become effective December 1, 2016. In order to be exempt under the new rule, an employee must meet both the duties test and the salary test. Simply making more than \$47,476 annually does not make an employee exempt. The employee must also meet one of the categories of exemptions under the duties test.⁴¹ For example, an administrative assistant who makes \$50,000 annually is still nonexempt as he/she does not meet one of the exemptions under the duties test.

The new salary threshold change would have had a significant impact on higher education as there are numerous positions on college and university

³⁸ The Wait is Over-Department of Labor Issues Final Rule That Significantly Expands Employees Eligible for Overtime, Archer (2016), <https://www.archerlaw.com/the-wait-is-over-department-of-labor-issues-final-rule-that-significantly-expands-employees-eligible-for-overtime/>.

³⁹ Andrew Peeling, Map Shows How FLSA Overtime Rule Changes Affect Each State SHRM (2016), <https://www.shrm.org/search/pages/default.aspx?k=map%20shows%20how%20FLSA%20overtime%20rule%20changes%20affects%20each%20state>.

⁴⁰ Stephen Miller, It Takes Two: Exempt Employees Must Meet Both Salary and Duties Tests Stephen Miller (2016), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/overtime-salary-duties-tests.aspx>.

⁴¹ *Id.*

campuses that meet the duties test and make more than \$23,660 but less than \$47,476. Some examples at most college and universities would include admissions counselors, academic advisors, residence hall managers, and many student affairs professionals. At smaller colleges and universities, this could also include many assistant athletic coaches. Therefore, under the new rule, these employees would be eligible for overtime. College and university administrators were faced with a choice: either to give employees in these positions a raise to meet the \$47,476 salary threshold or start paying them the overtime rate for hours worked in excess of 40 hours per week, which for some of these positions is considerable.

Just 10 days before the new rule was to go into effect (November 22, 2016), a federal judge for the Eastern District of Texas issued a preliminary injunction to block the new salary threshold of \$47,476 of becoming effective. This preliminary injunction was the result of the consolidation of a lawsuit filed by twenty-one states and the U.S. Chamber of Commerce and other business groups on the grounds that the Department of Labor had exceeded its authority by raising the salary threshold too high as well as the provision that there would be automatic adjustments to the salary threshold every three years. In issuing the preliminary injunction, Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas argued that a preliminary injunction serves to maintain the status quo while the court determined the Department of Labor's authority to promulgate the rule as well as the rule's actual validity. This preliminary injunction came just days after Donald Trump was elected as the 45th president of the United States. While the Obama Department of Justice did appeal the

injunction on December 1, 2016, it was highly unlikely that the new Republican administration would pursue the appeal.⁴²

On August 31, 2017, Judge Amos Mazzant permanently struck down the Obama administration rule of increasing the salary threshold under FLSA to \$47,476. In his ruling, Mazzant held that the Obama administration rule set the salary threshold excessively high, essentially making an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level. Even though Mazzant ruled against the Obama administration rule, Mazzant did also indicate in his ruling that the U.S. Department of Labor did, in fact, have the authority to establish a salary threshold, but that the \$47,476 was simply too high.⁴³

Many business groups were against the new rule so this decision by Judge Mazzant was a welcomed one. For example, the senior vice president of the National Restaurant Association said of the decision, "demonstrates the negative impact these regulations would have had on business and their workers."⁴⁴ Labor and employee rights groups were extremely disappointed in the decision. Christine Owens, executive director of the National Employment Law Project, a worker advocacy group, said the decision, "strips hard earned, long overdue overtime pay protects from millions of America's workers forced to put in extra

⁴² Lisa Nagele-Piazza, Federal Judge Halts Overtime Rule SHRM (2016), <https://www.shrm.org/search/pages/default.aspx?k=Federal%20Judge%20Halts%20Overtime%20Rule>.

⁴³ Paul Davidson, *Judge Strikes Down Overtime Pay Hike for 4.2 Million Workers*, USA Today, 2017.

⁴⁴ *Id.*

hours on the job- away from their families- with no extra pay at all.”⁴⁵ To date, the Trump administration has not appealed the federal court ruling and is not expected to do so in the future.

There has been some more moderate legislation introduced in Congress related to the FLSA. For example, the Overtime Reform and Enhancement Act was introduced in the House of Representatives in July of 2016 with phasing in the salary threshold levels over a period of three years. The companion legislation in the Senate phased in the salary threshold levels over a period of four years. Both of these measures had some bi-partisan support. ⁴⁶ However, since the final ruling blocking the Obama administration rule was issued in August of 2017 by Judge Mazzant, none of this legislation has progressed.

Another piece of legislation that has been introduced and passed in the House of Representatives is the Working Families Flexibility Act, which was passed in the House of Representatives in May of 2017. The bill would allow private sector employees to voluntarily exchange overtime pay for “compensatory time” off in the future. Compensatory time is time off from work in the future that an employee would earn at the rate of time and a half. For example, if an employee accrued four (4) hours of overtime and chose to take this as compensatory time, the employee would be able to take six (6) hours off from work at some future date. The bill allows for employees to change their minds and would give them the option to convert their compensatory time to an actual

⁴⁵ *Id.*

⁴⁶ David Cooper et al., Schrader Bill would Gut the Department of Labor's New Overtime Rule Economic Policy Institute (2016), <https://www.epi.org/publication/schrader-bill-would-gut-the-department-of-labors-new-overtime-rule/>.

cash payout for overtime if they did change their minds about the option they originally selected. Under this provision of the bill, the employer would then have to make the cash payment for the overtime within 30 days. Currently, this option of taking compensatory time in lieu of overtime payment is available to public sector employees but not private sector employees.⁴⁷

Proponents of this bill believe it would provide flexibility for overtime-eligible employees. That is, those employees who are non-exempt under the FLSA. An ardent supporter of the bill, Representative Martha Roby (R-AL) said of the bill, “it provides flexibility for working moms and dads who need more time to spend taking care of their family responsibilities.”⁴⁸ Some employer groups are also ardent supporters. The Society for Human Resource Management (SHRM), the largest professional association for human resource professionals, came out in support of the bill. Lisa Horn, the director of Congressional affairs for SHRM said, “the bill has built-in protections to make sure employees aren’t coerced into choosing comp time.”⁴⁹

Opponents of the bill, however, do not believe the protections for employees in the bill are strong enough.⁵⁰ Many Democrats and other advocates for workers believe that workers will be pressured into taking the compensatory time option instead of the pay option. Vicki Shabo, vice president for the

⁴⁷ Jena McGregor, *House Republicans Just Voted to Change Overtime Rule for Workers*, Washington Post, 2017.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Daniel Arkin, *HR 1180: House Passes Bill That Would Change Overtime Pay Rules* NBC News (2017), <https://www.nbcnews.com/politics/congress/hr-1180-house-passes-bill-would-change-overtime-pay-rules-n754226>.

nonprofit advocacy group National Partnership for Women and Families stated, “Whether it’s overt coercion, which language in the bill prohibits, or just a preference, there’s going to be strong incentives to giving overtime hours to workers choosing to take comp time.”⁵¹ Opponents of the bill are also worried that the limitations the bill puts in place of when workers can take the time off they accrued through comp time gives employers a good deal of latitude to deny the requests for employees to take time off, even though they have earned it through overtime work. To date, the U.S. Senate has not voted on the bill.⁵²

VII. Recent Case Law

*Lang v. Pennsylvania Higher Education Assistance Agency*⁵³

The Pennsylvania Higher Education Assistance Agency (PHEAA) services student loans and is organized under Pennsylvania law. The plaintiff was employed at its customer service call centers and alleged that PHEAA unlawfully failed to compensate its call center employees for the time spent before their shifts signing into a number of computer applications in preparation for handling calls at the beginning of their shift, in violation of FLSA. PHEAA argued that it was shielded from suit by Eleventh Amendment sovereign immunity, and the district court agreed. However, the United States Court of Appeals for the Third

⁵¹ Jena McGregor, *House Republicans Just Voted to Change Overtime Rule for Workers*, Washington Post, 2017.

⁵² *Id.*

⁵³ 201 F.Supp.3d 613 (2016).

Circuit was unable to determine whether PHEAA established immunity.⁵⁴ The appellate court vacated and remanded. On remand, the district court concluded that PHEAA did not constitute an arm of the state and denied to grant immunity from suit.

*Fernandez v. Zoni Language Centers, Inc.*⁵⁵

The plaintiffs were employed as English-language instructors at the for-profit institution, teaching classes held on the institution's campuses, but also worked outside of class on a variety of tasks associated with teaching, such as developing lesson plans, grading papers, and attending professional conferences. They argued that the additional time spent should qualify for overtime under the FLSA. The United States Court of Appeals for the Second Circuit disagreed, affirming the lower court, and concluding that the plaintiffs fell under the FLSA's professional exemption for teachers.

*Guy v. Casal Institute of Nevada, LLC*⁵⁶

In a case involving cosmetology students at a for-profit institution, the plaintiffs argued that they should be treated as employees for FLSA purposes. A federal district court found two salient reasons that they students should be considered employees: First, the court concluded that the students were treated as employees because they provided cosmetology services to paying customers, often unsupervised. Next, the court concluded that the institution subordinated

⁵⁴ Anthony Lang, Sr. v. PHEAA, 610 Fed. Appx. 158 (3d Cir. 2015).

⁵⁵ 858 F.3d 45 (2d Cir. 2017).

⁵⁶ 2016 WL 4479537.

the plaintiffs' educational needs toward its own interest in paying customers. Using these economic factors, the court reasoned that the student-plaintiffs should be considered employees for purposes of FLSA.

*Ayon v. Kent Denver School*⁵⁷

In a K-12 case, a plaintiff sued the private school where she worked as a provider of daycare services in the school's childcare center, arguing that she should be eligible for overtime pay under the FLSA. The private school countered that she fell under the FLSA's exceptions for employees who work in a bona fide executive, administrative, or professional capacity. Under Department of Labor standards, teachers are considered professional employees, and the district court found that because the plaintiff's primary duties constituted teaching, tutoring, or imparting of knowledge, and that she was employed by an educational institution, she was a teacher, not a caregiver, and exempt from the provisions of the FLSA.

*England v. Administrators of the Tulane Educational Fund*⁵⁸

A former business school writing tutor at a private university filed suit, arguing that she should have been eligible for overtime under the FLSA. The university countered that the plaintiff was clearly an exempt employee given his status as a teacher. A federal district court agreed, concluding that because his primary duties of teaching, tutoring, and instructing at an institution of higher education qualified him as an exempt employee under the FLSA.

⁵⁷ 2013 WL 1786978.

⁵⁸ 2017 WL 3537126

*Ortega v. Denver Institute, LLC*⁵⁹

In another case involving a cosmetology school student, the plaintiff filed suit against her institution, arguing that she should be eligible for overtime pay for the work that she provided through the course of her training. A federal district court disagreed, however, looking to economic realities under the totality of the circumstances. The court found that the plaintiff received training in a vocational education setting, the training was for her benefit, she did not displace regular employees, but worked under close supervision, the institution received no immediate benefit from her training, she was not necessarily entitled to employment upon program completion, and that trainees are not entitled to wages during the training period. Thus, the court concluded that because she attended the school as a student and graduate as a student, she was never an employee and ineligible for overtime pay under the FLSA.

*Garcia v. The University of Texas Southwestern Medical Center at Dallas*⁶⁰

An employee of a public university law school whose employment was terminated filed suit against the institution, arguing that she was improperly denied overtime pay for work that she allegedly performed during a 30-minute lunch break that was to be undisturbed and was unpaid. The university argued

⁵⁹ 2015 U.S. Dist. LEXIS 101427.

⁶⁰ 2013 WL 1759421.

that it was immune from suit because it was cloaked by sovereign immunity, but the plaintiff asserted that the university waived its immunity. A federal district court disagreed, concluding that the state of Texas had not waived sovereign immunity through statute incorporating FLSA standards into state employment law.

*Cichocki v. Massachusetts Bay Community College*⁶¹

A public community college engineering professor argued that his institution violated the FLSA's anti-retaliation provisions by refusing him a requested assignment, placing him on sick leave, and ceasing his paycheck in alleged retaliation for his protests against various grievances related to institutional actions. However, a federal district court concluded that Massachusetts had not waived its Eleventh Amendment immunity from suit from individuals and thus the plaintiff's FLSA claim was precluded.

*Burke v. Alta Colleges*⁶²

A group of "field representatives," who served as recruiters for a for-profit institution filed suit arguing that they should be eligible for overtime under the FLSA. However, a federal district court relied upon the FLSA's "outside salesperson" exemption, concluding that each plaintiff's primary duties included sales in the sense of recruiting students would pay tuition and were hired as salespeople, received sales training, were responsible for soliciting new business,

⁶¹ 174 F. Supp. 3d 572 (D. Mass. 2016). *See also McNair v. Mississippi*, 43 F. Supp. 3d 679 (N.D. Miss. 2014) (public university employee failed to show that Mississippi waived sovereign immunity).

⁶² 2015 WL 1399675.

worked under minimal supervision, and that their compensation and evaluations were dependent upon their sales activity. The court thus concluded that the plaintiffs fell squarely within the salesperson exemption under the FLSA and were ineligible for overtime pay.

*Kerr v. Marshall University Board of Governors*⁶³

A student teacher in a graduate K-12 teaching program at the public university sought overtime pay for her work during her student teaching portion of the program. She conflicted with her supervising teacher and was ultimately removed from the position and was not awarded credit for the course or her teaching license in Kentucky. The United States Court of Appeals for the Fourth Circuit looked to the text of the FLSA and concluded that employers as defined by the Act include those with influence over the terms of the employment relationship. Because the student-teaching supervisor did not comport with the Act's definition of an employer, the plaintiff's FLSA claim was dismissed.

Brown v. Indiana University Health Ball Memorial Hospital ⁶⁴

A public medical school employee whose position was terminated filed suit seeking overtime pay during the period of her employment under the FLSA. A federal district court readily concluded that the duties of her position in the trauma area squared with the administrative professional exemption under the FLSA and dismissed her claim.

⁶³ 824 F.3d 62 (4th Cir. 2016).

⁶⁴ 2015 WL 6142269.

*Berger v. NCAA*⁶⁵

Student athletes at the University of Pennsylvania and the National Collegiate Athletic Association (NCAA) filed suit arguing that student athletes are employees under the FLSA, and that the failure of NCAA institutions to pay athletes a minimum wage violated the FLSA. The United States Court of Appeals for the Seventh Circuit disagreed, holding that the plaintiffs could not confirm that their sporting activities qualified as work under the FLSA, and in fact was completely voluntary. In forceful language, the Seventh Circuit held that student athletes are not employees and therefore not entitled to minimum wage under the FLSA.

VIII. Conclusions

The Fair Labor Standards Act is an important and longstanding piece of federal legislation that provides guidance toward numerous issues, including overtime compensation. A review of recent higher education cases reveals that plaintiffs do not often prevail in claims against colleges and universities. In some circumstances, sovereign immunity prevails; in others, courts have been willing to construe plaintiffs' employment as exempt from the FLSA through an economic analysis. It appears from a review of recent cases that colleges and universities can be mindful of FLSA provisions with a certain degree of discretion, but should note that employee claims may be on the uptick in future years.

⁶⁵ 843 F.3d 285 (7th Cir. 2016).