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Overview of the FLSA, the District of Columbia Wage Laws and Class and Collective Actions

Fair Labor Standards Act Overview

Background

- Codified at 29 U.S.C. § 201 *et seq.*
- Originally enacted as part of Franklin D. Roosevelt's New Deal
- Still, as modified, the primary source of federal law regarding wage and hour issues

Key Points

- Federal Minimum Wage
  - $7.25/hour
  - $2.13/hour for tipped employees (employer must make up the difference if total wages do not equal $7.25/hour)
- Time and a half overtime (for covered employees)
- Limits on youth employment

Common Claims in FLSA Litigation

- Failure to timely and correctly pay for all hours worked;
- Failure to timely and correctly pay overtime;
- Misclassification as contractor;
- Misclassification as FLSA-exempt.

FLSA: Employee or Independent Contractor

- Facts matter. Labels don't.
- Most jurisdictions have adopted some version of the "Economic Reality" test.
- DOL has proposed regulations making it easier to classify workers as contractors.
- It is possible to be deemed a contractor under one law (such as the FLSA) and an employee under another (state law, etc.).

FLSA Independent Contractor Test – D.C. Circuit

- "Economic Reality" test:
  - Whether the alleged employer:
    - Had the power to hire and fire the employees;
    - Supervised and controlled employee work schedules or conditions of employment;
    - Determined the rate and method of payment; and
    - Maintained employment records.
  - Additionally, a court may examine:
    - The degree of control exercised by the employer over the employee;
    - The employee's opportunity for profit or loss and their investment in the business;
    - The degree of skill and independent initiative required to perform the work;
    - The permanence or duration of the working relationship; and
    - The extent to which the work is an integral part of the employer's business.
  - No one factor is dispositive and courts must look at the totality of the circumstances and consider relevant evidence.

Morrison v. Int'l Programs Consortium, Inc., 253 F.3d 5, 11 (D.C. Cir. 2001).

Independent Contractor – 4th Circuit Test

- Similar 6-Part "Economic Realities" test to determine whether a worker is an employee or a contractor:
  - The degree of control that the putative employer has over the manner in which the work is performed;
  - The worker's opportunities for profit and loss dependent on his managerial skill'
  - The worker's investment in equipment or material, or his employment of other workers;
  - The degree of skill required for the work;
  - The permanence of the working relationship; and
  - The degree to which the services rendered are an integral part of the putative employer's business.
  - No single factor is dispositive. The "touchstone of the 'economic realities' test is whether the worker is 'economically dependent on the business to which he renders service or is, as a matter of economic [reality], in business for himself.'"
  - *McFeeley v. Jackson Street Entertainment, LLC*, 825 F.3d 235, 241 (4th Cir. 2016).

DOL Proposed Regulations – Independent Contractors

- Comment Period Closed Oct. 26, 2020
  - We don't know what the final regulations will look like.
- Regulations would set a new 2-tiered "economic reality" test
- Core factors:
  - Nature and degree of worker's control over the work; and
  - Worker's opportunity for profit or loss based on
- Other (secondary) factors:
  - Whether the workers are performing the primary work of the alleged employer;
  - Worker investments in the business;
  - Permanence and exclusivity; and
  - Special skills or initiative required.
- Comparisons/Comments:
  - Existing test measures control employer has over the worker. DOL proposed test emphasizes control the worker has over the work.
  - Existing test: no factor is controlling.

FLSA: Most Employees Are Covered

Enterprise Coverage

- Businesses with at least $500,000 in annual dollar volume ("ADV"); and at least 2 employees.
- Non-profits' business activities can count.
- "Named" enterprises (hospitals, schools, gov't agencies) are covered.

Individual Coverage

- Employees' activities, not the establishment's, determine coverage.
- Includes domestic services and home care.

FLSA Exemptions

- White Collar Exemptions
  - Salary Basis Test
  - Executive/Administrative/Professional Exemptions
  - Highly Compensated Employees
- Agricultural Exemptions
- Other Statutory Exemptions
  - Driving; fishing; camps/conference centers; babysitting; railroad employees.

Statute of Limitations

- 2-year SOL, unless the violation was willful, in which case 3-year SOL.
  - 29 U.S.C. § 255(a)
- "Willful violation" occurs when employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited" by the FLSA.
  - *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

Liquidated Damages

- Liquidated damages (in the amount of the unpaid wages) are standard.
  - 29 U.S.C. § 216(b).
- Employer can avoid liquidated damages with showing of "good faith."
  - 29 U.S.C. § 260.
- "Good faith" is a substantial burden.
  - 29 C.F.R. § 790.22(b).

FLSA Fee Shifting Provision

- The court "shall…allow a reasonable attorney's fees to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b).

- In DC, courts typically award USAO *Laffey* rates for FLSA work.
  - *See, e.g., Serrano v. Chicken-Out, Inc.*, 209 F. Supp. 3d 179, 197 (D.D.C. 2016).

FLSA Recordkeeping

- Employers MUST keep adequate records, including:
  - Employee identifying information;
  - Hours worked, rate of pay, total earnings, any deductions, date of payment.
  - 29 C.F.R. Part 516.

- Where employer keeps inadequate records, employees may produce evidence to establish amount of work "as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946).

Practical Implications

- Federal employees must use FLSA rather than state wage and hour laws.
- Virginia overtime cases.
- FLSA is useful in multi-jurisdictional or national cases.

Winning Strategies for Litigating Under the DC Wage Payment and Collection Law and the Minimum Wage Revision Act

Two Statutes Amended

- Wage Payment and Collection Act (DCWPCA)(General wage collection)
- Minimum Wage Revision Act (DCMWRA)(Minimum wages and overtime)

Effective Date of Amendments is February 26, 2015 and the Substantive Provisions are Not Retroactive

- Amendments effective February 26, 2015

Generous/Mandatory Liquidated Damages

- DCWPCL – 10% per business day for late payments, up to 3x.
- DCMWRA – 3x

Statute of limitations more than three years for continuing violations

- 32-1308 (c)(1): Any action . . . must be commenced within 3 years after the cause of action accrued***, or of the last occurrence if the violation is continuous***, or the cause of action shall be forever barred.

- Last occurrence is last pay check

How Far Back to Go With Continuous Violations?

- Back to date limitations provision modified – February 26, 2015

10% Per Day Clock Starts When Wages Due to Be Paid

- Discharged employees – working day following discharge
- Employees who resign – next regular payday after resignation or seven days after the resignation, whichever is earlier.

Practical Advice About Unpaid Wages

Demand letter;

Wait until after 30th Business Day to file suit

Contractor Vicarious Liability

- D.C. Code §§ 32-1012(c) and 32-1303(5):
- Effective February 26, 2015, general contractor jointly and severally liable for wages, fees, costs and liquidated damages;
- Effective April 7, 2017, all contractors above non-paying subcontractor jointly and severally liable.
  - However, subcontractor is almost always required to indemnify the general contractor for subcontractor's violations

The Statutes are Extra-Territorial

DC Code §32-1003 (b): A person is employed in DC and is covered by statute when he or she either:

- "Regularly spends" more than 50% of working time in DC; or
- Employer has offices in DC and employee "regularly spends a substantial amount of working time in DC" and ***does not*** spend ***more than 50%*** of their working time in any particular state, §32-1003 (b). Supplement this.
- Applies to both DCMWRA and DCWPCA
- *Case: Lincoln-Odumu v. Med. Faculty Assoc., Inc.*, No. 15-1306, 2016 WL 6427645, at *5-11 (July 8, 2016)(Howell, J.)

  Key points of case:

  (1) employees working outside DC covered; and

  (2) rule applies to both DCWPCL and DCMWRA.

Can Teleworking from Another State be Considered Working in DC?

- *Case: Lincoln-Odumu v. Med. Faculty Assoc., Inc.*, No. 15-1306, 2016 WL 6427645, at *5-11 (July 8, 2016)(Howell, J.)(DCWPCL)

Wages Under DCWPCL Defined Broadly

- D.C. Code § 32-1301

- "Wages" means all monetary compensation after lawful deductions, owed by an employer, whether the amount owed is determined on a time, task, piece, commission, or other basis of calculation."

- **Former language which was narrower**: "monetary compensation after lawful deductions, owed by an employer ***for labor or services rendered***."

Wages Include:

- (A) Bonus;
- (B) Commission;
- (C) Fringe benefits paid in cash;
- (D) Overtime premium; and
- (E) Other remuneration promised or owed:
- (i) Pursuant to a contract for employment, whether written or oral;
- (ii) Pursuant to a contract between an employer and another person or entity (Davis Bacon, Service Contractors Act); or
- (iii) Pursuant to District or federal law (DBA, SCA);

Wages Include Obligation to Pay Out Accrued But Unused Leave

- "Accrued but unused vacation pay is "wages," under amended and former DCWPCL. *Perry v. Int'l Brother of Teamsters*, 247 F.Supp.3d 1, 15 (D.D.C. 2017); *Tisdale v. 1330 OPCO LLC,* Case No. 2011 CA 009761 B, 2012 WL 4029775 at *8 (D.C. Sup. Ct. July 31, 2012).
- Qualification: wages if employee accrues leave and employer does not have policy or contract taking away right. *Nat'l Rifle Ass'n v. Ailes*, 428 A.2d 816, 820-21 (D.C. 1981); *Jones v. District Parking Management Co*., 268 A.2d 860, 861-62 (D.C. 1970).

Wages Do Not Include Discretionary Bonuses or Commissions:

- *Rothberg v. Xerox Corp*., No. 12-617, 2016 WL 10953882, at *16 (D.D.C. Feb. 2016) (Discretionary commissions are not wages owed)

- *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 134 (D.D.C. 2018)(bonuses that are automatic and mandatory upon the satisfaction of an employer's condition are not discretionary).

What are discretionary bonuses or commissions?

- A disclaimer of contractual rights may not end the inquiry if there is other language in official company communications that is "rationally at odds" with the disclaimer. *Dantley v. Howard University*, 801 A.2d 962, 965 (D.C. 2002).
- *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1148, 1158 (D.C. Cir. 1984) (Breach of Contract Case: Even when a plan reserves to the employer the right to change it "within its sole discretion", the employer did not have the right to change the plan for any reason whatsoever and certainly not for the purpose of depriving employee of his earned commission).

When are Wages Earned

- Rothberg v. Xerox,
- Howell held commission not “wages earned”, when no contract of sale or delivery of product when employment ended.
- Declined to follow *Medex v. McCabe* (Md. 2002).
- Subsequently distinguished by *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 134 (D.D.C. 2018)
- MD WPCL defines wages more broadly than DCWPCL, which is incorrect.
- Takeaway: conditional commissions and bonuses become “wages earned” upon the satisfaction of the vesting condition

Davis Bacon cases

- DCWPCL creates private right of action.
- § 32-1301 (3): “The term ‘wages’ includes . . . [o]ther remuneration promised or owed: . . . (iii) [p]ursuant to District or federal law.”
- § 32-1305 (b): “the remuneration promised . . . shall be presumed to be at least the amount required by federal law . . . including federal law requiring the payment of prevailing wages”

Cases Disallowing Davis Bacon Type Claims Through Other Statutes or Common Law Theories

- *Grochowski v. Phoenix Constr. Corp.*, 318 F.3d 80, 87 (2d Cir. 2003) (dismissing third-party beneficiary contract theory to recover DBA-mandated wages because it was an "end run around the DBA");
- *Ibrahim v. Mid-Atl. Air of DC LLC*, 802 F. Supp. 2d 73, 76 (D.D.C. 2011); and
- *Johnson v. Prospect Waterproofing Co.*, 813 F. Supp. 2d 4 (D.D.C. 2011).
- *Dow v. HC2, Inc.*, 19-CV-00839 (APM), 2019 WL 5960198 (D.D.C. Nov. 13, 2019), appeal dismissed, 20-7005, 2020 WL 5358700 (D.C. Cir. Aug. 26, 2020) (dismissing Complaint under DCWPA and FLSA where plaintiffs alleged defendants misclassified them and determining classification was exclusive province of DOL)

Cases Allowing Davis-Bacon Type Claims Through Other Statutes – other jurisdictions since 2018

- *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519-20 (1950) (allowing FLSA overtime claim for wages mandated by the Walsh Healey Act ("WHA"), a prevailing wage statute very similar to the DBA);
- *Amaya v. Power Design, Inc*., 833 F.3d 440, 445-49 (4th Cir. 2016) (allowing FLSA overtime claim based on the rates required by the DBA and squarely rejecting "end run" rationale);
- *Perez v. C.R. Calderon Constr., Inc.*, 221 F. Supp. 3d 115, 149 (D.D.C. 2016) (Howell, J.) (Allowing claims for DBA-mandated wages under the FLSA, DCMWRA and DCWPCA on the theory that the Plaintiffs were entitled to the wage rate they were promised, which was the DBA rate for Carpenters);
- *Ayala v. Tito Contractors, Inc.*, 82 F. Supp. 3d 279, 286-87 (D.D.C. 2015) (Boasberg, J.) (Allowing claims under the DCWPCA for DBA-mandated wages when wage rate was not disputed and the plaintiffs simply were not paid for some hours of work);
- *Garcia v. Skanska U.S.A. Building, Inc*., ___ F.Supp.3d ___, 2018 WL 4053377 (August 24, 2018) (Friedrich, J.) (rejecting "end run" and holding that a cause of action exists under the DCMWRA and DCWPCA for DBA-mandated and promised wages).

Defendant must show it actually misclassified

- Through Certified Payroll Records

Ways to Get Around DOL Classification Issue

- Ds promised to pay DBA-mandated wages of a Carpenter
- Ds hired plaintiff as a Painter, promised to pay him wages consistent with that of a painter
- Use the statute to show that a promise to pay DBA wages was made:
- “the remuneration promised by an employer to an employee shall be presumed to be at least the amount required by federal law, including federal law requiring the payment of prevailing wages” D.C. Code § s32-1305

The Good Faith Defenses

Good Faith in Min. Wage and OT

- Action was in good faith (Subjective);
- Reasonable grounds to believe it did not violate law (Objective); and
- ***Employer promptly paid the full amount claimed by the employee.***
- ***First Two identical to the FLSA***

What Does it Mean to Promptly Pay Full Amount Claimed

- Employer must immediately pay after receiving law suit or demand letter.
- *Gainor v. Optical Society of America, Inc.*, 206 F.Supp. 3d 290, 297 n.5 (DDC 2016)(mentioning additional element); *Martinez v. China Boy, Inc.*, 229 F.Supp.3d 1, 4 (DDC 2016)(Moss, J.)(summarily concluding that all three elements are not met)
- *Orellana v. NBSB, Inc.*, 332 F. Supp.3d 252 (DDC 2018)(summarily concluded not promptly paid)

If Employer Proves Good Faith Defense

- Court need not award any liquidated damages but has discretion to award anything less than 299% of wages, just under 3 times.

Good Faith in WPCL

There isn’t one!

- There was a bona fide dispute good faith defense to liquidated damages and attorney’s fees before Feb. 26, 2015.
- Amendments changed that.

The 2015 Amendment Overruled *Fudali v. Pivotal Corp.* (Sullivan, J.)

In case of a bona fide dispute concerning the amount of wages due, the employer shall give written notice to the employee of the amount of wages which he concedes to be due, and shall pay such amount, without condition, within the time required by §§ 32–1302 and 32–1303; provided, however, that acceptance by the employee of any payment made hereunder shall not constitute a release as to the balance of his claim. ~~*Payment in accordance with this section shall constitute payment for the purposes of complying with §§32–1302 and 32–1303, only if there exists a bona fide dispute concerning the amount of wages due.*~~ The employee or Mayor shall be able to pursue any such balance of unpaid wages and related damages, interest, costs, and penalties.

Written Notice of Compensation Terms

D.C. Code § 32-1008 (c) -- every employer subject to this chapter.

- Name, address and phone of employer;
- Rate of pay, basis of rate (hour, week, shift etc.);
- Overtime rate;
- Exemptions from living wage or overtime wage, and basis for exemption; and
- Applicable prevailing wages (Davis Bacon Act, Service Contractors Act, etc.)

Note: Based on broad language appears to apply to both DCMWRA and DCWPCA

Date When Written Notice Must Be Given

- D.C. Code § 32-1008 (d)

(a) May 27, 2015 for employees already employed on or before that date; or

(b) At the time of hire.

Consequences Under DCMWRA Failure to Give Notice

D.C. Code §§ 32-1008(d)

- "failure shall constitute evidence weighing against the credibility of the employer's testimony ***regarding the rate promised***"
- Statute of limitations tolled as of the date notice due but not given.
- Note: no comparable provision in DCWPCA but language broad enough to apply to both statutes

Tolling Under the DCWPCA if Employer Fails to Give Notice

D.C. Code §§ 32-1308(c)(2)(A)

- Statute of limitations tolled "[d]uring any period that the employer fails to provide the complainant with actual or constructive notice of the employee's rights."
- D.C. Code § 32-1009 – Failure to abide by notice and posting requirement results in tolling.
  - *Medina v. Kevorkian Cleaning Co., Inc.*, 444 F. Supp. 3d 204, 210 (D.D.C. 2020)(unlike FLSA, failure to abide by notice and posting requirements automatically tolls the statute of limitations)

Current LSI or Adjusted Laffey Rates Mandated for DCMWRA and DCWPCA

§§ 32-1308 (b)(1)

- "[T]he court ***shall*** award . . .attorney's fees computed pursuant to the matrix approved in *Salazar v. District of Columbia* , 123 F.Supp.2d 8 (D.D.C. 2000), and updated to account for the current market hourly rates for attorney's services."

- "The court shall use the rates in effect at the time the determination is made."

Adjusted Laffey Rates Continued

§§ 32-1308 (b)(2)

- "If the fees remain unpaid . . .the court ***shall*** update the award to reflect the hours actually expended and the market rates in effect at that time."
- "No reduction shall be made **from this rate**, or from **the hours actually expended**, except upon clear and convincing evidence that the reduction will serve the remedial purposes of this law."

Cases Support

- *Stephens v. Farmers Restaurant Group*, No. 17-1087 (TJK), 2019 WL 2550674 (D.D.C. 2019)
- *Sanchez v. Devasish Hospitality, LLC*, No. 16-226 (RBW), 2018 WL 7522898 (D.D.C. 2018)
- *Herrera v. Mitch O'Hara LLC*, 257 F.Supp.3d 37, 46 (D.D.C. 2017)
- *Serrano v. Chicken-Out, Inc.*, 209 F.Supp.3d 179, 197 (D.D.C. 2016)
- *DL v. District of Columbia*, 924 F.3d 585, 591 (D.C. Cir. 2019)

What is the LSI Laffey Matrix?

- Yablonski survey in 1988 of market rates
- Updated every year using DOL's Legal Services Index
- Very easy to do
- Dr. Kavanaugh updated every year, but passed away
- Go to www.laffeymatrix.com

Class and Collective Actions

Class Action v. Collective Actions

Permit Aggregation of Wage and Hour Claims

Class Actions

- Pursuant to Rule 23
- Not permitted for FLSA claims
- Generally available for state law claims
- Governed by well developed case law
- Usually opt out

Collective Actions

- Only option for FLSA representative lawsuits
- May be unavailable for state claims
- Less developed case law
- Always opt in

Basis For Collective Actions

- Arises from interpretation of FLSA provision

  "An action to recover [FLSA] liability … may be maintained against any employer … by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. **No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."**
  29 U.S.C. 216(b)

- Precludes Rule 23 class actions
- Applies to Age Discrim. in Employment Act (ADEA) & Equal Pay Act (EPA)
- Some state laws adopts this procedure

State Collective Actions

- D.C.
  - Permitted for claims under the Wage Payment and Wage Collection Law, the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act. D.C. Code § 32–1308
  - Can be simultaneously brought as class action
- Maryland
  - For prevailing wage cases (probably). Md. Code State Finance and Procurement § 17-224 (f)
- Virginia
  - For unpaid wages cases. Va. Code § 40.1-29

Collective Action Procedure

- Not set out in statute or rules
  - Limited appellate law
- Preliminary or conditional certification
  - Done early in case
  - Low standard as to commonality of claims
  - Permits court-approved notice to class (per *Hoffmann-La Roche v. Sperling*, 493 U.S. 165 (1989)
  - Defendants must provide contact info for notice
    - Cell phone numbers should be requested
- Motion to decertify
  - Defendants can file after discovery

Representative Action or Joinder Mechanism?

- Preliminary certification is principally notification mechanism
  - "a putative class acquires an independent legal status once it is certified under Rule 23. Under the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status…. The sole consequence of conditional certification is the sending of court-approved written notice to employees…." *Genesis HealthCare Corp. v. Symczyk,* 569 U.S. 66 (2013)
- Arguably collective action is principally a joinder mechanism
  - Very different from class actions

Consequences of Nature of Collective Actions

- Presumably each plaintiff continues to control his case
- Arguably counsel has attorney-client relationship with each opt in
- Each client likely must consent to settlement
  - May be able to give power of atty. to lead plaintiffs
- Opt ins may be subject to discovery
- Lack of commonality should matter little

Statute of Limitations Issues

- Statute of limitations is not tolled until collective action members opt in
  - Different from class actions
- Problematic if delay in preliminary certification
  - Collective action members can file written opt ins before conditional certification
- Named plaintiffs should probably file opt ins
  - Some courts have held that named plaintiffs must opt into their own case to stop SOL running

Hybrid Class and Collective Actions

- FLSA claims cannot be class actions
- Many state law claims can be
- Federal and DC courts generally permit collective actions and state law class actions with overlapping facts to proceed in the same case

Practical Considerations

- Response rate likely to be low
  - Especially if many potential plaintiffs are undocumented
- Administrative burden of notification
- Pleading collective action puts significant settlement pressure on defendants
  - Pre-certification case can be settled on individual basis

Decertification: Unlikely in Practice?

- Probably will not arise until after discovery
  - Most cases will have been resolved by then
- Late in case defendants may not want to decertify
  - Want peace from all plaintiffs
- If decertified individual cases likely to proceed for opt ins with SOL tolled
  - *see, e.g., Dixon v. Scott Fetzer Co.*, 317 F.R.D. 329 (D. Conn. 2016); FRCP R. 20; R. 24

Special D.C. Class Action Rule

- D.C. liberal rule for wage and hour class actions
  - "For the purposes of this subsection, 2 or more employees are similarly situated if they:

    (A) Are or were employed by the same employer or employers, whether concurrently or otherwise, at some point during the applicable statute of limitations period;

    (B) Allege one or more violations that raise similar questions as to liability; and

    (C) Seek similar forms of relief."

    D.C. Code § 32–1308(a)(1)(C)(2)
  - also applies to collective actions
- Little or no interpretive case law
- Relaxes standard for "commonality" prong of class certification
- Only applies in D.C. courts

Federal "Commonality" Is Narrower

- Fed. Rule 23 requires closely related claims

  "[Class] claims must depend upon a common contention….. That common contention, moreover, must be of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, (2011)

  - Might preclude certification if no proof defendant had uniform payroll practices
  - Many employers have inconsistent practices
  - D.C. statute would seemingly allow
- Should also help in "typicality" analysis
  - Focuses on differences between plaintiffs and class

D.C. Deadlines for Class Cert Motions

- D.D.C. and D.C. Superior Court have early deadline to seek class certification
  - Motion must be filed within 90 days of filing complaint. D.D.C. LCvR 23.1(b); D.C. Super Civ. R. 23-I(b)
- Can be extended on motion
  - Don't forget!
  - Case law suggests deadline won't be extended after 90 days have passed