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OVERTIME PROVISIONS OF THE FLSA: UNEXPECTED LIABILITY AND WINDFALL RECOVERY

INTRODUCTION

The Fair Labor Standards Act of 1938¹ (FLSA) has been described as the first modern anti-poverty legislation.² The 1938 Act contained minimum wage,³ maximum hour,⁴ and child labor provisions.⁵ The Act's statutory purpose was expressly set out in section 2:

The Congress hereby finds . . . the existence, in industries engaged in commerce . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . . .

It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several states . . . to correct and as rapidly as practicable to eliminate the conditions above referred to. . . .⁶

In *United States v. Darby*,⁷ the Supreme Court sustained the constitutionality of the FLSA as a valid exercise of the commerce power.⁸ Yet, notwithstanding a generally favorable inter-

1. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as 29 U.S.C. §§ 201 to 219 (1970)). The FLSA has been amended by the Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, 63 Stat. 910; Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65; Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56; Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830; Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55; Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, 91 Stat. 1245.

2. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607 (1972) (hereinafter cited as Willis).

3. § 6. The substantive provisions of the Equal Pay Act are now also included in this section.

4. § 7.

5. § 12. Though the enforcement and exemption provisions of sections 13-17 apply to all of the substantive sections above, each also contains separate exemptions from that section only.

6. § 2.

7. 312 U.S. 100 (1940).

8. *Id.* at 115-23. Wage-hour legislation had been held unconstitutional on Due Process grounds. *Adkins v. Childrens' Hosp.*, 261 U.S. 525 (1923); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). But the validity of such state legislation was assured by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (explicitly overruling *Adkins*). Federal laws which regulated intrastate production activities such as child labor were unconstitutional under *Hammer v. Dagenhart* (Child Labor Cases), 247 U.S. 251 (1918). *Darby* overruled the *Child Labor Cases* and held that Congress may follow

pretation by courts and the express Congressional intention to effect the statutory purpose "as rapidly as practicable," forty years after passage of the FLSA, the Labor Department still regularly reports record violations of the Act.⁹

Clearly, the 1938 Act could never be regarded solely as "anti-poverty" legislation. The original FLSA exempted any of the nation's lowest-paid workers.¹⁰ Further, section 7's overtime provision prohibited employment in excess of a specified maximum number of hours at a rate less than one-and-a-half times an employee's "regular rate."¹¹ In *Overnight Motor Transportation Co. v. Missel*,¹² the Supreme Court held that the liability created by section 7 was separate from the minimum wage provision of section 6. An employer could not satisfy his statutory obligation merely by paying an overtime wage more than one-and-a-half times the minimum wage.¹³ Thus even the highest paid workers were potential beneficiaries of the Act. Additionally, Supreme Court decisions during the 1940's¹⁴ interpreted the overtime provisions so broadly that they created for employers an immense amount of "wholly unexpected liabilities" and led to the Portal-to-Portal Act of 1947.¹⁵

The Portal-to-Portal Act provided specific defenses to FLSA liability. However, these defenses have been narrowly interpreted.¹⁶ The Court decisions of the 1940's which precluded waiver, release, compromise and settlement, accord and satisfaction, as defenses to FLSA liability still stand.¹⁷ High Court decisions involving the FLSA, as well as the legal literature sur-

"its own conception of public policy . . . even though the state has not sought to regulate . . ." 312 U.S. at 114.

9. Chicago Sun Times, August 30, 1978, at 2, col. 1; [1977] LABOR RELATIONS YEARBOOK 424; *United States Department of Labor Sixty-Fourth Annual Report*, 27-30 (1976).

10. The 1938 Act only covered workers actually "engaged in commerce or in the production of goods for commerce," § 7(a)(1). Congress, in the 1974 Amendments curtailed the exemptions for agricultural workers and added the finding that "the employment of persons in domestic service in households affects commerce." 29 U.S.C. § 202(a) (1976).

11. § 7(a)(1). "Regular rate" is not defined in the FLSA, *see* notes 50-54 and accompanying text *infra*.

12. 316 U.S. 572 (1942).

13. *Id.* at 578.

14. *See* notes 45-80 and accompanying text *infra*.

15. Pub. L. No. 80-49, 61 Stat. 84 (1947) (now codified as 29 U.S.C. §§ 251-62 (1976)).

16. *See* notes 120-38 and accompanying text *infra* for examples of how the defenses of the Portal-to-Portal Act has been narrowed by judicial interpretation.

17. *See, e.g.,* Brennan v. Sinor, 391 F. Supp. 681, 684 (N.D. Okla. 1974) *citing* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945).

rounding the Act,¹⁸ appear to have concentrated on its expanded coverage rather than possible defenses to liability.¹⁹

Once coverage is determined, an employer's liability under the Act is almost absolute.²⁰ Courts usually find that this strict liability is necessary to effectuate the statutory purpose of the FLSA.²¹ With expanded coverage, the Act may again represent unexpected liability to employers in significant proportions.

DEVELOPMENT OF FLSA LITIGATION

The Fair Labor Standards Act of 1938 was passed in response to a Presidential message calling for "[a] day's pay for a fair day's work."²² It originally provided for a minimum wage of twenty-five cents per hour with a forty-four hour work week. Gradually, wages were to be raised to forty cents an hour and the work week shortened to forty hours.²³ In construing the FLSA, the Supreme Court recognized that it was passed in "a period of widespread unemployment and small profits."²⁴ But despite the fluctuating economic conditions of the last forty years, and the many amendments to the Act,²⁵ the basic enforcement structure of the FLSA, including its authoritative construction, remains essentially the same.²⁶

18. *E.g.*, Willis, *supra* note 2.

19. Four of five articles listed after 29 U.S.C.S. § 207 (Supp. 1978), at 20, deal with coverage of agricultural workers. The fifth deals with the coverage of state and municipal employees, Kliberg, *National League of Cities v. Usery: Its Meaning and Impact*, 45 GEO. WASH. L. REV. 613 (1977). Also, the Equal Pay Act has become a much discussed topic, but usually in connection with other civil rights legislation; *e.g.*, Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, [1977] U. ILL. L. F. 69. However, Willis, *supra* note 2, at 609 n.13, claims that "[t]here have been surprisingly few articles written on the coverage problems of the FLSA." (citing three articles).

20. All a covered employee need prove is that he worked over forty hours in a single work week to shift the burden of proof to the employer, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946) discussed at notes 148-51 and accompanying text *infra*.

21. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) and notes 65-74 and accompanying text *infra*.

22. 81 CONG. REC. 498 (message of President Roosevelt of May 24, 1937).

23. §§ 6-7. The 1977 Amendments, § 2(a) raises the minimum wage to \$3.15 an hour effective January 1, 1981.

24. *Overnight Motor Sav. Co. v. Missel*, 316 U.S. at 578.

25. Though unemployment was at a low national rate of only 3.8% in 1966, UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, at 216 (93rd ed. 1972), the Congress still instructed the Secretary of Labor to report on the number of jobs lost to the economy by the use of overtime work, 1966 Amendments, § 603. *See* note 212 *infra*.

26. The provisions of the Portal-to-Portal Act are interpreted so that they do not modify the basic structure of the FLSA itself, *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956).

Enforcement Provisions of the FLSA

A Wage and Hour Division within the Department of Labor was created to administer the FLSA.²⁷ The Act imposes on employers the duty to keep prescribed records appropriate to enforcement and it authorizes the Secretary of Labor, or his designated representative²⁸ to inspect all such records and make other necessary investigations.²⁹

Section 15 makes certain conduct unlawful. An employer cannot violate the substantive provisions of sections 6 and 7 by paying his employees less than the required compensation.³⁰ It is unlawful for any person³¹ to ship goods in interstate commerce, or to sell with knowledge such goods, which have been produced in violation of the Act.³² An employer cannot discharge or otherwise retaliate against an employee who makes a complaint or participates in a proceeding under the Act.³³ Further, it is unlawful for an employer to fail to keep the required records, or to maintain false records, or to violate any other order or regulation made under the Act.³⁴

To prevent these prohibited activities, the FLSA contemplates both public and private enforcement. Any willful violation of the conduct made unlawful is a criminal offense and punishable by imprisonment for a second conviction.³⁵ The Secretary is authorized to supervise the payment of back wages due under the Act³⁶ and he may now bring suit on behalf of employees to recover such wages.³⁷ When necessary, the Secretary

27. § 4. Rule making authority is granted by § 11(d) as amended by the 1949 Amendments, § 9.

28. The Secretary replaced the Wage-Hour Administrator as the official named in the Act through Reorganization Plan No. 6 of 1950, 64 Stat. 1263: [T]here are hereby transferred to the Secretary of Labor all functions of all other officers of the Department of Labor. . . . The Secretary . . . may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer . . . of the Department of Labor of any function of the Secretary. . . .

29. § 11(a).

30. § 15(a)(2).

31. All the section's prohibitions apply to any "person" though the substantive duty imposed by § 7(a) applies only to an employer.

32. § 15(a)(1). This provision, validated in *Darby*, was similar to the legislation struck down in the *Child Labor Cases*. See note 8 *supra*.

33. § 15(a)(3). Section 10 of the 1977 Amendments provides that the term employee includes a former employee.

34. § 15(a)(5).

35. § 16(a).

36. § 16(c). The statute additionally provides that any recovered sums not claimed by the employees are to be paid into the Treasury of the United States.

37. The 1974 Amendments deleted the prior requirements that 16(c) suits be brought only on an employee's written request and where the case

may bring suit for an injunction in a United States District Court to restrain violations of the FLSA.³⁸

Even so comprehensive a scheme of public enforcement is inadequate to reach the millions of employer-employee relationships covered by the Act. Both to redress wrongs under the FLSA and to aid in enforcement,³⁹ section 16(b) provides for a private cause of action:

Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid . . . compensation, . . . and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.⁴⁰

The 1938 Act was silent on whether or not an employee might maintain a private action because of employer retaliation⁴¹ and the courts which passed on the question were in conflict.⁴² In the 1977 Amendments, Congress expressly provided for such an action.⁴³ Whatever faults may be found in a system of private enforcement, Congress has now reaffirmed its intention to encourage employee suits and the policy long recognized in judging such actions:

[T]he liability of an employer is something more than a debt or liability to an individual.

. . . An employee, exercising his rights under Section 16(b) of the Act exercises them, not only for his own benefit, but the benefit of

did not involve an unsettled issue of law, and allowed for the recovery of liquidated damages in addition to back pay.

38. § 17. Issuance of the injunction is discretionary with the District Court, not mandatory on the mere finding of a violation, and should be granted in accordance with the public policy of the FLSA, *Mitchell v. Lublin, McGaughey, & Assoc.*, 358 U.S. 207 (1959). A court may refuse an injunction when it finds no question of future compliance by the employer, *Hodgson v. American Can Co.*, 440 F.2d 916 (8th Cir. 1971), but may enjoin a defendant as a corporation even where violations have been found at only some of its sixty chain stores, *Brennan v. J. M. Fields, Inc.*, 488 F.2d 443 (5th Cir. 1973), *cert. denied*, 419 U.S. 881 (1974) (an equal pay case).

39. See quotation accompanying note 72 *infra*.

40. § 16(b). This right of the employee is terminated if the Secretary brings a Section 17 injunction suit, 1961 Amendments, § 12.

41. This is an act prohibited by § 15(a)(3).

42. Compare *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959) and *Martinez v. Behring's Bearings Serv., Inc.*, 501 F.2d 104 (5th Cir. 1974) (Congress would have explicitly provided such an action if it wanted one) with *Boll v. Federal Reserve Bank of St. Louis*, 365 F. Supp. 637 (E.D. Mo. 1973), *affirmed*, 497 F.2d 335 (8th Cir. 1974) and *Fagot v. Flintkote*, 305 F. Supp. 407 (E.D. La. 1969) (Congress intended a scheme of both private and public enforcement). Where the Secretary brings an injunction suit (rather than a 16(a) criminal action), the court may order damages paid to employees for wrongful discharge as incidental relief, *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960).

43. § 10.

the general public. Consequently, public policy demands that such exercise be not unnecessarily hampered.⁴⁴

Supreme Court Construction of the FLSA

In construing the overtime provisions of the 1938 Act, the Supreme Court expanded on the express purpose of the FLSA.⁴⁵ In one case, the Court stated "the Congressional purpose in enacting section 7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime requirement. . . ; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act."⁴⁶

In *Darby* the Supreme Court held that Congress could legislate against labor conditions it found detrimental to workers and therefore a burden on commerce.⁴⁷ In *Missel*, the Court found that since the overtime requirement was intended to spread employment, it could be constitutionally applied absent any showing that the excess hours were injurious to workers.⁴⁸ The language of the FLSA was "clear and unambiguous. It calls for 150% of the regular rate, not the minimum wage."⁴⁹ The "regular rate" for a particular week would be determined by dividing weekly earnings by the hours worked each week.⁵⁰

Where employees were paid fixed salaries for fluctuating work weeks, the Court found it difficult "to provide a rigid definition of 'regular rate' when Congress has failed to provide one."⁵¹ It once held that employers could stipulate a regular rate by contract and then pay a fixed weekly salary regardless of hours worked as long as the compensation "equals or exceeds the minimum required by the Act."⁵² But later decisions obviated this

44. *Plourde v. Massachusetts Cities Realty Co.*, 47 F. Supp. 668, 670-71 (D. Mass. 1942).

45. See text accompanying note 6 *supra* and the explanation of Congressional purpose in Interpretive Bulletin on the General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act in 29 C.F.R. § 776.1 (1977).

46. *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 (1944). Though the purpose of spreading employment is not specifically mentioned in the Act, courts have consistently recognized it equally with the express purposes in overtime cases; e.g., *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1946); *Brennan v. Lauderdale Yacht Basin*, 493 F.2d 188, 189 (5th Cir. 1974).

47. 312 U.S. at 115-23.

48. 316 U.S. at 576-77. "Long hours may impede the free interstate flow of commodities. . . . If in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions it lies within Congress' power to use it to promote the employees' well-being." *Id.* at 577.

49. *Id.*

50. *Id.* at 580 n.16.

51. *Walling v. A.H. Belo Corp.*, 316 U.S. 624, 634 (1942).

52. *Id.* at 630. The Court accepted the finding "that the contracts were

holding⁵³ by making the regular rate a matter of judicial determination of fact in each particular case.⁵⁴

There was also uncertainty as to what constitutes working time. The FLSA defines "employ" as including "to suffer or permit to work."⁵⁵ "Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen."⁵⁶ In *Skidmore v. Swift & Co.*,⁵⁷ the Court held that whether waiting time was working time was a matter for *retrospective* judicial determination based on the facts of the particular case,⁵⁸ and while they are to be given great deference, the policies of the Administrator are not conclusive.⁵⁹ The Court has declared that in either an employee's private action or a proceeding by the Secretary of Labor, "good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons."⁶⁰

In *Jewell Ridge Coal Corp. v. Local No. 6169, UMWA*,⁶¹ the Court found that time spent by miners in traveling from the portal of the mines to their usual places of work was compensable under the FLSA.⁶² The majority in *Jewell Ridge* made this finding in disregard of the Administrator's interpretations, a valid collective bargaining agreement, and the acknowledged custom

'actual bona fide contracts of employment' and that 'they intended to, and did, really fix the regular rates at which each employee was employed.'" *Id.* at 629-30.

53. *Walling v. Helmerich & Payne*, 323 U.S. 37, 39-42 (1944) (plan which kept pre-FLSA wages was invalid); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (can't evade FLSA through hypothetical piecework rates); *145 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 206-09 (1947) (stipulated weekly guarantee for 46 hour week does not include required overtime pay).

54. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461-63 (1948). "[T]he Belo decision . . . does not imply that mere words in a contract can fix the regular rate." *Id.* at 462.

55. § 3(g).

56. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (privately employed firemen must be paid for their waiting time).

57. 323 U.S. 134 (1944).

58. *Id.* at 136.

59. *Id.* at 139.

60. *Id.* at 140.

61. 325 U.S. 161 (1945).

62. *Id.* at 167, "Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for *all* work . . ." (emphasis added).

The *Jewell Ridge* Court liberally applied the three element test it developed in *Tennessee Coal, Iron & Ry. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598-99 (1944): 1) Physical and mental exertion whether burdensome or not, 2) Exertion controlled or required by the employer, 3) Exertion pursued primarily or necessarily for the benefit of the employer. 325 U.S. at 163-66.

of the industry.⁶³

Uncertainty over working time, regular rate, as well as coverage⁶⁴ had led some employers to try to reach agreement with their employees and avoid the claim for liquidated damages under the Act. But, in *Brooklyn Savings Bank v. O'Neil*⁶⁵ the Court held that any waiver or release of either the unpaid compensation or the liquidated damages would be ineffective. "No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act."⁶⁶

Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining that so little damage was suffered that waiver of liquidated damages is called for.⁶⁷

The plaintiff in *O'Neil* had been offered the full amount of back wages by his employer who had heard of another case indicating that he was covered by the FLSA.⁶⁸ The Court held that bringing suit was not a precondition to receiving the liquidated damages.⁶⁹

Even where employees had accepted payment in settlement of a bona fide dispute over coverage, the majority in *D.A. Schulte v. Gangi*⁷⁰ held that accord and satisfaction was unenforceable.⁷¹ The Court showed little sympathy for the plight of em-

63. The danger to collective bargaining is the basis of a vigorous dissent doubting whether there was another case where the "Court has made a more extreme exertion of power or one so little supported or explained by either the statute or the record . . ." *Id.* at 196 (Jackson, J., dissenting).

64. In *A.B. Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942), the Court found that maintenance employees of a particular building with tenants engaged in commerce had a sufficient connection with interstate commerce to be covered themselves by the FLSA. Justice Frankfurter characteristically refused to draw a "mathematical line" which would provide a rigid definition of how "necessary" an employee must be to be engaged in commerce. *Id.* at 526.

65. 324 U.S. 697 (1945).

66. *Id.* at 707.

67. *Id.* at 708.

68. *Id.* at 703. The question of coverage was similar to *Kirschbaum* discussed at note 64 *supra*. Upon learning of that decision, the defendant-employer in *O'Neil* tendered to his employees checks for the wages due if they were covered.

69. *Id.* at 711: "Section 16(b) . . . provides *absolutely* that the employer shall be liable for liquidated damages . . ." (emphasis added).

70. 328 U.S. 108 (1946).

71. *Id.* at 110. Unlike *O'Neil*, the defendant refused to make any payments at all until after suit was filed. The trial court found that there had been an effective accord and satisfaction of a bona fide dispute, 53 F. Supp. 844, 846 (S.D.N.Y. 1943). Had it been material to the outcome, the bona fides of the dispute might have been questioned. The Court took judicial notice that the defendant's loft building was renting to tenants in the obviously interstate New York garment industry, 328 U.S. at 120.

ployers:

In a bona fide adjustment on coverage, there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived. The damages are at the same time compensatory and an aid to enforcement. It is quite true that the liquidated damage provision acts harshly upon employers whose violations are not deliberate but arise from uncertainties or mistakes as to coverage. Since the possibility of violations inheres in every instance of employment that is covered by the Act, Congress evidently felt it should not provide for variable compensation to fit the degree of blame in each infraction. Instead Congress adopted a mandatory requirement that the employer pay a sum in liquidated damages equal to the unpaid wages so as to compensate the injured employee for the retention of his pay.

It is realized that this conclusion puts the employer and his employees to an 'all or nothing gamble,'⁷²

The Court's conclusion that neither unpaid compensation nor liquidated damages "are capable of reduction by compromise of controversies over *coverage*"⁷³ leaves open the possibility of an effective compromise of a bona fide dispute over factual matters such as the number of hours worked.⁷⁴

In *Bay Ridge Operating Co. v. Aaron*⁷⁵ a few dissident union members⁷⁶ brought an action for overtime compensation allegedly earned under a contract providing premium pay designated as overtime. The Court recognized that the United States was the real party in interest, since the work done was under costs-plus wartime contracts under which the government was liable for the wages.⁷⁷ The majority showed as little sympathy for the taxpayers in this case, as it had for other employers.⁷⁸ The Court held that the premiums were mere "shift differentials" with excess compensation now due "of course subject to enlargement under the provisions of section 16(b)."⁷⁹ Even the passage of the Portal-to-Portal Act did not deter the Court from finding that its holding was mandated by the intention of Con-

72. *Id.* at 115-16 (footnotes omitted).

73. *Id.* at 116 (emphasis added).

74. *Id.* at 114. The Court expressly declined to rule on this question.

75. 334 U.S. 446 (1948).

76. *Id.* at 454. The International Longshoremen's Association filed a brief opposing the employee's suit.

77. *Id.* at 453. The defendant employers were represented by the U.S. Justice Department throughout the litigation.

78. Industry representatives had testified that the potential liability to all employees was \$260,000,000. This estimate did not allow for the retroactive effect of the Portal-to-Portal Act which had been enacted while the suit was pending. *Id.* at 454 n.7.

79. *Id.* at 460. The Court did hold that the "shift differentials" need not be included in determining time-and-a-half for those hours since overtime on overtime was not in the contemplation of Congress in enacting the FLSA. *Id.* at 464.

gress to spread employment through the overtime provisions of the 1938 Act.⁸⁰

The Portal-to-Portal Act of 1947

The 1947 Act begins with the Congressional finding "that the Fair Labor Standards Act of 1938, as amended, has been judicially interpreted in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation. . . ."⁸¹ The Act then lists ten ways in which business, labor, and government faced economic disaster should the FLSA be enforced as its case law had developed.⁸² Congress declared that it was acting "to meet the *existing* emergency and to correct *existing* evils."⁸³

The Portal-to-Portal Act's provisions give employers both retroactive⁸⁴ and prospective relief⁸⁵ for claims arising because of certain preliminary and postliminary activities which might otherwise be considered working time.⁸⁶ The 1947 Act also permitted employee waiver of liquidated damages for claims arising before its passage.⁸⁷

The Fair Labor Standards Act of 1938 contained no statute

80. *Id.* at 460. The case was remanded for judgment in accordance with the 1947 Act. *Id.* at 477.

81. § 1(a).

82. One of the dangers in the Congressional findings is "[E]mployees would receive windfall payments, including liquidated damages, of sums for activities performed by them without an expectation of reward beyond that included in their agreed rates of pay." § 1(a)(4). Compare the above with the Court's previous characterization of the liquidated damages and mandatory overtime payments. See notes 48, 69, and 72 and accompanying text *supra*. If the Congressional purpose in enacting the FLSA was to impose its judgment on the bargaining process, why should the workers' expectations matter? Did Congress intend to change the policy of the FLSA, or was it merely exaggerating the situation to aid in sustaining the Portal-to-Portal Act against the expected constitutional challenge? See notes 96-98 and accompanying text *infra*.

83. § 1(b) (emphasis added).

84. § 2 entitled "Existing Claims."

85. § 4 entitled "Future Claims."

86. For existing claims, liability was excused for activities not compensable by contract or custom. For future claims, the only such activities would be:

- (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (2) activities which are preliminary to or postliminary to said principal activity or activities,

§ 4(a). "Principal activity" is not defined in the Act.

87. § 3(b). Any settlement must be free of fraud or duress, § 3(c). This proposition hardly requires codification, but the statute might serve to shift the burden of proof to the proponent of the settlement.

of limitations. Courts had been applying the closest state periods⁸⁸ with some states deliberately enacting short periods⁸⁹ while in others, longer contract periods were liberally applied.⁹⁰ To eliminate this practice, the Portal-to-Portal Act provided for a uniform two-year period for all causes of action under the FLSA.⁹¹ The 1966 Amendments extended the statutory period to three years in the case of a "willful violation."⁹²

The 1947 Act established "good faith" defenses to liability or liquidated damages. For claims arising before enactment, an employer was relieved of liability if he could show that he acted in good faith and in reliance on any ruling, interpretation, or enforcement policy of any United States agency.⁹³ For later claims, this defense is available only to an employer who can plead and prove both that he acted "in conformity with *and* in reliance on any *written* administrative" ruling or interpretation from the administrator specified in the Act.⁹⁴ No attempt was made to alter the Supreme Court decisions which had precluded other defenses.⁹⁵

Finally, to assuage the harshness of the mandatory double damages of section 16(b), the Portal-to-Portal Act provided that:

[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith *and* that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court *may* in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in

88. *Caldwell v. Alabama Dry Dock & Shipbldg. Co.*, 161 F.2d 83 (5th Cir.), *cert. denied*, 332 U.S. 759 (1947).

89. *Smith v. Cudahy Packing Co.*, 73 F. Supp. 41 (D. Minn. 1947) upheld a Minnesota statute providing a two-year limitation period for back wage claims based on labor legislation, but keeping a six-year period for wage claims based on contracts. *But cf. Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *affirmed per curiam*, 327 U.S. 757 (1946) which invalidated on Equal Protection grounds an Iowa statute passed by a legislature hostile to the Act which provided a short limitation period aimed solely at the FLSA.

90. *See Bright v. Hobbs*, 56 F. Supp. 723 (D. Md. 1944) which applied Maryland's 12 year statute for an action on a specialty. *But see Roland Elec. Co. v. Black*, 163 F.2d 417 (4th Cir.), *cert. denied*, 333 U.S. 854 (1947) which held that Maryland's three year limitation period for contracts of employment should be applied to FLSA actions in that state.

91. § 6(a).

92. 1966 Amendments, § 601.

93. § 9.

94. § 10(a) (emphasis added). The stricter provisions which apply to future claims continue the pattern of Parts II and III, notes 84-87 *supra*. Congress originally intended to apply Section 9 to all claims—both existing and future, H.R. REP. NO. 98, 80th Cong., 1st Sess., *reprinted in* [1947] U.S. CODE CONG. SERV. 1031, 1036.

95. *See* notes 45-80 and accompanying text *supra*.

section 16 of such Act.⁹⁶

The preamble to the 1947 Act forebodes economic consequences more disastrous than those of the depression atmosphere of the 1938 Act.⁹⁷ Probably, Congress thought it was necessary to stress the effect on commerce to assure the constitutionality of the retroactive aspects of the 1947 legislation. However, the Act was upheld by the lower courts without the necessity of Supreme Court review.⁹⁸ Subsequently, constitutional challenges by private FLSA defendants have been wholly unsuccessful.⁹⁹

DEFENDING AGAINST OVERTIME LIABILITY

The dual nature of the Portal-to-Portal Act—some provisions retrospective only and some prospective¹⁰⁰—permitted two alternate courses of development for FLSA litigation. Courts could have interpreted the Act so as to preclude the recurrence of the “emergency” type situation which inspired its passage—the creation of an “immense amount” of “unexpected” liability.¹⁰¹ But, the Court found that “[t]he Portal-to-Portal Act was designed *primarily* to meet an ‘existing emergency’ resulting from claims which, if allowed . . . would have created ‘wholly

96. § 11 (emphasis added).

97. § 1(a). See notes 81-82 *supra* and legislative history in [1947] U.S. CODE CONG. SERV. 1031.

98. *Adkins v. E. I. DuPont De Nemours & Co.*, 176 F.2d 661 (10th Cir.), *cert. denied*, 338 U.S. 895 (1949); *Fisch v. General Motors Corp.*, 169 F.2d 299 (6th Cir.), *cert. denied*, 335 U.S. 902 (1948); *Darr v. Mutual Life Ins. Co. of N.Y.*, 169 F.2d 262 (2d Cir.), *cert. denied*, 335 U.S. 871 (1948); *Atallah v. B.H. Hubert & Son*, 168 F.2d 993 (4th Cir.), *cert. denied*, 335 U.S. 868 (1948). The constitutional issue might be more difficult in the wake of *Goldberg v. Kelly*, 397 U.S. 254 (1970) and its progeny, which have found that there are statutory entitlements protected by Due Process.

99. However, state governments have successfully challenged the applicability to them of the minimum wage and overtime provisions of the FLSA. *National League of Cities v. Usery*, 426 U.S. 833 (1976). The validity of FLSA coverage of state schools and hospitals had been upheld in *Maryland v. Wirtz*, 392 U.S. 183 (1968) *noted in* 19 DRAKE L. REV. 177 (1969). The 1974 Amendments, § 6, extended coverage to almost all state and municipal employees. In *Darby* the Court had said that the Tenth “[A]mendment states but a truism that all is retained which has not been surrendered,” 312 U.S. at 124. In holding unconstitutional FLSA coverage of employees engaged in the activities of the state “qua State,” the *National League of Cities* Court expressly overruled *Maryland v. Wirtz*, 426 U.S. at 840, and held that the extension violated the Tenth Amendment’s “constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” 426 U.S. at 842-43.

100. See notes 84-86 and 93-94 and accompanying text *supra*.

101. “The underlying reason for its enactment was to foreclose a myriad of suits demanding some *six billion dollars* as compensation. . . . There is no indication that Congress intended to modify the scope of employment under the Fair Labor Standards Act.” *Western Union Tel. Co. v. McComb*, 165 F.2d 65 (6th Cir.), *cert. denied*, 333 U.S. 862 (1947) (emphasis added).

unexpected liabilities'. . . ."¹⁰² Courts have interpreted the limited defenses of the 1947 Act quite narrowly,¹⁰³ rarely departing from the earlier pattern of imposing strict liability on offending employers.¹⁰⁴

Statute of Limitations

The principle incentive for the inclusion of the statute of limitation in the Portal-to-Portal Act was the desire for *uniformity* and a limitation or retroactive liability.¹⁰⁵ The Act's language provides that an FLSA action not commenced within two years of accrual "be forever barred."¹⁰⁶ Regardless of this conclusive language, courts have permitted the statute to be tolled in accordance with common law¹⁰⁷ and have found an employer estopped from pleading the statute of limitations as a de-

102. *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956) where the Court held time spent by employees showering and changing clothes after work under an industrial hygiene program was compensable despite § 4 of the Portal-to-Portal Act. Principal activities under that section was still a matter for judicial interpretation. See note 86 *supra*.

103. *E.g.*, *Dunlop v. City Elec. Inc.*, 527 F.2d 394 (5th Cir. 1976) which accepted the Administrator's interpretation of principal activity as excluding only time spent in pursuit of the employee's own benefit.

"Congress intended the words . . . to be construed liberally . . . to include any work of consequence performed for an employer no matter when the act is performed." 29 C.F.R. § 790.8 (1977).

104. "In applying the Act to the facts at hand, we must liberally construe it 'to apply to the furthest reaches consistent with congressional direction' in fulfillment of its humanitarian and remedial purpose." *Brennan v. Plaza Shoe Store, Inc.*, 522 F.2d 843, 846 (8th Cir. 1975) *citing* *Mitchell v. Lublin, McGaughey & Assoc.*, 358 U.S. 207, 211 (1959); *Marshall v. Elks Club of Huntington, Inc.*, 444 F. Supp. 957, 965 (S.D.W. Va. 1977).

105. See H.R. REP. NO. 71, 80th Cong., 1st Sess. *reprinted in* [1947] U.S. CODE CONG. SERV. 1031, 1035. Courts have therefore inferred that the Congress only intended the statute to be a limitation of the remedy and not on the right to bring an action. *Hodgson v. Humphries*, 454 F.2d 1279, 1284 (10th Cir. 1972).

106. Portal-to-Portal Act, § 6(a) reads:

Any action commenced on or after the date of the enactment of this Act . . . under the Fair Labor Standards Act of 1938, . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued.

107. *McCloskey v. Dickinson*, 56 A.2d 442, 444 (D.C. Mun. App. 1947) ("lulling" by promising to make payments); *cf.* *Bingham v. Advance Indus. Security Inc.*, 138 Ga. App. 903, 228 S.E.2d 1, 2 (1976) (maybe promise to pay or written acknowledgement would toll statute, but not partial payment alone); *Hitzman v. Ethyl Corp.* 42 So. 2d, 155, 158 (La. App. 1949) (acknowledgement must be unequivocal to toll). *But cf.* *Shunney v. Fuller*, 111 F.2d 543 (D.R.I. 1953) (not tolled by employee being abroad or merely asking for payment). *But see* *Shandelman v. Schuman*, 92 F. Supp. 334, 335 (E.D. Pa. 1950) ("statute, in unequivocal, mandatory language, states that recovery on a cause of action more than two years old 'shall be forever barred'").

fense.¹⁰⁸

Courts hold that the limitation period is procedural rather than substantive.¹⁰⁹ Accordingly, it is waived unless affirmatively pleaded.¹¹⁰ The cause of action does not accrue until the payday on which the overtime should have been paid.¹¹¹

Further, the limitation period is now three years for virtually any violation despite the language limiting the 1966 extension to a "willful violation."¹¹² Courts have found that willful means only that the violation was not inadvertent.¹¹³ Though in a civil context, "willful" need not connote the same state of mind as when the term is used in a criminal statute,¹¹⁴ on its face the word imparts something more than mere inadvertance. Nevertheless, a violation can be in "good faith" and still be willful within the meaning of the statute.¹¹⁵

The extended period has been held applicable when the em-

108. *Safrin v. Friedman*, 27 Misc. 2d 687, 96 N.Y.S.2d 627 (Sup. Ct. 1950), *affirmed*, 101 N.Y.S.2d 216 (App. Div. 1951); *accord Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975) (estopped to plead the same statute under the Age Discrimination in Employment Act, 29 U.S.C. § 621-34).

109. *Hodgson v. Humphries*, 454 F.2d 1279, 1283-84 (10th Cir. 1972) (limitation not substantive because in separate act and therefore not part of Congressional scheme).

110. *Mumbower v. Callicot*, 526 F.2d 1183, 1187 n.5 (8th Cir. 1975) (not considered when first raised on appeal, statute of limitations must be affirmatively pleaded under FED. R. CIV. P. 8(c)).

111. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. . . . Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. 29 C.F.R. § 778.106 (1977). This regulation was sustained in *Brennan v. State of New Jersey*, 364 F. Supp. 156, 159 (1973), discussed at notes 188-92 *infra*.

112. The 1966 Amendments, § 601, added, "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

113. *E.g.*, *Hodgson v. Hyatt*, 318 F. Supp. 390, 393 (N.D. Fla. 1970) ("[W]illful must be construed in the civil sense," applies to "intentional, knowing, or voluntary" but "not accidental" conduct, but includes "careless disregard"). *Accord*, *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974) (not inadvertant when employer had heard of FLSA amendments); *Bailey v. Pilot's Ass'n for Bay and River Delaware*, 406 F. Supp. 1302 (E.D. Pa. 1976); *Dowd v. Blackstone Cleaners Inc.*, 306 F. Supp. 1276, 1282 (N.D. Tex. 1969) (employer didn't call lawyer about practice of paying cash on weekends). *See also Shearer v. E. Brame Trucking Co.*, 69 Mich. App. 443, 245 N.W.2d 84 (1976) (willful doesn't contemplate malice or bad motive).

114. *See* text accompanying note 35 *supra*.

115. "Willful is construed to include violations made in good faith if the employer is aware of the . . . Act". *Herman v. Roosevelt Fed. Sav. & Loan Ass'n*, 432 F. Supp. 843, 851 (E.D. Mo. 1977), *affirmed*, 569 F.2d 1033 (8th Cir. 1978); *Usery v. Goodwin Hardware, Inc.*, 426 F. Supp. 1243, 1267 (W.D. Mich. 1976). *But cf.* *Clark v. Atlanta Newspapers Inc.*, 366 F. Supp. 886, 897 (N.D. Ga. 1973) (violation willful because not in good faith).

ployer "knows or has reason to know" that he is governed by the Act,¹¹⁶ or simply when he realizes that "the Act is in the picture"¹¹⁷ and somewhat inconsistently, even when his lawyer told him he need not fear the overruling of his wage plan.¹¹⁸ Further, a mere allegation of willfulness in a complaint will defeat a motion to dismiss the third year's claim pending the evidence taken at trial.¹¹⁹

Good Faith Defenses

The defense of the Portal-to-Portal Act, which totally excuses an employer's liability when he acts in good faith reliance on a written administrative ruling,¹²⁰ has only been allowed when it can be unequivocally invoked.¹²¹ Employers cannot rely on the inaction of the administrator in issuing a ruling¹²² or on the employer's own written memorandum of a conversation

116. *Brennan v. J. M. Fields, Inc.*, 488 F.2d 443 (5th Cir. 1973), *cert. denied*, 419 U.S. 881 (1974).

117. *Conklin v. Joseph C. Hofgesang Sand Co., Inc.* 407 F. Supp. 1090, 1094 (W.D. Ky. 1975), *remanded on other grounds*, 565 F.2d 405 (6th Cir. 1977). *See also Dunlop v. New Hampshire Jockey Club, Inc.*, 420 F. Supp. 416, 423 (D.N.H. 1976), *reversed on other grounds*, 562 F.2d 1373 (1st Cir. 1977).

118. *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972):

The entire legislative history of the 1966 amendments of the FLSA indicates a liberalizing intention on the part of Congress. Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with that intent. Consequently, we hold that employer's decision to change his employees' rate of pay in violation of FLSA is 'willful' when, as in this case, there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?

Id. at 1142. *But cf. Marshall v. McAlester Corp.*, 438 F. Supp. 1005, 1014 (E.D. Okla. 1977) (no willful violation by employer who kept records required by FLSA).

119. *Bormann v. Long Island Press Publishing Co., Inc.*, 379 F. Supp. 951 (E.D.N.Y. 1974); *Wirtz v. Handy*, 279 F. Supp. 264 (S.D. Fla. 1967). *See also Conklin v. Joseph C. Hofgesang Sand Co., Inc.*, 407 F. Supp. 1090 (W.D.Ky. 1975), *remanded on other grounds*, 565 F.2d 405 (6th Cir. 1977) (failure to plead willful violation does not defeat third year's claim when evidence at trial showed willfulness; where willfulness not alleged, pleadings may be conformed to the proof under FED. R. CIV. P. 15).

120. Portal-to-Portal Act, § 10. *See note 94 and accompanying text supra.*

121. *Hodgson v. Square D Co.*, 459 F.2d 805 (6th Cir.), *cert. denied*, 409 U.S. 967 (1972). The language of the Administrator's letter was "we are not prepared to say that the proposed pay plan would contravene the . . . provisions of the FLSA." *Id.* at 809.

122. *Schultz v. Deane-Hill Country Club, Inc.*, 310 F. Supp. 272 (E.D. Tenn. 1969), *affirmed*, 433 F.2d 1311 (6th Cir. 1970) (Interpretive Bulletin marked as not including latest amendments to FLSA); *Retail Store Employee's Union, Local 400 v. Drug Fair Community Drug Co.*, 307 F. Supp. 473, 480 (D.D.C. 1969) (Administrator refused to act on original complaint).

with the administrator.¹²³ Where there are conflicting rulings, the employer cannot simply choose which to follow; good faith reliance must be determined on an objective basis.¹²⁴ Further, the reliance must be actual and there is no defense where the employer did not know of the ruling at the time of the violation.¹²⁵

The limited defense to liquidated damages¹²⁶ is not much easier to obtain. A Circuit Court of Appeals has ruled that liquidated damages should not be awarded absent a showing of "bad faith, malice, or oppression."¹²⁷ But the same circuit has more recently reversed a District Court which used such a standard¹²⁸ and has adopted the long-held view of other circuits which have ruled on the question that the employer has the "substantial burden" of persuading the court that his violation was "both in good faith and based on such reasonable grounds that it would be unfair to impose liquidated damages upon him."¹²⁹ Absent such a showing the double damages are mandatory, but not withstanding such a showing the matter is still within the sound discretion of the trial judge¹³⁰ who will be overruled only upon

123. *Pilkenton v. Appalachian Regional Hosps., Inc.*, 336 F. Supp. 334 (W.D.Va. 1971).

124. *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661 (4th Cir. 1969). See also *Hodgson v. Royal Crown Bottling Co., Inc.*, 465 F.2d 473, 475 (5th Cir. 1972) (no good faith reliance on voluntary dismissal of previous complaint).

125. *Martinez v. Phillips Petroleum Co.*, 283 F. Supp. 514 (D. Idaho 1968), *affirmed*, 424 F.2d 547 (9th Cir. 1970) (but defense when successor employer claimed reliance on letter to predecessor left in company files).

126. Portal-to-Portal Act, § 11, see note 96 and accompanying text *supra*.

127. *Clougherty v. James Vernor Co.*, 187 F.2d 288, 293 (6th Cir.), *cert. denied*, 342 U.S. 814 (1951).

128. *McClanahan v. Mathews*, 440 F.2d 320, 323 (6th Cir. 1971). The District Court in *McClanahan*, 292 F. Supp. 737 (E.D. Ky. 1968), said that liquidated damages should only be awarded against employers who are "outrageous" violators, "maliciously and knowingly oppressive." The decision also implicitly overrules *Snelling v. OK Service Garage, Inc.*, 311 F. Supp. 842 (E.D. Ky. 1970) saying that liquidated damages are only awarded where the employer "stubbornly refuses" to comply with the FLSA.

129. *Rothman v. Publicker Indus.*, 201 F.2d 618, 620 (3rd Cir. 1953) (emphasis added). *Accord*, *King v. Board of Educ.*, 435 F.2d 295, 298 (7th Cir.), *cert. denied*, 402 U.S. 908 (1970); *Wright v. Carrigg*, 275 F.2d 448, 449 (4th Cir. 1960).

130. *McClanahan v. Mathews*, 440 F.2d 320 (6th Cir. 1971). The discretion not to award the liquidated damages is with the court and not the jury. *Martin v. Detroit Marine Terminals, Inc.*, 189 F. Supp. 579, 581-83 (E.D. Mich. 1960). Such discretion was sustained against constitutional challenge. 440 F.2d at 322. Though *Curtis v. Loether*, 415 U.S. 189 (1974) held that the Seventh Amendment applies equally to common law and statutory actions, courts still consider the liquidated damages award as a matter for the trial judge to decide alone. *Hannon v. Continental Nat'l Bank*, 427 F. Supp. 215, 219-22 (D. Colo. 1977); *Shearer v. E. Brame Trucking Co., Inc.*, 69 Mich. App. 443, 245 N.W.2d 84 (1976).

“compelling circumstances.”¹³¹

The right to liquidated damages arises at the time the overtime compensation was not paid,¹³² and therefore a later good faith attempt to tender payment will not excuse the liquidated damages.¹³³ Interestingly, a court may use a later refusal of the employer to pay as evidence that the violation was not in good faith.¹³⁴

Recent cases have allowed the defense to liquidated damages against small, informally-run family businesses,¹³⁵ but not allowed it for large corporate employers, even where there is no evidence of any intention to violate the FLSA.¹³⁶ The burden is on the employer to prove an “honest intention to ascertain what the Act requires and to act in accordance with it.”¹³⁷ The policy of the FLSA requires that liquidated damages be mandatory until it is “conclusively established that the employer had no means of knowing of its error.”¹³⁸

Non-Statutory Defenses

The “good faith” defenses of the Portal-to-Portal Act¹³⁹ have been called the “exclusive estoppel” to liability under the FLSA,¹⁴⁰ and courts still rule that to permit waiver or release of

131. *Reed v. Murphy*, 232 F.2d 668, 678 (5th Cir.), *cert. denied*, 352 U.S. 831 (1956).

132. *See* note 111 *supra*. This is a logical conclusion from the holding that a demand on the employer is not a precondition to bringing suit. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. at 711.

133. *Petrlik v. Community Realty Co.*, 347 F. Supp. 638, 645 (D. Md. 1972).

134. *Richard v. Marriot Corp.*, 549 F.2d 303, 305 (4th Cir.), *cert. denied*, 433 U.S. 915 (1977) where the employer's decision to refuse to pay and fight the administrator's interpretation of coverage was taken to show a lack of good faith, though the statute would appear to mean good faith at the time of non-payment. *Compare with Hodgson v. Square D Co.*, 459 F.2d 805 (6th Cir. 1972) where the defense of good faith reliance was denied but liquidated damages were not awarded.

135. *Lane v. M's Pub, Inc.* 435 F. Supp. 917, 920 (D. Neb. 1977); *Rau v. Darling Drug Store, Inc.*, 388 F. Supp. 877, 887 (W.D. Pa. 1975) (bonus paid to employee showed good faith, though no explanation of how this shows reasonable grounds for violation).

136. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 465 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (employer must *affirmatively* show both good faith and grounds for belief despite tradition of industry, collective bargaining agreement, silence of employees and written opinion of counsel). *See also Clark v. Atlanta Newspapers, Inc.*, 366 F. Supp. 886, 893 (N.D. Ga. 1973) (employee never reported overtime on time sheet; employer's duty to see that he doesn't work or is paid when he does).

137. *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953).

138. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 948 (2d Cir. 1959).

139. § 10.

140. *Usery v. Goodwin Hardware, Inc.*, 426 F. Supp. 1243, 1268 (W.D. Mich.

a claim would contravene and nullify the statutory policy of the FLSA.¹⁴¹ Only when the entire amount of unpaid wages are paid under the Secretary of Labor's supervision will a court find a valid waiver of any further claim.¹⁴²

An otherwise valid collective bargaining agreement has never been effective to avoid the provisions of the FLSA.¹⁴³ Courts have also ruled that an employee is under no duty to submit his overtime claim to arbitration under a grievance procedure.¹⁴⁴ But, it has been held that under certain circumstances, good faith is a defense under the FLSA and the court would therefore not reconsider a claim already submitted to arbitration.¹⁴⁵

An "estoppel" argument often arises in cases where the Act's required records¹⁴⁶ are unavailable or incorrect.¹⁴⁷ In *Anderson v. Mt. Clemens Pottery Co.*¹⁴⁸ the Court held that the employee need only show that he worked some overtime for which he was not properly compensated. Once an aggrieved employee has made such a showing, he could be awarded an "approximate" amount of damages.¹⁴⁹

The employer cannot be heard to complain that the damages lack

1976) (Congress intended to exclude any defense based on an oral misrepresentation by statutory requirement of reliance on a written ruling).

141. *Brennan v. Sinor*, 391 F. Supp. 681, 684 (N.D. Okla. 1974). The court's language suggests that it might validate a release "if" given under circumstances which would not contravene the statutory purpose, *Id.*

142. *Sneed v. Sneed's Shipbldg., Inc.*, 545 F.2d 537 (5th Cir. 1977) where after the employee had complained to the Wage and Hour Administration the employer gave him a check for the entire amount the administrator found due. Though the employee never cashed the check, the court equated the payment with the provision of section 16(c) of the FLSA authorizing the administrator to supervise the payment of unpaid compensation. *Id.* at 539-40.

143. *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173, 178 (1946).

144. *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971). *See also Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972) (per curiam dismissing cert. as improvidently granted) (since the agreement only provided for arbitration of disputes under its terms, 185 N.W.2d 738 (Iowa 1971), there was nothing to add to the *Arguelles* decision). Two years later, the Court passed on a chance to add to its previous decision. *See note 145 infra.*

145. *Satterwhite v. United Parcel Serv., Inc.*, 496 F.2d 448, 452 (10th Cir.), cert. denied, 419 U.S. 1071 (1974).

146. § 11(c). *See text accompanying note 29 supra.*

147. The employer's duty is not only to keep the records, but to see that they are accurate. *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973) (company responsible for supervisors' understatements of overtime worked); *Wirtz v. Williams*, 369 F.2d 783 (5th Cir. 1966) (employer's system of reporting hours based on time he estimated that job should take violated record keeping requirements).

148. 328 U.S. 680 (1946).

149. *Id.* at 686-87, followed in *Hodgson v. American Concrete Constr. Co., Inc.* 471 F.2d 1183 (6th Cir.), cert. denied, 412 U.S. 949 (1973); *Wirtz v. Turner*, 330 F.2d 11 (7th Cir. 1964); *Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721

the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of section 11(c) of the Act. And even where the lack of adequate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain.¹⁵⁰

Courts have required this shifting of the burden even to employers who had no reason to anticipate the need to keep the records.¹⁵¹

"Since the Fair Labor Standards Act was designed to implement a national policy, its purpose may not be frustrated by the joint actions of an employer and his employees."¹⁵² There is no estoppel defense even where the employee was responsible for reporting his own hours.¹⁵³ The "[o]bligation is the employer's and it is *absolute*,"¹⁵⁴ even where the employee was under contract not to work over forty hours weekly.¹⁵⁵ Nor does the employee have a duty to report his hours promptly so as to mitigate damages for his employer.¹⁵⁶

In one case a court found an estoppel due to the "iniquitous misconduct" of the employee who "cannot be heard to say . . . that he deliberately and voluntarily falsified reports."¹⁵⁷ However, the Court of Appeals, in affirming, based its decision solely on the insufficiency of the evidence.¹⁵⁸ The better view remains

(5th Cir. 1961), *Marshall v. R & M Erectors, Inc.*, 429 F. Supp. 771 (D. Del. 1977).

150. 328 U.S. at 688.

151. *Bingham v. Airport Limousine Serv.*, 314 F. Supp. 565, 572 (W.D. Ark. 1970) (change in exemption for tipped employees).

152. *Smith v. Superior Casing Crews*, 299 F. Supp. 725, 730-31 (E.D. La. 1969). See also *Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951) (contract to circumvent the FLSA void and unenforceable); *Schultz v. Bob Johnson Meat Co.*, 306 F. Supp. 720, 722 (C.D. Cal. 1969) (rights cannot be bargained away even though the parties acted in good faith).

153. *Burry v. National Trailer Convoy, Inc.* 338 F.2d 422 (6th Cir. 1964); *Clark v. Atlanta Newspapers, Inc.*, 366 F. Supp. 886 (N.D. Ga. 1973).

154. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959).

155. *Burry v. National Trailer Convoy, Inc.*, 338 F.2d 422 (6th Cir. 1964) (employer should have known that employee was working overtime).

156. *De Pasquale v. Williams-Bauer Corp.*, 151 F.2d 578, 580 (2d Cir. 1945). The court also disallowed defenses of release, accord and satisfaction, and account stated. *Id.* at 579-80.

157. *Wirtz v. Harrigill*, 214 F. Supp. 813, 815 (D. Miss. 1963).

158. 328 F.2d 963 (5th Cir. 1964). The court found that, unlike *Mt. Clemens*, there was not sufficient evidence to show that the employee had worked any overtime at all. *But cf. Mitchell v. All-States Business Prod. Corp.*, 250 F. Supp. 403, 408 (E.D.N.Y. 1965) (if employee's own records are not credible, use other evidence).

that an employer's "argument of estoppel ignores that this case lies in an area where agreements and other acts that would normally have controlling legal significance are overcome by congressional policy."¹⁵⁹

EXPANDING SCOPE OF OVERTIME LIABILITY

The overtime provision of the original FLSA applied to employees engaged "in the production of goods for commerce."¹⁶⁰ Courts concluded that by this language Congress did not intend to use the full extent of its commerce power.¹⁶¹ The Act has since been amended to include "enterprise coverage"¹⁶² as well as specific inclusions of other employees,¹⁶³ and accordingly courts now interpret Congressional intention expansively.¹⁶⁴

While a plaintiff employee must plead and prove that he is covered by the Act,¹⁶⁵ the burden is on the employer to show that he is entitled to a particular exemption,¹⁶⁶ and such exemp-

159. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959).

160. § 7(a)(1).

161. "[T]he scope of the Act is not coextensive with the limits of the power of Congress over Commerce," *A.B. Kirschbaum, Co. v. Walling*, 316 U.S. 517, 523 (1942).

162. "Enterprise" is defined in the FLSA as:

the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one more corporate or other organizational units. . . .

29 U.S.C. § 203(r) (1977). After the 1966 Amendments, Section 7(a)(1) of the FLSA reads:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce. . . .

Id. at § 203(s).

163. The 1966 Amendments added to the definition of a covered enterprise any school, hospital, or mental or old-age institution (whether public or private). *Id.* at § 203(s)(4).

164. See note 118 *supra*.

165. *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 90 (1942). The proof requires establishing the employee-employer relationship and the coverage of the employer.

166. *Mitchell v. Kentucky Fin. Co., Inc.*, 359 U.S. 290, 291 (1959). See also *Sinclair v. Beacon Gasoline Co.*, 447 F. Supp. 519 (W.D. La. 1978) ("Because of the importance of the overtime provisions in fostering the smooth flow of

tions are to be narrowly construed against the party claiming them.¹⁶⁷ Some courts have made the employer's burden nearly insurmountable.

Which Employees are Covered?

Certain higher paid employees are putatively excepted from coverage as those "employed in a bona fide executive, administrative, or professional capacity."¹⁶⁸ Regulations which severely limit this exemption have been upheld by the courts.¹⁶⁹ One requirement for exemption as a "professional" is that the employee's work involve predominately the exercise of "independent judgment" rather than the exercise of acquired skills.¹⁷⁰ Applying this subtle distinction to ever-growing enterprises where few employees can really exercise "independent judgment" leads to unexpected results.

In a recent case,¹⁷¹ ten computer programmers sued their former employer for unpaid overtime. The case turned on whether they were exempt administrative employees. The applicable regulation was equivocal¹⁷² and an expert witness testified to the need for exercising independent judgment in their work.¹⁷³ The trial judge rejected the expert testimony finding

interstate commerce, the employer seeking the exemption bears the burden of proving his entitlement to it.")

167. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960): "[a]nd their application limited to those establishments plainly and unmistakably within their terms and spirit." *Id.* See also *Hamblen v. Ware*, 526 F.2d 476, 477 (6th Cir. 1975).

168. FLSA, § 13(a)(1).

169. *Brennan v. South Davis Community Hosp.*, 538 F.2d 859, 865 (10th Cir. 1976) (x-ray technicians: "employer has the burden of establishing the exemption affirmatively and clearly"). *Usery v. Associated Drugs, Inc.*, 538 F.2d 1191, 1194 (5th Cir. 1976) (pharmacists: "employer has the burden of proving the existence of each of the conditions or standards prescribed by the Regulations"). The regulation defining a bona fide professional, 29 C.F.R. § 541.3 (1977), is followed by others detailing requirements of education, salary, time spent in non-exempt work, primary duty, discretion and judgment. § 541.314 makes an exception for physicians, lawyers, and teachers, who are always exempted if they are licensed and actively performing their profession.

170. 29 C.F.R. § 541.305 (1977).

171. *Pezillo v. General Tel. & Elec. Information Sys., Inc.*, 414 F. Supp. 1257 (M.D. Tenn. 1976), *affirmed per curiam*, 572 F.2d 1189 (6th Cir. 1978).

172. The regulation on the data processing field first lists tasks which require discretion and independent judgment which are done by programmers; then says that the exemption depends on the facts of the particular case; and then lists other tasks not requiring independent judgment performed by other data processing employees who are not exempt. 29 C.F.R. § 541.207(c)(7) (1977).

173. The court found that the defendant-employer had not carried its burden of proving that no more than 20% of the employee's time was spent doing non-exempt work. 414 F. Supp. at 1269.

that the employer could not in good faith have failed to realize that the job involved primarily the use of skill. He awarded back pay and the full amount of liquidated damages.¹⁷⁴ The Court of Appeals refused to reverse or modify, finding the decision solely within the trial court's discretion.¹⁷⁵ The victorious plaintiffs had been hired as temporary employees. Their judgment came after any reasonable expectation of further compensation for the work involved had ended.

In another case,¹⁷⁶ the court upheld the Secretary's interpretation of the executive exemption as only applying to that work actually done in a bona fide administrative capacity.¹⁷⁷ The result was that managers who admittedly were usually exempt from the Act were held covered by the overtime provisions for time they spent doing "strike duty."¹⁷⁸

In an early FLSA case denying to an employer an estoppel defense, the court stressed that the "plaintiffs were extremely ignorant men."¹⁷⁹ Less clear is whether employees who are arguably professionals should also be beneficiaries of the policy imposing a form of strict liability on their employers.

What Hours Worked are Covered?

Great liability may result when an employer's plan for fixed pay covering varying work weeks is held invalid.¹⁸⁰ Since 1949, the FLSA has contained a specific exemption¹⁸¹ which has been held to be the sole such plan permitted by the Act.¹⁸² The Secre-

174. Since the employer was aware of the FLSA, the court found that the violation was willful and the three year statute of limitation would apply. See notes 113-18 and accompanying text *supra*. Since the employer was aware that there was no blanket exemption for computer programmers, it could not rely in good faith on being exempt in the particular case. The court therefore awarded liquidated damages though "most reluctant to grant plaintiffs a 'windfall' when they were paid as highly skilled artisans." 414 F. Supp. at 1270.

175. 572 F.2d at 1190.

176. *Brennan v. Western Union Tel. Co.*, 561 F.2d 477 (3rd Cir.), *cert. denied*, 434 U.S. 1063 (1977).

177. An employee can be exempt in one week and covered by the FLSA in the next week if in the second week over 20% of his working time is spent in non-exempt work. 29 C.F.R. § 541.1(e) (1977).

178. 561 F.2d at 483-84. This suit had been brought by the Secretary of Labor. See note 36 *supra*.

179. *De Pasquale v. Williams-Bauer Corp.*, 151 F.2d 578, 579 (2d Cir. 1945) (therefore "lack of records does not preclude them from obtaining protection"). *Id.*

180. See notes 51-54 and accompanying text *supra*.

181. § 7(f) allows an employer pursuant to an express agreement, to pay a fixed weekly guarantee which stipulates a regular and overtime rate.

182. 29 C.F.R. § 778.403 (1977): "Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours vary from week

tary has interpreted the exemption to be inapplicable to a case where the employee is given compensatory time off in a later pay period—even at the rate of one-and-a-half hours off for each hour of overtime worked.¹⁸³ Courts have upheld this ruling and found employers liable for unpaid overtime compensation even where the employees had already taken their “comp” time, however, the exact amount of damages in such circumstances is uncertain.

In *Thomas v. State of Louisiana*,¹⁸⁴ the court held for the employees and ordered briefing and argument on the question of damages.¹⁸⁵ However, a settlement was reached and allowed because of an intervening court decision¹⁸⁶ and pending amendments to the FLSA.¹⁸⁷ The settlement was for the full amount of back pay for the hours worked (for which some of the employees had already taken off their compensatory time). Presumably, the only amount in dispute at that point was liquidated damages.

In affirming a similar holding against a public employer,¹⁸⁸ the Court of Appeals found that “the main objective of the FLSA’s overtime compensation provision: the broadening of employment . . . could be easily defeated if the employer were allowed discretion to manipulate the scheduled time off so as to

to week.” These plans are called “Belo” plans after the case validating them. See notes 51-54 and accompanying text *supra*. To qualify, the agreement must be express, and must contemplate an overtime premium. *Brennan v. Valley Towing Co.*, 515 F.2d 100 (9th Cir. 1975); *Triple “AAA” Co. v. Wirtz*, 378 F.2d 884 (10th Cir. 1967), *cert. denied*, 389 U.S. 959 (1968).

183. Wage and Hour Administrator Opinion Letter No. 913 (December 27, 1968).

184. *Thomas v. State of Louisiana*, 348 F. Supp. 792, (W.D. La. 1972). A subsequent order setting aside a settlement agreement was reversed, 534 F.2d 613 (5th Cir. 1976).

185. 348 F. Supp. at 796-97.

186. *Employees of the Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973) which held that in extending FLSA coverage to state governments, Congress did not intend to abridge Eleventh Amendment immunity and allow private individuals to bring 16(b) actions against a state in federal court. This decision came before final judgment in the lower court whereupon Thomas and Louisiana settled the claim for the back pay only.

187. In section 6 of the 1974 Amendments, Congress showed that it did indeed mean to allow private suits against states and suspended the statute of limitations so that suits dismissed because of the Court’s decision could be revived. Thomas thereupon petitioned to have the settlement set aside.

In reversing and upholding the settlement, the Fifth Circuit held that the agreement was akin to a stipulated judgment which had never been included in the prohibition against settlement of section 16(b) suits. 534 F.2d at 614-15, *referring to*, *D.A. Schulte v. Gangi*, 328 U.S. at 113 n.8.

188. *Brennan v. State of New Jersey*, 364 F. Supp. 156 (D.N.J. 1973), *affirmed in part, vacated in part*, 522 F.2d 504 (3d Cir. 1975), *vacated sub nom.* *New Jersey v. Usery*, 427 U.S. 909 (1976).

coincide with off-season or slack work periods. . . ."¹⁸⁹ In view of the fact that some employees had already been given compensatory time off, the court remanded for reconsideration of damages in light of policies enunciated in certain cases.¹⁹⁰ Since the cited cases hold that liquidated damages are mandatory, the employer was apparently faced with triple liability.¹⁹¹ However, the case was vacated when the Supreme Court ruled that the FLSA overtime provisions could not be constitutionally applied to certain activities of state government.¹⁹²

A private employer in such a case will not be so fortunate.¹⁹³ Further, he stands little chance of recovering for the time taken off by the employees. Set-offs are strongly disfavored in FLSA cases¹⁹⁴ and a counterclaim may be procedurally impossible.¹⁹⁵

Who May Bring Suit and Recover?

The statutory purposes of the FLSA are to abate substandard labor conditions, prevent unfair competitive practices, and to spread employment.¹⁹⁶ From these purposes certain classes of persons within the statute's protection may be identified: those who worked under the proscribed conditions; those who compete with violators of the Act; and those who are unemployed. Only the first class is expressly given a private right of action.¹⁹⁷

An employee who agreed to work overtime hours without

189. 522 F.2d at 510.

190. *Id.* at 517 n.23. The cases cited were the district court's *Thomas* opinion, *Aaron, Schulte*, and three appeals court opinions from the 1940s.

191. Of course, if the time off was taken at the employer's convenience (both cases' plans provided for the "comp" time to be taken at the mutual convenience of employer and employee) then the employer is incurring no damage.

192. See note 99 *supra*.

193. See *Clark v. Atlanta Newspapers, Inc.*, 366 F. Supp. 886 (N.D. Ga. 1973).

194. The only economic feud contemplated by the FLSA involves the employer's obedience to minimum wage and overtime standards. To clutter these proceedings with the minutiae of other employer-employee relationships would be antithetical to the purpose of the Act. Set-offs against back pay awards deprive the employee of the 'cash in hand' contemplated by the Act, and are therefore inappropriate in any proceeding brought to enforce the FLSA

Brennan v. Heard, 491 F.2d 1, 4 (5th Cir. 1974).

195. If the suit is brought by the Secretary under sections 16(c) or 17, then a counterclaim will be disallowed as one against the United States. *Mitchell v. Riley*, 164 F. Supp. 419 (W.D.S.C. 1958), *Mitchell v. Floyd Pappin & Son, Inc.*, 122 F. Supp. 755 (D. Mont. 1954). In a 16(b) suit there may be no jurisdiction for a counterclaim. *Timberlake v. Day & Zimmerman, Inc.*, 49 F. Supp. 28 (N.D. Iowa 1943).

196. See text accompanying notes 6 & 46 *supra*.

197. § 16(b). See text accompanying note 40 *supra*.

the required compensation may have been fearful of losing his job.¹⁹⁸ But an employee who actually wishes to work the overtime is in *pari delicto* with his employer in injuring the other classes of protected persons. Yet Congress has chosen to allow—indeed encourage—such employees to bring strike suits against their employers, and has given an explicit private right to recover for any employer retaliation.¹⁹⁹

Though an employee bringing a section 16(b) action is theoretically representing the public interest in reducing unemployment, the Act gives him the right to represent other similarly situated employees²⁰⁰—not the unemployed. Unlike the usual class action, the right is not discretionary with the court, though the FLSA requires the written consent of employees who choose to “opt-in.”²⁰¹ The importance of the class action has been increased by a decision of the Second Circuit Court of Appeals affirming a lower court decision ordering notice to be sent to other potential plaintiffs.²⁰² Another district court has ordered a defendant employer to post such a notice on its bulletin board with blank consent forms which could be returned to the plaintiff’s counsel.²⁰³

Counsel for a plaintiff-employee who prevails is entitled to an award of attorney’s fees.²⁰⁴ Even where a court denies liquidated damages upon a showing of good faith, the award of attorneys’ fees and costs is mandatory.²⁰⁵ Counsel may be allowed additional compensation when an action is appealed.²⁰⁶ In one case, an attorney received both a contingent fee from his clients’

198. See, e.g., *Burr v. National Trailer Convoy, Inc.*, 338 F.2d 422, 425 (6th Cir. 1964) (employer suggested that job might be eliminated if it required paying for over 40 hours a week).

199. Section 10 of the 1977 Amendments which gives employees a private cause of action for unlawful retaliation. See notes 41-43 and accompanying text *supra*.

200. Section 16(b) expressly allows an employee to sue in behalf of others similarly situated. The Portal-to-Portal Act, § 5(a) requires that such other employees must consent in writing to becoming parties.

201. *Id.*

202. *Braunstein v. Eastern Photographic Laboratories, Inc.*, No. 78-7464 (2d Cir. Nov. 17, 1978). *Contra* *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977).

203. *Lantz v. B-1202 Corp.*, 429 F. Supp. 421, 424 (E.D. Mich. 1977).

204. See text accompanying note 40 *supra*.

205. *Wright v. Carrig*, 275 F.2d 448 (4th Cir. 1960). *But cf.* *Hayes v. Bill Hayley & His Comets, Inc.*, 274 F. Supp. 34, 37 (E.D. Pa. 1967) (no attorney’s fees will be awarded when not requested in complaint). See also *Brennan v. Heard*, 491 F.2d 1, 4 (5th Cir. 1974) (error for trial court to refuse witness’ fees to employee-witnesses).

206. *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135 (5th Cir. 1970); *Bable v. T.W. Phillips Gas & Oil Co.*, 287 F.2d 21 (3d Cir. 1961). *But cf.* *U.S. Steel Co. v. Burkett*, 192 F.2d 489 (4th Cir. 1951) (original fee should be adequate to cover appeal).

recovery and a court awarded fee from the defendant.²⁰⁷

The mandatory fees, the ease of bringing a class action, and the substantive law placing much of the burden of proof on a defending employer, will encourage attorneys to seek out and bring more actions under section 16(b). Higher-paid employees are more likely to learn of their right to bring such suits and are more likely to have worked overtime without being paid the required compensation.²⁰⁸ Higher salaries mean higher potential recoveries for unpaid overtime. These factors, coupled with a continuing Congressional and judicial policy of encouraging employees to bring private actions, indicate that employers are now facing significant unexpected liability from the maximum hours provision of the FLSA.

CONCLUSION

The payment of time-and-a-half for overtime was intended to be an exception for the *benefit* of employers who wished to work their employees for more than the maximum hours imposed by the FLSA.²⁰⁹ The policy of the Act would prefer that no overtime at all be worked. An employer who *elects* to have his employees work more than the statutory maximum hours has no cause to complain "because Congress chose to use a less drastic prohibition than outright prohibition of overtime."²¹⁰

The effects of the FLSA on "spreading employment" are questionable.²¹¹ In 1966, Congress ordered a study of such effects.²¹² The results of the study were inconclusive, yet this has

207. *Ivey v. Foremost Dairies, Inc.*, 106 F. Supp. 793 (W.D. La. 1952). *But see* *Harrington v. Empire Constr. Co.*, 167 F.2d 389 (4th Cir. 1948) (attorney must give up fee received from employees because Congress intended them to have the full amount of back pay); *Sykes v. Lochmann*, 156 Kan. 223, 132 P.2d 620, *cert. denied*, 319 U.S. 753 (1943) (contingent fee contract void and unenforceable).

208. Over 60% of those workers working over 40 hours weekly come from the less than 40% of the work force made up of managers, professionals, and craftsmen. LEVITAN, MANGUM, & MARSHALL, *HUMAN RESOURCES AND LABOR MARKETS*, p. 20 (1976).

209. The language of section 7 at first prohibits all overtime work and then allows an exception for the employer willing to pay the time-and-one-half. *See* note 162 *supra*.

210. *Missel v. Overnight Motor Transp. Co.*, 316 U.S. at 578.

211. Some professional economists have claimed that Fair Labor Standards legislation has the effect of reducing employment. *See* M. FRIEDMAN, *CAPITALISM AND FREEDOM*, 180-81 (1962); Mincer, *Unemployment Effects of Minimum Wages*, 84 J. POL. ECON. 2 (1976).

212. U.S. DEPT. OF LABOR, *PREMIUM PAYMENTS FOR OVERTIME UNDER THE FAIR LABOR STANDARDS ACT* (1967). The report found that hiring and training costs and the increasing cost of fringe benefits (not completely subject to the time and one-half requirement) decreases the deterrant effect of the overtime provisions and the likelihood of employers hiring more workers.

not deterred Congress from further expanding the Act's coverage²¹³ and encouraging private actions in accordance with its provisions.

An employer should now carefully balance the costs to his business of either scrupulously paying the required "time-and-a-half" compensation, or prohibiting his employees from working any overtime at all. He cannot realistically rely on any exemptions from coverage or the hope that his employees will never bring suit against him. Whatever anomalies may be found in the scheme of private enforcement chosen by Congress, a private employer who elects an "all or nothing gamble"²¹⁴ with the FLSA, cannot realistically expect any luck with the courts.²¹⁵

Whether a plaintiff employee is truly suffering from substandard labor conditions or is seeking a windfall from liquidated damages, his right to bring an action against his employer is clearly established:

To enforce one's rights when they are violated is never a legal wrong, and may often be a moral duty. It happens in many instances that the violation passes with no effort to redress it—sometimes from praiseworthy forbearance, sometimes from weakness, sometimes from mere inertia. But the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong.²¹⁶

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However, some employers recognize that worker efficiency decreases as hours worked increases beyond forty. *Id.* at 20-22.

213. 1974 and 1977 Amendments. See H. REP. NO. 95-521, p. 32, 95th Cong., 1st Sess. (1977), *reprinted in*, [1977] U.S. CODE CONG. & ADM. NEWS 3201, 3233:

[E]xemptions from the minimum wage and/or overtime standards set forth in this legislation should be continued only if there was a proven need for such exemptions. It is the view of this committee that there are a number of overtime exemptions for which no need exists today even if there was justification in the past for enacting them.

214. *D.A. Schulte v. Gangi*, 328 U.S. at 116.

215. [T]he proposition that regulation of the minimum price of a commodity—even labor—will increase the quantity consumed is not one that I can readily understand. That concern, however, . . . merely reflects my views on a *policy issue which has been firmly resolved* by the branches of government having power to decide such questions. . . .

My disagreement with the wisdom of this legislation may not, of course, affect my judgment with respect to its validity. On this issue there is no dissent from the proposition that the Federal Government's power over the labor market is adequate to embrace these employees. *National League of Cities v. Usery*, 426 U.S. 833, 881 (1976) (Stevens, J., dissenting) (emphasis added).

216. *Morningstar v. Lafayette Hotel Co.*, 105 N.E. 656, 657, 211 N.Y. 596 (1914) (Cardozo, J.).

