

FAIR LABOR STANDARDS ACT UPDATES

Maria Dwyer

(248) 988-5899

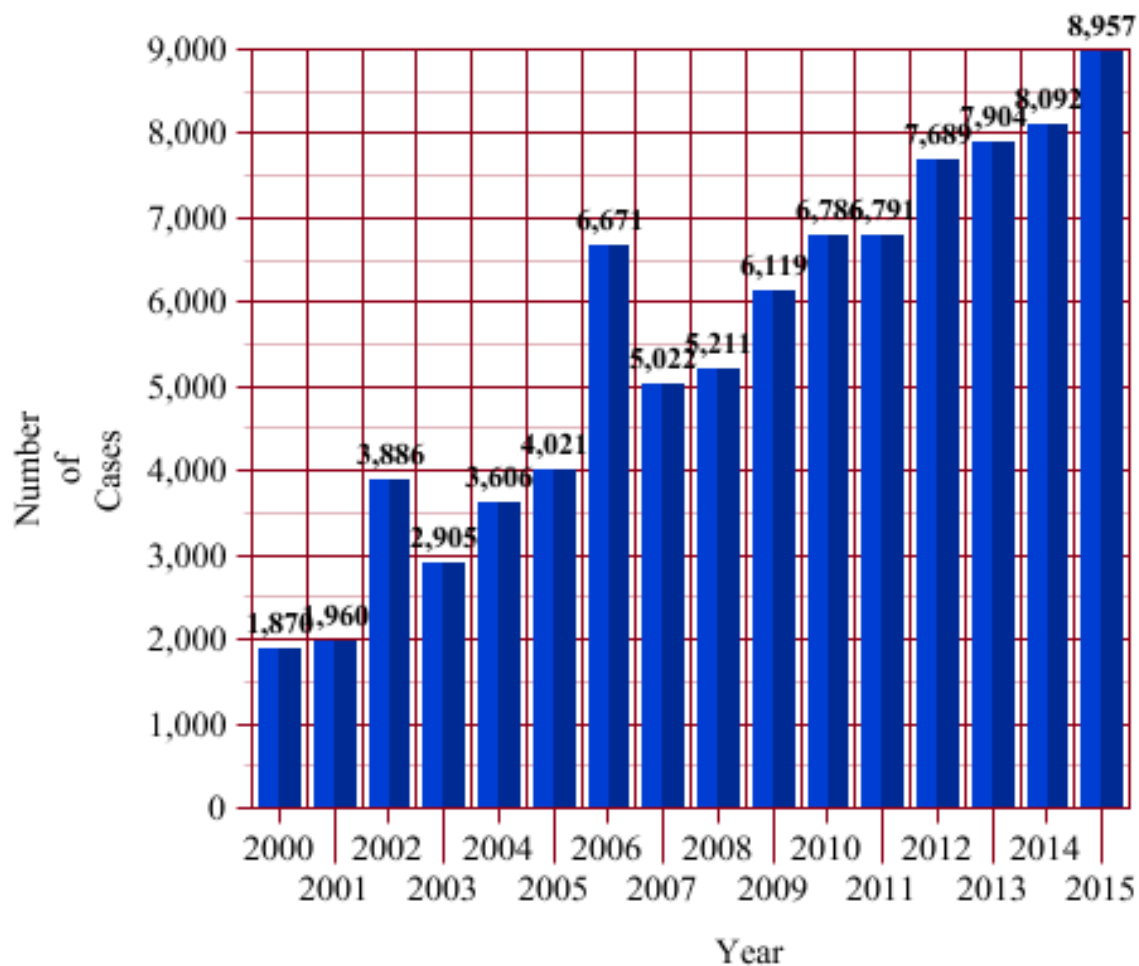
mdwyer@clarkhill.com

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FAIR LABOR STANDARDS ACT (FLSA) SUMMARY

- Employers must pay employees the minimum wage
- Employers must pay overtime for hours worked over 40 hours in a week by employees
- Employers must maintain pay records
- The FLSA contains a number of exemptions
 - Executive
 - Administrative
 - Professional
 - Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA

FLSA Cases Filed (U.S. Courts)

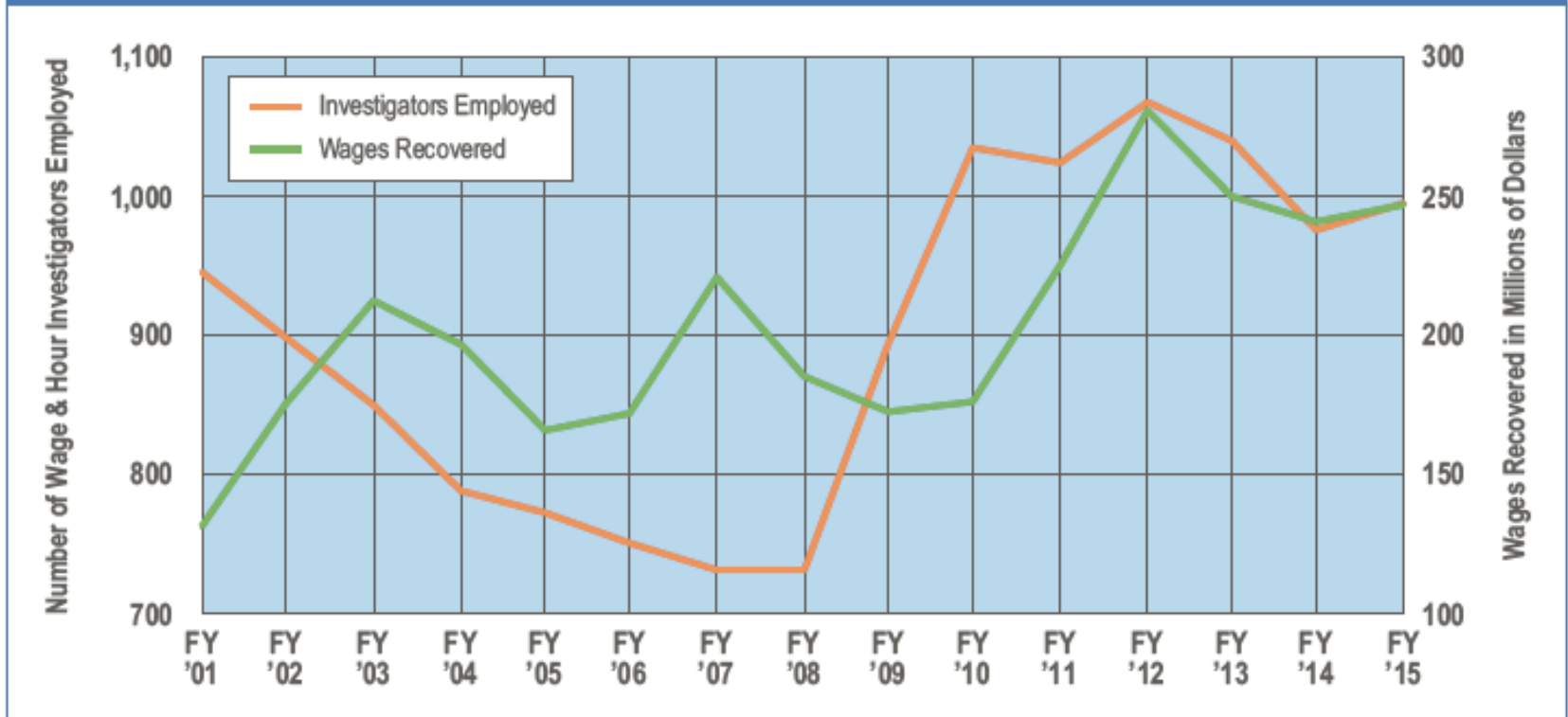


PACER Case Locator

DON'T FORGET THE DEPARTMENT OF LABOR!

Wage and Hour Enforcement Efforts

Investigators Employed and Wage Recovery, FY2001–FY2015



Source: Department of Labor, Wage and Hour Division

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DOL ENFORCEMENT EFFORTS

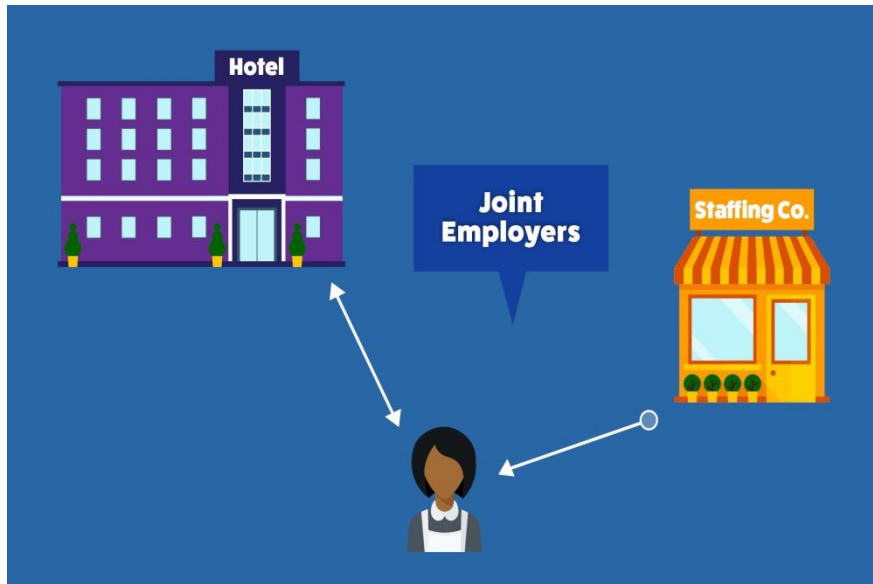
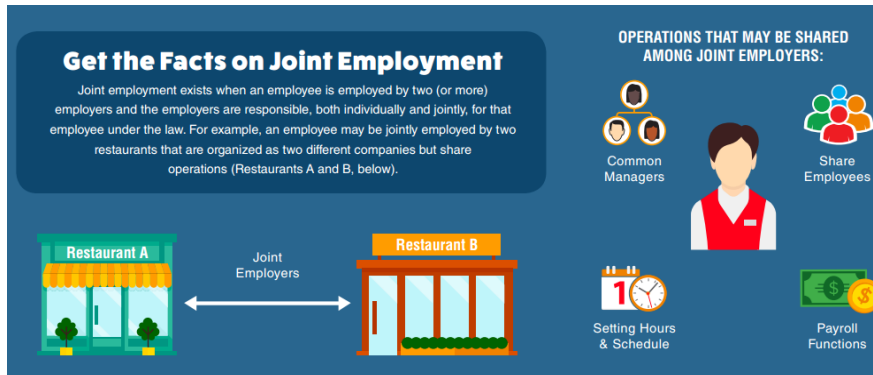
2015: Recovered \$246.8 million in back wages

2014: Recovered \$240 million in back wages

2012: Recovered \$280 million in back wages

- Decreased amount recovered allegedly due to more selective enforcement (e.g., fissured industries) and success of proactive efforts to educate employers on the law
- Amount recovered per worker increasing (\$1,027 in FY 2015, up from \$890 in FY 2014)

DOL's TAKE ON JOINT EMPLOYMENT



“Horizontal” joint employment

Two separate restaurants share wait staffs

- Common managers, sharing employees, payroll, scheduling, etc.

“Vertical” joint employment

- Staffing agency and user
- Subcontractor, labor provider, or “other intermediary employer” supplying employees to a user
- User handles payroll or other “employer” functions; sets hours or schedules; or is involved in hiring or supervising the employees

THREE TESTS FOR EXEMPTION

- Salary Level
- Salary Basis
- Job Duties

SALARY LEVEL TEST

- Beginning on December 1, 2016, the rules will require overtime for employees earning less than \$913/week (\$47,476/year)
 - Biweekly: \$1,826.00
 - Semimonthly: \$1,978.00
 - Monthly: \$3,656.00
- Former level required overtime for employees earning less than \$455/week (\$23,600/year)
- The employer may satisfy up to ten percent of the salary amount by the payment of nondiscretionary bonuses, incentives, and commissions, that are paid quarterly or more frequently to Executive, Administrative and Professionals
- The Employer may pay salary exempt employees additional compensation without losing the exemption

“HIGHLY PAID EMPLOYEES”

- Separate test for those earning more than \$134,004/year (was \$100,000/year). The employee must receive a weekly salary of \$9.13
- Employees must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee

WHITE-COLLAR EXEMPTIONS

- Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary. The Secretary will updated the salary to equal the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region in the second quarter of the year preceding the update as published by the Bureau of Labor Statistics

SALARY BASIS TEST

- To be paid on a salary basis means that the employee “regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount . . . which is not subject to reduction because of variations in the quality or quantity of the work performed”
- An exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked
- Employers do not need to pay exempt employees for any workweek in which they perform no work
- An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

FEE BASIS

- Administrative and professional employees may be paid on a fee basis, rather than on a salary basis
- An employee will be considered to be paid on a “fee basis” within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion
- To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$913 per week if the employee worked 40 hours

PERMITTED DEDUCTIONS

- One or more full days absences for personal reasons other than sickness or disability
- Absence of one or more full days occasioned by sickness or disability if the deduction is made with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability
- Employers may offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week
- Safety rules discipline
- One day or more suspension for violations of workplace conduct rules
- The employer may pay a proportionate part of an employee's full salary for time actually worked in the first and last weeks of employment
- For leaves covered under and chargeable to employees covered by the FMLA, the employer may deduct for partial days or worked missed

EFFECT OF IMPROPER DEDUCTIONS

- An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis
- Factors to consider:
 - The number of improper deductions, particularly as compared to the number of employee infractions warranting discipline
 - The time period during which the employer made improper deductions
 - The number and geographic location of employees whose salary was improperly reduced
 - The number and geographic location of managers responsible for taking the improper deductions
 - Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions

SAFE HARBOR

- To qualify for the safe harbor:
 - The employer must reimburse the employee for such deductions
 - The employer has a clearly communicated policy that prohibits the improper pay deductions specified in 29 C.F.R. § 541.602(a), and includes a complaint mechanism
 - The employer makes a good faith commitment to comply in the future

ASSESSMENT PROCEDURE

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EXEMPTIONS – YOU BEAR THE BURDEN



The employer bears the burden of proving that its employees fall within the applicable FLSA exemption

Elwell v. Univ. Hosps. Home Care Servs., 276 F.3d 832, 837 (6th Cir. 2002)

STEPS IN ASSESSING EXEMPT STATUS OF EMPLOYEES

- Check state law to determine if it has stricter criteria for exemptions
- Identify all salaried employees who the company considers exempt from the overtime provisions of FLSA because of the white collar exemptions
- Review the job descriptions for each of the identified employees
- Interview the employees' supervisors and confirm that they do perform the job duties contained in the job description
- Interview the employees to confirm that each employee performs the duties contained in the job description

STEPS IN ASSESSING EXEMPT STATUS OF EMPLOYEES

- Do employees who are exempt under the Executive Exemption meet the following tests:
 - Are they are paid a salary of \$913 a week?
 - Have deductions from their pay been made for reasons not permitted by the FLSA?
 - Do they manage the enterprise in which the they are employed or is customarily recognized department or division of the enterprise?
 - Do they customarily and regularly direct the work of two or more employees?
 - Do they have the authority to hire/fire other employees or make suggestions and recommendations that are given particular weight about hiring, firing, advancement, promotion, or other changes in status?

STEPS IN ASSESSING ADMINISTRATIVE EXEMPT STATUS OF EMPLOYEES

- Do employees who are exempt under the Administrative Exemption meet the following tests:
 - Are they are paid a salary of \$913 a week?
 - Have deductions from their pay been made for reasons not permitted by the FLSA?
 - Do they perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers?
 - Do they exercise discretion and independent judgment with respect to matters of significance in the performance of their primary duties?

STEPS IN ASSESSING PROFESSIONAL EXEMPT STATUS OF EMPLOYEES

- Do employees who are exempt under the Learned Professional Exemption meet the following tests:
 - Are they are paid a salary of \$913 a week?
 - Have deductions from their pay been made for reasons not permitted by the FLSA?
 - Do they perform work requiring an advanced knowledge of science or learning customarily acquired by a prolonged course of specialized intellectual instruction?

STEPS IN ASSESSING EXEMPT STATUS OF EMPLOYEES

- Do employees who are exempt under the Creative Professional Exemption meet the following tests:
 - Are they are paid a salary of \$913 a week?
 - Have deductions from their pay been made for reasons not permitted by the FLSA?
 - Does their work require invention, imagination, originality or talent in a recognized field of artistic or creative endeavor?

STEPS IN ASSESSING COMPUTER PROFESSIONAL EXEMPT STATUS OF EMPLOYEES

- Do employees who are exempt under the Computer Professional Exemption meet the following tests:
 - They are paid a salary of \$913 a week?
 - Have deductions from their pay been made for reasons not permitted by the FLSA?
 - Do they apply systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications?
 - Do they design, document, test, create or modify computer programs related to machine operating systems? or
 - Perform a combination of the these duties, the performance of which requires the same level of skills?

STEPS IN ASSESSING EXEMPT STATUS OF EMPLOYEES

- If an employee fails any one of the test might the employee fit into another exemption?
- Does the Company have a “Safe Harbor” provision?
- How does the Company publicize the “Safe Harbor” Provision?

QUESTIONS?



Maria Dwyer

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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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