



**STATEMENT OF
CHRISTINE V. WALTERS, JD, MAS, SHRM-SCP, SPHR**

**SOLE PROPRIETOR,
FIVEL COMPANY**

**SOCIETY FOR HUMAN RESOURCE MANAGEMENT
(SHRM)**

**SUBMITTED TO
U.S. HOUSE COMMITTEE ON EDUCATION AND THE
WORKFORCE, SUBCOMMITTEE ON WORKFORCE
PROTECTIONS**

**HEARING ON
“FEDERAL WAGE AND HOUR POLICIES IN THE
TWENTY-FIRST CENTURY ECONOMY”**

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Introduction

Chairman Byrne, Ranking Member Takano, my name is Christine Walters, and I am the sole-proprietor of the FiveL Company. I have more than 30 years of combined experience in human resources administration, management, employment law practice and teaching. Previously, I worked as an in-house HR practitioner in the nonprofit sector for nearly 10 years and subsequently served as an adjunct faculty member at the Johns Hopkins University, teaching a variety of courses in graduate, undergraduate and certification-level programs from 1999 to 2006 in human resource management topics.

I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I have been a member for 18 years. On behalf of our 285,000 members in more than 165 countries, I thank you for this opportunity to participate in today's hearing on "Federal Wage and Hour Policies in the Twenty-First Century Economy."

SHRM is the world's largest HR professional society and for nearly seven decades the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

Since 2002, I have served as an independent HR and employment law consultant. Many of my clients are small businesses, including small government contractors and small nonprofits. Given their limited resources, many of my clients face challenges imposed by antiquated wage and hour rules prescribed by the Fair Labor Standards Act (FLSA), which have not kept pace with the modern, 21st century workplace and workforce.

In my testimony, I will explain the key issues posed by the FLSA to our nation's employers and employees, demonstrate some of the practical challenges faced by employers when complying with the FLSA, and explain how the FLSA hinders an employer's ability to provide workplace flexibility.

The Fair Labor Standards Act

Certainly, the FLSA has been a cornerstone of employment and labor law since 1938. This important statute establishes minimum wage, overtime pay, record-keeping and youth employment standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA was enacted to ensure an adequate standard of living for all Americans by guaranteeing the payment of a minimum wage and overtime for hours worked in excess of 40 in a workweek.

The U.S. Department of Labor's (DOL's) Wage and Hour Division administers and enforces the FLSA with respect to private employers and state and local government employers, and virtually all organizations are subject to the FLSA. Additionally, many states and local jurisdictions have their own laws pertaining to overtime pay. If a state or local law is more inclusive or more generous to the employee than federal law, the state or local law will apply. If, however, the state

or local law is less inclusive, then employers are required to follow federal law. The myriad of federal, state and municipal laws add additional complexity to employers' compliance efforts.

As noted above, the FLSA was enacted toward the end of the Great Depression and reflects the realities of the industrial workplace of the 1930s, not the workplace of the 21st century. The Act itself has remained relatively unchanged in the nearly 80 years since its enactment, despite the dramatic changes that have occurred in where, when and how work is done. Therefore, today's examination of federal wage and hour policies is an important discussion.

Mr. Chairman, employers encounter challenges as they navigate the complexities of FLSA compliance. As such, I know my clients and employers generally would welcome additional guidance from the DOL to inform their compliance efforts. Complying with the statute can create significant legal costs for employers, especially for many small businesses and nonprofits. Improved guidance from the Department would also be helpful in order to prevent baseless lawsuits. Defending against litigation is just one of the practical challenges employers encounter with the FLSA. These practical challenges are outlined below.

Employee Classification Determinations

The FLSA provides exemptions from both the overtime pay and minimum wage provisions of the Act. Taking into consideration the regulations under 29 CFR Part 541, employers and HR professionals regularly use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime and the minimum wage provisions of the FLSA. Generally speaking, classification of employees as either exempt or nonexempt is made on whether the employee is paid on a salary basis, at a defined, minimum salary level, currently \$23,660 annually, and an individual's specific duties and responsibilities. It is assumed by the DOL that all employees covered under the FLSA are nonexempt employees, and each element of the three-part FLSA test must be met in order to consider an employee exempt under the statute.

These classification determinations must be made looking at each individual employee. Classification decisions for each employee are particularly challenging because the statute specifically includes both objective (salary basis level, salary basis test) and subjective (duties test) criteria. As a result, an employer acting in good faith can easily mistakenly misclassify employees as exempt who, in reality, should be nonexempt, or vice versa. How these tests are defined and the application of them in the workplace has been refined through years of litigation. We certainly do not want to take a step backward redefining these tests. Instead, employers would welcome additional examples that illustrate how the tests can be applied in various situations.

In addition, Administrators Interpretations (AIs) on both joint employment¹ and employee versus independent contractor classification² under the FLSA have contributed to the complexity of

¹ https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm

² https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf

employee classifications. In both instances, these AIs established new standards creating greater exposure for employers. The joint employment guidance defined both “horizontal joint employment” and “vertical joint employment” for which the agency listed seven economic reality factors that should be considered when analyzing vertical joint employment and nine factors when analyzing horizontal joint employment. This is an expansion from the three circumstances identified in the existing DOL regulations³ defining joint employment.

Similarly, DOL guidance issued in 2015 narrowed who could be considered an independent contractor. The agency again focused on a broad “economic realities” test asking whether the worker is economically dependent on the employer or in business for him or herself, rather than focusing on the extent to which the employer has the right to control how the worker does the job.

The economic realities test used in each of these AIs is open to various interpretations which means that employers have no practical, objective criteria on which to rely. At the same time, a misclassification or an unexpected finding of joint employment could have serious repercussions and risk of liability with respect to wage and hour law. SHRM believes that these AIs, which were issued without notice and comment, should be withdrawn.

Given the challenges HR professionals encounter, a significant portion of SHRM’s programs and educational resources focus on compliance with the FLSA. SHRM’s HR Knowledge Center responds to thousands of FLSA inquiries each year from our members as employers diligently work to stay in compliance with the law. In fact, the volume of questions SHRM receives regarding the FLSA is second only to one other federal statute—the Family and Medical Leave Act.

In order to assist employers, the department should provide examples within their regulatory text and reinstate department opinion letters. Unlike the Administrator Interpretations mentioned earlier, opinion letters enabled employers to understand the Department’s view on how the regulations apply to specific fact patterns and were widely used by employers to better understand the application to their own workplaces.

Defending Against Litigation

Despite the ambiguity of many employment situations, the stakes in “improperly” classifying employees as exempt or nonexempt are high. The DOL frequently audits employers and penalizes those that misclassify employees, awarding up to three years of back pay for overtime to those employees, plus attorneys’ fees, if applicable. Predictably, audit judgments can be subjective, since two reasonable people can disagree on a position’s proper classification. Employers also face the threat of class-action lawsuits challenging their classification decisions.

For example, today at least 14 states have their own “white collar” or “Executive, Administrative and Professional (EAP)” regulations that use a three-factor test different from the one described above for properly classifying an employee as exempt. In these states, employers must conduct a dual analysis under the state and then the federal regulations to ensure proper classification.

³ 29 CFR 791.2

Changes in state level thresholds may also be on the horizon as many state legislatures pursue proposals similar to the pending Obama Administration overtime final rule that I discuss later in my statement.

In addition, the definition of an independent contractor is also murky. The Internal Revenue Service (IRS) uses factors different from (1) those described above that are used by the DOL; (2) state workers compensation statutes; (3) state unemployment insurance codes; (4) and more. On several occasions, I have witnessed employers do their due diligence, follow the IRS guidance, and properly classify a worker as an independent contractor. Then, when the job is complete the worker files for unemployment insurance (UI) benefits and the state grants those benefits, despite the employer's appeal that the worker was not, in fact, an employee. This occurs because the state uses a different definition of employee or independent contractor and is under no obligation to follow the IRS guidance. The employer is then subject to back taxes, back wages, future increases to the UI tax premium and more.

Employers work hard to ensure that employee classification decisions are in compliance with the FLSA. Many of the small businesses and nonprofits I work with have limited budgets and time as well as tight margins, so it is imperative that these organizations avoid expensive lawsuits.

Technology Challenges

Information technology and advances in communication have clearly transformed how businesses operate, communicate and make decisions. Smartphones, tablets, the use of social media and other technology allow many employees to perform job duties when and where they choose.

Many employees enjoy the flexibility of regularly working from home. The enjoyment is recognized, in part through the *When Work Works* awards program,⁴ which is a research-based initiative that highlights how effective and flexible workplaces can yield positive business results and help employees succeed at work and at home. A unique aspect of this award program is that employees are surveyed about their individual use of and experiences with flexibility, and the final scoring heavily weights the experience of employees. Therefore, the flexible workplace arrangements offered by winning organizations are validated by their own employees.

While the benefits of telework for both employers and employees are well documented, potential pitfalls exist. For example, research shows that employee engagement has a positive correlation to productivity. Research also shows that teleworkers are more engaged if they participate in-person with their colleagues on a regular basis. Now consider this situation an employer client of mine recently faced.

To encourage inclusion and team engagement the employer asked all teleworkers to begin attending weekly staff meetings in person. The teleworkers then suggested that they should be

⁴ <http://www.whenworkworks.org/meet-our-winners>

paid for the travel time from their home to the office meeting. But the employees who regularly reported to the office each day were not paid for that time. Yet under the FLSA regulations, there is a reasonable interpretation that the teleworkers should be paid and the other employees need not be for the very same travel time. The antiquated regulations simply do not address the realities of today's work practices and create not just legal challenges but employee relations concerns as well.

As noted, the FLSA was written before the proliferation of smartphones. Phones and other "smart" devices are nearly universal in today's workforce, yet continue to present challenges in regards to nonexempt employees. It is not uncommon for nonexempt employees to want to access online work platforms remotely after work hours. Because nonexempt employees are only paid for the hours they work, all hours must be closely tracked in order to remain in compliance with the FLSA. Often, employers will error on the side of caution and implement policies to restrict employees' access to work platforms from home because of the challenges associated with tracking those hours. This is yet another example of how the FLSA has not kept pace with the 21st century economy.

Diminished Workplace Flexibility

The 21st century workforce and workplace are increasingly demanding workplace flexibility, defined as giving employees some level of control over how, when and where work gets done. Altering how, when and where work gets done in today's modern workplace, however, also raises compliance concerns with the FLSA.

The FLSA makes it difficult, if not impossible in many instances, for employers to provide workplace flexibility to millions of nonexempt employees. First, the FLSA limits choices for employees interested in modifying the biweekly workweek. Under the FLSA, employers are permitted to allow a nonexempt employee to work four 10-hour days Monday through Thursday, for a total of 40 hours in a week and to take every Friday off without the employer incurring any overtime obligations.

However, if an employee wanted greater flexibility to work a nine-hour day Monday through Friday of the first week for a total of 45 hours and then to work three nine-hour days and one eight-hour day in the second week and take Friday off, the employer would have to pay overtime for the additional hours over 40 hours in the first week or the employer would have to create and administer a separate workweek for payroll purposes for those employees working the flex schedule. In addition, several states have daily overtime requirements for more than an eight-hour day, further complicating employer efforts to provide this type of flexible work arrangement, often referred to as an alternative work schedule.

Second, the statute also prohibits private-sector employers from offering nonexempt employees the option of paid time off rather than overtime pay for hours worked over 40 hours per week, even though all public-sector employees are offered this type of flexibility, commonly referred to as "compensatory" or "comp" time. SHRM has long supported the Working Families Flexibility Act, a bill that would amend the FLSA to give private-sector employers the option of offering

nonexempt employees the voluntary choice of taking overtime in cash payments, as they do today, or in the form of paid time off from work. SHRM strongly supports the idea of compensatory time because it meets our core workplace flexibility principle—that in order for flexibility to be effective, it must work for both employers and employees.

During my time as an HR practitioner, I encountered a challenge involving the use of comp time at a private employer. I received a call from the Baltimore office of the DOL. In short, one of our directors was allowing the nursing technicians, who were nonexempt, to “bank” time for use at a later date instead of receiving overtime pay. The employees loved it; the director loved it – everyone was happy until I had to break the bad news that it was not permissible under current law. We then had to go back two years, including tracking down employees who had left our employment in that time, in order to calculate the overtime that was provided in the form of comp time for each person and compensate these individuals appropriately. Thankfully we avoided three years’ liability for back wages because we demonstrated that we had conducted in-house management training on the FLSA and – although it was clear that the director had not retained the information – we were able to show good faith and due diligence in our efforts to comply with the FLSA.

While the ability to offer nonexempt, private-sector employees comp time is one way public policy can encourage greater access to workplace flexibility, SHRM believes more can be done to incentivize employers to implement effective and flexible workplaces. It is our strong belief that public policy must not hinder an employer’s ability to provide flexible work options. Rather, public policy should encourage and enhance the voluntary employer adoption of workplace flexibility programs. As such, SHRM continues to work with Congress on developing legislation to expand workplace flexibility options for employees.

FLSA Overtime Regulations

As outlined earlier in my statement, an employee must satisfy each element of the three-part test to be considered exempt from overtime requirements as prescribed in section 541 of the FLSA overtime regulations. These regulations governing the FLSA have been revised by the Executive Branch numerous times.

In fact, last year the DOL released final regulations making changes to the overtime rules that raised serious concerns for SHRM and HR professionals. Specifically, the salary threshold would have been increased by more than 100 percent to \$913 per week, or \$47,476 per year. In addition, the final rule also provided for automatic salary threshold increases every three years. Throughout the rulemaking process, SHRM supported an update to the salary threshold, but the final rule’s salary threshold increase went too far, too fast. Fortunately, on November 22, 2016, the United States District Court, Eastern District of Texas issued a preliminary injunction delaying the final rule’s implementation date of December 1.

The significance of more than doubling the salary threshold to be exempt from overtime requirements was felt by many employees who currently are properly classified as exempt and resented the prospect of being reclassified as nonexempt. Employers were inundated with questions and complaints from those exempt employees about how the conversion would impact the flexibility they enjoy today to work a schedule that meets their work/life integration needs such as coming in late or leaving early to attend to children or family; enjoying the benefit of traveling to business events such as conferences; job fairs and educational programs; and more.

Going forward, SHRM believes that if summary judgment is granted on the pending overtime rule, the Trump Administration should reexamine the overtime regulations to determine a more reasonable salary threshold. SHRM would welcome the opportunity to provide input during a new rulemaking to achieve an updated salary threshold using a methodology consistent with past updates.

Conclusion

Mr. Chairman, as the modern workforce continues to evolve, workplace flexibility will become an even more important business strategy to help organizations respond to demographic, economic and technological changes in the workplace. Unfortunately for employers and employees, outdated employment laws can stifle employer innovation when it comes to how, when and where work is done in a way that best meets an employee's needs.

While the FLSA is a cornerstone among U.S. workplace statutes, the statute was crafted for a different time. Therefore, it must be evaluated to ensure it still encourages employers to hire, grow and better meet the needs of employees.

SHRM and its members are committed to working with this Subcommittee and other members of Congress to modernize the outmoded FLSA in a manner that balances the needs of both employees and employers and does not produce requirements that could limit workplace flexibility.

Thank you. I welcome your questions.