

**C R O W E
&
D U N L E V Y**
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**My Money Don't
Jiggle, Jiggle, It Folds:
FLSA Compliance
Strategies**

Presented by: Tanya S. Bryant

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*Hello
Autumn*

@kinten_niley

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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Tanya, or another licensed attorney.

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United States Department of Labor 2021 Violations

	Cases	Back Wages	Employees
Agriculture	1,000	\$8,432,451	10,379
Amusement	287	\$1,208,259	1,063
Apparel Manufacturing	76	\$1,305,534	588
Auto Repair	546	\$4,350,665	3,564
Child Care Services	435	\$832,770	1,523
Construction	3,034	\$36,068,080	21,341
Food Services	4,237	\$34,741,032	29,209
Guard Services	497	\$6,252,652	5,343
Hair, Nail & Skin Care Services	107	\$309,585	317

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United States Department of Labor 2021 Violations

	Cases	Back Wages	Employees
Health Care	1,194	\$13,882,897	17,079
Hotels and Motels	602	\$2,445,609	3,099
Janitorial Services	456	\$2,426,106	2,861
Landscaping Services	293	\$3,218,092	5,317
Retail	2,705	\$13,470,209	14,734
Temporary Help	471	\$2,602,223	4,883

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United States Department of Labor 2020 Violations

	Cases	Back Wages	Employees
Agriculture	1,036	\$7,172,827	11,175
Amusement	230	\$729,849	1,431
Apparel Manufacturing	128	\$1,690,750	829
Auto Repair	442	\$2,909,843	2,465
Child Care Services	434	\$991,052	2,112
Construction	2,991	\$34,535,715	24,787
Food Services	4,551	\$38,616,790	39,404
Guard Services	548	\$6,682,070	6,230
Hair, Nail, & Skin Care Services	102	\$1,407,609	7,861

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United States Department of Labor 2020 Violations

	Cases	Back Wages	Employees
Health Care	1,257	\$13,500,790	18,206
Hotels and Motels	645	\$2,464,165	3,784
Janitorial Services	460	\$3,544,663	3,247
Landscaping Services	238	\$2,414,277	1,937
Retail	3,020	\$10,931,746	12,929
Temporary Help	331	\$1,817,194	2,820

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Importance of Compliance Program

- Reduce potential risk of liquidated damages and damages for willful violations

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Unpaid Wages

• Individual Action

- 150 Weeks (for the three years) x 5 hours per week = 750 overtime hours
- 750 overtime hours x \$22.50 (\$15 x 1.5) = \$16,875 in unpaid wages
- Liquidated damages: \$16,875 x 2 = **\$33,750**

vs.

• Collective Action

- 100 current and former assistant managers join the collective action
- 100 x \$16,875 = \$1,687,500 in unpaid wages
- Liquidated damages: \$1,687,500 x 2 = **\$3,375,000**

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Attorneys' Fees and Costs

- Under the FLSA, prevailing plaintiffs are entitled to an award of their attorneys' fees
- Plus you have to add in your own fees in defense of the case

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Liability For FLSA Violations

- “Any person acting directly or indirectly in the interest of the employer in relation to the employee...”
 - Power to hire and fire
 - Control over schedule of work or conditions of employment
 - Maintenance of records
 - Control over method or rate of payment
 - Control over business enterprise (more than one business for common purpose)
- Possible criminal penalties too

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Importance of Compliance Program

- Employer's burden
 - Good faith belief
 - Took reasonable steps to ensure compliance

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FLSA Compliance Essential Policies

- Proper time recording of non-exempt employees
 - Meal breaks
 - Rounding practices
 - Off-the-clock work
 - Auto-deduction

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FLSA Compliance Supervisor Training

- Understand
- Awareness
- Issue Spotting
- Alert employer

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Supervisor Responsibility

- Comply with the company's timekeeping policy and require employees to do so
- Provide employees with an opportunity to take meal and rest breaks or require them to do so, in compliance with company policy. Supervisors and managers should not encourage or require employees to work during unpaid meal or break periods.
- Review employee time entries each week, including:
 - Any corrected time entries or employee requests for corrections;
 - Time entries or errors flagged by the timekeeping system, such as missed punches; and
 - By comparing time entries with an employee's customary schedule or special projects that week, such as out-of-town travel
- Document changes to time entries
- Escalate employee questions or concerns about timekeeping to the appropriate personnel, as needed

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FLSA Compliance Employee Training

- Employee Handbook
- Orientation
- Live training

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FLSA Compliance Employee Training

- Which activities are considered working time
- How to record working time and non-working time, such as vacations and company holidays
- How to correct erroneous or missing time entries, such as missed punches
- The required employee acknowledgment that time entries are accurate and complete
- Meal period and rest break policies, including any corresponding time entries
- Whether manager or supervisor approval is required before working overtime hours
- The company's prohibition against employees working off the clock
- How to use the employee complaint procedure
- Duties and responsibilities of managers and supervisors

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FLSA Compliance

- Consistent Enforcement
 - Ensure complete and accurate records
 - Investigate

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Discipline

- Employers must pay employees for all hours worked, even work that is not authorized or not properly recorded. Employers can, however, discipline employees for violations of working time and timekeeping policies, such as when:
 - Employees work overtime without prior authorization, in violation of company policy;
 - Employees over- or underreport working time;
 - Employees clock in early but perform no work, in violation of company policy;
 - Employees do not close or submit their time entries by the established deadline;
 - Managers or supervisors encourage or require OTC work; or
 - Managers or supervisors falsify time records or alter time entries without the employee's approval

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FLSA Compliance

- Reporting avenues
 - Hotline
 - Human Resources
 - Payroll
 - Any manager

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FLSA Compliance

- Periodic audits
 - Maintain audit records
 - Reduce liability
 - Liquidated damages
 - Willful violations

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FLSA Compliance

- Periodic audits
 - Record retention
 - Payroll
 - FLSA - 3 years
 - Oklahoma - 5 years



FLSA Compliance

- Periodic audits
 - Record retention
 - Wage computation records
 - Daily time sheets
 - Wage rate tables
 - Additions to and deductions from wages
 - 2 years



FLSA Compliance

- Periodic audits
 - Back-up and recovery procedures
 - Emergencies



FLSA Compliance

- Stay in the know
 - Wage and hour obligations
 - Federal government
 - State government
 - Court cases



FLSA Compliance

- Stay in the know
 - Wage and hour obligations
 - Periodic subscriptions
 - DOL website
 - Employment law attorney



Compensable Time

- Under the DOL's "continuous workday" principle, generally all activities that occur between the beginning and end of a workday constitute compensable working time (limited exceptions)
- When a workday begins and ends can be more complicated than simply clocking in and out
- Employers must also consider:
 - Activities occurring before or after (**preliminary or postliminary**) to an employee's principal work activities. If preliminary or postliminary activities are sufficiently related (**Integral and Indispensable**) to the employee's principal activities, they may be compensable
- *De minimis* time



De Minimis Time

- Employees generally cannot recover for otherwise compensable time if that time is *de minimis*. In determining whether time is *de minimis*, federal courts typically consider:
 - The practical administrative difficulty of recording the additional time;
 - The amount of compensable time; and
 - The regularity of the additional work

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Compensable Time

- Commonly litigated issues include:
 - Donning and doffing (time spent putting on and taking off clothing, safety equipment, and work-related gear)
 - Pre-shift activities (booting up a computer, pre-shift meetings)
 - Travel time to and from work and travel for work
 - Walking time (from locker to time clock, from time clock to front door)
 - Waiting or on-call time
 - Training, onboarding, and seminars

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Donning and Doffing

- Compensable if it satisfies the “**integral and indispensable**” test
 - Is the activity an intrinsic element of the employees’ principal activities and one with which the employee cannot dispense if they are to perform those activities

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Donning and Doffing

√ Integral and Indispensable

- Booting up computer for customer service representatives
- Meatpacking employees sharpening knives
- Battery-plant employees showering and changing clothes

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Donning and Doffing

∅ Integral and Indispensable

- Staffing company employees going through security screenings
- Poultry-plant employees waiting to don protective gear

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Travel Time DOL

- In an opinion letter dated December 31, 2020, the DOL concluded that for an employee who chooses to split their workday between teleworking and working in the office, with sufficient time in between to perform personal tasks, time spent traveling between home and work is not compensable:
 - As worksite-to-worksite travel
 - Based on the continuous workday rule

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Travel Time

- Employee receiving an emergency call-back to work:
 - Is compensable if the employee is called away from home "at night to travel a substantial distance"
 - May not be compensable if the employee is called to return to their normal work location (the DOL takes no position on the compensability of travel time in that situation)

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Travel Time

- Travel to another city for a special one-day assignment is generally compensable, though the employer can deduct the employee's:
 - Normal commuting time; and
 - Usual meal time

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Travel Time

- Overnight travel
- Generally compensable if:
 - It occurs during an employee's normal working hours on regular workdays and the corresponding hours on non-work days (the employer may exclude regular meal periods)
- Not compensable if:
 - It occurs outside an employee's normal working hours and the employee is a passenger in a car or on a plane, train, boat, or bus. However, if the employee is working while traveling, the same is compensable

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Travel Time

- Overnight travel
- If the employer offers public transportation for overnight travel away from home but the employee requests permission to drive their own car instead, the employer may count as hours worked either the time:
 - The employee spends driving their car; or
 - The employer would have counted as hours worked during the employee's normal working hours if the employee had taken public transportation

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Waiting Time

“Engaged to wait”
versus
“Waiting to be engaged”

- If the circumstances indicate the employee is engaged to wait, she is considered to be on duty and her time is hours worked
- If the circumstances indicate the employee is waiting to be engaged, he is considered to be off duty and his time is not hours worked

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Compensable Waiting Time FLSA

- Occurring on or away from the employer's premises;
- Periods of inactivity that are unpredictable and typically short;
- An integral part of the job; and
- Time the employee cannot effectively use for their own purposes

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Compensable Waiting Time SCOTUS

- Compensability of waiting time generally involves consideration of:
 - The terms of the parties' agreement;
 - Practical application of that agreement;
 - The nature of the services as it relates to the waiting time; and
 - All other relevant considerations

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On-Call Time

- Compensable if:
 - The employee must remain:
 - On the employer's premises; or
 - So close that they cannot use the time effectively for their own purposes.
- Not compensable if:
 - Not required to remain on the employer's premises; and
 - Only required to leave word at their home or with the employer where they may be reached

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Walking Time

- Generally not compensable if occurs:
 - Before an employee begins their principal activities; or
 - After an employee concludes those activities

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Walking Time

- Generally compensable if occurs:
 - After an employee commences a principal activity or an integral and indispensable preliminary or postliminary activity; or
 - Before an employee concludes those activities

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Take-Aways

- DOL is cracking down on FLSA violations
- Private FLSA lawsuits on the rise
- Misclassifications and other FLSA violations are costly
- Supervisor and employee training is crucial
- Perform regular audits to ensure compliance
- Keep your money folding, not jiggling

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