



# Wage and Hour Law Update

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# FLSA Update

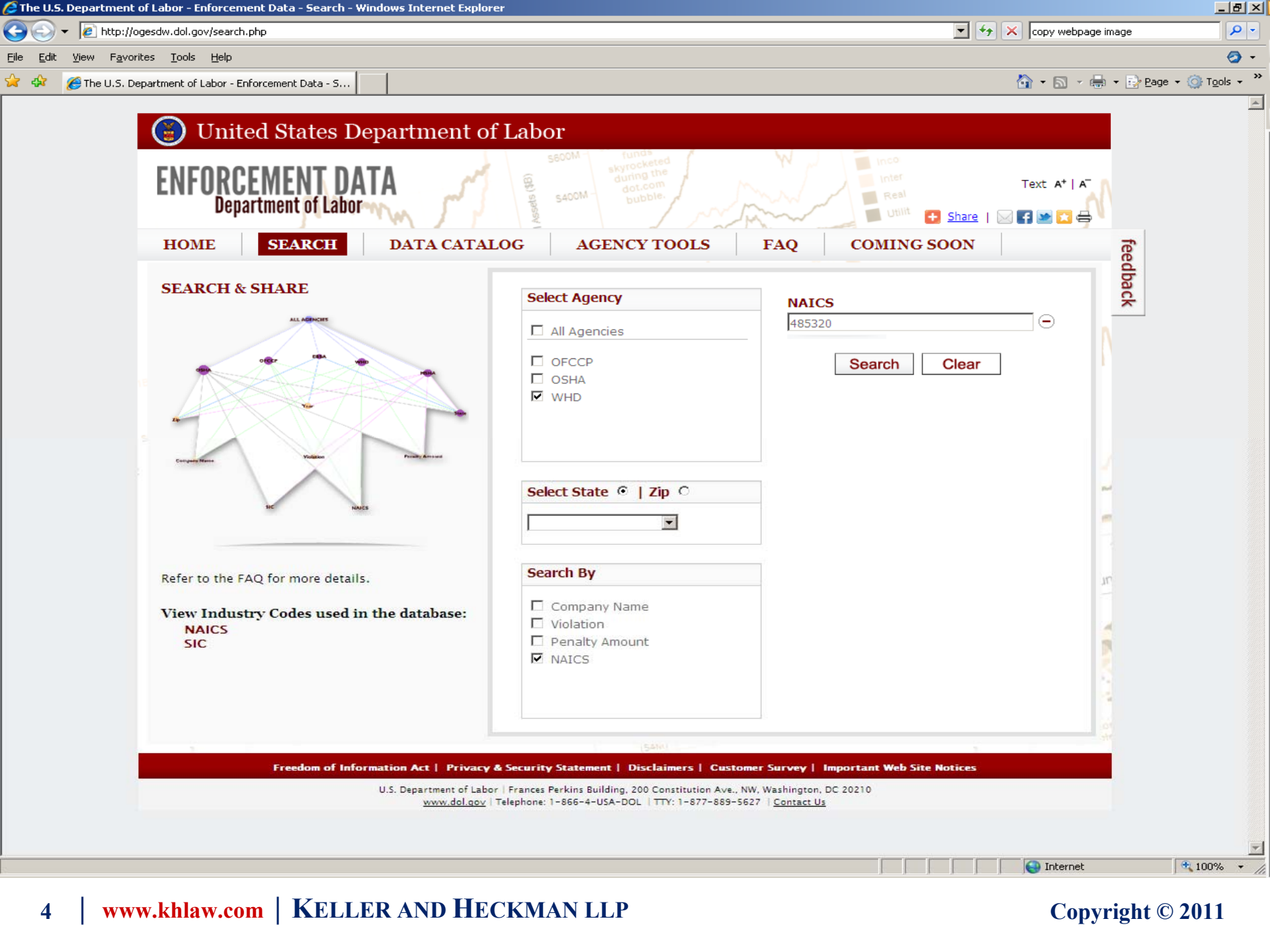
- FLSA Coverage
- Employee vs. Independent Contractor
- Guaranteed Rights
  - Minimum Wage
  - Overtime
- Exemptions
- Notice
- Recordkeeping
- Liability
- Litigation and Settlements



# Fair Labor Standards Act of 1938

- FLSA administered by Wage and Hour Division of Department of Labor
  - Act establishes standards for minimum wages, overtime pay, recordkeeping, and child labor



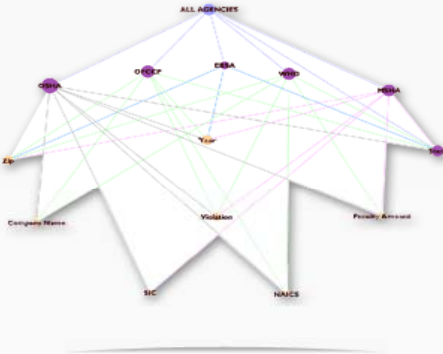


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Refer to the FAQ for more details.

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# Top 10 OT/Back Wage Awards – Limo Industry, 2008 - 2010

	Trade Name	City	State	FLSA Violation Count	FLSA BW Assessment	FLSA MW	FLSA OT
1	(Name Withheld)	Cambridge	MA	61	\$ 39,997.24	n/a	\$ 39,997.24
2	(Name Withheld)	Bohemia	NY	30	\$ 37,476.09	n/a	\$ 37,476.09
3	(Name Withheld)	Ashland	VA	11	\$ 34,172.36	n/a	\$ 34,172.36
4	(Name Withheld)	Tarrytown	NY	31	\$ 33,943.84	n/a	\$ 33,943.84
5	(Name Withheld)	Salt Lake City	UT	2	\$ 28,295.63	n/a	\$ 28,295.63
6	(Name Withheld)	Fort Worth	TX	8	\$ 28,172.52	n/a	\$ 28,172.52
7	(Name Withheld)	New York	NY	13	\$ 20,561.99	n/a	\$ 20,561.99
8	(Name Withheld)	Grafton	WV	21	\$ 20,024.88	n/a	\$ 20,024.88
9	(Name Withheld)	Woodside	NY	41	\$ 19,673.34	n/a	\$ 19,673.34
10	(Name Withheld)	Corvallis	OR	28	\$ 18,071.90	n/a	\$ 18,071.90

# PRELIMINARY ISSUE

- Is there an employment relationship between the driver and the operator?
- If DOL/WH is initiating the audit, may presume the existence of an employment relationship – but a federal court will have the final word.
- If I/O files suit for FLSA minimum wages and/or overtime, I/O has the burden of proof.
- Frequently a fact question decided by a jury – unless the parties stipulate to undisputed facts – in which case a federal judge will decide.

# Employee v. Independent Contractor

- Supreme Court has held that no one factor is determinative in evaluating worker status, but courts must weigh the following factors:
  - Permanency/exclusivity of relationship
  - Nature and degree of control exercised over the worker
  - Independence of the worker's business operations – and opportunity for profit or loss
  - Extent service is integral to defendant's enterprise



# Judge Robert Miller – On the FedEx Ground Package Driver Model

*“The court makes no value judgment as to whether independent contractor or employee status is a better business model or more beneficial for society. The court agrees with FedEx Ground that independent contract status is a legitimate and acceptable mode of commerce.”*

# Judge Miller's Top Criteria

## I/O

- Written I/O Agreement w/ Entrepreneurial Features
- I/O Incorporation
- 1099 – Flat or Job Rates
- Control Solely Results – Not the Means
- Not Terminable At-Will – Should Be Based on Failure to Achieve Results
- No Non-Compete

## E/S

- No Written I/O Agreement
- Terminable At-Will
- Over-Scheduling
- Insistence on Exclusivity in Personal Services – No Moonlighting
- Hourly Pay
- Tight supervision of hours and means of getting the job done

# Assuming Employment Status Established

- DOL/Employee must establish FLSA coverage under either the enterprise test or the employee test
- Assuming FLSA coverage, burden shifts to Employer to prove Employee is FLSA exempt.

# FLSA Enterprise Coverage

- Persons and organizations engaged in interstate commerce or with two or more employees that gross more than \$500,000/year.
- If enterprise coverage exists, all employees of that enterprise are subject to the FLSA regardless of their individual involvement in interstate commerce.

# FLSA Individual Coverage

- Covers individual workers involved in interstate commerce
- Chauffeurs covered if:
  - Cash wages from one employer are at least \$1,700/year; or
  - Work more than 8 hours/week for one or more employers



# Notable FLSA Exemptions

- Administrative
- Professional
- Executive
- Motor Carrier
- Taxi Cab



# Administrative Exemption



- Employee must make at least \$455 per week;
- Office or non-manual work directly related to management; and
- Primary duty includes exercise of discretion and independent judgment with respect to matters of significance

# Executive Exemption



- Employee must make at least \$455 per week;
- Primary duty managing business or subdivision of business;
- Regularly direct work of at least two full-time employees; and
- Authority to hire or fire other employees

# DOT - Primary and Exclusive Jurisdiction Over FLSA Motor Carrier Exemption

- DOT has exclusive jurisdiction to interpret and define key terms and to determine employees whose duties affect safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce under MCA
  - Pause for important news bulletin impacting NLA Members – GOOD NEWS from 11<sup>th</sup> Circuit Court of Appeals
- Hasn't stopped DOL/WHD from meddling

# *Abel v. Southern Shuttle Services, Inc.*

- January 28, 2011 Opinion
- Footnote 6 – rejects plaintiff’s argument that a motor carrier have a written agreement with an interstate carrier to satisfy the interstate commerce requirement
  - Prearranged ground transportation service to and from airport using interstate network to accept reservations and voucher payment system satisfies the “special arrangement” rule bringing intrastate motor carrier under DOT jurisdiction for MC exemption
  - Two years prior -- in *Powell v. Carey Int’l*-- district court judge in Miami rejected MC defense because Carey and its affiliate didn’t have written contracts with Virgin Airlines to provide formal transportation at the airport
- Now back to the bad news – DOL/WHD meddling.

# Small Vehicle Exception

- Operating vehicles or working on vehicles weighing 10,000 pounds or less, except vehicles:
  - Transporting more than 8 passengers, including driver, for compensation; or
  - Transporting more than 15 passengers, including driver, not for compensation; or
  - Transporting hazardous material
- Courts left to address effect on “Mixed Fleet” operations – divided results



# WHD MEDDLING AND CONFUSION

- 5/23/2007 Fact Sheet #19 – Interprets 2005 SAFETEA-LU Amendments and asserts “work week” jurisdiction over employees of “mixed fleet” operations who perform activities on non-exempt “small vehicles.”
- 11/4/2010 Field Assistance Bulletin (#2010-2) – Interprets 2008 TCA to override DOT “four-month” rule in any “work week” an employee works with non-exempt “small vehicles”; and generates its own standard for determining passenger capacity. (Retro to 6/8/2008 for audit purposes)

# *What DOT “Four-Month” Rule?*

- 1981 – FHWA/BMCS published NPRM establishing four month window as the period during which a motor carrier would be required to show that an employee had engaged in exempt MC activities in order to claim exemption from overtime pay
- 1999 – FHWA determines four month period not necessary to prevent driver fatigue and replaces it with a 14/15 day rule, consistent with DOT hours of service regulations. WHD didn’t get the Memo. Behold the result.

<b>DRIVER, DRIVER'S HELPER, LOADER OR MECHANIC WHOSE WORK AFFECTS THE SAFE OPERATION OF MOTOR VEHICLES ON PUBLIC HIGHWAYS IN INTERSTATE OR FOREIGN COMMERCE AND PERFORMS SUCH DUTIES ON THE FOLLOWING VEHICLES:</b>	<b>TCA &amp; FLSA § 13(b)(1) EXEMPT OR NONEXEMPT STATUS</b>
<b>A.</b> Exclusively on a motor vehicle that weighs (GVWR) 10,001 pounds or more.	Exempt → 4-month rule applies
<b>B.</b> Exclusively on a motor vehicle that is (regardless of weight) <ol style="list-style-type: none"> <li>1. designed or used to transport more than 8 passengers (including the driver) for compensation; or</li> <li>2. designed or used to transport more than 15 passengers (including the driver) and not used to transport passengers for compensation; or</li> <li>3. used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation.</li> </ol>	Exempt → 4-month rule applies
<b>C.</b> On a motor vehicle that weighs 10,001 pounds or more, as well as on a motor vehicle described in <b>B</b> above in the same workweek.	Exempt → 4-month rule applies
<b>D.</b> Exclusively on a motor vehicle that weighs 10,000 pounds or less (except motor vehicles described in <b>B</b> above).	Nonexempt entirely
<b>E.</b> On a motor vehicle that weighs 10,001 pounds or more; however, in some workweeks (whether the entire week or part of the week), also performs safety affecting duties on a motor vehicle that weighs 10,000 pounds or less (referred to as "small vehicle").	Nonexempt in those workweeks where work is also performed on a vehicle that weighs 10,000 pounds or less (small vehicle); 4-month rule may apply in other workweeks
<b>F.</b> On a motor vehicle that is (regardless of weight) <ol style="list-style-type: none"> <li>1. designed or used to transport more than 8 passengers (including the driver) for compensation; or</li> <li>2. designed or used to transport more than 15 passengers (including the driver) and not used to transport passengers for compensation; or</li> <li>3. used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation.</li> </ol> However, in some workweeks (whether the entire week or part of the week), also performs safety affecting duties on a motor vehicle that weighs 10,000 pounds or less ("small vehicle").	Nonexempt in those workweeks where work is also performed on a vehicle that weighs 10,000 pounds or less (small vehicle); 4-month rule may apply in other workweeks

# FLSA WAGE REQUIREMENTS

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- Minimum Wage
- Overtime

# Minimum Wage

- Covered, nonexempt employees entitled to \$7.25/hour (except if State or Local minimum is higher – then the higher rate applies)
- Special Rule for Tipped Employees
  - Provided tips = \$30 @ month, Employer may take credit for up to \$3.625 in actual hourly average tips in the work week towards satisfaction of Minimum Wage Payment
  - Guaranteed gratuities are not tips – therefore 100% counts toward Minimum Wage obligation
  - If guaranteed gratuities are included in the “Flat Rate” or “Day Rate” – they are included in gross weekly earnings for purposes of calculating the Regular Rate used in calculating the overtime premium due for hours worked in excess of 40

# Overtime

- Overtime
  - One and one-half times “regular rate” for more than forty hours/workweek
- Workweek
  - Period of 168 hours during 7 consecutive 24-hour periods



# Calculating Hours Worked

- All time employee must be on duty or at work, from beginning of first activity to end of last activity



# Are These Hours Compensable?

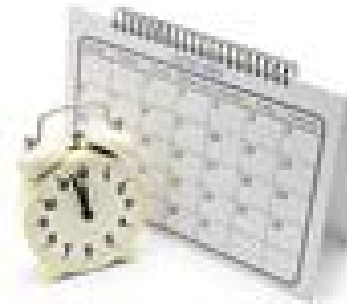
- Home to work commutes
- Cleaning, inspecting and maintaining vehicles
- Putting on and taking off uniforms
- Buying amenities and stocking limo
- Calling dispatch to get assignments and flight times
- Driving between jobs and mandatory meetings
- Waiting time to pick up customers

# Preliminary and Postliminary Activities

- Commuting time is never compensable
- Preliminary and postliminary activities are compensable if
  - Integral to employee's principal activity, and
  - Not de minimus
- Fact questions for jury

# Overtime

- **Waiting Time**
  - Employee engaged to wait
    - work time
  - Employee waiting to be engaged
    - not work time



# Overtime

- On-Call Time
  - Compensable if the employee required to remain on or close to employer's premises and cannot use time effectively for his or her own purposes



# Factors Weighed to Judge Compensability of On-Call Time

- Are there excessive geographic restrictions on employee movement
- Was the frequency of calls unduly restrictive
- Was a fixed time limit for response unduly restrictive
- Whether on-call employees could easily trade responsibilities
- Whether employees had actually engaged in personal activities during call-in time

# Notice

- Notice to Employees
  - Must post FLSA notice in conspicuous place

**EMPLOYEE RIGHTS**  
**UNDER THE FAIR LABOR STANDARDS ACT**  
DEPARTMENT OF LABOR | BUREAU OF LABOR STANDARDS

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**FEDERAL MINIMUM WAGE**  
**\$7.25** per hour

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**COVERED BY FLSA** Federal FLSA covers your employer and those who are not exempt under the Act.

**WORKING HOURS** An employer may not require you to work more than 40 hours per week unless you are exempt from the Act. Exemptions are determined by the Secretary of Labor.

Under FLSA and 40 hours per week means actual hours of service, not manufacturing, processing, or handling time. Exemptions apply for the following conditions:

- 8 hours per week for non-manufacturing, processing, or handling time.
- 12 hours per week for non-manufacturing, processing, or handling time.
- 16 hours per week for non-manufacturing, processing, or handling time.

**MINIMUM WAGE** Your employer must pay you at least the federal minimum wage. This minimum wage applies to all employees unless you are exempt from the Act.

**EMPLOYMENT** Employment of "seasonal employees" must not exceed 13 weeks in any 12-month period. If you are a seasonal employee, your employer must provide you with a written notice of your seasonal status. This notice must include the following information:

- The date you are expected to begin work.
- The date you are expected to end work.
- The number of hours you are expected to work.
- The number of times you are expected to be employed.

**ENFORCEMENT** The Department of Labor may recover back wages with interest and civil penalties, or through back pay, for the employees that have been employed in violation of the law. Violations may result in civil penalties of up to \$10,000 per employee. Employees may be assessed civil penalties of up to \$10,000 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to \$10,000 for each employer who is the subject of a violation of the law's overtime provisions or overtime pay provisions. A civil penalty of up to \$10,000 may be assessed for each willful or repeated violation of the law's overtime provisions or overtime pay provisions. The law also prohibits discrimination against an employee because of his or her participation in any proceeding under the Act.

**ADDITIONAL INFORMATION**

- Certain occupations with exemptions are exempt from the minimum wage, overtime, and other provisions.
- State minimum wage laws may apply to workers in Agriculture, Fisheries, and the Commonwealth of the Northern Mariana Islands.
- Some state laws provide greater minimum wage, overtime, and other provisions.
- The law makes employers liable for the unpaid wages and interest on the unpaid wages.
- Employees under 18 years of age may be paid the child labor minimum wage.
- Certain full-time students, student workers, apprentices, and workers with disabilities may be paid less than the minimum wage under special provisions under the Department of Labor.

**For additional information:**  
**1-866-4-USWAGE**  
1-866-487-2363 • TTY: 1-800-827-6858  
**WWW.WAGEHOUR.DOL.GOV**

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# Recordkeeping

- Payroll records, bargaining agreements, sales and purchase records
  - Retain 3 years
- Wage computation records
  - Retain 2 years
- Anticipated New Rule
  - Document grounds for independent contractor status and exemption from overtime pay



# Employer Liability

- Statute of Limitations
- Willful and non-willful conduct
- Liquidated damages
- Interest
- Attorney's Fees



# Statute of Limitations

- Two years for recovery of backpay
  - Three years if willful violation



# Liquidated Damages

- Equal to amount of award for lost or unpaid wages
  - Often referred to as "double damages" or "double back pay"



# Requirements for Effective Release

- At the pre-litigation stage, FLSA § 216(c) authorizes the settlement of FLSA claims solely under the supervision of the DOL
- Employers who undertake private FLSA settlements “do so at their peril”
- In litigation, courts must approve the terms of settlement



# Questions?





# Thank you

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