

Overtime Violations Lisa Diaz-Ordaz

What Industries Tend to Violate Overtime Laws the Most?

Overtime violations are especially prevalent in low wage jobs. Some of the industries with notably high instances of violations include the restaurant and hotel industries, retail, drug and grocery stores, private households and home health care.¹

Within these industries, occupations with the most overtime violations include childcare workers, home health care workers, waiters and bartenders, cooks and food preparers, retail salespeople, cashiers and stock clerks.² A quick glance at the national median hourly wages for these jobs shows that they all pay around just ten dollars an hour.³ This averages out to just 100 percent of the poverty level for a single person,⁴ which would make the worker eligible for various kinds of public assistance in New York State.⁵ Thus, the workers who are making the least amount of money are the ones who are most vulnerable to this exploitation.



Since overtime violations continue to proliferate, it is clear that the present protections and sanctions under the Fair Labor Standards Act are inadequate. In order to curb these violations, there needs to be increased protection for workers and harsher sanctions for the employers who violate these laws.

What is the Fair Labor Standards Act?

The heart of the federal Fair Labor Standards Act (FLSA) is the wage and hour provisions. These establish a minimum wage and require employers to pay their workers time and a half for overtime – any hours worked in excess of forty per week.⁶ The FLSA, however, does not protect all employees.⁷

Who is Not Covered by the FLSA?

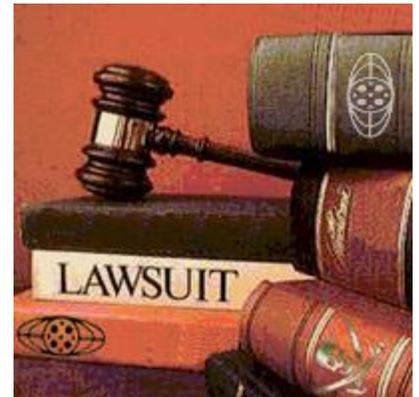
The act exempts any family-owned businesses that do not employ persons outside the immediate family.⁸ It also exempts independent contractors, most agricultural workers, domestic workers who perform casual babysitting or care for the disabled or aged, and employees of seasonal amusement and recreational businesses.⁹ In addition, the FLSA has “white collar exemptions”.¹⁰ Many commentators have written about how these “white collar exemptions” make “white collar” workers reluctant to argue that they should be covered by the FLSA, because even if coverage increased their wages it would remove their “white collar” class status.¹¹ There are also income based exemptions; however in 2004, coverage was expanded to protect more workers.¹²

How Does New York Labor Law Differ from the FLSA?

With regard to coverage, New York Labor Law and the FLSA are nearly identical. New York, does, however, provides for an eight hour day or a five day work week regardless of hours worked for specific state employees.¹³ Where the State overtime provisions provide greater benefits than the Federal overtime provisions, the State provisions must be applied.¹⁴

How Can an Employee Bring a Claim under the FLSA?

An aggrieved employee can bring a civil action against his or her employer, the Secretary of Labor can bring a civil claim on behalf of employees, or the Department of Justice can criminally prosecute employers.¹⁵ The FLSA also contains an anti-retaliation provision which proscribes employers from retaliatory conduct such as discharging or discriminating against an employee for filing a complaint under the FLSA or testifying in an FLSA proceeding.¹⁶



What Sanctions Are Imposed on the Employer, and What Can the Employee Recover?

A willful violation is criminally punishable with up to a \$10,000 fine; a fine and/or up to six months of imprisonment can be imposed for subsequent violations.¹⁷ The most common forms of recovery for workers in a civil suit are back pay, double back pay, double back pay with attorney fees and court costs, or injunctions against the injury causing behavior.¹⁸ It is a complete defense to liability if an employer can show that its FLSA violation was “in good faith in conformity with and in reliance on any written administrative regulation” of the Wage-Hour Administrator.¹⁹ However, the employer will still have to pay back wages.²⁰

Are The Sanctions Different If an Employee Files a Claim under New York State Labor Law?

In New York, there is a six year statute of limitations for bringing an action to recover against an employer for an overtime violation; thus, an employee can recover for lost wages accrued during the six years prior to the commencing of the action.²¹ Under the FLSA, there is a two year statute of limitation (or three years if the employee can prove that the violation was willful).²² On the other hand, whereas the FLSA allows double back pay, the New York Labor Law only allows for back pay plus 25 percent of the total amount of wages found to be due.²³

With regard to criminal sanctions in New York State, the first willful violation is punishable with no less than a \$500 fine and no more than a \$20,000 fine (which is twice as high as the FLSA maximum) or up to one year imprisonment.²⁴ The second violation is a felony and is punishable the same as the first, except the maximum prison term is one year and one day, and the violation can be punishable by both imprisonment and a fine.²⁵

Furthermore, unlike some states, New York does not recognize a tort for wrongful discharge;²⁶ thus if, for instance, the employee suffered a retaliatory discharge for complaining about overtime violations, the employee would be limited to recovery under either the FLSA or the New York State Labor Law, both of which have caps on damages. New York does, however, allow for a civil penalty against the employer for retaliation claims, which was just recently increased.²⁷

In What Ways Do Employers Evade Overtime Pay?

Overtime violations include underpaying or not paying at all for “off the clock work” and failure to pay time and a half or at all for work in excess of 40 hours.

For example, in one case, meat market employees were secretly staying late or coming in early and working off the clock, because they could not meet their employer’s unrealistic quotas.²⁸ In these types of cases, if the employer does not have knowledge that the employee is working off the clock, then the employer is not liable.²⁹

Three examples from Wal-Mart stores include

- a manager employees to work through breaks if a customer needs assistance,³⁰
- a manager locking workers in the store for an hour after closing in order to clear the store,³¹ and



- a manager understaffing in order to cut labor costs, which had the result of forcing employees to work through their breaks and meals³² (this practice is also very common in the food industry).³³

There is also the problem of employees working over 40 hours a week, and either not getting paid at all or not getting time and a half. The latter is very common for domestic workers, including home health care workers and child care providers, who are not fully covered by the FLSA.³⁴ These workers often receive a flat weekly or monthly pay regardless of how many hours they work.³⁵ In fact, a 2008 study shows that 90 percent of childcare workers and 82 percent of home health care workers suffer from overtime violations.³⁶

What Can Be Done to Crack Down on Overtime Violations?

At best, FLSA and New York State Labor Law coverage is incomplete, so first and foremost, the FLSA and NY Labor Law must be expanded to include coverage for more workers. The exemptions for domestic workers and agricultural workers are archaic and harmful to workers' health, as both are very demanding jobs that require working long hours.

Furthermore, it is apparent from the above mentioned examples that even those workers who are covered by the FLSA overtime provision are not being protected. Thus, there should be increased sanctions on employers for violations of the wage and hour provisions in order to deter them from continuously violating these laws.



Under New York Labor Law, the civil sanctions are not sufficient to deter employers from committing violations, especially since the liquidated damages are lower than those an employee can recover under the FLSA. Fortunately, the civil penalty against employers for retaliatory discharge was just increased.³⁷ However, with the cap on damages, although the both the FLSA and New York State allow the prevailing employee to recover reasonable attorney fees, an employee has to consider if the time and stress of litigation is worth the hassle for the arguably small amount they will recover.

In criminal claims, the employee is not a party to the lawsuit and is only a witness, so in a sense the employee loses control over the direction of the

suit. Also, the employee recovers nothing. While the employer can be fined up to \$20,000 in New York State and up to \$10,000 under the FLSA and can go to prison for up to a year, the employee recovers neither back pay nor damages.

What Else Can New York State and Local Governments Do?

In March 2010, state legislatures introduced a bill entitled the Wage Theft Protection Act to New York State Senate and the New York State Assembly.³⁸ This Act would increase damages recoverable against employers from 25 percent of the total underpayment to up to 200 percent.³⁹ Furthermore, sanctions in criminal suits would also be more severe.⁴⁰ This bill would act as a stronger deterrent to employers than the current system of damages.



The New York State Commissioner of the Department of Labor must also improve its investigation tactics. The National Employment Law Project has suggested a national enforcement initiative that actively targets and investigates employers in high violation industries.⁴¹ The study states that unannounced investigations would help discover violations where employees are not reporting them or filing claims.⁴²

New York counties and cities might also look into what they can do at the local level. At the beginning of 2010, Miami-Dade County in Florida took it upon itself to enact a wage theft ordinance that gives the county the power to intervene and seek remedies on behalf of employees when employers fail to pay employees the wages they are owed.⁴³ The ordinance was passed with the help of the County's Wage Theft Taskforce. The City of San Francisco has a similar ordinance.⁴⁴ If New York is unsuccessful at the state level, enacting an ordinance at the local level would be an excellent step in the right direction.

¹ ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 34 FIGURES 4.4, 4.5 (2009), *available at* [http://low-wage.wikispaces.com/file/view/BrokeLawsReport2009\[1\].pdf](http://low-wage.wikispaces.com/file/view/BrokeLawsReport2009[1].pdf)

² *Id.*; Heather Somerville, Behind-the-Scenes Restaurant Workers Often Abused, Cheated, Study Says, MEDILL REPORTS, Chicago, Northwestern University, March 11, 2010.

³ Occupational Employment Statistics, The United States Department of Labor, Bureau of Labor Statistics, <http://www.bls.gov/oes/current>

⁴ Prior HHS Poverty Guidelines and Federal Register References, United States Department of Health and Human Services, <http://aspe.hhs.gov/poverty/figures-fed-reg.shtml>

⁵ Temporary Assistance Source Book, New York State Office of Temporary and Disability Assistance, <http://www.otda.state.ny.us/main/ta/TASB.pdf>

⁶ MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 710,711 (2005).

⁷ The FLSA only protects employees who are engaged in commerce. The “enterprise” must have a gross sales or business volume of at least \$500,000 or it must be a public agency, hospital, or educational institution. Second, there must be an employment relationship, that is, the worker must be an employee rather than an independent contractor, a student or a volunteer. Lastly, the employee must not fall under any of the FLSA exemptions.⁷ *Id.* at 712.

⁸ *Id.* at 713.

⁹ *Id.* at 716.

¹⁰ “White collar” exemptions exclude those employed in executive, administrative or professional faculties. *Id.*

¹¹ *Id.* at 792.

¹² In 2004, FLSA coverage was expanded to include those who make a maximum of \$455 per week, which is \$23,660 annually. Those earning below \$23,660 are guaranteed overtime. It was further expanded to include those earning between \$23,660 and \$100,000, but they must first pass the “standard duties test”, which ensures that the employees do not share any of the duties with those listed in the white collar exemptions. *Id.* at 779

¹³ Those employees include those which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law and any contract for public work which may involve the employment of laborers, workers or mechanics NY Labor Law § 220 (2)

¹⁴ *Fitzgerald v Catherwood*, 388 F.2d 400, 403 (2d Cir. 1968).

¹⁵ *Id.* at 744

¹⁶ *Id.*

¹⁷ *Id.* at 745

¹⁸ Handy Reference Guild to the Fair Labor Standards Act, The United States Department of Labor, <http://www.dol.gov/whd/regs/compliance/hrg.htm#15>

¹⁹ Crain, *supra* at 745.

²⁰ *Id.*

²¹ NY Labor Law §198.

²² Crain, *supra* at 746

²³ NY Labor Law §198

²⁴ *Id.* at §198-a

²⁵ *Id.*

²⁶ *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 297

²⁷ New York Labor Law § 215. In November 2009, the civil penalty was increased to between \$1,000 and \$10,000 from \$200 and \$2,000.

²⁸ *Davis v. Food Lion*, 792 F.2d 1274 (4th Cir. 1986)

²⁹ Id.

³⁰ *In re Wal-Mart Employee Litigation*, 271 F. Supp. 2d 1070 (E.D. Wisc. 2003)

³¹ Barbara Ehrenreich, *Two-Tiered Morality*, N.Y. TIMES, June 30, 2002, sec. 4, at 15.

³² Id.

³³ *Basco v. Wal-Mart Stores, Inc.*, 2004 U.S. Dist. LEXIS 4655, 5-6 (E.D. La. 2004); Bernhardt, *supra* at 23; Heather Somerville, Behind-the-Scenes Restaurant Workers Often Abused, Cheated, Study Says, MEDILL REPORTS CHICAGO, Northwestern University, March 11, 2010.

³⁴ Adam J. Hiller and Leah E. Saxtein, Falling through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protection, 27 Hofstra Lab. & Emp. L.J. 233, 233-35, 257, (2009); BERNHARDT, *supra* at 33

³⁵ Id.

³⁶ BERNHARDT, *supra* at 34, Figure 4.5.

³⁷ See note 27 *supra*, New York Labor Law § 215

³⁸ Wage Theft Prevention Act, Open Legislation, New York State Senate, <http://open.nysenate.gov/legislation/api/1.0/html/bill/S7050>, last accessed April 20, 2010.

³⁹ Id.

⁴⁰ With regard to sanctions in criminal suits, they would be based on the amount of wages an employer failed to pay out. The worker would have to pay up to twice the amount of the underpayment in fines and the maximum term of imprisonment would increase to up to 15 years for a willful violation. Id.

⁴¹ Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor, The National Employment Law Project 9 (2010).

⁴² Id.

⁴³ James Parks, *Miami-Dade County Commissioners Pass Historic Wage Theft Ordinance*, AFL-CIO Now Blog News, February 19, 2010, <http://blog.aflcio.org/2010/02/19/miami-dade-county-commissioners-pass-historic-wage-theft-ordinance/> (last accessed April 20, 2010).

⁴⁴ Id.