

PREFACE

The Third Edition is current through May 2013, with additional significant developments through November 2015.

Since the publication of the first edition of this treatise in December 1999, private litigation under the Fair Labor Standards Act (FLSA) has grown exponentially, and the law has developed considerably. For example, the U.S. Supreme Court has established precedent on several FLSA issues, including overtime exemptions and exclusions, standards for compensable time, and what triggers a retaliation claim. Litigation has led to judicial examination of enforcement procedures, from so-called “hybrid” FLSA and state law actions to settlement approval. Requirements that had only been addressed by an interpretative regulation from the U.S. Department of Labor (DOL) have now been analyzed in scores of trial and appellate court decisions. Along with the explosion in private litigation, the DOL has continued to play a major role in developing the law under the FLSA, including issuing new “white collar” exemption regulations in 2004 and revising them again in 2016; promulgating a Final Rule on domestic service employment in 2013, and issuing a Final Rule that “contains the most ambitious and far-reaching revisions to the child labor regulations in the last thirty years and marks another step forward in the Department’s ongoing effort to promote positive, safe work experiences for young workers.”¹ The DOL has also penned opinion letters, administrator interpretations, amicus briefs, website postings, and fact sheets. This growth in the law is mirrored in part by the increased girth of this treatise, starting

¹U.S. Department of Labor, Wage & Hour Division, *Updating Child Labor Regulations for the 21st Century*, available at <http://www.dol.gov/whd/cl/whdfsCLFR.htm> (last visited Nov. 17, 2015).

with a single volume of 1,675 pages, expanding to more than 2,600 pages in a two-volume second edition, and now the third edition, spanning well over 2,800 pages.

While it has only been five years since publication of the second edition of the treatise,² wage and hour case law and rules regarding the litigation of collective action cases has changed significantly in that short period of time. Thus, the Board of Editors determined that it was imperative to rewrite the treatise and produce a third edition. The treatise is intended to provide a balanced and comprehensive treatment of the FLSA statute, DOL regulations, and case law regarding private and DOL enforcement and employer obligations. This new edition was a collaborative effort by the following volunteer members of the Board of Editors:

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The Board members are recognized subject matter experts from around the country, with experience representing employees and employers in litigation and DOL investigations as

²The second edition of the FLSA treatise was published in December 2010.

well as counseling companies, unions, and private individuals. This group of 16 editors is evenly divided, with eight primarily representing management and eight primarily representing employees and unions. The Board was assisted by Assistant Editor Cristina Parra Herrera.

The organization of the third edition is slightly different from the second edition. A summary of those changes is as follows:

1. We folded the contents of Chapters 7 (Special Certificates) and Chapter 13 (Homework) into Chapter 2 (Operations and Functions of the Department of Labor).
2. We folded the contents of Chapter 14 (Hot Goods) into Chapter 15 (Department of Labor Enforcement and Remedies).
3. We folded the contents of Chapter 20 (Hybrid FLSA/ State Law Claims) into Chapter 17 (Collective Actions and “Hybrid” Class Actions).
4. We divided the contents of Chapter 3 (Coverage) into two separate Chapters—Chapter 3 (The Employment Relationship) and Chapter 4 (Employer Coverage).

Chapters 1 through 14 consist of the substantive law under the FLSA, and Chapters 15 through 17 consist of the procedural aspects of DOL enforcement and FLSA litigation.

Major changes to the existing chapters are as follows:

- Chapter 2: An updated discussion of deference in light of recent U.S. Supreme Court precedent
- Chapter 3: Updated discussions of employment relationships, including interns and joint employers
- Chapter 5: A thorough discussion of cases under the revised white-collar regulations
- Chapter 6: A comprehensive analysis of Section 7(i), including coverage of all significant circuit court cases
- Chapter 8: An updated discussion concerning what constitutes compensable work, including coverage of significant district and appellate

- court decisions and the impact of recent U.S. Supreme Court cases
- Chapter 9: An update of case law and regulatory changes to minimum wage law regarding tipped employees, including the DOL's 2011 regulations
- Chapter 10: An analysis of the FLSA overtime provisions, including the application of the fluctuating workweek
- Chapter 11: Comprehensive coverage of case law applicable to employees in the public sector
- Chapter 12: A thorough analysis of the new DOL regulations concerning child labor and employment of 14- and 15-year-olds
- Chapter 16: An analysis of developing case law addressing litigation issues under the FLSA
- Chapter 17: A comprehensive analysis of the scores of new cases involving collective actions and "hybrid" actions under the FLSA

The Board of Editors set May 2013 as the cutoff date for the inclusion of case law and developments for the new treatise. However, certain developments and decisions issuing after the general cutoff date were included in the book. For example, Supreme Court decisions occurring after that date were included, as well as most appellate decisions issued prior to autumn 2015. Similarly, legislation and DOL regulations that were enacted or issued up to autumn 2015 were also included.

The first supplement for this treatise will be issued in autumn 2016. It will cover case law and developments from May 2013 to May 2015. Subsequent supplements will be published on an annual basis, adding developments of the preceding year and updating the discussions in the treatise.

Consistency in Board membership has been key to producing all three editions. Ellen Kearns has served as Editor-in-Chief on all three editions. Dennis McClelland and Aaron Kaufmann served on the second edition and were Co-Editors-in-Chief for each of the annual cumulative supplements to the second edition. Several of the other editors have served on the earlier editions and supplements as well. This treatise would not be

possible without each of these Board members volunteering hundreds of hours to this project.

To ensure fairness, accuracy, and comprehensive treatment, the treatise is fully vetted by the Board of Editors. To create the new treatise, each chapter was authored by one or more members of the Board of Editors. The Board members began the process by reviewing the second edition and agreeing upon edits and additions to the organization of each chapter and the book as a whole. In writing each chapter, authors were expected to review the cases discussed in the 2014 Cumulative Supplement, regulations and opinion letters issued by the DOL, and any newly enacted legislation that impacted the contents of their chapters, and then draft revisions to the current language in the treatise as well as new text and sections as needed. In some instances, Board members were assisted with research and writing by attorneys in their firms, and those contributors are acknowledged in the list of Contributors. The Board met in person seven times over two years, reviewing drafts of each chapter at the meetings. Assistant Editor Cristina Parra Hererra made those revisions agreed upon at the Board meetings and made further line and style edits. The three Co-Editors-in-Chief then reviewed each chapter again, and, in some instances, presented new text for further Board review to ensure a balanced and accurate treatment of the law. Bloomberg BNA editorial staff and Cristina Parra Herrera then made final, non-substantive edits. Cristina's consistent high quality work and attention to minute detail added a level of care to the final publication that was invaluable to the treatise's publication.

Finally, we would like to acknowledge the contribution to the treatise of the ABA's FLSA subcommittee. Every year subcommittee members produce a report for the ABA's Federal Labor Standards Legislation Committee's Midwinter Meeting.³ After sifting through more than 2,000 cases that have addressed the FLSA in one way or another each year, approximately 100

³These reports were formerly provided on a CD-ROM accompanying this treatise. The CD-ROM has been discontinued with this third edition of the treatise.

contributors write summaries of several hundred cases reflecting the most significant developments in the law. Chapter Editors then edit the contributors' work, and FLSA subcommittee chairs perform a final review and assemble the report for distribution to the Federal Labor Standards Legislation Committee. These annual reports form the basis for the annual cumulative supplements to the treatise; this new edition would not have been possible without the work of scores of contributors and dozens of chapter editors who have generated these annual reports.

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EXCERPT FROM THE PREFACE OF THE FIRST EDITION
CONCERNING THE "OVERVIEW"

The Core Committee's first task was to draft a comprehensive table of contents. In attending to that chore, Committee members recognized that many topic areas fell under one or more chapter headings. To resolve that matter, the Core Committee determined which chapter would provide primary coverage of a topic area and which would handle it in a more summary fashion. The outline provided, however, that both sections of the treatise would cross reference the topic to the other's material. To assist in this cross-referencing process, the Committee decided that each chapter would begin with an "Overview." The Overview describes the contents of the chapter, provides a list of the regulations that are discussed in that chapter, and refers the reader to other sections in the treatise where the same matter is covered. Core Committee members hope that this effort at cross referencing is helpful to the labor practitioner.