Chapter 1

A BRIEF HISTORY OF   
THE FAIR LABOR STANDARDS ACT

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I. Overview

The Fair Labor Standards Act (FLSA) was a hallmark of President Franklin D. Roosevelt’s New Deal program because it addressed the economic struggles of the Great Depression. However, when President Roosevelt signed the FLSA in 1938, it also marked the culmination of decades of government efforts to provide minimum labor standards for workers. The FLSA’s minimum wage, overtime, and child labor provisions have antecedents dating back to at least the mid-nineteenth century.

Prior to the FLSA, the U.S. Supreme Court grappled with the issue of whether government could regulate wages and hours without violating the doctrine known as “liberty of contract.” For instance, in the 1905 decision *Lochner v. New York*,[[1]](#footnote-2) the Court struck down a New York law that capped bakers’ work hours, ruling that “[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”[[2]](#footnote-3) But three years later the Court upheld Oregon’s law limiting the maximum hours women could work, reasoning that the differences between the sexes justified government protection of women.[[3]](#footnote-4) In 1923—three years after women won the right to vote—the Court declared that an act of Congress that established a minimum wage for women in the District of Columbia was unconstitutional because it interfered with the liberty of individuals to enter into employment contracts under the terms of their choice.[[4]](#footnote-5) The Court reached the same result in 1936 with respect to New York State’s minimum wage law.[[5]](#footnote-6) However, just one year later, in *West Coast Hotel Co. v. Parrish*,[[6]](#footnote-7) Justice Owen Roberts switched his vote[[7]](#footnote-8) to uphold a Washington State minimum wage statute for women and children. This switch paved the way for the FLSA.

Legislatures and courts, both federal and state, long struggled over the problem of balancing individual liberty with the need for minimum standards to protect workers. At the federal level, this struggle culminated in the 1938 passage of the FLSA. The controversy over the propriety of government regulating the workplace was largely put to rest with its passage and the Supreme Court’s ruling that its provisions were constitutional.[[8]](#footnote-9) Since that time, the FLSA has seen numerous amendments. Court decisions have construed its provisions, and regulations have filled in its outlines. Within its framework, competing values were recognized, gained prominence, or receded. Over time, the FLSA has generally been seen as serving fundamental national interests, including affording workplace rights that cannot be privately waived by employees and that must be interpreted broadly to accomplish the FLSA’s purposes.[[9]](#footnote-10)

This chapter describes the FLSA’s historical roots in earlier federal and state legislation, the political and legislative struggle surrounding passage of the FLSA, and the most significant amendments and changes to the law; it also identifies the major policy initiatives that shaped the legislation as it is today, and reviews the substantive provisions of the statute.

II. Pre-FLSA Legislation

A. Federal Activity

1. Eight-Hour Laws

One of the earliest movements in wage and hour law was to limit the number of hours worked in certain workplaces. In 1840, President Martin Van Buren issued an Executive Order setting a 10-hour maximum workday at Navy yards.[[10]](#footnote-11) The first federal statute on the subject, however, was not enacted until 1868, when Congress mandated an eight-hour workday for all “laborers, workmen, and mechanics who may be employed by or on behalf of the government of the United States.”[[11]](#footnote-12) The statute, however, did not prohibit agreements for overtime work. In 1892, Congress passed a more effective law that included a heavy penalty for those federal government contractors who violated the eight-hour rule.[[12]](#footnote-13) In 1907, the Supreme Court limited the coverage of the 1892 eight-hour law by holding that it did not apply to dredging and rock excavating in rivers and harbors.[[13]](#footnote-14) Congress voided that decision in 1913 through an amendment to the statute.[[14]](#footnote-15)

Additional eight-hour-day rules were enacted at various levels of government. Congress itself expanded the requirement in the Act of June 19, 1912, which required that an eight-hour-day provision be inserted into all contracts made by or on behalf of the federal government, its territories, or the District of Columbia.[[15]](#footnote-16)

These eight-hour-day statutes were passed when 10-, 11-, and 12-hour days were common in the private sector. By using the federal government’s clout as a purchaser in the marketplace through restrictions on its own contractors, Congress altered the playing field for others operating within these industries. This gradual change of standards through use of economic power became a hallmark of pre-FLSA legislation.

2. The Seaman’s Act

The Seaman’s Act of 1915[[16]](#footnote-17) broadly regulated the employment relationship between ship owners and seamen. Congress limited the number of hours a seaman on an American vessel could work—establishing a nine-hour limit for days spent in port—and it also addressed a multitude of other employment issues. For example, the Seaman’s Act limited the number of days an employee could work without time off and established certain holidays. It also sought to prevent overwork by regulating how seamen were assigned to watches and requiring a ship’s master to replace any sailors who left the ship, or who were lost due to casualties, at the next port of call. The statute also established minimum daily water and butter allowances for each sailor. While the Seaman’s Act showed a Congress willing to protect workers, its proscriptions addressed specifically identified harms within a specific industry.

3. The Davis-Bacon Act

The Davis-Bacon Act of 1931,[[17]](#footnote-18) like the early “eight-hour” laws, used federal contracting power to regulate the workplace—at least for private employers with certain federal construction contracts. Unlike the FLSA, Davis-Bacon did not set a single minimum wage; it instead required federal contractors to pay their employees, at a minimum, the “prevailing wage” for work of the same type in the same geographic area. It called for every federal construction contract over a minimum amount to contain a provision requiring the contractor to pay these wages, directly and unconditionally, once a week. Under the Davis-Bacon Act, the Secretary of Labor (the Secretary) set the prevailing wages. However, like other pre-FLSA legislation, Davis-Bacon’s coverage was narrow—applying only to laborers and mechanics employed by private employers under federal contracts for the construction or repair of public buildings and public works. Although the Act did not set a specific minimum wage, it did establish the principle that the government could determine the wages to be paid by private companies when working on federally funded contracts for the construction, alterations, or repair of public buildings or public works.

4. The National Industrial Recovery Act

The National Industrial Recovery Act of 1933[[18]](#footnote-19) was perhaps the federal government’s broadest attempt to control wages and hours during the pre-FLSA era. It authorized the president to establish agencies to control wages in any industry that the president found was engaging in “unfair competition.”[[19]](#footnote-20) In the fourth year of the Great Depression, Congress sought to address “destructive” wages—those that fell so low that, for practical purposes, they would destroy competition or would inhibit an industry from developing and employing enough workers. The Act empowered the president to govern maximum hours, minimum wages, and any and all other conditions of employment in any industry that was engaging in unfair practices. In short, the Act gave the president virtually unlimited powers to establish wage and hour control over the economy. The Supreme Court found this broad delegation of power to the president to be unconstitutional in *Schechter Poultry Corp. v. United States*[[20]](#footnote-21)—the famous “sick chicken” case.

5. The Motor Carrier Act

Congress passed the Motor Carrier Act[[21]](#footnote-22) in 1935, empowering the Interstate Commerce Commission to establish maximum hours of work to guarantee safety on the highways. Unlike the Davis-Bacon Act and other earlier laws, which dealt with contractors who worked for the federal government, the Motor Carrier Act permitted the government to regulate private industry, specifically bus lines and common carriers, by imposing maximum hours.

6. The Merchant Marine Act

Congress enacted the Merchant Marine Act[[22]](#footnote-23) in 1936, creating the U.S. Maritime Commission and empowering it with broad regulatory authority over the nation’s merchant shipping. Such authority included the power to adopt minimum wage and staffing scales to be imposed on the industry. The purpose of the Act was to promote the efficient development of the merchant marine industry as a necessary element of national defense. Congress had again acted in a limited way, asserting its power to protect national interests and deeming that power sufficient to regulate matters that would otherwise have been left to the independent negotiations of workers and employers.

7. The Walsh-Healey Act

The Walsh-Healey Public Contracts Act of 1936[[23]](#footnote-24) established “minimum wage, maximum hours, and safety and health standards for work on contracts in excess of $15,000 for the manufacturing or furnishing of materials, supplies, articles, or equipment to the U.S. government or the District of Columbia.”[[24]](#footnote-25) Like the Davis-Bacon Act, the Walsh-Healey Act was enacted to harness the government’s immense purchasing power to improve labor standards.[[25]](#footnote-26) It included a “prevailing wage” provision, administered by the Secretary,[[26]](#footnote-27) and also required overtime pay for work performed in excess of eight hours per day and 40 hours per week.[[27]](#footnote-28) The Walsh-Healey Act also required government contractors to comply with codes of fair competition issued under the National Industrial Recovery Act.[[28]](#footnote-29) The Walsh-Healey Act was a true precursor to the FLSA in that it combined both minimum wage and maximum hour requirements—albeit limited to labor under federal supply contracts.[[29]](#footnote-30)

B. State Wage and Hour Laws

The states were far ahead of Congress in enacting comprehensive minimum wage laws.[[30]](#footnote-31) The first such state law was passed by Massachusetts in 1912.[[31]](#footnote-32) By 1921, minimum wage laws had been established in 13 states, plus Puerto Rico and the District of Columbia.[[32]](#footnote-33) States also responded to agitation for shorter hours.[[33]](#footnote-34) In 1900, 11 states had laws specifically restricting the number of hours adult women could work. By 1920, 40 states had such legislation.[[34]](#footnote-35)

Unlike the federal enactments prior to the FLSA, the state laws were not typically limited to public contracts or by industry. However, because such legislation ran counter to the freedom of contract theory, it generally survived scrutiny only when it applied to women and children or limited the work hours of men with hazardous jobs. There was little movement to apply these laws to adult males until the Great Depression. Some writers attribute this in part to the influence of labor unions and the belief that adult males could organize into unions to protect their interests, whereas women and children, who were less able or even unable to do so, needed the external protection of legislation.[[35]](#footnote-36)

The states also varied in methods for establishing a minimum wage. Some state legislatures set the minimum wage within the statute itself (Arizona, Puerto Rico, and Utah), while others delegated the rate-setting to regulatory bodies. Such regulators typically considered employers’ records, testimony, and the amount of pay that would be necessary for an appropriate standard of living.[[36]](#footnote-37)

Until the Supreme Court’s 1936 landmark decision in *Morehead v. New York ex rel. Tipaldo*,[[37]](#footnote-38) most courts upheld state minimum wage laws as necessary to protect women and children, whose freedom to contract was already limited by their “weakness” and lower status in society.[[38]](#footnote-39) But in overturning New York’s minimum wage statute, the Court in *Morehead* emphasized that “[f]reedom of contract is the general rule and restraint the exception,” and that fixing wages by statute could only be justified in “exceptional circumstances.”[[39]](#footnote-40) The Court found no such circumstances justified fixing minimum wages for women, noting that to rule otherwise

would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.[[40]](#footnote-41)

The *Morehead* decision inspired widespread criticism, including from the Roosevelt administration and the Republican Party.[[41]](#footnote-42) As noted earlier, *Morehead* remained good law for less than a year, as the Court reversed itself in *West Coast Hotel*. The fallout from *Morehead* and subsequent shift in constitutional analysis of wage and hour regulations in *West Coast Hotel* thus set the stage for the first comprehensive federal wage and hour statute.

III. The Fair Labor Standards Act of 1938

A. Enactment

On May 24, 1937, President Roosevelt challenged Congress to enact a law to establish fair labor standards:

Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work. A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers’ wages or stretching workers’ hours.

Enlightened business is learning that competition ought not to cause bad social consequences which inevitably react upon the profits of business itself. All but the hopelessly reactionary will agree that to conserve our primary resources of manpower, government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor.

…

And so to protect the fundamental interest of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of free labor shall not be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.[[42]](#footnote-43)

The overwhelmingly Democratic 75th Congress held several hearings to determine how substandard labor conditions had impacted interstate commerce. Various pieces of legislation were then proposed in the House and Senate following the president’s message. These efforts led to a joint statement from the House and Senate Labor Committees that conducted the hearings, which included the following findings:

(1) maintenance of substandard labor conditions in a particular industry by a few employers necessarily lowers the standards of the whole industry, and this lowering of standards is brought about because the channels of interstate commerce have been open to goods produced under substandard labor conditions;

(2) the overwhelming majority of reputable employers consider competition in wages as an unfair and unreasonable method of competition in commerce;

(3) maintenance of substandard labor conditions by the few employers referred to results in a downward spiral of wages in the industry and subsequent dissatisfaction among employees in the industry, which in turn results in labor disputes; and

(4) states are unable to remedy the situation because goods produced under substandard labor conditions in one state may, if protected by the failure of Congress to exercise its commerce power, flow freely into another state that attempts to maintain its fair labor standards.[[43]](#footnote-44)

The committees called on Congress to exercise its constitutional power to regulate commerce in order to remedy substandard labor conditions:

[T]he existence in industries engaged in commerce, or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well-being, required immediate action to correct, and as rapidly as possible to eliminate, conditions in such industries without substantially curtailing employment or earning power.[[44]](#footnote-45)

The committees recommended that Congress act to prohibit the shipment via interstate commerce of goods produced under substandard labor conditions and eliminate such conditions among employers engaged in industries that affect interstate commerce.

The fair labor standards legislation went through several versions before it was enacted.[[45]](#footnote-46) The initial version was modeled to some extent on the National Industrial Recovery Act. It authorized a board to appoint advisory committees to investigate and report on the “fair value of services rendered” before issuing orders establishing minimum fair wages and maximum workweeks for particular industries and occupations. The board was to establish a 40-hour workweek and $.40 minimum wage that would be generally applicable to all interstate industries, unless exceptional circumstances were present. Between May and December 1937, many amendments were offered; some were incorporated into the bill, only to disappear in subsequent versions.

President Roosevelt again pushed for a wage and hour law by the time the 75th Congress convened for its third session in 1938. In April 1938, a subcommittee of the House Labor Committee reported the bill that embodied the following major provisions:

• The law was to be administered by a five-member board selected by geographic regions.

• Power would be given to the board to fix wages and hours so that the ultimate twin goals of $.40 per hour and 40 hours per week could be reached gradually.

• Wages could not be increased by the board more than five cents per hour in any 12-month period.

• Average wages for a given industry would be calculated by dividing the total payroll by the total number of workers and by taking into consideration the wages paid for like work under collective bargaining agreements.

• Differentials would be narrowed, because the lowest wage to be paid would be the weighted average.[[46]](#footnote-47)

This version, however, did not make it out of the full House Labor Committee; rather, a more modest new bill presented by Congresswoman Mary Norton of New Jersey provided for a $.40 hourly minimum wage, and replaced the wage boards with an administrator and advising commission.[[47]](#footnote-48) The House Rules Committee prevented discussion of the bill on the House floor.[[48]](#footnote-49)

In May 1938, Congressman Claude Pepper won a resounding victory over anti–New Dealer J. Mark Wilcox in the Florida Senate primary. Wilcox had made New Deal programs the major issue and had labeled Pepper “Roosevelt rubber stamp.”[[49]](#footnote-50)

Following Pepper’s victory, a petition to discharge the bill from the Rules Committee was placed on the desk of the Speaker of the House.[[50]](#footnote-51) Two hours later, 218 members had signed it, and additional members were waiting in the aisles.[[51]](#footnote-52) According to U.S. Department of Labor (DOL) Historian Jonathan Grossman, a bitter controversy raged over labor standards in the South, and partly because of these Southern protests, provisions of the bill were altered, including lowering the minimum wage to $.25 an hour for the first year of the Act.[[52]](#footnote-53) The revised bill also substantially reduced the administrative machinery provided for in earlier drafts, and modified the authority of the DOL Administrator.[[53]](#footnote-54)

The bill passed the House on May 24, 1938, by a 314 to 97 majority. The Senate then passed an amended version, and the two were sent to the Senate-House Conference Committee, which made more changes to the bill to reconcile differences.[[54]](#footnote-55)

The final version of the bill set a maximum number of hours of work per week for the first year at 44, which would be reduced by two hours over the next two years until a maximum workweek of 40 hours was established. It also set a minimum wage at $.25 an hour with a projected increase during the next six years up to $.30 an hour, reaching a maximum rate of $.40 an hour by 1945.[[55]](#footnote-56) Certain categories of employees, industries, and employers were exempted from various provisions of the bill, including large segments of the retail and service industries (e.g., hotels, motels, restaurants, and other food services) and agricultural workers.[[56]](#footnote-57) The exact parameters of these exemptions were left for the Wage and Hour Administrator to determine by regulation. On June 12, 1938, the House and Senate conferees agreed on a final version of the bill, which was adopted by the House the next day by a vote of 291 to 89 and thereafter by the Senate, which did not record the votes.[[57]](#footnote-58) President Roosevelt signed the bill on June 25, 1938.[[58]](#footnote-59) It became effective on October 24, 1938.[[59]](#footnote-60)

Although the scope of both coverage and exemptions has changed significantly, the basic framework of the minimum wage, overtime, and child labor provisions remains unchanged from the 1938 legislation. These central provisions of the FLSA include

• requirements for payment of minimum wages, found in Section 206;

• the prohibition of employment for more than 40 hours in a week without payment of a premium, or “overtime,” found in Section 207; and

• prohibitions on the use of “oppressive child labor,” appearing principally in Section 212.

Other major components of the FLSA that have been added by subsequent legislation are

• coverage terms such as “employer,” “employee,” and “enterprise,” defined in Section 203;

• provisions relating to the DOL’s administration of the FLSA and the requirements for recordkeeping, set forth in Sections 204 and 211;

• exemptions, of which the most frequently used are those appearing in Section 213(a) (exemptions from both minimum wage and overtime) and Section 213(b) (exemptions from overtime only);

• enforcement provisions, which appear in Sections 215, 216, and 217;

• payment of below-minimum wages in a variety of special situations (e.g., apprentices, students, disabled workers), which is covered in Section 214; and

• the relationship of the FLSA to other laws, which is dealt with in Section 218.

In sum, the FLSA was “designed to raise substandard wages and to give additional compensation for overtime work … thereby helping to protect this nation ‘from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.’”[[60]](#footnote-61) The FLSA also sought to protect the free flow of interstate commerce and fair competition, as long hours were seen as “creating friction between production areas with different length workweeks, by offering opportunities for unfair competition through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work.”[[61]](#footnote-62) The law did not prohibit overtime, but rather—by imposing a premium rate for overtime—provided additional compensation to employees for the burden of working overtime and encouraged employers to spread employment.[[62]](#footnote-63) Ultimately, Congress saw standards for wages and hours as necessary to address the threats to “national health and efficiency” that arose from private employment contracts imposed by employers with bargaining power superior to that of their employees.[[63]](#footnote-64)

B. Early Constitutional Challenge

In 1939, the F.W. Darby Lumber Co. was indicted for alleged violations of the FLSA’s minimum wage provisions. The district court sustained a motion to quash the indictment on constitutional grounds, concluding that the manufacturer was not involved in interstate commerce or, if it was, the FLSA was unconstitutional.[[64]](#footnote-65) The Supreme Court ultimately reversed the lower courts, identifying two key issues about Congress’s ability to regulate the workplace: (1) Congress had “constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum,” and (2) Congress had the “power to prohibit the employment of workmen in the production of goods ‘for interstate commerce’ at other than prescribed wages and hours.”[[65]](#footnote-66) The Court held that both were a valid exercise of Congress’s commerce power and did not violate the Due Process Clause of the Fifth Amendment. Finally, the Court upheld the FLSA’s recordkeeping requirement as a “means of enforcing the valid law, to keep a record showing” the hours worked each day and week by its employees. The Court stated:

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.[[66]](#footnote-67)

The Court unequivocally overruled and rejected its earlier decision in *Hammer v. Dagenhart*,[[67]](#footnote-68) in which a “bare majority” had held that Congress was without power to exclude the products of child labor from interstate commerce.[[68]](#footnote-69) Congress’s enactment of the FLSA and the high court’s subsequent blessing paved the way for federal regulation of the workplace. Major historical developments since have affected the FLSA from the time of passage to the present.[[69]](#footnote-70)

IV. Early Amendments to the FLSA

The FLSA has been amended frequently since its original enactment in 1938. The discussions in this section and in Section V [Legislative Developments: 1961–1989] of this chapter address only the most significant changes.[[70]](#footnote-71)

A. The Portal-to-Portal Act of 1947

One of the purposes of the Portal-to-Portal Act[[71]](#footnote-72) was to reverse the result of and reduce the number of suits filed in response to the Supreme Court’s historic decision in *Anderson v. Mt. Clemens Pottery Co*.[[72]](#footnote-73) In *Mt. Clemens*, the Supreme Court addressed what constituted compensable work time under the FLSA. The company operated a plant that was about one-quarter mile in length. When employees first arrived at the plant each day, they were required to punch a time clock at one end of the building. Then they spent 2–12 minutes walking to their assigned work areas. They also spent an additional 14 minutes before their shift doing preparatory activities such as putting on aprons and overalls, removing shirts, and preparing equipment before beginning “productive work,” and 14 minutes after each shift of productive work leaving their work areas and punching out on the time clock.[[73]](#footnote-74)

The Supreme Court held that the time spent walking to and from an employee’s assigned work area and the preparatory time required before and after the scheduled productive work shift was compensable under Section 207(a) of the FLSA.[[74]](#footnote-75) The Court reasoned that the walking time was compensable because it was “under the complete control of the employer” and the employees were “compelled to do so by the necessities of the employer’s business.”[[75]](#footnote-76) The Court also stated that “[w]ork of that character must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract.”[[76]](#footnote-77)

Another early Supreme Court decision that prompted amendments to the FLSA was *Brooklyn Savings Bank v. O’Neil*.[[77]](#footnote-78) When the Brooklyn Savings Bank discovered that it had failed to pay overtime to an employee, it calculated the amount of overtime owed and tendered a check in that amount to the employee. The bank obtained a release from the employee that relinquished all of the employee’s rights under the FLSA. Later, the employee nonetheless brought suit under the FLSA seeking liquidated damages.[[78]](#footnote-79) The Court held that, due to the public interest inherent in the statute, an employee could not release rights to liquidated damages and that any such waiver “was absolutely void.”[[79]](#footnote-80)

Prompted by these two Supreme Court rulings, Congress enacted the Portal-to-Portal Act to amend the FLSA. “The Portal-to-Portal Act was designed primarily to meet an ‘existing emergency’ resulting from claims which, if allowed in accordance with *Anderson v. Mt. Clemens Pottery Co*., would have created ‘wholly unexpected liabilities, immense in amount and retroactive in operation.’”[[80]](#footnote-81) The Portal-to-Portal Act also sought to address other employer concerns that had become pronounced since the initial passage of the FLSA, including the absence of a federal statute of limitations and the ability of employees to bring representative actions for back pay and penalties.[[81]](#footnote-82) Although the Portal-to-Portal Act excluded from compensable time certain preliminary and postliminary activities that would have been compensable work under *Mt. Clemens* that had already been performed, courts found its retroactive provisions were a constitutional exercise of congressional power and not in violation of due process.[[82]](#footnote-83)

1. Compensable Activity[[83]](#footnote-84)

The Portal-to-Portal Act overturned the major holding of *Anderson v. Mt. Clemens Pottery Co*.[[84]](#footnote-85) by abolishing all claims for minimum or overtime wages for any preliminary or postliminary activity engaged in by an employee before May 14, 1947, absent “an express provision of a written or nonwritten contract”[[85]](#footnote-86) or a custom or practice in effect at the place of employment that made such activity compensable.[[86]](#footnote-87) The Act divested all federal and state courts of jurisdiction to enforce liability or impose punishment for any cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages which accrued prior to May 14, 1947, to the extent that such cause of action was based on an activity that was not compensable within the meaning of subsections (a) and (b) of Section 254 of the Act.[[87]](#footnote-88) Claims for payment for preliminary or postliminary activities were banned if they were stated in a claim that had been filed before May 14, 1947.[[88]](#footnote-89) This provision of the Act was retroactive only, and thus it did not apply to claims filed after May 14, 1947.[[89]](#footnote-90)

Section 4 of the Act addressed prospective claims by excluding from compensable time certain activities, including “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities” and “activities which are preliminary to or postliminary to”[[90]](#footnote-91) the principal activities. The statute allowed that such activities could be made compensable by specific agreement or custom or practice at the place of employment to include them.[[91]](#footnote-92) Nine years later, the Supreme Court held that if changing clothing and preparing machinery were “integral and indispensable” parts of the principal activity, then Congress intended such activities to be compensable under the FLSA.[[92]](#footnote-93)

2. Compromise of Claims and Liquidated Damages[[93]](#footnote-94)

The Portal-to-Portal Act also sought to address *Brooklyn Savings Bank v. O’Neil*[[94]](#footnote-95) by amending the FLSA to allow claims to be compromised “if there exists a bona fide dispute as to the amount payable.”[[95]](#footnote-96) Claims cannot be compromised, however, to the extent that doing so would result in payment of an amount less than the minimum hourly wage or in payment of overtime less than the statutory rate.[[96]](#footnote-97)

The Act also provided a grace period for the compromise or waiver of liquidated damages claims for activities engaged in prior to May 14, 1947, regardless of whether there was a bona fide dispute.[[97]](#footnote-98) Finally, the Portal-to-Portal Act gave the courts discretion to forgo awarding liquidated damages or to award only partial liquidated damages where an employer acted in good faith and had reasonable grounds for believing its acts or omissions were not in violation of the FLSA.[[98]](#footnote-99)

3. Collective Actions

Before enactment of the Portal-to-Portal Act, individuals could bring class actions for back pay on behalf of themselves and others similarly situated; actions could also be brought by “agents” or “representatives” who were not employees.[[99]](#footnote-100) The Portal-to-Portal Act banned actions filed by agents or representatives who were not employees.[[100]](#footnote-101) The purpose of the provision was to ban all actions on behalf of employees who had no knowledge of or involvement in the litigation.[[101]](#footnote-102)

The Portal-to-Portal Act also limited the availability of “class” recovery by requiring employees to affirmatively “opt in” in order to be bound by or receive any benefit from a judgment, including compensation for unpaid wages.[[102]](#footnote-103) “No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”[[103]](#footnote-104)

4. Statute of Limitations

No federal statute of limitations applied to the FLSA before the Portal-to-Portal Act. The courts were left to apply the parallel state law to determine the limitations period on FLSA claims. The Portal-to-Portal Act set a two-year statute of limitations.[[104]](#footnote-105) This statute of limitations was amended in 1966 to allow for commencement of a claim arising out of a willful violation within three years after accrual.[[105]](#footnote-106)

5. Reliance on Administrative Rulings[[106]](#footnote-107)

Finally, the Portal-to-Portal Act provided a defense to employers who established that their act or omission was “in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation” of any administrative agency.[[107]](#footnote-108) Section 9 of the Act applied this provision to all past administrative rulings of any agencies of the United States.[[108]](#footnote-109) Section 10 applied the provision to all future administrative rulings.[[109]](#footnote-110) Under Section 10, however, eligible administrative rulings are limited to those by the Administrator of the Wage and Hour Division of the DOL.[[110]](#footnote-111)

If the conditions are met, these provisions may allow an employer to completely escape any liability under the FLSA for unpaid minimum wages, overtime wages, and/or liquidated damages that otherwise would be owed.[[111]](#footnote-112) The provisions protect an employer from liability for only past actions; if the judiciary should determine that the administrative ruling is invalid, the employer may be enjoined from future violations.[[112]](#footnote-113)

B. The 1949 Amendments

Two years after the Portal-to-Portal Act was enacted, Congress again took up the FLSA and made some significant revisions to its exemption provisions. Specifically, the Act of October 26, 1949,[[113]](#footnote-114) made the following changes to Sections 213 and 207:

• in Section 213(a)(2), defined the term “retail or service establishment” and stated conditions under which the exemptions would apply;

• in Section 213(a)(3), redesignated clause (3) as clause (14) and added a new clause (3) relating to “establishments engaged in laundering, cleaning, or repairing clothing”;

• in Section 213(a)(4), redesignated clause 4 as (b)(3) and added a new clause (4) that deals with retail establishments at the place where the goods are made or processed;

• in Section 213(a)(5), eliminated “canning” and reassigned “canning” functions to (b)(4);

• in Section 213(a)(6), added to the exemption for agriculture work involved with operating and maintaining ditches, canals, reservoirs, or waterways used for agricultural purposes;

• in Section 213(a)(8), extended the exemption to employees of daily newspapers, increased the circulation limitation to 4,000, and increased the circulation area by adding “counties contiguous thereto” after “published”;

• in Section 213(a)(11), increased the number of stations from “less than 500” to “not more than 750”;

• in Section 213(a)(12), added a new clause to exempt from minimum wage and overtime employees engaged in the business of operating taxicabs;

• in Section 213(a)(13), added a new clause to exempt from minimum wage and overtime employees engaged in handling telegraphic messages for the public under a contract with a telegraph company where the message revenue did not exceed $500 a month;

• in Section 213(a)(14), redesignated clause 3 as clause 14 to read as follows: “Any employee employed as a seaman”;

• in Section 213(a)(15), added a new clause to exempt from minimum wage and overtime employees engaged in planting or tending trees, cruising, surveying, or felling timber or in preparing or transporting logs or other forestry products to the mill, railroad or other transportation terminal if the number of employees employed in such operations did not exceed 12;

• in Section 213(b)(3), added a new clause to read “any employee of a carrier by air subject to the provisions of the Railway Labor Act”;

• in Section 213(b)(4), added a new clause dealing with the canning of aquatic life;

• in Section 213(b)(5), added a new clause dealing with outside buyers of poultry, eggs, cream, or milk in their raw or natural state;

• in Section 207(b)(1), increased the limitation period from 1,000 hours to 1,040 hours;

• in Section 207(b)(2), increased the limitation period from 2,080 to 2,240 hours and provided for overtime rates in excess of the guaranty; and

• in Section 207(c), added buttermilk to commodities.

In addition, the 1949 Amendments made changes to Section 203 (Definitions) in subsections (b), (j), and (l) and added subsections (n) and (o); increased the minimum wage to $.75/hour; and continued existing minimum wages in Puerto Rico and the Virgin Islands until superseded by special industry committee wage orders.

The 1949 Amendments also addressed child labor by:

• defining “oppressive child labor” as including parental employment of a child younger than 16 years of age in an occupation found by the Secretary to be hazardous for children between the ages of 16 and 18 years;

• adding the good faith purchaser proviso regarding goods produced by oppressive child labor;

• making the Section 213(c) exemption only applicable outside of school hours for the school district where the employee is living while so employed;

• adding radio or television productions to Section 213(c); and

• adding the Section 213(d) exemption for newspaper delivery and pine wreath making.

Finally, the 1949 Amendments provided that “except as provided in section 3(o) and in the last sentence of section 16(c) of the FLSA as amended, no amendment made by [the 1949 Amendments] shall be construed as amending, modifying, or repealing any provisions of the Portal-to-Portal Act of 1947.”[[114]](#footnote-115)

V. Legislative Developments: 1961–1989

One of Congress’s most significant amendments to the FLSA occurred in 1961, amending the FLSA’s coverage in the retail trade sector[[115]](#footnote-116) and incrementally raising the minimum wage from $1.15 an hour to $1.25.[[116]](#footnote-117) These amendments introduced the concept of “enterprise” coverage, extending protections to employees of retail trade enterprises with sales exceeding $1 million annually.[[117]](#footnote-118) Under the enterprise coverage scheme, the principal focus of coverage broadened from the individual employee covered if “engaged in commerce or the production of goods for commerce” to the “enterprise,” where employees were covered if two or more were engaged in commerce or the production of goods for commerce. The number of employees entitled to the FLSA’s protection increased dramatically because employees who did not handle, sell, or otherwise work on goods that had been moved in or produced for commerce were covered now if the employer had other employees who did so.

Two other changes were made to the FLSA by the 1961 Amendments: (1) the definition of “wages” was added to the statute, and (2) the Secretary of Labor was given authority in Section 217 to sue for back wages.[[118]](#footnote-119)

In 1966, Congress significantly expanded the FLSA’s coverage.[[119]](#footnote-120) The definition of “enterprise” changed to include any business that had at least $250,000[[120]](#footnote-121) in annual sales.[[121]](#footnote-122) The 1966 Amendments also repealed or modified certain exemptions, such as by extending enterprise coverage to previously exempt employees of all businesses that engaged in laundering, cleaning, and repairing services, or in construction.[[122]](#footnote-123)

This expanded coverage under the 1966 Amendments extended the FLSA’s protections for the first time to workers in many retail and service industries, such as hotels, motels, and restaurants, ending a battle that had been fought since the FLSA’s inception. The expansion of minimum wage coverage was offset to some degree by a provision for a “tip credit” against minimum wage and allowing payment of a subminimum wage (85 percent of the minimum wage) for student workers.[[123]](#footnote-124) Also offsetting the expanded coverage was an exemption from overtime pay requirements for retail or service establishment employees whose regular rate of pay exceeded one and one-half times the minimum wage and more than half of the employee’s compensation represented commissions on goods or services.[[124]](#footnote-125)

Perhaps most significantly, Congress extended protections to certain classes of public employees.[[125]](#footnote-126) It did so by extending the FLSA’s coverage to significant groups by including any enterprise that operated a hospital; any institution primarily engaged in the care of the sick, aged, mentally ill, or “defective”; schools for physically or mentally handicapped or gifted children; and public and private elementary schools and institutions of higher education.[[126]](#footnote-127) Overall, Congress estimated that the amendments would extend protections to an additional 7.2 million employees,[[127]](#footnote-128) including 1.4 million public employees in hospitals and schools.[[128]](#footnote-129)

In 1966, minimum wage protection was also expanded to include certain agricultural workers employed by “large farms.”[[129]](#footnote-130) The FLSA would apply only to agricultural businesses that used “five hundred man-days of agricultural labor” in any calendar quarter of the preceding year; it was estimated that only 1 percent of all U.S. farms were covered by this provision.[[130]](#footnote-131)

In *Maryland v. Wirtz*,[[131]](#footnote-132) the Supreme Court rejected a constitutional challenge to the provisions of the 1966 Amendments that extended coverage to employees of state and local government bodies. The Court found that hospitals, institutions, and schools are major users of goods imported from other states and do, in fact, affect commerce.[[132]](#footnote-133) The Supreme Court later ruled, however, that employees of a state could not sue the state in federal court for violations of the FLSA—suits by such employees were limited to state court.[[133]](#footnote-134) Those claims, however, could be asserted by the DOL against the state in federal court.

The 1966 Amendments also

• raised the minimum wage, in steps, to $1.60 per hour;

• provided for employment of disabled individuals at less than minimum wage;[[134]](#footnote-135) and

• added a “tip credit” provision applying to employers whose employees earn tips on a regular basis, which allows employers to include a portion of an employee’s tips as part of the wages paid, subject to certain conditions.[[135]](#footnote-136)

Finally, in 1966, the Portal-to-Portal Act was amended to provide for a three-year limitations period for causes of action arising out of an employer’s willful violation of the FLSA.[[136]](#footnote-137)

A. The Equal Pay, Age Discrimination in Employment, and Service Contract Acts

The Equal Pay Act, enacted in 1963 to address gender-based pay discrimination,[[137]](#footnote-138) and the Age Discrimination in Employment Act (ADEA), enacted in 1967,[[138]](#footnote-139) are both amendments to the FLSA. Because of this legislative connection, Equal Pay Act and ADEA cases deciding matters other than the substance of the violation—e.g., coverage or the statute of limitations—can inform FLSA jurisprudence. Because there is rich, independent literature on these antidiscrimination laws,[[139]](#footnote-140) this treatise does not consider them in detail.

On the other hand, the McNamara-O’Hara Service Contract Act of 1965 was a free-standing act and not an amendment to the FLSA.[[140]](#footnote-141) It applies to every contract entered into by the United States or the District of Columbia primarily for the furnishing of services to the United States, and it invokes the FLSA’s minimum wage and overtime provisions to all service contracts equal to or less than $2,500.[[141]](#footnote-142)

B. The 1974 Amendments

In 1974, Congress extended the coverage of the FLSA to most federal, state, and local government employees not otherwise covered by virtue of the 1966 Amendments.[[142]](#footnote-143) In doing so, Congress relied heavily on the Supreme Court’s ruling in *Maryland v. Wirtz*[[143]](#footnote-144) that the “enterprise concept” of coverage is clearly within congressional power under the Commerce Clause.[[144]](#footnote-145)

Other specific changes made by the 1974 Amendments included

• revision to overtime pay provisions providing special treatment for employees working in the areas of law enforcement, fire protection, and correctional institutions;[[145]](#footnote-146)

• a modification of Section 216(b) of the FLSA to allow employees of state and local governments to bring suit for recovery of back wages and liquidated damages in any federal or state court of competent jurisdiction;[[146]](#footnote-147)

• a provision to aggregate the gross receipts of the several entities belonging to a chain of retail and service establishments for purposes of determining coverage;[[147]](#footnote-148)

• extension of minimum wage coverage to employees in domestic service, telegraph agencies, motion picture theaters, logging operations, and shade-grown tobacco processing operations, among others;[[148]](#footnote-149)

• revision to tip credit provisions, 29 U.S.C. §203(m) and (t), which were further revised by amendments enacted in 1977, 1996, and 2018;

• extension of overtime pay requirements to other classes of employees previously excluded;[[149]](#footnote-150) and

• an increase in the minimum wage, in steps of $.10 or $.20 per hour per year, to $2.30.[[150]](#footnote-151)

1. National League of Cities v. Usery

The constitutionality of the 1974 Amendments extending FLSA coverage to state and local government employees was challenged in *National League of Cities v. Usery*.[[151]](#footnote-152) The National League of Cities argued that the amendments would intrude on the states’ performance of essential governmental functions. Relying on the Supreme Court’s decision in *Maryland* *v. Wirtz*,[[152]](#footnote-153) a three-judge panel dismissed the complaint for failure to state a cause of action.[[153]](#footnote-154) The Supreme Court, on appeal, overruled its previous decision in *Wirtz* and reversed the district court panel on the eve of the effective date of the amendments.[[154]](#footnote-155) The Court held that the coverage extension was unconstitutional on the ground that, under the Tenth Amendment, “Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”[[155]](#footnote-156)

The Court concluded that determining wages and hours for employees carrying out essential functions of the government was an undoubted attribute of sovereignty,[[156]](#footnote-157) and thus held that, “insofar as the challenged amendments operate to directly displace the states’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause].”[[157]](#footnote-158)

After the *National League of Cities* decision, the DOL and the lower courts struggled to determine the traditional and nontraditional functions of government. This struggle culminated in another landmark Supreme Court decision.

2. Garcia v. San Antonio Metropolitan Transit Authority

On September 17, 1979, the Deputy Wage and Hour Administrator published an opinion letter stating that operating public transit systems was not a traditional governmental function for purposes of a *National League of Cities* analysis. The DOL issued a Final Interpretation on December 21, 1979, that amended its interpretative bulletins to include transit as a nontraditional governmental activity.[[158]](#footnote-159) This interpretation prompted the San Antonio Metropolitan Transit Authority (SAMTA) to seek declaratory judgment that the FLSA’s minimum wage and overtime provisions were inapplicable to its operations. This action was countered by claims from SAMTA workers that SAMTA violated the FLSA and counterclaims by the Secretary against SAMTA for back pay and injunctive relief. After the district court ruled that SAMTA’s operation of a mass transit system was a traditional function of government,[[159]](#footnote-160) the Secretary and workers appealed directly to the Supreme Court.

The Supreme Court recognized, in *Garcia v. San Antonio Metropolitan Transit Authority*,[[160]](#footnote-161) the difficulties in distinguishing traditional from nontraditional governmental activities as required under *National League of Cities*,[[161]](#footnote-162) and found that distinction to be “unsound in principle and unworkable in practice.”[[162]](#footnote-163) The Court, in a 5–4 decision, overruled *National League of Cities* and held that SAMTA was subject to the provisions of the FLSA. The *Garcia* Court explained that the protection of state sovereign interests from intrusive federal regulation could be found in the structure of the federal government and the political process itself rather than in judicially created limitations on federal power.[[163]](#footnote-164) Under this ruling, the provisions of the FLSA became applicable to employees of state and local governments.

C. The 1977 Amendments

Congress made several amendments to the FLSA in 1977[[164]](#footnote-165) affecting minimum wage increases and generally expanding its protections. The 1977 Amendments eliminated the lower minimum wage that applied to large-farm agricultural workers, setting a new uniform wage rate schedule for all covered workers. It also put in place a four-step increase for the minimum wage, taking it from $2.30 an hour in 1976 to $3.35 an hour as of January 1981. The amendments also made changes involving tipped employees and the tip credit. However, the amendments eased provisions allowing employment of students at a subminimum wage and allowed special waivers for children 10–11 years old to work as agricultural hand harvesters of short-season crops.

These amendments also extended coverage of the FLSA’s overtime protections because the partial overtime exemption found in Section 213(b)(8) was repealed in stages for certain hotel, motel, and restaurant employees. Overall coverage was expanded for retail trade and service enterprises, as the amendments adjusted the dollar volume sales coverage test to compensate for the effects of inflation. Finally, an employee’s right to sue for Section 215(a)(3) violations (e.g., retaliation) was included in Section 216(b).

D. The 1978 Amendment Concerning Military Commissaries

Congress amended the FLSA to exclude baggers and grocery deliverers who worked for tips at military commissaries, overriding a Civil Service Commission decision that such workers were employees for purposes of the FLSA.[[165]](#footnote-166) Congress reasoned that such exclusion was necessary to facilitate employment of dependents of military personnel whose employment opportunities were limited by the fact that they tend to be short-term residents of the area in which they are employed.[[166]](#footnote-167)

E. The 1985 Amendments Concerning Public Employees

In response to *Garcia v. San Antonio Metropolitan Transit Authority*,[[167]](#footnote-168) Congress amended the FLSA to ease some of the financial burdens on states and local governments, which were required for the first time to pay overtime to significant numbers of employees, as well as to protect the rights of public employees. The main provisions of the 1985 Amendments allowed public employers to offer employees compensatory time off in lieu of overtime pay.[[168]](#footnote-169)

The 1985 Amendments also modified the definition of the term “employee” to exclude persons who volunteer their services to a public agency, subject to specified conditions.[[169]](#footnote-170) It also created special exemptions applicable only to state and local government employers,[[170]](#footnote-171) including a partial overtime exemption for employees engaged in fire protection and law enforcement activities.[[171]](#footnote-172)

F. The 1986 Amendments

The 1986 Amendments to the FLSA addressed issues that had arisen in Section 214 of the FLSA (employment under special certificates). The amendments eliminated different programs under Section 214, provided for one certificate for all programs under Section 214, and provided for an appeals procedure whereby clients could ask for a review of wage rates by an administrative law judge, subject to DOL review.[[172]](#footnote-173)

G. The 1989 Amendments

In 1989, Congress amended the FLSA by again increasing the minimum wage, in stages, to $4.25 per hour. It also adopted for the first time a provision that allowed for a “training wage.”[[173]](#footnote-174) The training wage provisions expired on March 31, 1993, and were not renewed by Congress.

The 1989 Amendments also increased the dollar volume threshold for enterprise coverage from $250,000 to $500,000 for all enterprises, in order to simplify coverage determinations and restrict coverage to larger businesses. In addition, those amendments repealed the “retail exemption,” formerly FLSA Section 213(a)(2), under which employees of virtually all small retail enterprises had previously been exempt from the minimum wage and overtime requirements.[[174]](#footnote-175) In addition, the amendments eliminated construction and laundry/dry cleaning as named enterprises. The net effect was a significant further expansion of coverage.

Other changes made by the 1989 Amendments included

• an increase in the tip credit from 40 percent to 50 percent;[[175]](#footnote-176)

• a provision allowing employers to provide up to 10 hours of on-the-job remedial education to their employees without being required to pay overtime compensation to those employees, subject to certain conditions;[[176]](#footnote-177)

• changes in the wage-setting procedures that had been applicable to the Virgin Islands and Puerto Rico (those applicable to American Samoa were left unchanged);[[177]](#footnote-178)

• a small extension of coverage to some employees of the House of Representatives and of the Architect of the Capitol;[[178]](#footnote-179) and

• the authorization of civil monetary penalties up to $1,000 for repeated or willful violations of the minimum wage and overtime provisions of the FLSA.[[179]](#footnote-180)

VI. Legislative Developments: 1990–1999

A. The 1990 Amendments

In 1990, as part of an Omnibus Budget Reconciliation Act, Congress amended Section 216(e) of the FLSA to increase civil penalties for child labor violations, changing the maximum civil penalty from $1,000 to $10,000 per employee subject to a violation. The amendment also provided that “[a]ny person who repeatedly or willfully [violates] section 206 or 207 of this title shall be subject to a civil penalty of not to exceed $1,000 for each violation.”[[180]](#footnote-181)

Also in 1990, Congress directed the DOL to treat specified computer employees as exempt under Section 213(a)(1) of the FLSA whether paid on a salary basis (similar to exempt executive, administrative, or professional employees) or an hourly basis if they were compensated at a rate of not less than six and one-half times the FLSA’s minimum wage.[[181]](#footnote-182)

B. The Congressional Accountability Act of 1995

Although not technically an amendment to the FLSA, the Congressional Accountability Act of 1995[[182]](#footnote-183) extended the FLSA’s minimum wage, overtime, and child labor provisions to employees of the U.S. Congress. However, other provisions of the FLSA, such as the recordkeeping requirements and the prohibitions against retaliation, were not adopted. The enforcement structure for congressional staff is somewhat different in that it provides for a comprehensive counseling and mediation procedure that employees are obligated to follow before pursuing their claims in an adjudicative setting. The limitations period in which to bring FLSA claims is much shorter for congressional employees.[[183]](#footnote-184)

C. The Court Reporter Fair Labor Amendments of 1995

Congress amended the FLSA to create a partial exemption for public agency court reporters preparing transcripts outside their regular employment hours. Under the amendments, a public agency court reporter must receive a minimum per-page rate to qualify for the overtime exemption.[[184]](#footnote-185)

D. The Small Business Job Protection Act of 1996

In 1996, Congress amended the FLSA to include a specific statutory exemption in Section 213(a)(17) entitled “Computer Professionals.”[[185]](#footnote-186) This amendment changed the computer employee exemption in two ways. First, it froze—at $27.63 per hour—the hourly rate at which exempt computer employees needed to be paid ($27.63 represented the former $4.25 federal minimum wage rate multiplied by 6.5). Second, Congress simplified the “duties test” for computer employees by codifying most, but not all, of the language in the DOL’s existing regulations concerning computer employees.[[186]](#footnote-187) Although Congress revised the hourly pay rate requirement, Congress specifically did *not* repeal Public Law 101-583, which, as noted above, exempts computer employees under Section 213(a)(1).[[187]](#footnote-188) Congress considered computer employees covered by the Section 213(a)(17) exemption to be “Computer Professionals” and thus exempt under Section 213(a)(1) just as they had been before Section 213(a)(17) was enacted. This understanding is reflected in the language used in the Conference Report on Public Law 104-188, which specifically notes that the bill “maintain[s] current law.”[[188]](#footnote-189)

In the same legislation, Congress also (1) raised the minimum wage;[[189]](#footnote-190) (2) amended the Portal-to-Portal Act such that otherwise compensable use of employer-provided vehicles for commuting to and from work, and activities performed incidental to such use, pursuant to an agreement between employer and employee did not constitute compensable activity;[[190]](#footnote-191) and (3) brought within coverage of the minimum wage all government employees as of April 1, 1996.[[191]](#footnote-192)

E. The Federal Civil Penalties Inflation Adjustment Act of 1990, as Amended by the Debt Collection Improvement Act of 1996

The Federal Civil Penalties Inflation Adjustment Act of 1990,[[192]](#footnote-193) as amended by the Debt Collection Improvement Act of 1996,[[193]](#footnote-194) requires federal agencies to adjust their civil money penalties for inflation. While these enactments did not amend the FLSA, the penalty adjustments they mandated impact enforcement of the FLSA.[[194]](#footnote-195) These adjustments must be made at least every four years, using a cost-of-living formula tied to the DOL’s Consumer Price Index. As a result, the DOL must regularly adjust its penalties for willful violations of the minimum wage, overtime, and child labor laws to “maintain the[ir] deterrent effect … and promote compliance with the law.”[[195]](#footnote-196)

F. The Compactors and Balers Safety Standards Modernization Act of 1996

The Compactors and Balers Safety Standards Modernization Act of 1996[[196]](#footnote-197) created FLSA Section 213(c)(5), which prohibits minors younger than 18 years of age from operating and unloading balers and compactors, but permits children ages 16 and 17 years old to load certain balers and compactors under specific conditions.[[197]](#footnote-198) The amendments also require employers to provide and post notices that outline the provisions of this subparagraph on the balers and compactors, as well as (for the subsequent two years) to submit reports to the Secretary of any injury or death of an employee younger than age 18.[[198]](#footnote-199)

G. The Drive for Teen Employment Act of 1998

Pursuant to the Drive for Teen Employment Act of 1998,[[199]](#footnote-200) Hazardous Order 2 was modified to provide that employees who are 17 years of age *may* drive certain automobiles and trucks on public roadways only if they meet the conditions set out in the Act.[[200]](#footnote-201) Employees younger than 17 years of age are prohibited from driving automobiles or trucks on public roadways, but employees who are 17 years of age are permitted to do so in limited situations and subject to detailed safety restrictions.[[201]](#footnote-202)

H. The Amy Somers Volunteers at Food Banks Act of 1998

In August 1998, Congress amended the FLSA definition of “employee” by enacting the Amy Somers Volunteers at Food Banks Act.[[202]](#footnote-203) The amendment excludes from the definition of “employee” individuals who volunteer at food banks for humanitarian purposes, even if such individuals receive groceries from the food bank, which might otherwise be considered a form of compensation.[[203]](#footnote-204)

I. The Labor Department Appropriations Act of 1998

The Labor Department Appropriations Act of 1998 made relatively minor amendments to the FLSA, broadening the overtime exemption for irrigation workers.[[204]](#footnote-205)

J. The 1999 Amendments to Clarify the Overtime Exemption for Employees Engaged in Fire Protection Activities

In 1999, Congress amended the FLSA with respect to the applicability of the Section 207(k) partial overtime exemption for fire protection employees. To “clarify” the application of the Section 207(k) partial exemption, Congress added a new Section 203(y) to the FLSA, providing by definition that an “employee in fire protection activities” includes publicly employed firefighters and other medical and emergency personnel trained, responsible for, and engaged in firefighting and prevention.[[205]](#footnote-206)

VII. Legislative Developments: 2000–Present

A. The Worker Economic Opportunity Act of 2000

Congress amended the FLSA in 2000 to provide that income derived from a stock option, stock appreciation right, or employee stock purchase plan does not have to be included in the compensation of employees for purposes of calculating the regular rate, provided certain restrictions are met.[[206]](#footnote-207)

The Act also revised Section 207(h) of the FLSA to address how certain premium pay should be treated for purposes of complying with the minimum wage and overtime requirements. This amendment made explicit that payments that are excluded from the “regular rate,” as defined by Section 207(e), may not be used as credits against the minimum wage obligation; however, certain premium pay, addressed in Sections 207(e)(5), (6), or (7), may be used as credits against overtime.[[207]](#footnote-208)

B. The Consolidated Appropriations Act of 2004

The Consolidated Appropriations Act of 2004[[208]](#footnote-209) added Section 213(c)(7) to the FLSA, which created a limited exemption from the ban on the employment of children ages 14 and 15 in manufacturing occupations contained in Section 203(l). The amendment permitted “a new entrant into the workforce” to be employed inside or outside places of business where machinery is used to process wood products.[[209]](#footnote-210) The section then set out conditions under which such a new entrant may be employed.[[210]](#footnote-211)

Although Section 213(c)(7) of the FLSA does not impact the prohibitions on Hazardous Order 5 because eligible youth are still prevented from operating power-driven woodworking machines, it did expand the types of workplaces where certain youth may be employed to include sawmills and cooperage stock mills, as well as other workplaces included under Hazardous Order 4.[[211]](#footnote-212)

C. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005[[212]](#footnote-213) did not amend the FLSA but did affect its application. The act authorized funds for federal-aid highways, highway safety programs, and transit programs, and, as relevant here, amended the definition of “motor vehicle,” such that drivers of vehicles weighing less than 10,001 pounds were no longer under the jurisdiction of the Secretary of Transportation and therefore were not subject to the motor carrier exemption under Section 213(b)(1) of the FLSA.[[213]](#footnote-214)

Upon passage of SAFETEA-LU and the industry’s realization of its impact on the scope of Section 213(b)(1), many transportation industry employers objected to the imposition of an increased overtime obligation. They argued that insertion of the word “commercial” in the definition of a “motor carrier” was an “unintended result” or a “drafting error that was never negotiated or discussed.” However, worker advocates were not willing to give up the overtime protections workers gained under SAFETEA-LU.

On June 8, 2008, the SAFETEA-LU Technical Corrections Act (TCA)[[214]](#footnote-215) went into effect and addressed these competing interests by

• defining a “covered employee” under SAFETEA-LU;

• establishing that Section 207 requirements apply to a “covered employee” regardless of the language of Section 213(b)(1); and

• protecting employers from violations of Section 207 with respect to a “covered employee” for a one-year period after August 10, 2005, if the employer did not have actual knowledge of the impact of SAFETEA-LU.

Thus, the TCA restored jurisdiction to the Secretary of Transportation over vehicles that weigh 10,000 pounds or less, but it did not restore the overtime exemption for drivers, drivers’ helpers, loaders, and mechanics of these vehicles under the FLSA.[[215]](#footnote-216)

D. The 2007 Amendments Concerning Minimum Wage

The Fair Minimum Wage Act of 2007 amended the FLSA by raising the federal minimum wage for the first time since 1997.[[216]](#footnote-217) Effective July 24, 2007, the minimum wage increased $0.70 to $5.85 per hour, with additional increases to $6.55 per hour effective July 24, 2008, and $7.25 per hour effective July 24, 2009.

The 2007 Amendments were also intended to extend the FLSA’s Section 206 minimum wage to American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI), over time. For American Samoa, the legislation eliminated the industry committees that set wage rates in American Samoa and planned to raise the applicable minimum wage by $.50 per hour on July 24, 2007, and $.50 per hour every year thereafter until the mainland minimum wage was reached. However, in 2010, as a result of an assessment of the minimum wage increases on living standards and rates of employment in both American Samoa and CNMI, the planned increases for 2010 and 2011 were halted in American Samoa.[[217]](#footnote-218)

In July 2012, the Insular Areas Act delayed the planned increases in the minimum wages in American Samoa for 2012, 2013, and 2014. In 2015, Congress amended the Fair Minimum Wage Act of 2007 to reduce the scheduled increases in American Samoa from $.50 per hour to $.40 per hour, with increases taking effect every three years thereafter until all rates have reached the federal minimum.[[218]](#footnote-219) As amended, the minimum wage increased $.40 per hour across all industries effective September 30, 2015, and again on September 30, 2018, with the next scheduled increase to take effect on September 30, 2021.

Although CNMI had retained control over the minimum wage in its Covenant of Association with the United States in the mid-1970s, the 2007 Amendments set the minimum wage for CNMI at $3.55 per hour, with annual increases of $.50 per hour until it reached the same level as in the continental United States. However, Public Law 111-244 postponed the scheduled increase in the minimum wage for 2011.

On September 30, 2012, the minimum wage increase in CNMI resumed with another increase of $.50 per hour to $5.55. Two additional increases of $.50 per hour occurred in 2014 and 2016, bringing the minimum wage to $6.55 an hour, effective September 30, 2016. The following year, it increased by $.50 per hour to $7.05. Then, on September 30, 2018, the minimum wage increased $.20 per hour to $7.25, bringing it equal to the mainland minimum wage.

E. The 2008 Amendments Regarding DOL Penalties

In 2008, the Genetic Information Nondiscrimination Act (GINA)[[219]](#footnote-220) amended Section 216(e) of the FLSA by increasing civil money penalties for a child labor violation from $10,000 to $11,000 per violation. The 2008 Amendments also provided that the DOL could assess a penalty of up to $50,000 when the violation resulted in the death or serious injury of a minor and provided that the penalty could be doubled when the violation is determined to be willful. The amendments also increased from $1,000 to $1,100 the civil money penalty for willful violations of the minimum wage or maximum hours requirements.

F. The Patient Protection and Affordable Care Act of 2010

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA),[[220]](#footnote-221) which included an amendment to Section 207 of the FLSA to require most employers to provide reasonable break time for nursing mothers. It did so by requiring employers to

• provide reasonable break times for a period of one year following a child’s birth, as needed, for an employee to express breast milk; and

• offer access to a private location other than a bathroom to be used by an employee to express milk.

The ACA stated that employers are not required to compensate employees for such breaks. It also provided an exception for employers with fewer than 50 employees if compliance would impose an undue hardship by causing significant difficulty or expense relative to the size, nature, structure, or financial resources of the employer’s business. State laws providing greater protections for employees are not preempted by the amendments.[[221]](#footnote-222)

The ACA also amended Section 218 of the FLSA to extend health insurance coverage, inserting the following to the end of Section 218:

• an automatic enrollment requirement applicable to employers with more than 200 full-time employees that had previously offered enrollment in one or more health plans;[[222]](#footnote-223)

• a notice requirement informing employees of the right to opt out of an employer-sponsored health plan and to purchase a qualified health plan from an Exchange, including eligibility for a premium tax credit and cost- sharing reduction;[[223]](#footnote-224) and

• antiretaliation provisions protecting employees receiving a tax credit or otherwise providing information about noncompliance with the ACA.[[224]](#footnote-225)

Each of these provisions was subsequently struck from the FLSA by Congress.[[225]](#footnote-226)

G. The Border Patrol Agent Pay Reform Act of 2014

In 2014, Congress amended Section 213(a) to provide an exemption for border patrol agents from the FLSA’s minimum wage and overtime requirements.[[226]](#footnote-227) House Bill 2252, signed on May 20, 2015, delayed implementation of the Act until January 1, 2016.[[227]](#footnote-228)

H. The Consolidated Appropriations Act of 2018

In the Consolidated Appropriations Act of 2018,[[228]](#footnote-229) Congress amended the FLSA in several respects. First, it amended FLSA Section 203(m) to explicitly prohibit employers, including managers and supervisors, from keeping any portion of employee tips, regardless of whether the employer takes a tip credit.[[229]](#footnote-230) Additionally, the statute added a private right of action for tips unlawfully kept by an employer,[[230]](#footnote-231) including civil penalties and liquidated damages.[[231]](#footnote-232) The legislation also struck down portions of the DOL’s 2011 regulations that are not addressed by Section 203(m),[[232]](#footnote-233) as the statute was in effect at that time, stating that the regulations “shall have no further force or effect until any future action” taken by the Wage and Hour Administrator.[[233]](#footnote-234)

Second, the Act included a provision entitled “Save America’s Pastime Act” (SAPA), which exempted Major League Baseball teams from paying minimum wage and overtime pay to minor league players under contract. The language amended Section 213(a) of the FLSA and required that covered players be under a contract that provides for a weekly salary “equal to the minimum wage under section 6(a) for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball related activities.”[[234]](#footnote-235)

Finally, Congress added an amendment to Section 207 of the FLSA by adding an overtime exemption for certain insurance company employees for the two-year period following a national disaster. The Consolidated Appropriations Act did not amend the text of the FLSA, but instead provided that the FLSA “shall be applied as if” the exemption appeared in the text of Section 207.[[235]](#footnote-236)

I. Providing Urgent Maternal Protections for Nursing Mothers Act

In the Consolidated Appropriations Act of 2023,[[236]](#footnote-237) Congress expanded protections for nursing employees under the ACA[[237]](#footnote-238) by passing the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which repealed FLSA Section 207(r) and introduced Section 218(d). Under the PUMP Act, the right for nursing employees to receive break time and a private place to express breast milk was extended to nearly all employees, not just those classified as nonexempt.[[238]](#footnote-239) Employees using break time to express breast milk must be completely relieved from duty or otherwise be paid for such time.[[239]](#footnote-240) Additionally, the PUMP Act enacted a private right of action for employees to enforce violations and seek remedies.[[240]](#footnote-241)

1. 198 U.S. 45 (1905). [↑](#footnote-ref-2)
2. *Id*. at 57. [↑](#footnote-ref-3)
3. Muller v. Oregon, 208 U.S. 412 (1908). [↑](#footnote-ref-4)
4. Adkins v. Children’s Hosp., 261 U.S. 525 (1923). Although reaching the same result as in *Lochner*, the *Adkins* Court did so for a different reason—finding that the passage of the Nineteenth Amendment evidenced that gender differences “have now come almost, if not quite, to the vanishing point.” *Id*. at 552. [↑](#footnote-ref-5)
5. Morehead v. New York *ex rel*. Tipaldo, 298 U.S. 587 (1936). [↑](#footnote-ref-6)
6. 300 U.S. 379 (1937). [↑](#footnote-ref-7)
7. This became known by the phrase “switch in time saves nine” because it allegedly avoided President Roosevelt’s plan to pack the Court with additional justices who would uphold his New Deal program. However, there is some question whether the Court-packing scheme was made public prior to the *West Coast Hotel* decision. *See, e.g.*, G. Edward White, West Coast Hotel*’s Place in American Constitutional History*, 122 Yale L.J. Online 69 n.11 (Sept. 24, 2012), http://yalelawjournal.org/forum/west-coast-hotels-place-in-american-constitutional-history (citing Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 18 (1998)). [↑](#footnote-ref-8)
8. United States v. Darby, 312 U.S. 100 (1941). [↑](#footnote-ref-9)
9. *See, e.g*., *Supreme Court:* Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 296 (1985); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981); Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959); Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 (1945).

   *Fifth Circuit:* Foremost Dairies v. Wirtz, 381 F.2d 653 (5th Cir. 1967).

   *Sixth Circuit:* Bumpus v. Continental Baking Co., 124 F.2d 549 (6th Cir. 1941).

   *Tenth Circuit:* Walling v. Rutherford Food, 156 F.2d 513 (10th Cir.), *aff’d in part and modified in part*, 331 U.S. 722 (1946). [↑](#footnote-ref-10)
10. John R. Commons & John B. Andrews, Principles of Labor Legislation (4th rev. ed. 1936). [↑](#footnote-ref-11)
11. U.S. Rev. Stat. 1878, tit. 43, §3738; 13 Documentary History of American Industrial Society 85 (John R. Commons ed., 1914). [↑](#footnote-ref-12)
12. 27 Stat. 340, ch. 352 (1892). [↑](#footnote-ref-13)
13. Ellis v. United States, 206 U.S. 246, 260 (1907). [↑](#footnote-ref-14)
14. 37 Stat. 726 (1913). [↑](#footnote-ref-15)
15. 37 Stat. 137, ch. 174 (1912). [↑](#footnote-ref-16)
16. 38 Stat. 1164, ch. 153 (1915). [↑](#footnote-ref-17)
17. 46 Stat. 1494, ch. 411 (codified as amended at 40 U.S.C. §§3141–44, 3146, 3147 (formerly 40 U.S.C. §276 *et seq.*)). [↑](#footnote-ref-18)
18. 48 Stat. 195, ch. 90. A discussion of the Supreme Court’s rejection of this statutory scheme appears in Chapter 12, Child Labor. [↑](#footnote-ref-19)
19. 48 Stat. 195, ch. 90, §3(a). [↑](#footnote-ref-20)
20. 295 U.S. 495 (1935). [↑](#footnote-ref-21)
21. 48 Stat. 543, ch. 498 (1935). [↑](#footnote-ref-22)
22. 46 U.S.C. ch. 27, §§1101–1295(g), 1131 (1936). [↑](#footnote-ref-23)
23. 49 Stat. 2036 (codified as amended at 41 U.S.C. §35 *et seq.*). [↑](#footnote-ref-24)
24. U.S. Department of Labor, Wage & Hour Div., Government Contracts Compliance Assistance––Walsh-Healey Public Contracts Act (PCA), https://www.dol.gov/whd/govcontracts/pca.htm (last visited Apr. 23, 2020). [↑](#footnote-ref-25)
25. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507 (1943). [↑](#footnote-ref-26)
26. *Id*. Since 1964, as a result of a court decision, the prevailing wage provision of the Walsh-Healey Act has been set at the minimum wage. The Walsh-Healey Act provides for wage determinations to be made by the Secretary of Labor “on the record,” i.e., after notice and opportunity for a hearing. In *Wirtz v. Baldor Electric Co.*, 337 F.2d 518, 527–28 (D.C. Cir. 1964), a company demanded that the Secretary disclose the data on which the determination had been made. The Secretary declined to do so on the ground that Bureau of Labor Statistics data must be maintained confidentially in order to preserve the ability of the Bureau to carry out its function. The court declined to permit the wage determination so challenged to stand. Shortly thereafter, the U.S. Department of Labor (DOL) issued a new prevailing wage rate, setting as “prevailing” the then-statutory minimum wage rate. Since that time, the DOL has issued a new prevailing wage determination at the new minimum wage rate each time the FLSA statutory minimum has been raised. [↑](#footnote-ref-27)
27. The requirement to pay overtime after eight hours in a day has been discontinued; today the requirement is solely to pay overtime after 40 hours in a workweek. 41 U.S.C. §6502(2). [↑](#footnote-ref-28)
28. 48 Stat. 195, ch. 90 (1933). [↑](#footnote-ref-29)
29. In 1985, the requirement to pay overtime in excess of eight hours was repealed by Public Law No. 99-145. [↑](#footnote-ref-30)
30. For a conclusive treatment of the states’ current wage and hour laws, see Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L. 3d ed. 2016 & Supp.). [↑](#footnote-ref-31)
31. Women’s Bureau, U.S. Dep’t of Labor, Bull. 66, pt. I; *see also* Clara Mortenson Beyer, *History of Legislation for Women in Three States*, and Don Divance Lescohier, *Working Conditions*, *in* History of Labor in the United States, Reprints of Economic Classics (Augustus M. Kelley ed., 1966). Connecticut has a minimum wage law for children dating back to1842. [↑](#footnote-ref-32)
32. Ariz. (Act of 1917, ch. 38); Ark. (Act of 1915, No. 191); Cal. (Act of 1913, ch. 324); Colo. (Act of 1917, ch. 98); D.C. (40 Stat. 960, ch. 174); Kan. (Act of 1915, ch. 275); Mass. (Act of 1912, ch. 706); Minn. (Act of 1913, ch. 547); N.D. (Act of 1919, ch. 174); Or. (Act of 1913, ch. 62); P.R. (Act of 1919, No. 45); Tex. (Act of 1919, ch. 160); Utah (Act of 1913, ch. 63); Wash. (Act of 1913, ch. 174); Wis. (Act of 1913, ch. 712). [↑](#footnote-ref-33)
33. *See* Bunting v. Oregon, 243 U.S. 426 (1917) (upholding 10-hour-day statute for male and female mill factory workers). [↑](#footnote-ref-34)
34. *See, e.g.*, Ariz. (1913) (limiting electric light and power plant employees to eight-hour workday); Colo. (1908) (limiting hours for mechanics, laborers, and state public works project workers); *see also* Elisabeth Landes, *The Effect of State Maximum-Hour Laws on the Employment of Women in 1920*, 88 J. Pol. Econ. 3, 476 (1980). [↑](#footnote-ref-35)
35. *See* Muller v. Oregon, 208 U.S. 412, 419–23 (1908); Lochner v. New York, 198 U.S. 45, 57 (1905); and West Coast Hotel Co. v. Parrish, 300 U.S. 379, 395 (1937), discussed in §I [Overview]of this chapter; *see also* Clara Mortenson Beyer, *History of Legislation for Women in Three States*, *in* History of Labor in the United States, Reprints of Economic Classics (Augustus M. Kelley ed., 1966). [↑](#footnote-ref-36)
36. For a complete review of early minimum wage laws, see U.S. Bureau of Labor Statistics, Bull. No. 285 (July 1921). For a detailed discussion of the philosophy underlying minimum wage legislation, contemporaneous with the struggle over such laws, see John R. Commons & John B. Andrews, Principles of Labor Legislation (Harper & Bros. Publishers, 1916, 1920). [↑](#footnote-ref-37)
37. 298 U.S. 587 (1936). [↑](#footnote-ref-38)
38. *See* *West Coast Hotel*, 300 U.S. at 395 (“[Woman] was ‘properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained.’”) (quoting *Muller*, 208 U.S. at 422). [↑](#footnote-ref-39)
39. 298 U.S. at 610–11. [↑](#footnote-ref-40)
40. *Id*. at 611. [↑](#footnote-ref-41)
41. Indeed, the soon-to-be presidential nominee of the Republican party, Alf Landon, advised the party’s convention via telegram of his support of a constitutional amendment that authorized minimum wage legislation, if necessary. *Landon Telegram on Platform*, Wash. Post, June 12, 1936, at 1 (reporting Landon endorsed state minimum wage laws and interstate compacts, not federal legislation). [↑](#footnote-ref-42)
42. H.R. Rep. No. 101-260 (Sept. 26, 1989), *reprinted in* 1989 U.S.C.C.A.N. 696–97. President Roosevelt’s 1937 remarks were reproduced in the House Report preceding enactment of the Fair Labor Standards Amendments of 1939. [↑](#footnote-ref-43)
43. J. Hearings on H.R. 7200 and S. 2475, H.R. Rep. No. 75-2182, at 6 (1937). [↑](#footnote-ref-44)
44. H.R. Conf. Rep. No. 75-2738, at 28 (1937). [↑](#footnote-ref-45)
45. For a detailed discussion of the FLSA’s legislative history and political context, *see* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, https://www.dol.gov/general/aboutdol/history/flsa1938 (last visited May 5, 2020). [↑](#footnote-ref-46)
46. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 Law & Contemp. Probs. 463, 466 (1939). [↑](#footnote-ref-47)
47. Franklin Roosevelt, VI Public Papers 215 (May 24, 1937). [↑](#footnote-ref-48)
48. *Id.* at 263. [↑](#footnote-ref-49)
49. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, https://www.dol.gov/general/aboutdol/history/flsa1938 (last visited May 5, 2020). [↑](#footnote-ref-50)
50. *Id.* [↑](#footnote-ref-51)
51. *Id*. (citing *The New York Times*,May 6, 7, 1938). [↑](#footnote-ref-52)
52. *Id.* [↑](#footnote-ref-53)
53. *Id*. [↑](#footnote-ref-54)
54. *Id.* According to Grossman, during the entire legislative process over the FLSA, members of Congress had proposed 72 amendments. [↑](#footnote-ref-55)
55. 29 U.S.C. §206. [↑](#footnote-ref-56)
56. Autumn L. Canny, *Lost in a Loophole: The Fair Labor Standards Act’s Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 Drake J. Agric. L. 355, 365–66 (2005). [↑](#footnote-ref-57)
57. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, https://www.dol.gov/general/aboutdol/history/flsa1938 (last visited May 5, 2020). [↑](#footnote-ref-58)
58. Act of June 25, 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§201–219). [↑](#footnote-ref-59)
59. *Id.* [↑](#footnote-ref-60)
60. United States v. Rosenwasser, 323 U.S. 360, 361 (1945) (quoting S. Rep. No. 884 (75th Cong., 1st Sess.)). [↑](#footnote-ref-61)
61. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 576 (1942). [↑](#footnote-ref-62)
62. *Id*. at 577–78. [↑](#footnote-ref-63)
63. Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 706 (1945). [↑](#footnote-ref-64)
64. United States v. F.W. Darby Lumber Co., 32 F. Supp. 734 (S.D. Ga. 1940). [↑](#footnote-ref-65)
65. United States v. Darby, 312 U.S. 100, 108 (1941). [↑](#footnote-ref-66)
66. *Id*. at 115. [↑](#footnote-ref-67)
67. 247 U.S. 251 (1918). [↑](#footnote-ref-68)
68. The short-lived Keating-Owen Child Labor Act of 1916 (also known as Wick’s Bill), 39 Stat. 675, ch. 432 (Comp. St. 1916, §§8819a–8816f), prohibited interstate commerce of any merchandise made by children younger than the age of 14, or made in factories where children between the ages of 14 and 16 worked for more than eight hours a day, worked overnight, or worked more than six days a week. The Court struck the legislation nine months after it was enacted. The *Hammer* decision arose from an action to enjoin enforcement of the Act, filed by a father who worked in a cotton mill with his two minor children. [↑](#footnote-ref-69)
69. More detailed examination of the statutory exemptions can be found in Chapters 5, White-Collar Exemptions; 6, Other Statutory Exemptions; and 7, Agricultural Exemptions. Chapters 2, Operations and Functions of the Department of Labor; and 12, Child Labor, also contain detailed discussion of the history of the FLSA’s child labor and “hot goods” provisions. [↑](#footnote-ref-70)
70. For full text of the FLSA, *see* *29 U.S. Code Chapter 8—Fair Labor Standards,* Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/uscode/text/29/chapter-8 (last visited Nov. 12, 2020). For an overview of FLSA coverage, *see* *Handy Reference Guide to the Fair Labor Standards Act,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa (last visited Nov. 12, 2020). For full text of the Portal-to-Portal Act, *see* *29 U.S. Code Chapter 9—Portal-to-Portal Pay,* Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/uscode/text/29/chapter-9 (last visited Nov. 12, 2020). [↑](#footnote-ref-71)
71. Pub. L. No. 80-99, 61 Stat. 84 (1947) (codified as amended at 29 U.S.C. §§251 *et seq.*). [↑](#footnote-ref-72)
72. 328 U.S. 680 (1946); *see* Universities Research Ass’n v. Coutu, 450 U.S. 754, 780 (1981); Steiner v. Mitchell, 350 U.S. 247, 254 (1956). [↑](#footnote-ref-73)
73. *Mt. Clemens*, 328 U.S. at 682. [↑](#footnote-ref-74)
74. The plaintiffs alleged that their employer’s method of computation did not accurately reflect all the time actually worked, and that they were thereby deprived of the proper overtime compensation guaranteed them by §207(a) of the FLSA. They claimed, *inter alia*, that all employees worked approximately 56 minutes more per day than credited by the employer, and that, in any event, all the time between the hours punched on the timecards constituted compensable working time. *Id.* [↑](#footnote-ref-75)
75. *Id*. at 691. The Court differentiated between time spent walking on the employer’s premises, which was compensable, and time required in driving from the employee’s home to the factory, which was not compensable. [↑](#footnote-ref-76)
76. *Id*. at 692. The Court also found the time spent engaging in preparatory activities, such as putting on aprons and overalls, removing shirts, and preparing equipment, to be compensable, stating that such activities were a necessary prerequisite to productive work and were not for the personal convenience of the employees. *Id*. at 693. A discussion of current law governing hours of work, including preliminary and postliminary activities, appears in Chapter 8, Compensable Hours. [↑](#footnote-ref-77)
77. 324 U.S. 697 (1945). [↑](#footnote-ref-78)
78. *Id*. at 699. [↑](#footnote-ref-79)
79. *Id*. at 714. [↑](#footnote-ref-80)
80. Steiner v. Mitchell, 350 U.S. 247, 253 (1956) (citation omitted). [↑](#footnote-ref-81)
81. 1947 U.S.C.C.A.N. 1032. [↑](#footnote-ref-82)
82. *First Circuit:* Manosky v. Bethlehem-Hingham Shipyard, 177 F.2d 529, 532 (1st Cir. 1949).

    *Second Circuit:* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948); Darr v. Mutual Life Ins. Co., 169 F.2d 262, 266 (2d Cir. 1948).

    *Third Circuit:* Thomas v. Carnegie-Ill. Steel Corp., 174 F.2d 711, 712 (3d Cir. 1949).

    *Fourth Circuit:* Atallah v. B.H. Hubbert & Son, Inc., 168 F.2d 993 (4th Cir. 1948); Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948).

    *Sixth Circuit:* Busch v. Wright Aeronautical Corp., 174 F.2d 322 (6th Cir. 1949); Newsom v. E.I. du Pont de Nemours & Co., 173 F.2d 856, 860 (6th Cir. 1949); Fisch v. General Motors Corp., 169 F.2d 266, 270 (6th Cir. 1948); Rogers Cartage Co. v. Reynolds, 166 F.2d 317, 320 (6th Cir. 1948).

    *Seventh Circuit:* Lee v. Hercules Powder Co., 171 F.2d 950, 951 (7th Cir. 1949).

    *Eighth Circuit:* Bumpus v. Remington Arms Co., 183 F.2d 507, 509 (8th Cir. 1950).

    *Ninth Circuit:* Lassiter v. Guy F. Atkinson Co., 176 F.2d 984, 986 (9th Cir. 1949); Role v. Neils Lumber Co., 171 F.2d 706 (9th Cir. 1949); Potter v. Kaiser Co., 171 F.2d 705 (9th Cir. 1949).

    *Tenth Circuit:* Adkins v. E.I. du Pont de Nemours & Co., 176 F.2d 661, 663 (10th Cir. 1949); McDaniel v. Brown & Root, Inc., 172 F.2d 466, 471 (10th Cir. 1949) [↑](#footnote-ref-83)
83. For a detailed discussion of compensable activities, see Chapter 8, Compensable Hours. [↑](#footnote-ref-84)
84. 328 U.S. 680 (1946). [↑](#footnote-ref-85)
85. 29 U.S.C. §252(a)(1). [↑](#footnote-ref-86)
86. *Id*. §252(a)(2). [↑](#footnote-ref-87)
87. *Id*. §252(d). [↑](#footnote-ref-88)
88. *Id*.; Cities Serv. Def. Corp. v. Dutton, 240 F.2d 113, 115–16 (8th Cir. 1957); Dunning v. Q.O. Ordnance Corp., 233 F.2d 902, 904–05 (8th Cir. 1956). [↑](#footnote-ref-89)
89. Steiner v. Mitchell, 350 U.S. 247, 253 (1956). [↑](#footnote-ref-90)
90. 29 U.S.C. §254(a)(2). [↑](#footnote-ref-91)
91. *Id*. §254(b). Of course, an employer cannot succeed in having the provisions of the Portal-to-Portal Act apply merely by designating certain activities as preliminary or postliminary, whether they be done by custom or by contract, when those activities are, in fact, the same type of work that is performed throughout the workweek. *See* U.S. Steel Co. v. Burkett, 192 F.2d 489, 491 (4th Cir. 1951); Western Union Tel. Co. v. McComb, 165 F.2d 65, 73 (6th Cir. 1947). [↑](#footnote-ref-92)
92. *Steiner*, 350 U.S. at 254. For a detailed discussion of compensable activities, see Chapter 8, Compensable Hours. [↑](#footnote-ref-93)
93. A detailed discussion of the good faith defense to liquidated damages is included in Chapter 16, Litigation Issues. [↑](#footnote-ref-94)
94. 324 U.S. 697 (1945). [↑](#footnote-ref-95)
95. 29 U.S.C. §253(a). [↑](#footnote-ref-96)
96. *Id*. [↑](#footnote-ref-97)
97. *Id*. §253(b). [↑](#footnote-ref-98)
98. *Id*. §260. [↑](#footnote-ref-99)
99. 29 U.S.C. §216(b). For a discussion of the policy change, *see* Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 Vand. L. Rev. 727, 731–32 (2010) (“Section 216(b) also permitted employees to designate a completely uninterested third party, such as a labor union that itself suffered no overtime injury, to bring and maintain the employees’ overtime suit. What followed was a significant increase of representative suits filed by parties with no personal stake in the outcome.”). Collective action litigation issues are addressed in Chapter 17, Collective Actions and “Hybrid” Class Actions. [↑](#footnote-ref-100)
100. Pub. L. No. 80-49, ch. 52, §5(a), 61 Stat. 84, 87 (1947) (amending 29 U.S.C. §216(b)). [↑](#footnote-ref-101)
101. 93 Cong. Rec. 2162 (remarks of Sen. Donnell); *see also* United States v. Cook, 795 F.2d 987, 992–93 (Fed. Cir. 1986); Dolan v. Project Constr. Corp., 725 F.2d 1263, 1266–67 (10th Cir. 1984). [↑](#footnote-ref-102)
102. 29 U.S.C. §256; *see also Cook*, 795 F.2d 987; *Dolan*, 725 F.2d at 1266. [↑](#footnote-ref-103)
103. 29 U.S.C. §§216(b), 256. For a detailed discussion of these opt-in procedures, see Chapter 17, Collective Actions and “Hybrid” Class Actions. [↑](#footnote-ref-104)
104. 29 U.S.C. §255. [↑](#footnote-ref-105)
105. *Id.* [↑](#footnote-ref-106)
106. For a detailed discussion of the “good faith defense” under this provision, see Chapter 16, Litigation Issues. [↑](#footnote-ref-107)
107. 29 U.S.C. §§258, 259. [↑](#footnote-ref-108)
108. *Id*.; *see* Rogers Cartage Co. v. Reynolds, 166 F.2d 317, 320 (6th Cir. 1948). [↑](#footnote-ref-109)
109. 29 U.S.C. §259. [↑](#footnote-ref-110)
110. *Id*.; *see* Berg v. Newman, 982 F.2d 500 (Fed. Cir. 1992); Hultgren v. County of Lancaster, 913 F.2d 498 (8th Cir. 1990). [↑](#footnote-ref-111)
111. Northwestern-Hanna Fuel Co. v. McComb, 166 F.2d 932, 939 (8th Cir. 1948). [↑](#footnote-ref-112)
112. McComb v. Homeworkers’ Handicraft Coop., 176 F.2d 633, 640–41 (4th Cir. 1949); *Northwestern-Hanna*, 166 F.2d at 939. [↑](#footnote-ref-113)
113. The Fair Labor Standards Amendments of 1949, 63 Stat. 910 (1949). [↑](#footnote-ref-114)
114. *Id.* §216(b). [↑](#footnote-ref-115)
115. See Chapter 6, Other Statutory Exemptions, for a discussion of the retail and service exemptions. [↑](#footnote-ref-116)
116. Pub. L. No. 87-30, 75 Stat. 65 (1961). [↑](#footnote-ref-117)
117. *Id*. §2(c). [↑](#footnote-ref-118)
118. Pub. L. No. 87-30. [↑](#footnote-ref-119)
119. 1966 U.S.C.C.A.N. 3002. [↑](#footnote-ref-120)
120. This definition was subject to transition provisions. Initially, an enterprise was included only if it had an annual gross volume of sales or business of not less than $500,000 during the period February 1, 1967, through January 31, 1969. Beginning on February 1, 1969, the annual gross volume of sales made or business done was reduced to $250,000. Gasoline service establishments were covered if they had a gross volume of sales of $250,000 beginning February 1, 1967. [↑](#footnote-ref-121)
121. 1966 U.S.C.C.A.N. 3008. [↑](#footnote-ref-122)
122. *Id*. at 3003. [↑](#footnote-ref-123)
123. Pub. L. No. 89-601, §§101, 501, 80 Stat. 830 (1966). [↑](#footnote-ref-124)
124. 29 U.S.C. §207(i). [↑](#footnote-ref-125)
125. Pub. L. No. 89-601, §§101, 501, 80 Stat. 830. [↑](#footnote-ref-126)
126. *Id*. §102. [↑](#footnote-ref-127)
127. *Id*. [↑](#footnote-ref-128)
128. *Id*. §§101, 501. In 1972, this provision was amended to include preschools as well. The FLSA also began to cover employees of street, suburban, or interurban electric railways, trolleys, or motor bus carriers, regardless of whether they were private or public sector operations. [↑](#footnote-ref-129)
129. *Id*. §203, 80 Stat. 830, 833 (codified as amended at 29 U.S.C. §213(a)(6)). [↑](#footnote-ref-130)
130. S. Rep. No. 89-1487, at 3 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3011. [↑](#footnote-ref-131)
131. 392 U.S. 183 (1968). [↑](#footnote-ref-132)
132. *Id*. at 194. [↑](#footnote-ref-133)
133. Employees of Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973); *see* *also* Gilbreath v. Cutter Biological, 931 F.2d 1320 (9th Cir. 1991); Dunlop v. New Jersey, 522 F.2d 504, 513–14 (3d Cir. 1975). In 1974, Congress amended the FLSA to allow employees of state and local governments to bring suit in any federal or state court of competent jurisdiction. See §V.B [Legislative Developments: 1961–1989; The 1974 Amendments] of this chapter. [↑](#footnote-ref-134)
134. Pub. L. No. 89-601, 80 Stat. 830 (1966) (codified as amended at 29 U.S.C. §214(c)). [↑](#footnote-ref-135)
135. *Id*.; 29 U.S.C. §203(m). [↑](#footnote-ref-136)
136. Pub. L. No. 89-601, 61 Stat. 87 (1966) (codified as amended at 29 U.S.C. §255). [↑](#footnote-ref-137)
137. 29 U.S.C. §§206–209. [↑](#footnote-ref-138)
138. Pub. L. No. 90-202, *reprinted in* 1967 U.S.C.C.A.N. 2213 (codified as amended at 29 U.S.C. §§621–634). [↑](#footnote-ref-139)
139. *See, e.g*., Age Discrimination in Employment Law (Eric E. Kinder, ed., Bloomberg L., 3d ed. 2018 & Supp.); *see also* Barbara T. Lindemann, Paul Grossman, & Geoff Weirich, Employment Discrimination Law chs. 19 (Compensation) and 12 (Age) (Bloomberg L., 6th ed. 2020 & Supp.). [↑](#footnote-ref-140)
140. Like the McNamara-O’Hara Service Contract Act, several other freestanding statutes (with direct or indirect application to the FLSA) remain independently enforceable and are effective today, including the Davis-Bacon Act, the Motor Carrier Act, the Merchant Marine Act, and the Walsh-Healy Act. [↑](#footnote-ref-141)
141. Pub. L. No. 111-350, §3, 124 Stat. 3813 (2011) (codified as amended at 41 U.S.C. §6704 (formerly 41 U.S.C. §351)). For those contracts in excess of $2,500, the Service Contract Act requires payment of wage rates and fringe benefits found in the prevailing locality or as contained in a predecessor’s collective bargaining agreement. [↑](#footnote-ref-142)
142. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974). [↑](#footnote-ref-143)
143. 392 U.S. 183 (1968). [↑](#footnote-ref-144)
144. 1974 U.S.C.C.A.N. 2817–18. [↑](#footnote-ref-145)
145. As discussed in greater detail in Chapter 11, Government Employment, §V [Special Provisions That Apply to Fire Protection and Law Enforcement Employees], among other things, a partial overtime exemption for employees in fire protection and law enforcement activities was added. Permissible hours before payment of overtime were to be established by the Secretary of Labor, based on statistical data and after a phase-in. Currently, permissible hours are 212 hours in a 28-day work period for fire protection employees and 171 hours in a 28-day work period for law enforcement personnel, with the proportional equivalents for shorter work periods. [↑](#footnote-ref-146)
146. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §6, 1974 U.S.C.C.A.N. 2811 (codified as amended at 29 U.S.C. §216(b)). [↑](#footnote-ref-147)
147. *Id*., 1974 U.S.C.C.A.N. at 2839. [↑](#footnote-ref-148)
148. *Id*. at 2812–13. [↑](#footnote-ref-149)
149. For example, newly and recently covered employees in federal, state, and local governmental employment; domestic service; retail and service industries; seasonal industries and agricultural processing; telegraph agencies; hotels, motels, and restaurants; food service; bowling establishments; nursing homes; local transit; cotton ginning and sugar processing; seafood canning and processing; oil pipeline transportation; and parts employees and mechanics. *Id*. at 2813. [↑](#footnote-ref-150)
150. *Id.* at 2811, 2812. [↑](#footnote-ref-151)
151. 426 U.S. 833 (1976). [↑](#footnote-ref-152)
152. 392 U.S. 183 (1968). [↑](#footnote-ref-153)
153. National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974). [↑](#footnote-ref-154)
154. *Usery,* 426 U.S. at 839. [↑](#footnote-ref-155)
155. *Id*. at 843 (citing Fry v. United States, 421 U.S. 542, 547 (1975)). [↑](#footnote-ref-156)
156. *Id*. [↑](#footnote-ref-157)
157. *Id*. at 852. [↑](#footnote-ref-158)
158. 44 Fed. Reg. 75,628–30 (1979) (codified as amended at 29 C.F.R. §775.3(b)(3)). [↑](#footnote-ref-159)
159. San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983). [↑](#footnote-ref-160)
160. 469 U.S. 528 (1985). [↑](#footnote-ref-161)
161. *Id*. at 538–39. [↑](#footnote-ref-162)
162. *Id*. at 546. [↑](#footnote-ref-163)
163. *Id*. at 548–58. [↑](#footnote-ref-164)
164. Pub. L. No. 95-151, 91 Stat. 1245 (1977). [↑](#footnote-ref-165)
165. Pub. L. No. 95-485, §819, 92 Stat. 1611, 1626 (1978) (codified as amended at 29 U.S.C. §213). [↑](#footnote-ref-166)
166. For a detailed analysis of the legislative history of this provision, *see* Waters v. Rumsfeld, 320 F.3d 265 (D.C. Cir. 2003). [↑](#footnote-ref-167)
167. 469 U.S. 528, *reh’g denied*, 471 U.S. 1049 (1985). [↑](#footnote-ref-168)
168. Pub. L. No. 99-150, 99 Stat. 787 (1985). [↑](#footnote-ref-169)
169. *Id*.; 29 U.S.C. §203(e)(4). [↑](#footnote-ref-170)
170. 29 U.S.C. §203(e)(2)(C); 29 U.S.C. §213(b)(20). [↑](#footnote-ref-171)
171. 29 U.S.C. §207(k). [↑](#footnote-ref-172)
172. Pub. L. No. 99-486, 100 Stat. 1229 (1986). [↑](#footnote-ref-173)
173. Pub. L. No. 101-157, §6, 103 Stat. 938 (1989). Under the training wage provisions, employers of individuals who had fewer than 60 days of cumulative work experience were permitted to pay those individuals 85% of the statutory minimum wage. Congress limited the training wage provision to safeguard current employees and avoid the potential risk of employers’ displacing existing employees for the purpose of hiring trainees at the lower rate. The amendment stated that no more than 25% of an employer’s workforce could be paid at the lower hourly rate; no individual could be employed at the training wage for more than a total of 180 days, regardless of the number of jobs; and employers could not displace regular employees in order to hire those eligible for the training wage. In addition, employers were prohibited from hiring employees at the training wage when other employees had been laid off in the previous six months from the positions to be filled at the training wage or from substantially equivalent positions. Any employer who was found to have violated the provision was disqualified from employing any individuals at the subminimum wage in the future. [↑](#footnote-ref-174)
174. See discussion of the effect of this repeal in Chapter 6, Other Statutory Exemptions. [↑](#footnote-ref-175)
175. Pub. L. No. 101-157, §5. [↑](#footnote-ref-176)
176. Employers must pay these employees at their regular rate of pay for their time in classes. Only employees who lack a high school diploma or whose reading level or basic skills are at or below the eighth-grade level qualify to receive this special remedial education. [↑](#footnote-ref-177)
177. Pub. L. No. 101-157, §4. In 1990, Congress changed the evidentiary requirements for calculating a special minimum wage for American Samoa. Pub. L. No. 101-583, 104 Stat. 2871 (1990). [↑](#footnote-ref-178)
178. Pub. L. No. 101-157, §8. [↑](#footnote-ref-179)
179. *Id*. §9. [↑](#footnote-ref-180)
180. Pub. L. No. 101-508, tit. III, §3103, 104 Stat. 1388 (1990) (29 U.S.C. §216). [↑](#footnote-ref-181)
181. Pub. L. No. 101-583, §2, 104 Stat. 2871 (1990). [↑](#footnote-ref-182)
182. 2 U.S.C. §§1301 *et seq*. [↑](#footnote-ref-183)
183. The coverage, protections, and unique procedures of the Congressional Accountability Act are discussed in detail in Chapter 11, Government Employment, §VIII [Application to Congressional Employees]. [↑](#footnote-ref-184)
184. Pub. L. No. 104-26, 109 Stat. 265 (1995) (codified as amended at 29 U.S.C. §207(o)(6)). Details of the partial exemption for public agency court reporters are discussed in Chapter 11, Government Employment, §III.B [Public Sector Exemptions From FLSA Overtime Requirements; Court Reporters’ Time Spent Preparing Transcripts]. [↑](#footnote-ref-185)
185. Pub. L. No. 104-188, §2105, 110 Stat. 1755, 1929 (1996). [↑](#footnote-ref-186)
186. *Compare* 57 Fed. Reg. at 46,744 (29 C.F.R. §§541.3(a)(4), 541.303) *with* 29 U.S.C. §213(a)(17)(A)–(D) (1996). [↑](#footnote-ref-187)
187. *See* 69 Fed. Reg. 22,122, 22,159 (Apr. 23, 2004) (“[T]he original 1990 statute was not repealed by the 1996 amendment.”). [↑](#footnote-ref-188)
188. *See* H.R. Rep. No. 104-737, at 359 (Aug. 1, 1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 1677, 1851. [↑](#footnote-ref-189)
189. Minimum Wage Increase Act of 1996, Pub. L. No. 104-188, §2104(b), 110 Stat. 1755, 1928 (1996) (codified as amended at 29 U.S.C. §206(a)). [↑](#footnote-ref-190)
190. Employee Commuting Flexibility Act of 1996, Pub. L. No. 104-188, §2102, 110 Stat. 1755, 1928 (1996) (codified as amended at 26 U.S.C. §1 n.9707). [↑](#footnote-ref-191)
191. Pub. L. No. 104-188, §2104(c), 110 Stat. 1755, 1928. [↑](#footnote-ref-192)
192. Pub. L. No. 101-410, Stat. 890 (1990) (codified as amended at 28 U.S.C. §2461). [↑](#footnote-ref-193)
193. Pub. L. No. 104-134, §31001, 110 Stat. 1321–73 (1996). [↑](#footnote-ref-194)
194. See, for example, Chapter 12, Child Labor, §XI [Enforcement], regarding penalties to enforce child labor provisions. [↑](#footnote-ref-195)
195. Pub. L. No. 101-410, §2(a)(2), 104 Stat. 890. [↑](#footnote-ref-196)
196. Pub. L. No. 104-174, 110 Stat. 1553 (1996) (codified as amended at 29 U.S.C. §§213–216). [↑](#footnote-ref-197)
197. *Id.* See the discussion in Chapter 12, Child Labor, §VII.B [Employment of Youth Between 16 and 18 Years of Age; the Hazardous Occupations Orders]. [↑](#footnote-ref-198)
198. Pub. L. No. 104-174 (codified as amended at 29 U.S.C. §213(c)). [↑](#footnote-ref-199)
199. Pub. L. No. 105-334, 112 Stat. 3137 (1998) (effective Oct. 31, 1998). [↑](#footnote-ref-200)
200. 29 U.S.C. §213(c)(6). [↑](#footnote-ref-201)
201. *Id*. See Chapter 12, Child Labor, for an in-depth discussion of this Act. [↑](#footnote-ref-202)
202. Pub. L. No. 105-221, 112 Stat. 1248 (1998) (codified as amended at 29 U.S.C. §203(e)(5)). [↑](#footnote-ref-203)
203. 29 U.S.C. §203(e)(5). [↑](#footnote-ref-204)
204. Pub. L. No. 105-78, 111 Stat. 1467 (1998) (codified as amended at scattered sections in 8, 20, and 42 U.S.C.), *amending* 29 U.S.C. §213(b)(12). [↑](#footnote-ref-205)
205. Pub. L. No. 106-151, 113 Stat. 1731 (1999) (codified as amended at 29 U.S.C. §203(y)). The cases construing the application of the special §207(k) provisions to paramedics, emergency medical technicians, and ambulance employees are discussed in Chapter 11, Government Employment, §VI [Determining Whether Employees Are Employed in Fire Protection or Law Enforcement Activities]. [↑](#footnote-ref-206)
206. Worker Economic Opportunity Act, Pub. L. No. 106-202, 114 Stat. 308 (2000) (codified as amended at 29 U.S.C. §207(e)(8)). See Chapter 10, Overtime Compensation, for a full discussion of this restriction. [↑](#footnote-ref-207)
207. For a detailed discussion of §207(h) and overtime compensation, see Chapter 10, Overtime Compensation. [↑](#footnote-ref-208)
208. Pub. L. No. 108-199, 118 Stat. 3 (2004). [↑](#footnote-ref-209)
209. 29 U.S.C. §213(c)(7)(A)(i). “A new entrant into the workforce” is an individual at least 14 years of age who is exempt from compulsory school attendance beyond the eighth grade. 29 U.S.C. §213(c)(7)(A)(ii). [↑](#footnote-ref-210)
210. 29 U.S.C. §213(c)(7)(B)(i)–(iv). [↑](#footnote-ref-211)
211. 75 Fed. Reg. 28,432 (May 20, 2010). [↑](#footnote-ref-212)
212. Pub. L. No. 109-59, 119 Stat. 1738 (2005), *amended by* Pub. L. No. 109-163, §3508 (Jan. 6, 2006), div. C, tit. XXXV, 119 Stat. 3557. [↑](#footnote-ref-213)
213. *Id*. [↑](#footnote-ref-214)
214. Pub. L. No. 110-244, 122 Stat. 1572 (2008). [↑](#footnote-ref-215)
215. Specific provisions of this legislation are more fully discussed in Chapter 6, Other Statutory Exemptions, §IV.A [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Employees Covered by the Motor Carrier Act]. [↑](#footnote-ref-216)
216. Pub. L. No. 110-28, tit. VIII (2007). [↑](#footnote-ref-217)
217. Pub. L. No. 111-244, 124 Stat. 2618 (2010). [↑](#footnote-ref-218)
218. Pub. L. No. 114-61, 129 Stat. 545 (2015). In American Samoa, the wage rates are set for particular industries, not for an employee’s particular occupation. [↑](#footnote-ref-219)
219. Pub. L. No. 110-233, 122 Stat. 881 (2008). [↑](#footnote-ref-220)
220. Pub. L. No. 111-148, 124 Stat. 119 (2010); Pub. L. No. 111-152, 124 Stat. 1029 (2010). [↑](#footnote-ref-221)
221. 29 U.S.C. §207(r). [↑](#footnote-ref-222)
222. Pub. L. No. 111-148, tit. I, §1511, 124 Stat. 252 (codified as amended at 29 U.S.C. §218a). [↑](#footnote-ref-223)
223. 29 U.S.C. §218b. [↑](#footnote-ref-224)
224. *Id.* §218c. [↑](#footnote-ref-225)
225. *See* Pub. L. No. 114-74, tit. VI, §604, 129 Stat. 599 (2015) (repealing automatic enrollment requirement set forth in §218a); *see also* Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (finding individual mandate unconstitutional and declaring that remaining provisions of ACA, including amendments to §§207 and 218 of FLSA, were inseverable and therefore invalid), *aff’d in part*, *vacated in part, and remanded*, 945 F.3d 355 (5th Cir. 2020) (recognizing that officials from 19 states sued the federal government alleging that recent amendments to the ACA rendered it unconstitutional because they removed the hook of Congress’s enumerated power to tax). On March 2, 2020, the Supreme Court consolidated three cases and granted certiorari to consider the question of severability. *See* Texas v. California, No. 19-019, 2020 WL 981805 (U.S. Mar. 2, 2020) (mem) *and* California v. Texas, No 19-840, 2020 WL 981804 (U.S. Mar. 2, 2020) (mem). On June 17, 2021, the Supreme Court reversed the Fifth Circuit’s judgment with respect to standing, vacated the judgment regarding severability, and remanded with instructions to dismiss. *See* California v. Texas, 141 S. Ct. 2104, 2120 (2021) (finding both individual and state plaintiffs lack Article III standing to challenge minimum essential coverage provision). [↑](#footnote-ref-226)
226. Pub. L. No. 113-277, 128 Stat. 2995 (2014). [↑](#footnote-ref-227)
227. H.R. 2252, 114th Cong. (May 20, 2015). [↑](#footnote-ref-228)
228. Pub. L. No. 115-141, 138 Stat. 348 (2018). [↑](#footnote-ref-229)
229. 29 U.S.C. §203(m)(2)(B). However, the statute did not define the terms “managers” and “supervisors.” [↑](#footnote-ref-230)
230. *Id*. §216(a). [↑](#footnote-ref-231)
231. *See* *id*. §216(b). [↑](#footnote-ref-232)
232. *See* 29 C.F.R. §531.52 (regarding general characteristics of tips); 29 C.F.R. §531.54 (addressing tip pooling); and 29 C.F.R. §531.59 (discussing tip wage credit). [↑](#footnote-ref-233)
233. Pub. L. No. 115-141, div. S, tit. XII, §1201. [↑](#footnote-ref-234)
234. 29 U.S.C. §213(a)(19). *See generally* Senne v. Kansas City Royals Baseball Corp., 2022 WL 783941 at \*18–26 (N.D. Cal. Mar. 15, 2022) (discussing SAPA's relation to state minimum wage laws that incorporate FLSA). [↑](#footnote-ref-235)
235. Pub. L. No. 115-141, div. H, tit. I, §109. [↑](#footnote-ref-236)
236. Pub. L. No. 117-328, 136 Stat. 4459 (2022). [↑](#footnote-ref-237)
237. Congress passed the Patient Protection and Affordable Care Act (ACA), which amended FLSA §207 to require most employers to provide reasonable break time for nursing mothers. For discussion of the Reasonable Break Time for Nursing Mothers Act, see §VII.F [The Patient Protection and Affordable Care Act of 2010] of this chapter. [↑](#footnote-ref-238)
238. Pub. L. No. 117-328, div. KK, §102(a). Certain employees of airlines, railroads, and motorcoach carriers are exempt from the nursing protections but still may be entitled to protections under state or local laws. *Id.* (codified as enacted at 29 U.S.C. §218d(d)–(f)); *see also* Field Assistance Bulletin No. 2023-02 (May 17, 2023), *Enforcement of Protections for Employees to Pump Breast Milk at Work* which supplements Fact Sheet #73, Frequently Asked Questions and its public presentation, Pump at Work Protections under the Fair Labor Standards Act; U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work (Jan. 2023), https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers. [↑](#footnote-ref-239)
239. Pub. L. No. 117-328, div. KK, §102(a) (codified as enacted at 29 U.S.C. §218d(b)(2)). [↑](#footnote-ref-240)
240. *Id.* §102(b). Before commencing an action, an employee must notify the employer of the violation and provide 10 days for the employer to comply. *Id.* §102(a) (codified as enacted at 29 U.S.C. §218d(g)). [↑](#footnote-ref-241)