

GIBSON DUNN



Labor & Employment Update

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FLSA Litigation and Regulatory Update: Recent Developments and Areas to Watch

This FLSA litigation and regulatory update summarizes recent key legal opinions and developments to assist employers navigating the evolving wage-and-hour litigation landscape.

Introduction

Wage-and-hour litigation under the Fair Labor Standards Act remains among the highest-volume categories of federal employment litigation, and collective actions continue to impose substantial aggregate exposure on employers. Because these claims aggregate wages across large employee groups and carry liquidated damages and mandatory fee-shifting, they remain attractive targets for the plaintiffs' bar. This risk merits attention from any employer with a sizable workforce or significant reliance on independent contractors whose classification could be challenged.

Over the past several quarters, however, courts and the current Department of Labor have moved to narrow the avenues for aggregate wage-and-hour liability. By limiting the reach of court-authorized notice, federal courts have increasingly tightened the procedural pathways through which nationwide collective actions proceed. They have also begun to narrow the universe of cognizable claims, with the Third Circuit recently holding that the FLSA affords no remedy for "overtime gap time" and channeling such claims toward state law. Courts have also trimmed overtime exposure in the transportation sector and for employers with exempt employees who do not record their hours, with the Seventh Circuit applying the Motor Carrier Act exemption to intrastate delivery drivers, and the Fifth Circuit holding that an employer's failure to maintain a timekeeping system does not constitute constructive knowledge of an exempt

employee's hours worked. And a recent decision out of the Western District of Washington is the latest to enforce a private severance agreement as a valid release of FLSA claims, even without approval from a court or the Department of Labor—a sign that courts are increasingly willing to provide employers with the benefits memorialized in employee agreements. The picture is not uniformly one of retrenchment, though: the Supreme Court declined to resolve a circuit split on the proper standard for authorizing notice in collective actions, leaving the lenient two-step process in place for most of the nation.

In parallel, the Department of Labor has adopted a more cooperative enforcement posture, retreating from the prior administration's more expansive regulatory positions on overtime exemptions and independent-contractor classification. As a result, defenses and forum considerations have taken on heightened strategic importance, even as substantive exposure—particularly under state law—continues to evolve.

I. Recent Litigation Activity

A. Personal Jurisdiction Over Out-of-State Opt-In Plaintiffs

Unlike Rule 23 class actions, collective actions proceed on an opt-in basis: a worker becomes a party only by affirmatively filing written consent. A growing majority of circuits has held that, because opt-in plaintiffs are real parties in interest asserting their own claims, the personal-jurisdiction analysis of *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255 (2017), applies on a claim-by-claim basis in FLSA collective actions. The practical effect is that a court cannot exercise specific personal jurisdiction over the claims of out-of-state opt-ins against an employer that is not subject to general jurisdiction in the forum.

Most recently, on May 4, 2026, the Second Circuit joined this majority in *Provencher v. Bimbo Foods Bakeries Distribution LLC*, 175 F.4th 180 (2d Cir. 2026), holding that a district court in Vermont could not authorize notice to proposed Connecticut and New York opt-ins where the defendant was incorporated in Delaware and headquartered in Pennsylvania and the out-of-state workers' claims did not arise from the defendant's contacts with Vermont. The Second Circuit joined the Third, Sixth, Seventh, Eighth, and Ninth Circuits in applying *Bristol-Myers* to collective actions. See *Fischer v. Fed. Express Corp.*, 42 F.4th 366 (3d Cir. 2022); *Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021); *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718 (7th Cir. 2024); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861 (8th Cir. 2021); *Harrington v. Cracker Barrel Old Country Store, Inc.*, 142 F.4th 678 (9th Cir. 2025). The First Circuit remains the lone outlier. See *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022). The Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits have not squarely resolved the question at the circuit level, and district courts within them are often divided.

Why this matters: *Because the Second Circuit encompasses some of the highest-volume FLSA filing venues in the country, Provencher in particular reduces the settlement leverage historically available to plaintiffs suing employers headquartered elsewhere.*

B. Third Circuit Holds the FLSA Provides No Remedy for “Overtime Gap Time”

The Third Circuit held on June 3, 2026, that the FLSA provides no remedy for so-called “overtime gap time”—that is, unpaid straight-time wages for non-overtime hours worked during a workweek in which the employee also worked overtime. See *Sec’y U.S. Dep’t of Lab. v. Comprehensive*

Healthcare Mgmt. Servs. LLC, No. 24-2842, 2026 WL 1582064 (3d Cir. June 3, 2026). The Secretary had obtained a \$35.8 million judgment on behalf of nearly 6,000 nursing-facility employees, a portion of which compensated overtime gap time. *Id.* at *1. Reasoning that the FLSA's text guarantees only a minimum wage and overtime pay—and does not require payment for non-overtime hours so long as the employee's average wage satisfies the minimum-wage floor—the court reversed the gap-time portion of the award. *Id.* at *4. In doing so, it joined the Second Circuit, see *Lundy v. Catholic Health System of Long Island, Inc.*, 711 F.3d 106 (2d Cir. 2013), and split from the Fourth Circuit, see *Conner v. Cleveland County*, 22 F.4th 412 (4th Cir. 2022), which had recognized such claims; the Supreme Court previously declined to review the question.

Why this matters: *The decision forecloses overtime-gap-time claims under federal law in the Third Circuit and deepens an existing circuit split. Employers should anticipate that plaintiffs will increasingly pursue gap-time theories under state wage-and-hour laws, many of which require payment for all hours worked and are unaffected by this ruling.*

C. Seventh Circuit Holds that Intrastate Drivers Moving Interstate Goods Are Exempt

On April 2, 2026, the Seventh Circuit held that drivers who operate exclusively intrastate routes may still fall within the Motor Carrier Act (MCA) exemption to the FLSA's overtime requirement, 29 U.S.C. § 213(b)(1), so long as the goods they carry remain in a continuous interstate journey. See *Stingley v. Laci Transport, Inc.*, 172 F.4th 525, 530–32 (7th Cir. 2026). Plaintiffs were shuttle truck drivers who moved automobile parts entirely within Illinois, ferrying them between storage lots and a Ford assembly plant in Chicago. Although the drivers never crossed state lines, the parts were manufactured out of state, delivered by interstate carriers to the storage lots, and then shuttled to the plant as production required. The court held that the temporary staging at the storage lots did not interrupt the interstate journey because the lots were not the goods' final destination. It rejected the drivers' attempt to treat the lots and the plant as a single endpoint and affirmed the district court's grant of summary judgment for the employers.

Stingley represents only the latest expansion of the MCA exemption's reach. The Ninth Circuit is poised to address the same continuous-journey question in the last-mile context in *Madero v. McLane Foodservice, Inc.*, Nos. 25-1341 & 25-1798. Litigants—including in *Madero*—now also invoke by analogy the Supreme Court's recent decision in *Flowers Foods, Inc. v. Brock*, 146 S. Ct. 1358 (2026), where the Court held that last-mile drivers delivering goods that have moved interstate are engaged in interstate commerce and therefore fall within the Federal Arbitration Act's exemption for transportation workers. The MCA exemption also faces a legislative threat: the bipartisan Guaranteeing Overtime for Truckers Act, S. 893, 119th Cong. (2025)—although seemingly stalled in the Senate—would repeal the motor-carrier overtime exemption and make drivers eligible to earn overtime.

Why this matters: *For employers in trucking, logistics, and distribution, Stingley offers a strong overtime defense wherever local or last-mile drivers handle goods that originated out of state, which describes much of the modern supply chain. Employers relying on the exemption should document the interstate nexus of the goods their drivers move and watch these developments closely, as a contrary ruling in Madero could reopen significant overtime exposure.*

D. Supreme Court Declines to Resolve Circuit Split Over Collective-Action Notice

On January 12, 2026, the Supreme Court denied certiorari in *Eli Lilly & Co. v. Richards*, No. 25-476, declining to resolve a deepening split over the showing a plaintiff must make before a court authorizes notice to potential opt-in plaintiffs in an FLSA collective action under 29 U.S.C.

§ 216(b). The petition had asked the Court to overrule *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989)—which authorizes court-facilitated notice—or, failing that, to prescribe a uniform evidentiary standard. On February 23, 2026, the Court also denied cross-petitions in *Cracker Barrel Old Country Store v. Harrington*, Nos. 25-534 and 25-559, on functionally identical questions.

As a result of these denials, a fractured landscape remains in place. Most circuits continue to follow the lenient two-step approach traced to *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), under which a plaintiff can obtain conditional certification and court-authorized notice on a modest factual showing, often before meaningful discovery—an early, low bar that has historically pressured employers toward settlement. Three circuits, however, have abandoned that approach for more demanding, employer-friendly tests: the Fifth Circuit requires the plaintiff to prove similarity at the outset, see *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 441 (5th Cir. 2021); the Sixth Circuit requires a “strong likelihood” that the proposed members are similarly situated before issuing notice, *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1011 (6th Cir. 2023); and the Seventh Circuit, in the decision the Court left undisturbed, requires a “material factual dispute” over similarity and permits the employer to introduce rebuttal evidence before notice issues, see *Richards v. Eli Lilly & Co.*, 149 F.4th 901, 913 (7th Cir. 2025). By denying review, the Court left these competing standards—and the forum-dependent outcomes they may produce—firmly in place.

Why this matters: *For now, the circuits remain split. That divergence elevates the importance of forum: plaintiffs will keep steering collective actions toward Lusardi jurisdictions, while employers will press for the heightened standards—and, where available, for transfer—in the others. Because the Supreme Court has now passed on the question, the split is likely to persist absent further percolation or a future grant, and multi-state employers should expect inconsistent certification outcomes for similar claims.*

E. Misclassification Alone Does Not Establish Liability, Confirms Fifth Circuit

On February 6, 2026, the Fifth Circuit in *Merritt v. Texas Farm Bureau*, held that an employee who successfully shows he was misclassified cannot recover overtime without proving his employer had actual or constructive knowledge of overtime hours worked. See 166 F.4th 490, 493–94 (5th Cir. 2026). Plaintiff—manager of a team of insurance agents and classified as an independent contractor—set his own schedule, earned a commission rather than an hourly wage, worked largely off-site, and was not required to record or report his time worked. After the district court determined that Merritt had been misclassified and was owed at least 816 hours of overtime, a jury found that the employer neither knew nor had reason to know that he was working overtime, and it returned a verdict for the employer, and the plaintiff appealed. The Fifth Circuit affirmed. Although employers are required to keep records of hours worked and only in the absence of such records does the burden shift to the employee to establish that he or she performed uncompensated work, see *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 456 (2016), the Fifth Circuit confirmed that the employee must also show that the employer had actual or constructive knowledge of that uncompensated work, and held that the absence of a

timekeeping system, without more, does not establish constructive knowledge, see 166 F.4th at 493.

Why this matters: *For businesses that engage workers as independent contractors—especially autonomous, commission-based, or remote workers who set their own hours—Merritt preserves a meaningful second line of defense even if a classification is later rejected. But the ruling cuts both ways: more rigorous tracking of exempt workers’ hours, while strengthening compliance with the requirement to maintain timekeeping records, also increases the employer’s knowledge—and thus its potential liability—for any overtime those records reveal.*

F. Western District of Washington Enforces FLSA Release Without Prior Court Approval

On February 5, 2026, the Western District of Washington granted summary judgment to an employer, holding that a former hourly employee’s FLSA claim was barred by a private separation agreement releasing his wage-and-hour claims—even though no court or the Department of Labor had approved the release. See *Lomibao v. AGC Biologics, Inc.*, 823 F. Supp. 3d 1224, 1238 (W.D. Wash. 2026). The court rejected the plaintiff’s contention that FLSA rights can never be waived by contract, finding no statutory text or binding Ninth Circuit authority establishing a categorical bar to waiver. See *id.* at 1234. Because the release resolved a “bona fide dispute” as required for a valid FLSA waiver and the plaintiff identified no disputed facts bearing on contract formation, the court found no genuine issue of material fact, enforced the release, and dismissed the plaintiff’s FLSA and parallel state-law claims. See *id.* at 1234–35, 1242–43.

Although both the Second and Eleventh Circuits have invalidated private releases or settlements in the absence of court or Department of Labor approval, see *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015); *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982), *Lomibao* is the latest in a string of district-court decisions out of the Third, Fifth, Sixth, Ninth, and Tenth Circuits where, in the absence of Circuit authority to the contrary, courts have enforced private releases of FLSA claims without court or agency approval. See 823 F. Supp. 3d at 1236–37 & n.17 (collecting cases).

Why this matters: *The line of cases enforcing private release of FLSA claims offers employers a realistic path to finality without agency or judicial approval. Employers should ensure that any separation agreement rests on a bona fide wage dispute and is executed knowingly and voluntarily, with an express release of wage claims, a recitation that the employee has been paid for all hours worked, a recommendation to seek the advice of counsel, and adequate consideration and revocation periods.*

II. Regulatory and Policy Context

The litigation trends described above are unfolding against a regulatory backdrop in which the Department of Labor has withdrawn from several of the prior administration’s more expansive positions and has emphasized cooperative compliance over adversarial enforcement.

A. Overtime Salary Threshold

Among the requirements for the executive, administrative, professional, computer, and highly-compensated-employee (HCE) exemptions is that the employee earn a salary above a minimum threshold set by Department regulation. The Department has now formally closed out its 2024 rule raising that threshold. The 2024 rule had increased the salary threshold initially to the equivalent of \$43,888 annually, with a further scheduled increase to \$58,656, and the HCE threshold to \$132,964, with a further scheduled increase to \$151,164. Before those second increases took effect, however, the Eastern District of Texas vacated the rule nationwide. See *Texas v. U.S. Dep't of Labor*, 756 F. Supp. 3d 361 (E.D. Tex. 2024).

The matter has now been resolved at the federal level. After the Fifth Circuit dismissed the related appeals in early May 2026, the Department announced a technical amendment nullifying the 2024 rule and confirming that the operative regulations are those that were in effect on June 30, 2024. The practical result is that the salary threshold returns to its prior level of \$684 per week (\$35,568 annually), and the HCE threshold returns to its prior level of \$107,432. See 91 Fed. Reg. 27833, 27834 (May 15, 2026) (codified at 29 C.F.R. pt. 541). The Department had previously indicated in a court filing that it would determine how to proceed with the overtime rule by June 30, 2026; the technical amendment resolves that question ahead of schedule.

Why this matters: *The applicable federal thresholds (\$35,568 and \$107,432) are unchanged in practical terms, but their legal footing is now more secure, resting on the closure of the appellate challenges and an affirmative regulatory action rather than a single district-court vacatur. Employers should bear in mind that several states maintain higher salary thresholds unaffected by the federal reversion, and that the duties tests remain the operative inquiry for exempt status.*

B. Joint-Employer Standard

Joint-employer status determines when two or more businesses share legal responsibility for the same worker's wage-and-hour obligations—a question that arises most often in staffing-agency, subcontracting, and franchise arrangements. The stakes are substantial: entities deemed joint employers are jointly and severally liable for unpaid wages, overtime, and related damages, and the worker's hours are aggregated across them for overtime purposes. This area has lacked a uniform federal standard since the 2020 joint-employer rule was rescinded in 2021, leaving courts to apply varying tests.

The Department has now moved to fill that void. On April 22, 2026, the Wage and Hour Division announced a notice of proposed rulemaking—published in the Federal Register on April 23, 2026—that would establish a single, nationwide standard for joint-employer status under the FLSA, the Family Medical Leave Act, and the Migrant Seasonal Agricultural Worker Protection Act. See Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 21878 (proposed Apr. 23, 2026) (to be codified at 29 C.F.R. pts. 500, 780, 791, 825). At the center of the proposed rule is the distinction between “vertical” and “horizontal” joint employment. The proposal largely restores the control-focused, four-factor framework of the 2020 rule for “vertical” joint employment, wherein two employers simultaneously benefit from the work performed—examining whether the putative joint employer hires or fires the worker, supervises or controls schedules or conditions of employment, determines pay, and maintains employment records—while pulling

back on the features of the 2020 rule that drew the most judicial scrutiny. Notably, the proposed rule acknowledges that reserved and indirect control are relevant while assigning greater weight to control actually exercised. Analysis of “horizontal” joint employment under the proposed rule turns instead on the degree of association between the allegedly joint employers; employers are likely to be “sufficiently associated” if they arrange to share the employee’s services, one employer acts in the interest of the other, or they share control of the employee. The comment period closed June 22, 2026.

Why this matters: *A joint-employer finding exposes an entity to joint-and-several liability for wage-and-hour violations and aggregates hours across employers for overtime purposes. Employers operating through staffing agencies, franchise arrangements, or subcontracting structures should evaluate their arrangements against the proposed four-factor framework—particularly any reserved contractual control rights.*

C. Independent-Contractor Classification

Whether a worker is an employee or an independent contractor is a threshold question under the FLSA: the statute’s minimum-wage and overtime protections apply to employees but not to independent contractors. The governing inquiry is the judicially developed “economic realities” test, which asks whether the worker is economically dependent on the hiring entity or is in business for themselves. In recent years the applicable regulatory framework has shifted repeatedly between administrations, and this year has brought another move.

The substantive standards have shifted with each iteration. The Biden Administration’s 2024 rule applied a six-factor “totality of the circumstances” test in which no single factor controlled, an approach widely viewed as making it harder to classify workers as contractors because it gave weight to factors that often point toward employee status—such as the worker’s economic dependence on the business. The framework favored by the current Department is more streamlined: it elevates two “core” factors—the degree of control the worker exercises over the work and the worker’s opportunity for profit or loss—over the remaining considerations. This two-factor framework traces back to the first Trump Administration’s 2021 rule and, before that, to the Department’s longstanding guidance in Fact Sheet #13, which listed the multi-factor “economic realities” test developed by courts. The Department views this approach as more predictable for businesses and more favorable to contractor classification.

The Department has moved in two steps to restore that approach. First, at the enforcement level, it instructed its investigators in May 2025 to stop applying the 2024 rule and to revert to the Fact Sheet #13 framework. See U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2025-1, FLSA Independent Contractor Misclassification Enforcement Guidance (May 1, 2025). Then, on February 26, 2026, it announced a proposed rule—published in the Federal Register on February 27, 2026—that would formally rescind and replace the 2024 rule with the more streamlined, control-and-opportunity-focused standard. See Employee or Independent Contractor Status Under the Fair Labor Standards Act, 91 Fed. Reg. 9932 (proposed Feb. 27, 2026) (to be codified at 29 C.F.R. pts. 500, 795, 825). The 60-day comment period closed on April 28, 2026, and a final rule is pending.

Why this matters: *Although the proposed rule would ease the federal classification standard, it would not reduce private-litigation exposure. Until a final rule is issued, the 2024 rule remains in effect for purposes of private litigation, and private plaintiffs continue to bring misclassification collectives under the economic-realities test regardless of the Department's enforcement posture. State-law standards—most notably California's ABC test—are still stricter and remain unaffected by the federal rulemaking. Employers should continue to document the factual basis for contractor classifications carefully, evaluating each arrangement on its merits rather than relying on the favorable federal trend.*

D. Cooperative Enforcement and the PAID Program

Beyond these specific rulemakings, the Department has adopted a broadly cooperative enforcement posture that creates meaningful opportunities for employers to address compliance gaps proactively. Most significantly for employers, the Department revived the Payroll Audit Independent Determination (PAID) program in July 2025. PAID permits an employer to self-identify potential FLSA (and certain FMLA) violations, calculate and pay the back wages owed, and obtain a Department-supervised release of the affected employees' claims. This mechanism is consequential because FLSA rights generally cannot be extinguished through an ordinary private settlement; apart from litigation and judicially approved settlements, a Department-supervised resolution is one of the few avenues through which an employer can obtain a valid release of FLSA claims.

Two related developments reinforce this posture. In Field Assistance Bulletin No. 2025-3, the Department directed the Wage and Hour Division to no longer pursue pre-litigation liquidated damages in investigations and settlements—removing a significant cost from cooperative resolution. U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2025-3, Prohibition on Seeking Liquidated Damages in Administrative Settlements under the FLSA (June 27, 2025). The Department has also resumed issuing opinion letters addressing recurring compliance questions, providing employers a renewed channel for advance guidance.

Why this matters: *For an employer that identifies a wage-and-hour exposure through self-audit, the PAID program offers a rare opportunity to resolve it with finality and without liquidated damages. Eligibility is limited—an employer generally cannot use PAID for practices already under investigation or in litigation, and a complaint filed before a PAID submission will foreclose participation—so employers weighing the program should evaluate it promptly. Because the release obtained through PAID is limited to the identified violations and the participating employees, counsel should scope any self-audit and resulting disclosure with care.*

Closing

Several of these issues should see further movement in the coming months, including the Ninth Circuit's pending decision on the Motor Carrier Act exemption and the Department of Labor's pending independent-contractor and joint-employer rules. We will continue to monitor these developments and provide updates as additional decisions are issued and new matters progress.

The following Gibson Dunn lawyers prepared this update: Rachel Robertson, Megan Cooney, Naima Farrell, Savannah Hundt, Tommy McCormac, and Alana Bevan.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or the following leaders of the firm's Labor & Employment practice group:

Karl G. Nelson – Partner, Labor & Employment Practice Group,
Dallas (+1 214.698.3203, knelson@gibsondunn.com)

Rachel W. Robertson – Partner, Labor & Employment Practice Group,
Dallas (+1 214.698.3273, rrobertson@gibsondunn.com)

Jason C. Schwartz – Co-Chair, Labor & Employment Practice Group,
Washington, D.C. (+1 202.955.8242, jschwartz@gibsondunn.com)

Katherine V.A. Smith – Co-Chair, Labor & Employment Practice Group,
Los Angeles (+1 213.229.7107, ksmith@gibsondunn.com)

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