No. 12-1286

In The

# Supreme Court of the United States

JOSEPH DINICOLA,

*Petitioner,*

v.

STATE OF OREGON,
DEPARTMENT OF REVENUE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Oregon Court of Appeals**

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

Petitioner Joseph DiNicola ("petitioner") respectfully requests rehearing of this Court's October 7, 2013, order denying certiorari in this case, and asks that this Court vacate its denial of the petition for writ of certiorari and grant the petition.



## GROUNDS FOR REHEARING

This Court recently granted the writs of certiorari in two cases scheduled for oral argument during the October 2013 Term: No. 12-417, *Sandifer v. United States Steel Corp.* and No. 12-99*, Unite HERE v. Mulhall, et al*. The grant of certiorari in those two cases is the type of "intervening circumstance[ ] of a substantial or controlling effect" contemplated by S. Ct. R. 44.2.

### I. Holding This Petition Pending This Court's Consideration of *Sandifer v. United States Steel Corporation* and *Unite HERE v. Mulhall* Is Consistent With This Court's Practice.

Petitioner requests that this Court hold the present petition for rehearing until *Sandifer* and *Unite HERE* are decided. This Court has granted certiorari for the October 2013 Term in both *Sandifer* and *Unite HERE*, which are presently scheduled for argument in November 2013. After petitioner filed his petition for certiorari, the Court received merits

briefings for *Sandifer* and *Unite HERE*. In the past, when the Court has held petitions for rehearing pending decisions in other matters before the court, it has granted certiorari, vacated judgments, and remanded for analysis consistent with new precedent. As outlined below, the decisions in *Sandifer* and *Unite HERE* might affect the outcome of petitioner's present matter, thus petitioner respectfully requests that this Court postpone deciding petitioner's petition for rehearing until after the *Sandifer* and *Unite HERE* matters have been heard and decided.

## II. The judgment below relied on an interpretation of the term "work" for purposes of the FLSA, which *Sandifer* may overrule or limit.

In the underlying case, the Oregon appellate court relied heavily upon the term "work" from the definition of "employ" which includes "to suffer or permit *to work,*" where "work" is a term which remains undefined in FLSA. 29 U.S.C. § 203(g) (emphasis supplied), Pet. App. 10a-22a, 58a. One of the issues the *Sandifer* parties appear to argue is what constitutes "work" for purposes of the Fair Labor Standards Act ("FLSA"). Sandifer Respt. Br. 2-9.

The *Sandifer* issue should be resolved concurrent with the present matter because the present matter addresses whether a person performing duties assigned under a union's collective bargaining agreement ("CBA") during employer-paid release-time (as

opposed to leave without pay) is "suffer[ed] or permit[ted]" "to work" (29 U.S.C. § 203(g), Pet. App. 58a) for the union or the employer; which determination affects whether the union, the employer, or both "employed" petitioner. *Sandifer* may also clarify whether any "work" assigned by the employer can be excluded from the FLSA definition of "employ" without being expressly excluded in the text of the FLSA. Sandifer Petr. Br. 52-56.

The outcome of *Sandifer* will also be informative regarding the standards applicable in determining whether statutes like the anti-bribery portion of the Labor Management Relations Act ("LMRA") could similarly exclude persons serving in a dual role as both a represented "employee" and a worker and union officer or member, from the definition of FLSA "employees" by virtue of being assigned part-time or full-time "work" activities subject to CBA agreements (like those in *Sandifer* subject to 29 U.S.C. § 203(o)). The argument applies to petitioner's matter not specifically for "clothes changing" but for performance of other employer-assigned "principal" activities or duties. Sandifer Petr. Br. 3-4.

*Sandifer* will also address whether work is subject to the overtime provisions of FLSA when both the CBA and FLSA do not expressly exclude or exempt employer-assigned or permitted activities such as "clothes changing." Sandifer Petr. Br. 3. Over the years, the Court has consistently declined to find employees exempt from FLSA overtime coverage when employees did not fall within a specified exemption

since Congress intended to include all employees within the scope of FLSA with "narrow and specific" exceptions. *Powell v. U. S. Cartridge Co.*, 339 U.S. 497, 516-517 (1950). Oregon courts in *DiNicola*[1] have held that employer-paid duties that are labeled "work" "for the union" (Pet. App. 4a, 5a, 7a, 12a, 17a) are excluded from the ambit of the FLSA statute. Petitioner raises the issue of whether employer-assigned "union" activities would be subject to the FLSA overtime provisions when neither the CBA nor FLSA excludes or exempts "union" activity from the definition of "work" that is "suffer[ed] or permit[ted]." 29 U.S.C. 203(g), Pet. App. 58a.

What constitutes "work" for purposes of determining whether one has "employed" another, and whether one has employed a person for purposes of the overtime provisions of FLSA when one has permitted that person to do union-related "work" are important questions of federal law that should be settled by this Court. The parties in *Sandifer* appear to intend to address the definition of "work" in the employer-union context and that definition will affect whether this Court should grant a writ of certiorari in *DiNicola*.

A related issue that *Sandifer* may examine is whether a union and employer can *agree* to eliminate

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[1] *DiNicola v. State of Oregon*, 246 Or. App. 526, 268 P.3d 632 (2011), *rev. den.*, 352 Or. 377, 290 P.3d 813 (2012), *reconsideration den.*, ___ Or. ___, ___ P.3d ___ (Jan. 24, 2013), *cert. den.* No. 12-1286 (Oct. 7, 2013).

overtime compensation for "clothes changing" -type activities. Sandifer Petr. Br. 3-4. Sandifer Respt. Br. 61. This issue relates to petitioner's question about whether an employer and union may agree to eliminate certain work-related activities from the scope of work compensable under the FLSA.

## III. Substantial grounds for granting the writ of certiorari not previously presented include whether the Oregon Court of Appeals lacked subject matter jurisdiction to make determinations about the FLSA based on its own interpretation of the LMRA.

The Oregon appellate court raised and applied LMRA anti-bribery provisions, 29 U.S.C. § 186, Reh. App. 3a-10a, for the first time in the life of the case without briefing or argument by the parties. Pet. App. 13a-15a. No party had an opportunity in briefing or argument to dispute a state court's jurisdiction to interpret or incorporate 29 U.S.C. § 186 into its opinion. Petitioner raised this issue in his petitions for review and reconsideration from the Oregon Supreme Court, which petitions were ultimately denied by order dated January 24, 2013.

In *Cotton*, this Court held that, "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002).

Under 29 U.S.C. § 152(2), (Reh. App. 2a), the term "employer" excludes States.[2] Congress established that jurisdiction to determine questions related to LMRA anti-bribery amendments to the National Labor Relations Act ("NLRA") rests with federal district courts. 29 U.S.C. § 186(e):

> The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 7 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title. Reh. App. 10a.

The state appellate court interpreted and applied 29 U.S.C. § 186, Reh. App. 3a-10a, to claims for FLSA overtime wages from a state employer. 29 U.S.C. §§ 142 and 152(2). Reh. App. 2a, exclude States as LMRA and NLRA "employers." The LMRA amendments to the NLRA relied upon in *DiNicola* are not related to the determination of who is an employee for "purposes of FLSA." Instead, the LMRA amendments address when or whether illegal bribes pass between non-State employers and unions or their officers with the purpose or effect of obstructing workers' representation rights. 29 U.S.C. § 186; Reh. App. 3a-10a. Mulhall Respt. Br. 1-3.

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[2] 29 U.S.C. § 152(2); Reh. App. 2a. *See also*, *NLRB v. Natural Gas Utility District*, 402 U.S. 600 n.1 (1971).

Courts should infer that if Congress had intended the anti-bribery provisions, 29 U.S.C. § 186, to apply to FLSA cases, it would have so stated. 29 U.S.C. § 186(e), Reh. App. 8a, grants jurisdiction of anti-bribery actions to "federal district courts" and conflicts with FLSA's enforcement standard. Reh. App. 10a. "An action to recover the liability [for violation of section 206, 207, or 215(a)(3)] . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself. . . ." 29 U.S.C. § 216(b); Reh. App. 11a-12a. Thus, even if Oregon is authorized to grant its courts jurisdiction over LMRA 29 U.S.C. § 186 and that statute's precedent, Oregon's holding that, "consistently with the test under the FLSA," Pet. App. 17a, it can apply LMRA cases or precedent to hold that petitioner is not an "employee" of respondent cannot stand because it is inconsistent with Congressional intent to limit interpretation of LMRA's anti-bribery statutes to private sector employers to "federal district courts."

Furthermore, applying the LMRA in *DiNicola* to hold that petitioner could not perform employee "work" for respondent under the FLSA, even after finding that respondent, as an employer, permitted such union activity, is an exclusion or exemption that only the Oregon courts created. Oregon's interpretation of the FLSA conflicts with Congress's intent and this Court's holdings in *Powell*, *supra*.

Without a hearing before this Court, Oregon's judicial enlargement of FLSA to include an exclusion

or exemption from overtime compensation for "union work" will no doubt result in subsequent litigation about which specific duties or time spent performing each category of employer-assigned or employer-permitted "work" for a union or union-related duties is subject to exemption or exclusion from the FLSA.

## IV. The judgment below relied on an interpretation of *Caterpillar* and on the LMRA anti-bribery statute, which *Unite HERE* may overrule or limit.

In *Unite HERE*, respondent Mulhall specifically raises 29 U.S.C. § 186 precedent relied upon by the Oregon Court of Appeals to deny petitioner's FLSA overtime claims:

> Moreover, Section 302 is often civilly enforced against conduct that usually does not lead to criminal prosecution. This includes employer provision of special leave or benefits to union officials, *see e.g.*, *Caterpillar, Inc. v. United Auto. Workers of America*, 107 F.3d 1052, 1056-57 (3d Cir. 1997) (listing similar cases), *cert. granted*, 521 U.S. 1152 (1997), *cert. dismissed due to settlement*[.]

Mulhall Respt. Br. 30.

The Court may amplify or reject the holdings in *Caterpillar* in its review of *Unite HERE* and thus impact the issues petitioner has advanced in this case. In *DiNicola*, the Oregon appellate court also cited *Machinists Local #964 v. B. F. Goodrich Group*, 387 F.3d 1046 (9th Cir. 2004) ("relying on *Caterpillar*")

as further reason to deprive petitioner of FLSA protection by applying LMRA. The outcome of *Unite HERE* has every potential to substantially impact or at least inform the issues presented to this Court by petitioner and the *DiNicola* appellate court opinion.

*Unite HERE*'s decision will also impact the outcome in *DiNicola* because this Court is examining LMRA's anti-bribery provisions with respect to defining what corrupt or criminal transactions benefiting unions and union officers might consist of, e.g., Mulhall Respt. Br. 27-28, 29. The decision may distinguish permissible wages paid to union officers from employers under CBA terms (29 U.S.C. § 186(c), Reh. App. 5a-8a) and impermissible LMRA payments, in money or things of value (29 U.S.C. § 186(a), (b) and (d), Reh. App. 3a-5a; 8a-10a), from employers to union officers. Mulhall Respt. Br. 29-30.

The issues slated for this Court's review in *Unite HERE* are particularly relevant because the state court below assigned nearly all the material weight of its *DiNicola* opinion to two LMRA (29 U.S.C. § 186, Reh. App. 3a-10a) anti-bribery cases, Pet. App. 13a-15a; 17a-18a, to adopt Ninth Circuit dicta that only if union "work" is performed on the employer's "shop floor" could the employer be considered the LMRA employer and not found to bribe the employees when it paid agreed upon wages. Pet. App. 14a. The courts below denied FLSA protection to petitioner because, among other reasons, he did not perform his CBA required employer-permitted union duties on respondent's premises. There is no dispute that respondent's CBA (Pet. App. 73a) states that respondent retains

control over petitioner with equal authority as it has over presidents and executive directors assigned to union duties for less than full time. A separate Agreement (Pet. App. 81a-82a) plainly states that as between petitioner and respondent, "We agree to the Terms and Conditions of *That Assignment* as stated above . . . Department of Revenue [ ]" (emphasis supplied). Thus respondent permitted petitioner, as a "continuing employee of Revenue" (Pet. App. 10a) to perform that "assignment" without regard to where petitioner performed the assignment. Nonetheless, by applying LMRA cases, the court below held dispositive the location where petitioner performed the work, Reh. App. 12a, and decided that petitioner could not be respondent's employee for purposes of the FLSA. This holding is contrary to the U.S. Secretary of Labor rules as set out at 29 C.F.R. § 785.12 (Pet. App. 62a).

## V. Substantial grounds for granting the writ of certiorari not previously presented include that the First Amendment guarantees of speech and assembly are chilled when LMRA criminal statutes are used to deprive workers of FLSA protection.

Petitioner believes his undisputed assignment to perform union duties "directly related and central to the collective bargaining relationship" between respondent and the union qualifies as First Amendment peaceable "assembly" and protected "speech" activities, Reh. App. 1a, benefiting both the respondent and respondent's union-represented employees. Pet. App. 73a. To allow such protected activity to be exempted

from the FLSA is antithetical to this Court's long-surviving and oft-cited holdings in *Thomas v. Collins*, 323 U.S. 516 (1945), which protect union speech and assembly, regardless of whether it is business or economic activity. To permit the courts below to characterize petitioner's attempts to receive compensation for overtime work as criminal under the LMRA is likely to suppress an employee's desire to perform lawful union-related duties when the employer allows those duties to be performed by the employee, whether that employee is assigned or permitted to perform such duties full-time or part-time. Courts permitting employers to characterize wage or overtime claims as criminal in the labor context chills the right to peaceably assemble because it punishes participation in peaceable labor assembly and speech. *See Thomas*, 323 U.S. at 539-540.

Plaintiff requests that this Court review the dangers to the First Amendment in *DiNicola* not presented previously because of the chilling effect the decision to exclude union activity from the overtime provisions of the FLSA has on the First Amendment rights of laborers.



## CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner requests that this Court grant petitioner's request for rehearing, vacate the order denying writ

of certiorari, grant the petition for writ of certiorari, resolve the jurisdiction questions presented here, and review the judgment and opinion below. In the alternative, petitioner requests that this Court hold this case to consider whether the reasoning in *Sandifer* and *Unite HERE* justifies the Court's consideration of this case.

Respectfully submitted,

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NOVEMBER 2013

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**CERTIFICATE OF COUNSEL**

As counsel of record for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in S. Ct. R. 44.2.

KEVIN T. LAFKY
*Counsel for Petitioner*

## RELEVANT CONSTITUTIONAL PROVISION AND STATUTES

**United States Constitution – First Amendment**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**The Labor Management Relations Act, 1947; LMRA; 29 U.S.C. §§ 141-197**

**The National Labor Relations Act; NLRA; 29 U.S.C. §§ 151-169**

**§ 142. Definitions**

When used in this chapter –

* * *

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in subchapter II of this subchapter.

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**§152. Definitions**

When used in this chapter –

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include * * * any State[.]

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise * * * but shall not include

any individual employed * * * by any other person who is not an employer as herein defined.

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**§186. Restrictions on financial transactions**

**(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations**

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the

right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

**(b) Request, demand, etc., for money or other thing of value**

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an

employer to any of his employees as compensation for their services as employees.

**(c) Exceptions**

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value

paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and

shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other

thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

**(d) Penalties for violations**

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by

clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

**(e) Jurisdiction of courts**

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

**(f) Effective date of provisions**

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

**(g) Contributions to trust funds**

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

**Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq.**

**§216 Penalties**

**(a) Fines and imprisonment**

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

**(b) Damages; right of action; attorney's fees and costs; termination of right of action**

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any

Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. 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. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. * * *

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