



## US Court of Appeals Delivers an Employee-Friendly Verdict Regarding Timekeeping, By Jason Rossiter, Esq.

For employers based in the South or with offices in the Southern region it's more important than ever to keep good timekeeping records.  
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On July 12, 2023, the United States Court of Appeals for the Fifth Circuit, which has jurisdiction over Texas, Louisiana, and Mississippi, made it easier for employees to prove overtime violations in situations where their employer lacks timekeeping records or where those records are inaccurate or incomplete. The case is *Flores v. FS Blinds, LLC*.

The employer in the new *Flores* case had believed that its workers were independent contractors. As a result, it was not keeping detailed records showing the exact hours that those workers had been working. Those workers sued, believing that they were misclassified as contractors and were owed unpaid overtime. The workers testified that, during their work, they "averaged workdays between 11 and 17 hours," and also offered some work orders as partial corroboration. The lower court ruled for the company on the overtime claims, believing that the workers should have come forward with more "definite and certain" evidence that they had worked unpaid overtime hours.

### Ruling Overturned

The Fifth Circuit reversed this ruling. It held that because the company had not been keeping adequate timekeeping records, a much more lenient standard of proof applied to the workers' overtime claims. Under this standard—from a 1946 case called *Anderson v. Mt. Clemens Pottery Co.*—all the plaintiffs needed to do was offer evidence that they had performed work for which they were "improperly compensated," and that permitted a "just and reasonable inference" about the "amount and extent" of that work. The Fifth Circuit described this as "not a tall slope" for the workers to climb. The Fifth Circuit held that the workers' testimony about the length of their average workdays was sufficient, even though it was imprecise. The Fifth Circuit also held that this testimony would have been enough even had the workers not come forward with any corroborating work orders. It concluded by stating that an employer in this situation has little grounds for complaining that an overtime award based only on a worker's testimony might lack "exactness" or "precision," as it was the employer's failure to keep and preserve records that led to the situation.

### Employers Be Warned

This new case highlights a key danger of misclassifying workers as independent contractors. It is also an important reminder to safeguard employee timekeeping records. If those records cannot be found when a lawsuit hits, or if they are not accurate or complete or had not been prepared in the first place, a worker's uncorroborated testimony may be all that is needed to prove an expensive overtime violation.

### Kaufman Dolowich Can Assist

Kaufman Dolowich's team of employment attorneys in our Dallas and New Orleans offices can assist with compliance including:

- Properly Classifying Workers
- Establishing Timekeeping Policies
- Defending Against Misclassification Claims
- Complying with Overtime Obligations

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Jason Rossiter, Of Counsel, concentrates his practice on labor and employment. He represents clients in high-risk employment claims such as wage-and-hour class actions and employment contract disputes.

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