FAIR LABOR STANDARDS ACT UPDATE (2008/2009)

Robert A. Boonin
Butzel Long

Charlotte Garry Carne
Butzel Long

I. Introduction

The federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, governs the obligation to pay minimum wages and overtime pay, as well as child labor. This outline highlights the developments under the FLSA with respect to overtime and minimum wage issues during the past year.

The Department of Labor's ("DOL") 2008 statistics regarding FLSA collections persuasively illustrate how important it is for employers to comply with the Act's regulations. In fiscal year 2008, the Wage and Hour Division collected approximately $185 million in back wages for FLSA violations relating to 228,000 employees.

- Of the $185 million collected, nearly $123 million was collected as a result of violations of the overtime regulations (for 182,964 employees), and $16.6 million (for 42,199 employees) was collected as a result of minimum wage violations. Another $3.1 million was collected as civil money penalties.

- $3.4 million of the overtime regulations violations were due to exempt status misclassifications of 2600 employees. Most of these employees were misclassified as exempt executive employees.

II. Minimum Wage

Michigan's minimum wage currently is, and will remain in the foreseeable future, greater than the federal minimum wage. Employers must pay the higher of the applicable state minimum wage or the federal minimum wage. Michigan's minimum wage is currently $7.40/hour. The current federal minimum wage of $6.55/hour is scheduled to rise to $7.25/hour on July 24, 2009.

III. Recent Overtime Settlements/Judgments

1. $640 million paid by Wal-Mart to settle 63 wage and hour suits across the country in numerous courts involving claims for off-the-clock work, failure to provide required meal and rest breaks, and failure to pay overtime.

2. $105 million paid by Starbucks to an estimated 100,000 barristas that were required by company policy to pool tips with supervisory employees.

3. $54.25 million paid by Wal-Mart to settle a class action that alleged that it had violated Minnesota's labor laws by requiring employees to work off the clock during training.

4. $27 million paid by FedEx to 203 of its current and former drivers in California due to misclassifying the drivers as contractors instead of employees.

5. $5.19 million awarded to employees of the Chinese Daily News as part of a class and collective action claiming that the employees were not paid overtime, and were not paid for meal and rest breaks.

6. $4.9 million paid by Hewitt Associates, Inc., an Illinois-based human resources placement and consulting firm, for overtime pay allegedly owed to 1,100 benefits analysts who were misclassified as exempt.

7. $4 million paid by two T.V. reality shows' production workers for failure to pay overtime and failure to provide required break periods.

8. $1.2 million paid by Oracle to 345 current and former contract administration and license migration employees for alleged overtime and break-time violations.

9. $530,000 was paid by Hachi-Hachi Corporation, which operates a sushi restaurant in Manhattan, to 66 workers comprising kitchen staff, sushi chefs, wait staff, cashiers and delivery staff, due to the employees' allegations that the Company paid a straight salary for all hours worked rather than time and one-half for hours worked over 40.

10. $233,000 was paid by three Asian buffet-style restaurants in Florida to 55 former employees after an investigation by the Department of Labor into alleged violations of the FLSA.

11. $93,897 paid by two paper stores in New York City to 28 employees for alleged paycheck shortfalls.

12. $90,000 in liquidated damages paid by owners of five Famous Dave's restaurants in Omaha, Nebraska for failing to combine the hours of employees who worked at more than one location for the purposes of calculating overtime. The owners also paid $90,000 in overtime compensation and post-judgment interest.

IV. Overtime Pay Exemptions

A. Administrative Exemption (29 C.F.R. § 541.200, *et seq*.)

The administrative exemption is one of the more difficult exemptions for courts and employers to comprehend. Under the regulations, an administrative employee is one who is paid at least $455 per week on a salary basis and whose primary duty is "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers…, and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." *Id.*

Exemption Found:

1. *Wage and Hour Opinion Letter*, FLSA 2008-1, 3/6/2008: **Purchasing agents** for a motor home manufacturer are exempt administrative employees because: 1) They work in such functional areas as purchasing and procurement; 2) Their duties include ensuring that materials, equipment, and supplies are ordered and delivered; and 3) They are minimally supervised.

2. *Wage and Hour Opinion Letter*, FLSA 2008-3, 5/7/2008: A **Product Technology Application and Marketing Analyst (PTA)** who spends 40 percent of her time performing research and quality control, and 30 percent of her time acting as a liaison to the company's sales employees is an exempt administrative employee. Even though the employee spends some time performing standardized tests, she is an exempt administrative employee because she performs office or non-manual work directly related to functional areas such as quality control, research and marketing.

Exemption Not Found:

3. *Alvarez v. Key Transportation Service Corp.*, 541 F. Supp. 2d 1308 (S.D. Fla. 2008): A **car dispatcher** for a transportation service was not an administrative employee under the FLSA. The Court reasoned that to find that plaintiff was an administrative employee would render the phrase "directly related to the general business operations of the employer" so broad that almost any job could be "shoehorned into it."

4. *Iaria v. Metro Fuel Oil Corp*., 2009 U.S. Dist. LEXIS 6844 (E.D.N.Y. January 30, 2009): **Truck dispatchers** who were not paid overtime wages were entitled to proceed to trial. The Court reasoned that, although a majority of courts have considered truck dispatchers to be exempt, the Defendant failed to show that the dispatchers in this case performed work related to the Company's "management or general business operations." Thus, although the dispatchers exercised discretion and independent judgment, the Company was not entitled to summary judgment because it failed to show that he dispatchers spent the majority of their time on exempt work.

B. Executive Exemption (29 C.F.R. § 541.100, *et seq*.)

Under the regulations, an executive is an employee who is compensated at the rate of at least $455 per week on a salary basis and –

- Whose primary duty is management of the enterprise or a customarily recognized subdivision or department of the enterprise;
- Who customarily and regularly directs the work of at least two full-time equivalent employees; and
- Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. *Id.*

Exemption Found:

1. *Wage and Hour Opinion Letter*, FLSA 2008-4NA, 2/29/2008: A **plant manager** for an ready-mix concrete business qualifies as an exempt executive employee because the employee's primary duties include: hiring new employees, supervising at least two full-time employees, scheduling work hours, directing employees, maintaining records, appraising and disciplining employees, planning and apportioning work, determining the type of materials to be used, controlling distribution, conducting safety meetings, enforcing safety rules, and recommending employees for termination.

Exemption Not Found:

2. *Rodriguez v. Farm Stores Grocery Inc.*, 518 F.3d 1259 (11TH Cir. March 6, 2008): The Eleventh Circuit partially affirmed a jury verdict that held that drive-in grocery store employees designated **"store managers"** were not exempt from the FLSA, and were therefore owed overtime. The Court held that the employer's designation of one of the five employees who typically worked in its stores as a "store manager" did not necessarily bring that individual under the "executive exemption" to the FLSA without a showing that the employee actually performed exempt work.

3. *Pendlebury v. Starbucks Company*, 2008 U.S. Dist. LEXIS 20086; 155 Lab. Cas. (CCH) P35,410 (S.D. Fla. March 13, 2008): The Court denied plaintiffs' motion for summary judgment on defendant's affirmative defense that the plaintiffs, **store managers** for Starbucks, were exempt executive employees. The Court reasoned that because the evidence regarding the performance of managerial duties conflicted, summary judgment on the affirmative defense was not appropriate. Specifically, there

was a conflict regarding whether the plaintiffs' managerial duties were less important than the nonmanagerial duties.

4. *Jones v. Riggs Distler & Co..*, 2007 U.S. Dist. LEXIS 89072 (M.D. Fla. December 4, 2007): The Middle District of Florida ruled that a construction contractor failed to show that a **supervisor** with authority to fire employees for safety violations was an exempt executive under the FLSA. The Court reasoned that even though the supervisor had authority to fire employees who broke safety rules, that authority was "a far cry" from the customary and regular direction of employees required to qualify for the executive exemption.

5. *Morgan v. Family Dollar Stores, Inc.* 551 F.3d 1233 (11th Cir. December 16, 2008): The Eleventh Circuit affirmed a district court ruling that Family Dollar Stores willfully violated the FLSA by not paying overtime to 1,424 retail **store managers**. The Court held the store liable for approximately $35.6 million in back pay and liquidated damages. The Court reasoned that the store managers were not exempt executives because they spent 80 to 90 percent of their time on manual duties and lacked any authority over hiring, firing, pay or evaluations of other employees. The Court upheld the liquidated damages finding because the retailer never studied whether the store managers were exempt. The Court also rejected the Company's argument that the executive exemption was "complex and fact-intensive," and therefore precluded a willfulness finding.

C. Professional Exemption (29 C.F.R. § 541.300*, et seq*.)

The professional exemption is analyzed within one of two subcategories, "learned" and "creative."

- Learned professionals must be paid in accordance with the applicable salary rules and are otherwise those whose "primary duty" is "the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. **§** 541.301. Among the fields commonly considered to fall within this exemption are: doctors, lawyers, engineers, accountants, psychologists, social workers, pharmacists, teachers, scientists, theology, architecture, registered nursing, certified medical technologists, dental hygienists, physician assistants, chefs, and some athletic trainers and funeral directors or embalmers. *Id.*

- Creative professionals are those whose primary duty is the "performance of work requiring invention, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training." 29 C.F.R. **§** 541.302.

Exemption Found:

1. *Chatfield v. Children's Servs. Inc.,* 555 F. Supp. 2d 532, (E.D. Pa. May 20, 2008): The Eastern District of Pennsylvania held that **a truancy case manager** whose job required

him to exercise discretion and hold a degree in a field related to social work was an exempt learned professional under the FLSA even though his work was supervised and he held only a bachelor's degree. In granting summary judgment, the Court reasoned that the agency's job requirements, which consisted of a degree in a field related to social work and at least three years of related work experience, were "substantial" enough to "qualify one for exemption."

2. *Wage and Hour Opinion Letter*, FLSA2008-7, 9/26/2008: **Substitute teachers** are exempt professional employees if their primary duty is teaching in an educational establishment, even if they do not have a college degree or teaching certificate.

3. *Wage and Hour Opinion Letter*, FLSA2008-9, 10/1/2008: **Instructors** in a cosmetology school qualify for the teaching exemption in section 13(a)(1) because their primary duty is teaching and instructing students in cosmetology theory, as well as in the practical part of the curriculum.

4. *Wage and Hour Opinion Letter*, FLSA2008-11, 12/1/2008: **Assistant Athletic Instructors (AAIs)** at institutions of higher education qualify as exempt teachers under the FLSA because they spend more than 50% of their time on teaching proper skills and skill development to student-athletes.

Exemption Not Found:

5. *Wage and Hour Opinion Letter*, FLSA2008-10NA, 6/9/2008: **Service Coordinators** are not exempt learned professional employees because "[o]ccupations requiring only a bachelor's degree in any field, an associate's degree, or completion of a short course of specialized training as a standard prerequisite for entrance into a particular field, do not qualify for the learned professional exemption."

6. *Wage and Hour Opinion Letter*, FLSA2008-17, 12/19/2008: **Certified Occupational Therapist Assistants (COTAS)** employed by a school district do not qualify as exempt professional employees because their primary duty does not require "knowledge of an advanced type of a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." Indeed, the COTAS need only obtain a certificate requiring 60 academic semester credits.

D. Salary Basis (29 C.F.R. § 541.602)

Under the regulations, most executives, professional and administrative employees must be paid at least $23,600 per year or $455 per week to be exempt.

1. *Wage and Hour Opinion Letter*, FLSA20080-1NA*:* The minimum salary requirement under 29 C.F.R. 541.602 may not be prorated to reflect the part-time status of an employee. Thus, a part-time employee must earn at least $23,600 per year or $455 per week to be exempt.

2. *Havey v. Homebound Mortgage Inc.*, 547 F.3d 158 (2ND Cir. October 22, 2008): The Second Circuit affirmed a lower court's grant of summary judgment to Homebound

Mortgage Inc., holding that an underwriter whose "base level" salary was adjusted each quarter based on the projected number of loans she would review was exempt. The Court reasoned that the prospective adjustments to the Plaintiff's salary based on the quantity and quality of work she performed did not violate the salary-basis test because the adjustments were always prospective and she still guaranteed a minimum of $48,000 a year. The Court stated that the scheme "was designed to give underwriters an incentive to take on larger quantities of work" not to circumvent the requirements of the FLSA.

E. Fire Protection and Law Enforcement Personnel (29 U.S.C. § 207(k))

The FLSA provides a partial overtime exemption for fire protection and law enforcement personnel employed by public agencies on a "work period" bases. *See* 29 U.S.C § 207(k). Employees covered by the fire protection exemption are not entitled to overtime pay until they work more than 60 hours in an eight-day period, instead of the usual rule of overtime pay for working more than 40 hours in a seven-day workweek.

1. *Philadelphia v. Lawrence*, 129 S. Ct. 763 (U.S. December 15, 2008): The U.S. Supreme Court denied certiorari on the Third Circuit's holding that **paramedics** employed by the Philadelphia Fire Department are not responsible for fire suppression, as required by 29 U.S.C. 207(k), and, therefore, are not exempt from the normal overtime pay requirements of the FLSA.

2. *Wage and Hour Opinion Letter*, FLSA2008-9NA, May 30, 2008: **Jailers**, despite lacking the power to make arrests, are security personnel in a correctional institution, and therefore qualify for the partial overtime exemption under section 7(k).

F. Sales Exemption

Section 13(a)(1) of the FLSA provides a minimum wage and overtime exemption for outside sales employees as defined in 29 C.F.R. § 541. An outside sales employee is any employee who is customarily and regularly engaged in making sales away from the employer's place of business.

Retail and service establishments are exempt from the minimum wage and overtime pay requirements of the FLSA. This exemption, however, is very narrowly construed by the Courts. It applies to local retailers and businesses whose sales come primarily from within the state where they are located. Thus, it applies to local merchants, or the "corner grocer," but not to banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, and similar businesses. *See Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190, 202 (1966).

Exemption Found:

1. *Wage and Hour Opinion Letter*, FLSA2008-6NA, 5/8/2008: Workers sent to retail stores to sell novelty items at special store events were exempt outside sales employees

because they performed their primary duties away from the employer's own place of business.

2. *English v. Ecolab, Inc.*, 2008 U.S. Dist. LEXIS 25862 (S.D.N.Y. March 31, 2008): The U.S. District Court for the Southern District of New York held that the home offices of pest extermination technicians qualified as establishments under 29 U.S.C. 201(i) because they were fixed locations accessible to the public through telecommunications when the defendant routed customer calls to the technicians.

Exemption Not Found:

3. *Wong v. HSBC Mortgage Corp*., 2008 U.S. Dist. LEXIS 21729 (N.D. Cal. March 19, 2008): Following DOL regulations and well settled case law, the Court held that banks and home mortgage loan companies do not qualify as retail or service establishments.

4. *Wilks v. Pep Boys*, 2008 U.S. App. LEXIS 10722 (6th Cir. May 15, 2008)(unpublished): The Court held that a complex payment scheme, which used a "variable benefit rate" that took into account not only productivity but also actual labor hours, was not a commission scheme because it failed to "establish some proportionality between the compensation to the employees and the amount charged the customer."

5. *Clements v. Serco Inc.*, 530 F.3d 1224 (10th Cir. July 1, 2008): The 11th Circuit affirmed summary judgment for an army contractor, holding that civilians working as military recruiters did not qualify for the outside sales exemption because they were responsible only for finding prospective recruits but had not authority to sign them up for military service.

G. Motor Carrier Exemption (29 U.S.C. § 213(b))

The FLSA's Motor Carrier Exemption exempts from the FLSA's overtime requirements "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act (MCA)." In 2005, the "Safe, Accountable, Flexible, Efficient Transportation, Equity Act: A Legacy for Users" (SAFETEA-LU) considerably narrowed the class of employees subject to this exemption by excluding employees driving vehicles weighing 10,000 pounds or less. This widely unnoticed change in the MCA appeared to remove an entire class of vehicles from eligibility from the Motor Carrier Exemption. On June 6, 2008, President Bush signed into law the SAFETEA-LU Technical Corrections Act, which provides partial relief to employers who were caught unaware of the changes to the FLSA's Motor Carrier Exemption made in 2005. The TCA provides employers a limited safe harbor from liability for overtime for violations that occurred between August 10, 2005 and August 9, 2006.

1. *Ashby v. Nat'l Freight Inc.*, 2008 U.S. Dist. LEXIS 66815; 13 Wage & Hour Cas. 2d (BNA) 1826 (M.D. Fla. July 22, 2008): The United States District Court for the Middle District of Florida denied summary judgment for a trucking company on a driver's FLSA claims because the driver never drove across state lines, and thus, he did

not engage in interstate commerce. The Court reasoned that the Motor Carrier Exemption applies only to employees "who either (i) actually transport goods across state lines, or (ii) do not cross state lines but transport goods as part of a 'practical continuity of movement' across state lines from the point of origin to the point of destination."

V. Safe Harbor

A. Background

Under the regulations, most executive, administrative and professional employees must be paid on a salary basis in order to be exempt. Indeed, the regulations only allow employers to make deductions from employees' salaries in a few very narrow circumstances:

1. Absences from work for one or more full days for personal reason, other than sickness or disability;

1. Absence from work for one or more full days due to sickness or disability if deductions are made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences;

2. To offset any amounts received as payment for jury fees, witness fees or military pay;

3. As a disciplinary penalty imposed in good faith for violating safety rules of "major significance;"

4. Through an unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules;

5. A proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment;

6. When unpaid leave is taken under the FMLA; and

7. For public sector employees taking partial days off for personal reasons or due to illness or injury, but only in certain situations.

B. Rule

Under the regulations, an employee will not lose his or her exempt status merely because the employer made an isolated error by not following the above-stated rule. This "safe harbor" provision applies if the employer did not intend to make the improper deduction and:

1. The employer has a clearly communicated policy prohibiting improper deductions, including a complaint mechanism;

2. The employer reimburses employees for any improper deductions; and

3. The employer makes a good faith commitment to comply in the future.

C. Practice Tip

Employers should have a written policy, with a complaint procedure, prohibiting improper deductions from the salaries of exempt salaried employees. Employers must also inform their employees of the policy, and promptly make corrections, as necessary.

VI. Hours Worked

A. Compensable Time

Non-exempt employees must be paid for all hours worked, and they must also be paid an overtime premium for hours worked over 40 in a workweek. Identifying what time is compensable is often less obvious than most expect. Under the FLSA, the term "employ" is "to suffer or permit to work." 29 U.S.C. § 203(g). Issues abound regarding the compensability of pre- and post-shift activities, on-call time, break time, travel time, and even time which many would assume constitutes part of a normal commute (i.e., when the workday begins and ends). Many of these issues are discussed in Part 785 of the regulations, 29 C.F.R. Part 785.

B. Recent Cases and Opinion Letters

Time Found Compensable:

1. *Chao v. Gotham Registry, Inc.*, 13 Wage & Hour Cas. 2d (BNA) 353 (2nd Cir. January 24, 2008): The Second Circuit held that the Nursing Agency violated the FLSA by failing to pay its nurses time and one-half for overtime worked, regardless of the fact that the overtime was unauthorized. The Court reasoned that the Agency had a "panoply of practical measures to induce compliance with its formal rule [unauthorized] overtime." Failure to pay time and one-half for the overtime worked was not one of those measures, and violates the FLSA.

2. *Wage and Hour Opinion Letter,* FLSA2008-2NA, February 14, 2008: A timekeeping policy that requires nonexempt employees to keep accurate records of all time spent performing on-line training at home via a timesheet signed by the employee's manager complies with the timekeeping requirements of the FLSA.

3. *Wage and Hour Opinion Letter,* FLSA2008-3NA, February 29, 2008: A fire truck driver whose duties include fighting fires may not serve as a volunteer firefighter for his employer during his off-duty hours.

4. *Copeland v. ABB, Inc.*, 521 F.3d 1010 (8th Cir. March 27, 2008): The Eighth Circuit held that an employer must pay an employee for time missed due to a medical appointment that was requested by the employer's workers' compensation administrator, and the right to payment cannot be waived. The Court reasoned that the

FLSA requires that an employee be compensated for time spent during normal working hours receiving medical treatment "at the direction of the employer," including an agent of the employer.

5. *Wage and Hour Opinion Letter*, FLSA2008-7NA, May 15, 2008: Under 29 C.F.R. § 785.11 an employer must compensate an employee for all hours worked including the time worked during a missed meal period. This is true even if the employer has a policy requiring pre-approval for working during breaks and meal periods, and the employee does not get pre-approval. Moreover, the time worked during the missed meal period is "time worked" under the FLSA. In addition, if an employee's employment contract requires him or her to be paid time and one half for all hours worked over eight hours in a day, the compensation for the hours over eight is excluded from the regular rate calculation. Lastly, the payment of wages can be based on recording and computing time to the nearest five minutes.

6. *Wage and Hour Opinion Letter*, FLSA2008-8NA, May 23, 2008: Employees of an ambulance rescue service who are required to work on call throughout the year are entitled to pay for on-call time when the employee is not able to use the time effectively for personal purposes. During the busy winters, the ambulance workers could not use the time for themselves, and were entitled to on-call pay; however, during the other seasons, the employees could use the time for themselves, and were not entitled to on-call pay.

7. *Brown v. Family Dollar Stores of Ind. LP*, 534 F.3d 593 (7th Cir. July 15, 2008): The Seventh Circuit held that a former assistant manager of a Family Dollar Store in Indianapolis could proceed with her FLSA claim that she was not paid for all the hours of overtime she worked, despite her lack of specific evidence, because the Plaintiff presented evidence that management altered her time records.

8. *Wage and Hour Opinion Letter*, FLSA2008-11NA, September 22, 2008: Detention Officers may not volunteer with the same public agency as sheriff deputies under the FLSA because they are still performing a security or safety function within the same agency. However, if the Detention Agency is a completely different public agency than the Sheriff's Department, the officers are free to volunteer as reserve deputy sheriffs.

9. *Wage and Hour Opinion Letter*, FLSA2008-14, December 18, 2008: A paid firefighter employed by a private, nonprofit fire department may not volunteer to perform duties similar to his or her paid duties for the same fire department during off hours at no pay under Section 3(e)(4)(A). "Even when there is no evidence of coercion . . . . allowing paid employees of a nonprofit organization to perform the same type of services for their employer on an uncompensated, volunteer basis would in effect allow employees to waive their rights to compensation under the FLSA."

10. *Wage and Hour Opinion Letter*, FLSA2008-16, December 18, 2008: A Latino Victim Specialist (LVS) may not volunteer as a Reserve Police Officer because he is compensated for part of those services at a rate greater than a nominal fee.

Time Found Not Compensable:

11. *Wage and Hour Opinion Letter*, FLSA2008-5NA, March 7, 2008: Detention and Patrol officers can work on an occasional and sporadic basis in the Communications Department of the Sheriff's Department without the Department incurring liability for overtime hours because the work they perform in the Communications Department is different from the work them perform in the Detention and Patrol Departments.

12. *Loodeen v. Consumers Energy Co*., 2008 U.S. Dist. LEXIS 19978; 155 Lab. Cas. (CCH) P35,442; 13 Wage & Hour Cas. 2d (BNA) 896, (W.D. Mich. March 14, 2008): Consumers Energy Co. did not have to pay an employee for college courses that it required the employee to take within his first two years of employment because the FLSA regulations governing training do not apply to college studies.

13. *Wage and Hour Opinion Letter*, FLSA2008-2, March 17, 2008: A public agency employer can compensate an employee according to his or her normal schedule even if he or she substitutes a shift with that of another employee in the same classification. The only exception to this rule is if the employee works so many substitute shifts that his or her wages fall below minimum wage. In this instance, the employee must be compensated directly for hours worked.

14. *Alford v. Perdue Farms, Inc*., 2008 U.S. Dist. LEXIS 24948 (M.D. Ga. March 28, 2008): The Court held that donning and doffing personal protective equipment such as hair nets, beard nets, goggles, ear plugs, boots or bump caps prior to the start and end of a work shift was preliminary and postliminary activities and thus not compensable. In addition, the Court stated that to the extent that the activities were compensable, they were di minimis in nature.

15. *Bamonte v. City of Mesa*, 2008 U.S. Dist. LEXIS 31121 (D. Ariz. April 14, 2008): The Court held that a police department need not compensate its officers for time spent donning and doffing their uniforms and protective gear where neither the law, the policy of the department, nor the nature of police work mandate that the officer perform these activities at the station or reporting place.

16. *Singh v. New York City*, 524 F/3d 361 (2nd Cir. April 29, 2008): The Second Circuit ruled that New York City fire alarm inspectors, who carried 15 to 20 pounds of files with them every week as they traveled to and from work and around the city, were not entitled to receive compensation for the time they spent community because carrying the documents was a "minimal burden."

17. *Sisk v. Sara Lee Corp*., 2008 U.S. Dist. LEXIS 105777; 14 Wage & Hour Cas. 2d (BNA) 346 (W.D. Tenn. September 26, 2008), Order Granting Summary Judgment: The Western District of Tennessee held that the donning and doffing of protective clothing and safety gear in a unionized pork processing plant was exempted from compensable time under section 3(o) because the activity constituted "changing clothes," and the union had acquiesced to the donning and doffing pay practice.

18. *Masterson v. Federal Express Corp*., 2008 U.S. Dist. LEXIS 99622 (M.D. Pa. December 10, 2008): The U.S. District Court for the Middle District of Pennsylvania ruled that Federal Express did not violate the Pennsylvania Minimum Wage Act when it failed to pay its couriers for pre- and post- shift work. The Court reasoned that there was no violation of the PMWA because the couriers' weekly compensation when divided by their hours worked exceeded the minimum wage amount required by state law, even after including the alleged uncompensated time.

19. *Wage and Hour Opinion Letter*, FLSA2008-13, December 18, 2008: Paid emergency medical technicians employed by the county may volunteer to provide the same services for the local volunteer emergency crew under the FLSA because the county and the crew are not the "same public agency" under Section 3(e)(4)(A).

20. *Wage and Hour Opinion Letter*, FLSA2008-14NA, December 18, 2008: On-call time where an employee is required to "be reachable at all times, abstain from alcohol or other substances, and report to work within one hour of notification" is not compensable under the FLSA. The requirements are not so restrictive as to convert on-call periods into hours worked under the FLSA.

21. *Wage and Hour Opinion Letter*, FLSA2008-15, December 18, 2008: A Fire Protection District's plan to provide "monthly" stipends to its volunteer firefighters and other volunteers does not violate the FLSA if the calculation of the monthly stipend is based on an approximation of the prevailing wages in the area, and the amount of the proposed stipend does not exceed 20 percent of the wages for the same services. In other words, the stipend must be "nominal."

22. *Wage and Hour Opinion Letter*, FLSA2008-19, December 19, 2008: Store managers do not lose their exempt status under section 13(a)(1) of the FLSA by participating in a seven-week training program. These employees, who have been employed as bona fide exempt store managers for years, remain exempt during the seven weeks of management training because their primary duty continues to be that of an exempt store manager.

23. *Bustamante v. El Palenque Mexican Restaurant & Cantina*, 2009 U.S. Dist. LEXIS 7387 (S.D. Tex. February 3, 2009): The U.S. District Court for the Southern District of Texas held that an undocumented foreign kitchen worker who claimed eligibility for overtime pay by asserting that he worked two shifts under two different names failed to carry his burden of proof under the FLSA. The Court reasoned that "[p]laintiff bears the burden of proof on his claim for overtime wages." Therefore, "[g]iven the Plaintiff's lies, half-truths, and failures to explain, he failed to show, by a preponderance of the evidence, that he worked under the name of Jesus Bustamante and Angel Bustamante."

24. *Jonites v. Exelon Corp*., 522 F.3d 721 (7th Cir. 2008): The Seventh Circuit held that electronic utility employees subject to a call-out program, where off-duty employees were notified by phone when additional manpower was needed on an emergency basis, were not entitled to compensation for the time spent on-call. The Court reasoned that

the requirement that employees stay within two hours of the duty station was not "such a hardship that it turn[ed] . . . waiting into work."

VII. Regular Rate of Pay

A. Defining the Regular Rate of Pay

Non-exempt employees must be paid 1.5 times their regular rates of pay for all hours worked over 40 in a workweek. Issues often arise as to what compensation is to be included in the regular rate of pay. Section 7(e) of the FLSA provides that the regular rate of pay includes "all remuneration for employment paid to, or on behalf of, the employee" except for certain narrow exceptions such as discretionary gifts and bonuses, vacation and sick leave, contributions to third party or trustee controlled benefit plans, and premium pay for holidays and weekends already paid at 1.5 times the regular rate of pay. 29 U.S.C. § 207(e). *See also* 29 C.F.R. § 778.200, *et seq.* Virtually all other pay must be rolled into the regular rate of pay, including shift premiums, lead employee premiums, attendance and production bonuses, and commissions. Non-exempt salaried, commissioned and piecework employees must have their pay converted to an hourly rate to determine their regular rate of pay for overtime pay calculation purposes.

B. Recent Cases and Opinion Letters

1. *Wage and Hour Opinion Letter,* FLSA2008-5, May 30, 2008: A school district's pay schedule, which computes non-exempt employee salaries by multiplying the hourly rate by 40 and then multiplying the result by 52, complies with the minimum wage and overtime requirements of the FLSA.

2. *Wage and Hour Opinion Letter,* FLSA2008-6, September 22, 2008: An employee's regular rate of pay must be computed on a workweek basis and the payment for on-call time must be attributed to the particular workweek that includes the period of time during which the employee was on-call. Thus, on-call time may not be averaged over a two-week period.

3. *Wage and Hour Opinion Letter,* FLSA2008-12NA, September 22, 2008: A company's pay schedule for its dump truck drivers, which computes the drivers' regular rate of pay by dividing their total commission amount by the total number of hours worked in a workweek, complies with the FLSA.

4. *Wage and Hour Opinion Letter,* FLSA2008-12, December 1, 2008: $1,000 bonuses paid to full-time emergency communications operators in recognition of the high stress level of the employees' duties did not have to be included in the employees' regular rates of pay because the bonuses were discretionary "as to both the fact and the amount of payment."

VIII. Tip-Pooling

Section 3(t) of the FLSA describes a tipped employee as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. 203(t). Section 3(m) of the FLSA allows a valid tip-pooling arrangement among employees who customarily and regularly receive tips. 29 U.S.C. 203(m).

A. *Wage and Hour Opinion Letter*, FLSA2008-18, December 19, 2008: Itama-sushi and teppanyaki chefs may participate in tip pools and be considered tipped employees under the FLSA.

B. *Agofonova v. Nobu Corp*., motion for final approval filed 1/30/09: A class of waiters, bartenders and bus staff working for the Nobu restaurant group co-owned by Robert DeNiro, asked a federal district court in New York to approve a $2.5 million settlement of their claims that the restaurants violated the FLSA by requiring them to share their tips with managers and sushi chefs.

IX. Uniforms

A. *Wage and Hour Opinion Letter*, FLSA2008-4, May 15, 2008: Requiring employees to wear "dark-colored" shoes without prescribing any particular quality, brand, style, model or type, does not constitute requiring employees to wear a "uniform" under the FLSA. Therefore, the employees' voluntary assignment of wages to the employer for the purchase of such shoes from a third party vendor is not an impermissible deduction of wages even if wages fall below the minimum wage for each hour worked during the pay period.

B. *Wage and Hour Opinion Letter*, FLSA2008-10, October 24, 2008: If an employer "supplies a reasonable and sufficient number of wash and wear uniforms and replaces any uniforms that are damaged in the course of work-related duties, the employer has satisfied its obligations under the Fair Labor Standards Act." Thus, if an employee repeatedly damages uniforms while riding a skateboard on days off work, the employer is not under an obligation to continually supply new uniforms. The employer need only supply a number of uniforms that is reasonable and sufficient with regard to work-related duties.

X. Collective Actions

A. The "Class Remedy" Under the FLSA

Rule 23/opt-out class actions are not available for FLSA claims. Instead, the FLSA allows for opt-in "collective actions" in accordance with 29 U.S.C. § 216(b). If a collective class is conditionally or conclusively approved by a court, notices are sent to the individuals in

the class and those individuals are given the opportunity to opt-in the suit. The critical language provides:

> An action to recover the liability prescribed in [this section] . . . may be maintained against any employee (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 curt in which such action is brought. *Id.*

B. Recent Cases

1. *Guess v. U.S. Bancorp*, 2008 U.S. Dist. LEXIS 18806 (N.D. Cal. February 26, 2008): The United States District Court for the Northern District of California denied the request for certification for "hundreds and perhaps thousands" of commission-paid employees across the country who served as "financial sales representatives" for U.S. Bancorp because the Plaintiff failed to show that the employees and former employees were similarly situated. The class included loan officers, employees who worked in corporate and commercial banking, as well as employees who worked in real estate and the credit business lines. The Court reasoned that "Although all of these jobs may include, as one of their elements, the selling and/or marketing of any type of financial products, including, but not limited to, securities, mortgages, loans and insurance and retirement products, there is insufficient evidence to support a conclusion that the employees who performed those jobs are 'similarly situated.'"

2. *Fox v. Tyson Foods Inc*., 519 F.3d 1298 (11th Cir. March 12, 2008): The Eleventh Circuit ruled that the U.S. District Court for the Northern District of Alabama correctly refused to allow 161 Tyson Foods Inc. workers to intervene in a FLSA donning and doffing suit after the Court refused to certify a collective action. The Court reasoned that "substantial evidence" showed that compensation practices for the time workers spent donning and doffing safety and sanitary gear, as well as the types of protective equipment and clothing they used, varied both among and within the Tyson plants. Thus, "any resolution of [the Plaintiff's] case would not likely have even a stare decisis effect on a later action" by the 161 workers.

3. *Alix v. Wal-Mart Stores Inc*., 868 N.Y.S. 2n 372 (N.Y. App. Div. December 4, 2008): The New York Supreme Court Appellate Division ruled that two former employees of Wal-Mart were not entitled to certification of a class action on behalf of 200,000 current and former employees who were allegedly required to work "off the clock." The Court reasoned that determining the impact of the company's actions on particular employees would require a detailed analysis of individual circumstances that "would simply overwhelm consideration of the issues common to the entire class."

4. *Barnwell v. Corrections Corp. of Am*., 2009 U.S. Dist. LEXIS 11804 (D. Kan. December 9, 2008): The U.S. District Court for Kansas ruled that corrections workers employed by a private prison management company could proceed with their collective action under the FLSA, which alleges that the company regularly required them to work off the clock. The Court reasoned that "[t]he fact that the specific tasks that corrections officers performed off-the-clock might have varied (or that the duration of those tasks might have varied) in no way undermines plaintiffs' substantial allegations that [the company] required employees to perform work both before and after shifts without compensation."

XI. Arbitration/ADR

A. *Andrako v. United States Steel Corp*. 2008 U.S. Dist. LEXIS 37617; 13 Wage & Hour Cas 2d (BNA) 964 (W.D. Pa., May 8, 2008): The U.S. District Court for the Western District of Pennsylvania rejected U.S. Steel's argument that the employees' FLSA claims should be dismissed because they had not exhausted the grievance and arbitration provisions available to them under their Collective Bargaining Agreement. The Court reasoned that the employees were not relying on the CBA for their overtime claims, but were, rather, relying of the FLSA.

B. *Long John Silver's Rests. Inc. v. Cole*, 129 S. Ct. 58 (U.S., October 6, 2008), cert denied: The U.S. Supreme Court refused to review of Fourth Circuit decision allowing three former restaurant managers and managerial assistants to proceed with on opt-out class arbitration of their FLSA claims. The arbitrator certified an opt-out class despite the fact that section 16(b) of the FLSA creates an opt-in procedure.

XII. Joint Employers

A. *Salley v. PBS of Central Florida*, 2007 U.S. Dist. LEXIS 91219 (M.D. Fla. December 12, 2007): The U.S. District Court for the Middle District of Florida held that a leasing company was not a "joint employer" under the FLSA. Applying the "economic reality" test, the Court reasoned that the physician that the employee worked for interviewed and hired the Plaintiff; set her pay rate and schedule; managed her day-to-day activities; had the power to terminate; and decided her vacation and sick leave allotments.

B. *Cannon v. Douglas Elliman*, LLC, 2007 U.S. Dist. LEXIS 91139 (S.D.N.Y. December 10, 2007): The U.S. District Court for the Southern District of New York held that plaintiffs, two former sales associates, were not jointly employed by a real estate brokerage and a reason estate development company because of a joint venture between the two. Applying the "economic realities" test, the Court held that the plaintiffs were the employees of the real estate brokerage firm only because that firm hired and fired the workers; supervised and controlled the plaintiffs' work and work schedules; determined the plaintiffs' rate of pay and method of payment; and managed employee records.

XIII. Private Waivers

A. Private settlements of FLSA claims must be approved by the Courts or the Department of Labor.

B. *Progress Energy Inc. v. Taylor, U.S.*, No. 07-539, solicitor general's brief (U.S. May 16, 2008): The Solicitor General advised the U.S. Supreme Court not to review a case involving employee waivers of their rights under the FMLA. In advising the Court so, Clement stated that the FLSA is the "sole exception" to the public policy that favors settlement of employment claims. Indeed, he stated that "the prohibition against private FLSA settlements is based on policy considerations unique to that statute," which "is a broad remedial statute setting the floor for minimum wage and overtime pay and was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers."

XIV. Retaliation/Constructive Discharge

A. *Darveau v. Detecon Inc.*, 515 F.3d 334 (4TH Cir. January 31, 2008): The Fourth Circuit held that an ex-employee for a wireless telecommunications firm, who sued his former employer for overtime wages under the FLSA, may bring an FLSA retaliation claim after his former employer sued him for fraud and breach of contract two weeks after the original suit. The Court reasoned that although the employee could not possibly show that the Company had taken "adverse employment action" because he was not an employee at the time the Company brought suit, he could still bring a retaliation claim because, like under Title VII, he "need only allege that his employer retaliated against him by engaging in an action 'that would have been materially adverse to a reasonable employee'." The Court upheld the dismissal of the underlying FLSA claim, agreeing with the lower court that the Plaintiff was an exempt administrative employee.

B. *Ellis v. Yum! Brands Inc.*, 556 F. Supp. 2d 677 (W.D. Ky. April 28, 2008): The U.S. District Court for the Western District of Kentucky held that an employee, who resigned from his job after he was told that he could either stop demanding overtime or leave the company, could proceed with a constructive discharge claim. The Court reasoned that the threat was "objectively intolerable to a reasonable person."