FAIR LABOR STANDARDS ACT UPDATE (2009/2010)

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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.

Departing from long-standing practice, the Department of Labor ("DOL") has not published its 2009 statistics regarding FLSA collections. In addition, on March 24, 2010, the DOL announced that it will no longer provide detailed opinion letters on specific fact situations under the FLSA. Rather, the DOL plans to have the administrator of the division issue "general" interpretations of the FLSA that apply to all those affected by the provision at issue. The DOL stated that it will now respond to requests for guidance on specific fact situations "by providing references to statues, regulations, interpretations and cases that are relevant to the specific request but without an analysis of the specific facts presented."

Despite these dramatic changes within the DOL, the fact remains that the Wage and Hour Division is still collecting millions in back wages for violations of overtime regulations and exempt status misclassifications. Therefore, it is more important than ever for employers to comply with the Act's regulations.

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 is $7.25/hour.

III. Recent Overtime Settlements/Judgments

1. $105 million paid by Pilgrim's Pride to 798 workers for failure to pay wages for time spend donning and doffing.

2. $105 million paid by Starbucks for improper tip pooling policy.

3. $85 million paid by Wal-Mart to more than 3 million employees and former employees for permitting off-the-clock work, failing to provide required meal and rest breaks, and neglecting to pay overtime.

4. $42 million paid by Staples to approximately 5,000 current and former assistant store managers that were misclassified as exempt.

5. $11.7 million paid by Casey's General Stores, Inc. to settle two class actions alleging the Company failed to pay 7,800 current and former assistant store managers overtime.

6. $2.88 million paid by a financial firm to approximately 1,310 current and former financial consultants/advisors for misclassifying them as exempt employees.

7. $1.6 million paid by a Houston, Texas Manufacturer to 1751 employees for failure to pay for overtime hours.

8. $747,729 paid by QuickTrip Corp. to 3,819 current and former convenience store workers for failing to pay these employees the additional overtime premium due on performance-related bonuses.

9. $517,000 paid by Merrill Lynch to 60 employees for misclassifying them as exempt administrative employees.

10. $3,500 to 80 non-active or retired police officers and 130 hours of vacation time to active police officers paid by the City of Oakland, California to settle a wage and hour suit involving claims for unpaid time and failure to pay overtime.

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*, FLSA2009-4, 3/6/2009: The DOL stated that a city's convention and visitors' **services sales manager** was an exempt administrative employee. The DOL reasoned that the manager selected potential clients and decided what services the city would offer to convention groups. Therefore, the employee's marketing activities were directly related to management or general business operations of the city, and involved the exercise of discretion and judgment on "matters of significant impact on the city."

2. *Wage and Hour Opinion Letter*, FLSA2009-28, 3/6/2009: The DOL stated that **life insurance agents** that made sales and obtained orders for policies were exempt under the outside sales exemption, while agents who serviced the company and its clients were exempt administrative employees. The DOL reasoned that agents who primarily met with customers in their homes or at restaurants to sell policies would qualify for the outside sales exemption. However, agents that provided analysis and advice to the company and its clients were administrative employees.

3. *In Re Novartis Wage and Hour Litigation*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009): Novartis won summary judgment on a class action brought by current and former **pharmaceutical sales representatives**. Novartis argued that the sales reps were exempt from overtime pay under both the administrative and outside sales exemptions. Agreeing with the employer, the court held that the reps were exempt administrative employees because they performed non-manual work, "[their] success in obtaining prescriptions [was] critical to [the defendant's] business, and they exercised discretion and independent judgment by choosing when and how to use materials and by planning their daily call schedules." The court also held that they were exempt outside sales employees because they essentially sold the products to the "distributors," i.e., the physicians; the court could not ignore the reality that without these "distributors," the patients would be unable to buy the product. This case is pending appeal before the Second Circuit. On October 14, 2009, the U.S. Department of Labor filed an amicus brief arguing for a stricter interpretation of both the outside sales and administrative exemptions. In its brief, the DOL urged that the employees be found non-exempt because they neither "make sales" nor exercise sufficient discretion to qualify for either of the exemptions.

4. *Robinson-Smith v. Gov't Employees Ins. Co.,* 590 F.3d 886 (D.C. Cir. Jan. 5, 2010): The U.S. Court of Appeals for the District of Columbia held that auto damage **adjusters** for GEICO are exempt from the overtime provisions of the FLSA per the administrative exemptions. The Court reasoned that the adjusters exercised sufficient discretion and independent judgment due to the fact that they had authority to settle claims for up to $15,000 without supervisory approval.

5. *Smith v. Johnson & Johnson,* 593 F.3d 280 (3rd Cir. 2010): The Court of appeals affirmed summary judgment in favor of the employer, finding that the plaintiff, a **pharmaceutical sales rep**, was an exempt administrative employee. The Court reasoned that the plaintiff's "primary duty" included the "management or general business operations of the employer" because she marketed the company's products. In addition, the court reasoned that the plaintiff exercised discretion and independent judgment because she chose which doctors to visit in her assigned territory, executed "nearly all her duties without direct oversight," determined how to spend her own budget, and was generally considered an "expert" on her territory. The Court did not address the outside sales exemption.

Exemption Not Found:

6. *Iaria v. Metro Fuel Oil Corp.,* 2009 U.S. Dist. LEXIS 6844; 14 Wage & Hour Cas. 2d (BNA) 1435 (E.D.N.Y. Jan. 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.

7. *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2nd Cir. Nov. 20, 2009): The Second Circuit held that **underwriters** tasked with approving loans were not exempt administrative employees. The Court reasoned that the plaintiff's work did not relate to setting "management policies" or to "general business operations," such as human resources or marketing, but, rather, related to "the 'production' of loans – the fundamental service provided by the bank." Therefore, the plaintiff was a non-exempt employee entitled to overtime because he performed "production" work as opposed to "administrative" work.

8. *Desmond v. PNGI Charles Town Gaming LLC*, 564 F.3d 688 (4th Cir. April 30, 2009): The Fourth Circuit held that **racetrack officials** for horse races were not exempt from the overtime requirements of the FLSA. The Court reasoned that even though the officials' duties are mandated by law, the officials served in a "production-side role" rather than in an administrative capacity.

9. *Ruggeri v. Boehringer Ingelheim Pharmaceutical*, 2009 U.S. Dist. LEXIS 44136 (D. Conn. May 26, 2009): The Court held the administrative exemption did not apply to **sales reps** because it was "impossible to say whether the matters over which plaintiffs

had discretion were matters of significance to [defendant.]" The Court also held that the outside sales exemption did not apply because, even though plaintiffs visit doctors and promote pharmaceuticals, federal regulations actually prevent them from selling pharmaceuticals.

10. *Reiseck v. Universal Commc'ns of Miami, Inc.*, 2010 U.S. App. LEXIS 490 (2nd Cir. Jan. 11, 2010): The Second Circuit held that the **regional director of advertising** for Elite Traveler was not an exempt administrative employee. The Court reasoned that "an employee making specific sales to individual customers is a salesperson for the purposes of the FLSA, while an employee encouraging an increase in sales generally among all customers is an administrative employee for the purposes of the FLSA."

11. *Administrator's Interpretation,* 2010-1, 3/24/10: In the DOL's first interpretation released under its new policy of providing "general" interpretations of law through the administrator, Deputy Administrator Nancy J. Leppink stated that employees performing the typical duties of a mortgage loan officer do not qualify as exempt administrative employees under the FLSA.

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 Not Found:

Johnson v. Big Lot Stores, Inc., 604 F. Supp. 2d 903 (E.D. La. 2009): The U.S. District Court for the Eastern District of Louisiana held that defendant improperly classified two **assistant store managers** as exempt executives. The Court reasoned that the assistant managers' primary duty was moving stock from the backroom to the sales floor; and not performing managerial tasks.

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 Not Found:

1. *Wage and Hour Opinion Letter*, FLSA2009-6, 1/14/09: The DOL stated that pilots do not qualify for the learned professional exemption because aviation is not a "field of science or learning" and the knowledge required to be a **pilot** is not "customarily acquired by a prolonged course of specialized intellectual instruction." However, the DOL stated that it takes a position of non-enforcement regarding pilots and co-pilots who hold an FAA Airline Transport Certificate or Commercial Certificate, and who receive compensation of a salary or fee basis at a rate of at least $455 per week and who engage in the following activities: 1) Flying of aircraft as business or company pilots; 2) aerial mineral exploration; 3) aerial mapping and photography; 4) aerial forest fire protection; 5) aerial meteorological research; 6) test flights of aircraft in connection with engineering, production or sale; 7) aerial logging, fire suppression, forest fertilizing, forest seeding, forest spraying and related activities involving precision flying over mountainous forest areas; 8) flying activities in connection with transmission line construction, transportation of completed structures with precision setting of footings, concrete pouring or 9) aerial construction of sections of oil drilling rigs and pipe-lines, and ski-lift and fire outlook constructions.

2. *Young v. Cooper Cameron Corp.*, 586 F.3d 201 (2nd Cir. Nov. 12, 2009): The Second Circuit held that a **product design specialist** was not an exempt professional employee under the FLSA. The Court reasoned that although the employee performed duties requiring knowledge of an advanced type, he did not have a college degree, and, therefore could not qualify for the exemption. The Court stated: "If advanced and specialized education is not customarily required, the exemption does not apply, regardless of the employees duties."

3. *Pignataro v. Port Auth. Of New York and New Jersey*, 593 F.3d 265 (3rd Cir. Jan. 27, 2010): The Third Circuit held that helicopter **pilots** were not exempt professionals under the FLSA. The Court reasoned that "[w]hile the Port Authority is correct that helicopter pilots have 'specialized knowledge' and 'unique skills,' this is not sufficient under the learned professional exemption because [the] pilots' knowledge and skills were acquired through experience and supervised training as opposed to intellectual, academic instruction."

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*, FLSA2009-14, 3/6/09: The DOL stated that an employer's proposal to meet its short-term business needs by cutting employee hours and salaries would not comply with the FLSA. The DOL noted that the employer intended to offer employees voluntary time off on a first-come, first-served basis, during which time the employees would not be paid their normal salary, but could use their accrued PTO time, for which they would receive payment. If the employer did not have enough volunteers, it would select employees for mandatory time off. During this time, the employee could chose to use PTO time, but his or her salary would be reduced if he or she did not have PTO or did not use the time. The DOL reasoned that this arrangement violated the FLSA because "An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business."

2. *Wage and Hour Opinion Letter*, FLSA2009-18, 3/6/09: The DOL stated that a health care provider could not require salaried employees who are FLSA-exempt to stay home or leave work early during periods when the employer's patient census dropped, even if they received an amount equal to their usual salaries if they had a positive PTO balance. The DOL reasoned that salary deductions "due to day-to-day or week-to-week determinations of the operating requirements of the business . . . are inconsistent with the guaranteed salary basis of payment required by the regulations."

3. *Wage and Hour Opinion Letter*, FLSA2009-2, 3/6/09: The DOL stated that an employer may require employees who are exempt from the overtime provisions of the FLSA to use their accrued vacation time during a temporary plant shutdown without affecting their exempt status or violating the FLSA. The DOL reasoned that an employer may require the use of vacation time by exempt employees who are paid on a salary basis as long as those employees receive vacation pay or some other payment that equals their guaranteed salaries.

4. *Baden-Winterwood v. Life Time Fitness Inc.*, 566 F.3d 618(6th Cir. May 19, 2009): Life Time Fitness, Inc. could not claim that its white collar employees were exempt when it deducted money from their base compensation to recover bonuses already remitted. The Sixth Circuit reasoned that because the pay deductions were over a two-month period in 2005, the white collar employees of Life Time Fitness Inc. were not paid on a "salary basis" and therefore were entitled to overtime pay during three of their pay periods.

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 53 hours in a 7-day period or 212 hours in a 28-day period. See 29 C.F.R. § 553.230(c).

Wage and Hour Opinion Letter, FLSA2009-19, 1/16/2009: The DOL states that fire fighters employed by the Transportation Authority were employed by a public agency and thus entitled to overtime under 29 C.F.R. § 553.230(c). The DOL further stated that the TA could exclude payments for vacation buy-backs from the regular rate of pay, but must include stipends for nonuse of sick leave in the regular rate of pay.

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. *Schaefer-LaRose v. Eli Lilly and Co.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009): The Court granted summary judgment to Eli Lilly on claims for unpaid overtime brought by its **reps** and held that the reps were exempt under both the administrative and outside sales exemptions. The Court reasoned that the reps performed non-manual work and that their primary duties were marketing and promoting drugs to physicians, or in other words, "administrative duties." The Court also reasoned that the reps were exempt outside sales employees because they were hired "not simply to educate and inform physicians about Lilly pharmaceuticals, but to generate sales of those products."

2. *Christopher v. SmithKline Beecham*, 2009 U.S. Dist. LEXIS 108992 (D. Ariz. Nov. 20, 2009): The Court held that **reps** are exempt outside sales employees. The Court reasoned that the sales reps were "the functional equivalent of an outside salesperson" because the goal of their calls on physicians was to obtain a commitment to prescribe the assigned product. The Court stated that "to hold otherwise is to ignore reality in favor of form over substance."

3. *In Re Novartis Wage and Hour Litigation*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009): Novartis won summary judgment on a class action brought by current and former **pharmaceutical sales representatives**. Novartis argued that the sales reps were exempt from overtime pay under both the administrative and outside sales exemptions.

Agreeing with the employer, the court held that the reps were exempt administrative employees because they performed non-manual work, "[their] success in obtaining prescriptions [was] critical to [the defendant's] business, and they exercised discretion and independent judgment by choosing when and how to use materials and by planning their daily call schedules." The court also held that they were exempt outside sales employees because they essentially sold the products to the "distributors," i.e., the physicians; the court could not ignore the reality that without these "distributors," the patients would be unable to buy the product. This case is pending appeal before the Second Circuit. On October 14, 2009, the U.S. Department of Labor filed an amicus brief arguing for a stricter interpretation of both the outside sales and administrative exemptions. In its brief, the DOL urged that the employees be found non-exempt because they neither "make sales" nor exercise sufficient discretion to qualify for either of the exemptions.

4. *Delgado v. Ortho-McNeil, Inc.,* 2009 U.S. Dist. LEXIS 28810 (C.D. Cal. Feb. 6, 2009): The U.S. District Court for the Central District of California held that **pharmaceutical sales reps** were outsides sales employees under the FLSA. The Court reasoned that the reps made "sales" within the meaning of 29 C.F.R. 504.501(b) because the physicians' prescriptions constituted the "other disposition" language written in the regulation.

Exemption Not Found:

5. *Tracey v. NVR, Inc.*, 667 F. Supp. 2d 244 (W.D.N.Y. Nov. 5, 2009): The Court held that a former **sales and marketing representative** for a home construction company was not an outside sales employee under the FLSA. The Court reasoned that the employee actually worked from assigned model homes that were located on land owned by the defendant, and, therefore, did not "customarily and regularly engage" in work outside of defendant's place of business.

6. *Ruggeri v. Boehringer Ingelheim Pharmaceutical*, 2009 U.S. Dist. LEXIS 44136 (D. Conn. May 26, 2009): The Court held the administrative exemption did not apply to **sales reps** because it was "impossible to say whether the matters over which plaintiffs had discretion were matters of significance to [defendant.]" The Court also held that the outside sales exemption did not apply because, even though plaintiffs visit doctors and promote pharmaceuticals, federal regulations actually prevent them from selling pharmaceuticals.

7. *Kuzinski v. Schering Corp*., 604 F. Supp. 2d 385 (D. Conn. 2009): The United States District Court for Connecticut held that **sales reps** were not exempt under the outside sales exemption. The Court reasoned that plaintiffs did not make "sales." Instead, plaintiffs traveled to doctors' offices to promote the defendant's products and persuade the doctors to prescribe those products to their patients. The Court noted that the reps were actually prohibited from making sales by law.

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. *Sedrick v. All Pro Logistics LLC*, 2009 U.S. Dist. LEXIS 48051(N.D. Ill. June 8, 2009): The United States District Court for the Northern District of Illinois held that a truck driver that delivered creamer from a manufacturing facility to a warehouse – both in Illinois – was not exempt from the overtime provisions of the FLSA. The Court reasoned that there was no evidence that the manufacturer intended to ship its product in interstate commerce as required by the motor carrier exemption.

2. *Mena v. McArthur Dairy LLC*, 2009 U.S. App. LEXIS 21142 (11th Cir. Sept. 22, 2009) (unpublished): A delivery driver for a dairy distribution company that only made Florida deliveries was exempt under the motor carrier exemption. The Court reasoned that although the driver only made deliveries in Florida, the delivers were part of a "continuous stream of interstate travel." Specifically, the product was manufactured in other states, pre-packaged and delivered unchanged to the customer. Therefore, the distributor was just a "temporary storage hub."

H. Amusement, Recreational and Similar Employees (29 U.S.C. 213(a) (3))

1. *Wage and Hour Opinion Letter*, FLSA2009-5, 1/14/2009: The DOL stated that lifeguards who are employed by a town to protect swimmers at a local public beach for less than seven months out of the year were exempt under the seasonal amusement or recreational exemption, despite the fact that the entire municipal government did not qualify for the exemption.

2. *Wage and Hour Opinion Letter*, FLSA2009-11, 1/15/2009: The DOL stated that a concessionaire providing catering services to people that used a recreational establishment's facilities was not itself a recreational establishment within the meaning of the FLSA. The DOL reasoned that the concessionaire was separate and distinct from the recreational facility because it maintained separate records and separate employees. Therefore, the concessionaire could not claim the exemption.

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;

2. 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;

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

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

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

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

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

8. 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. *Wage and Hour Opinion Letter*, FLSA2009-13, 3/6/09: The DOL stated time spent by technicians in web-based courses that are considered prerequisites for in-house training is compensable. The DOL reasoned that each of the four web-based programs would take about 10 hours to complete. In addition, citing § 785.27, the DOL said that the training met the requirements of being voluntary and outside of working hours, but the training was directly related to the technicians' jobs. Indeed, the training directly related to the employer's products. Therefore, it was compensable.

2. *Perez v. Mountainaire Farms, Inc.*, 610 F. Supp. 2d 499 (D. Md. April 17, 2009): The United States District Court for Maryland held that time spent donning and doffing personal protective equipment before and after a meal break was compensable. The Court reasoned that: 1) the donning and doffing was done for the employer's benefit; and 2) the donning and doffing was required by the employer.

3. *Andrako v. United States Steel Corp.*, 632 F. Supp. 2d 398 (W.D. Pa. June 22, 2009): The federal district court for the western district of Pennsylvania held that production and maintenance employees who spent time donning and doffing protective clothing were entitled to pay for the time spent walking to and from the locations where they change in and out of protective clothing. The Court declined to hold that the time spent actually donning and doffing the protective clothing was hours worked, however, because of the collective bargaining agreements between the company and the United Steelworkers that addressed this issue.

Time Found Not Compensable:

4. *Dager v. City of Phoenix*, 646 F. Supp. 2d 1085 (D. Ariz. Jan. 21, 2009): The U.S. District Court for Arizona held that time spent by police officers donning and doffing police uniforms and protective gear is not compensable. The Court reasoned that the activities were preliminary and postliminary to the principle activity of police work. The Court noted that the police department had no policy against changing at home, and, indeed, several officers testified that they don and doff, at least partially, at home.

5. *Wage and Hour Opinion Letter*, FLSA2009-15, 3/6/09: The DOL stated that time spent by public employees in training programs intended to help the employees become more proficient at their jobs was compensable. The training was conducted during normal working hours. In addition, the instructor informed the employees that they were required to read or study selected material after hours, before the next class. The DOL reasoned that "[w]hen completion of homework is a requirement of a compensable training class . . . the time spent completing [the] assignments for such training is compensable."

6. *Wage and Hour Opinion Letter*, FLSA2009-17, 3/6/09: The DOL stated that "on call" time for emergency service workers of a private water company was not compensable time under the FLSA. The DOL reasoned that the "on call" time occurred only once every eight weeks and was not so restrictive as to constitute "hours worked" under the FLSA.

7. *Wage and Hour Opinion Letter*, FLSA2009-1, 3/6/09: The DOL stated that time spent by child care employees in "in-service training" or continuing education programs that allow the employees to maintain their state certifications is not compensable time. The DOL noted that under 29 C.F.R. § 785.27, an employer does not count training time as compensable time if 1) the training is conducted outside regular working hours; 2) attendance is voluntary; 3) training is not directly related to the employee's job; and 4) the employee does not perform any productive work during the training period. The DOL reasoned that the time was not compensable because it satisfied these four elements. The DOL pointed out that: "In the child care industry, we regard child care training to be for the benefit of the employees when it provides instruction of general applicability that enables an individual to gain or continue employment with any child care service provider."

8. *Rutti v. Lojack Corp.*, 2010 U.S. App. LEXIS 4278 (9th Cir. Aug. 21, 2009): The Ninth Circuit held that time spent by a LoJack technician commuting in a company vehicle and preliminary activities before his first job of the day were not compensable under the FLSA. Time spent for postliminary activities performed at home after he returned for the day was compensable, however. The Court reasoned that the preliminary activities, including prioritizing job assignments and mapping routes, were related to his commute and were not integral to his principal activities, and took a de minimis amount of time. However, the time spent on postliminary activities, including transmitting data to the company, was integral to his principal activities and took more than a de minimis amount of time.

9. *Kuebel v. Black & Decker, Inc.*, 2009 U.S. Dist. LEXIS 43846 (W.D.N.Y. 2009): The U.S. District Court for the Western District of New York held that time spent by a retail specialist doing work-related activities at home prior to and after the last compensable work activity was not compensable. The Court reasoned that these activities – responding to e-mails, receiving directives, printing and reviewing reports and synchronizing phones – were not principal activities. The Court also found that the Company's policy of paying home based employees for all but one hour of travel time was acceptable under 29 CFR 785.35.

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*, FLSA2009-3NA, 3/6/09: A gas station operator's plan to pay its non-exempt employees a fixed salary did not comply with the FLSA. 29 U.S.C. § 207(f) allows employers to pay non-exempt employees, whose duties require them to work irregular hours, a weekly salary for no more than 60 hours a week, at a regular rate of pay that is no less than the minimum wage and includes overtime. The gas station operator's plan did not meet these requirements because: 1) the employer failed to prove that the employees actually worked irregular hours; and 2) the FLSA only allows a weekly guarantee for no more than 60 hours of work a week and the operator planned to pay its tow truck drivers based on a 70 hour work week.

2. *Wage and Hour Opinion Letter*, FLSA2009-4NA, 3/6/09: The DOL stated that a residential contractor that pays workers a flat sum regardless of hours worked is violating the FLSA. The DOL reasoned that such a plan results in employees who work between 40 and 55 hours per week receiving the same fixed amount. Therefore, the employer is using a "job rate" that fails to comply with the FLSA.

3. *Wage and Hour Opinion Letter*, FLSA2009-21, 3/6/09: The DOL stated that a nondiscretionary safety bonus must be factored into a calculation of overtime pay.

4. *Wage and Hour Opinion Letter,* FLSA2009-3, 3/6/09: The DOL stated that an employer that misclassified employees as exempt can calculate back pay by determining a regular rate of pay based on the biweekly salary the employees received. The DOL noted that under the fluctuating workweek method of payment, an employer may pay non exempt employees whose hours vary on a weekly basis at a fixed salary if the payment compensates the employee at a rate above the minimum wage and at least one and one-half times the statutory minimum for overtime hours. Therefore, the employer could use this method; because the number of hours worked from week to week will vary, the regular rate of pay for the employee may vary from one week to the next.

5. *Russell et al. v. Wells Fargo and Co. and Wells Fargo Bank, N.A.,* 2009 U.S. Dist. LEXIS 107044; 158 Lab. Cas. (CCH) P35,667; 15 Wage & Hour Cas. 2d (BNA) 1053 (N.D. Cal. Nov. 17, 2009): The federal district court for the Northern District of California held that the fluctuating work week method of calculating the regular rate of pay cannot be used to calculate overtime pay retroactively in a misclassification case. The Court noted that "section 778.114 contains legal prerequisites, which employers must first satisfy to use the discounted overtime rate available through the FWW method. These prerequisites include (1) a clear mutual understanding that a fixed salary will be paid for fluctuating hours, apart from overtime premiums; and (2) the contemporaneous payment of overtime premiums." The Court reasoned that "[w]hen an employee is treated as exempt from being paid for overtime work, there is neither a clear mutual understanding that overtime will be paid nor a contemporaneous payment of overtime. Thus, when an employee is erroneously classified as exempt and illegally not being paid overtime, neither of these legal prerequisites for use the FWW method is satisfied." The Court also stated that it was "unpersuaded" by the DOL's Wage and Opinion Letter2009-3 (cited above). The Court reasoned that "[t]he opinion letter does not explain why the FWW method should be applied retroactively, despite the plan language of the DOL's long-standing interpretation of the FLSA contained in § 788.14."

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*, FLSA2009-12, 1/15/2009: Employees known as "barbacks" – a bartender's assistant – qualify as tipped employees for the minimum wage tip credit 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.

C. *In re Starbucks Employee Gratuity Litig.*, 2009 U.S. Dist. LEXIS 117392 (S.D.N.Y. Dec. 16, 2009): The U.S District Court for the Southern District of New York dismissed a lawsuit brought by Starbucks baristas to challenge the company's tip-sharing policy, which included tip-sharing with shift supervisors. The Court reasoned that the shift supervisors did not have enough supervisory authority to be considered agents of the Company.

D. *Cumbie v. Woody Woo Inc.*, 2010 U.S. App. LEXIS 3686 (9th Cir. Feb. 23, 2010): On an issue of first impression for the Ninth Circuit, the Ninth Circuit held that a restaurant did not violate the FLSA by requiring its food servers to pool and share tips with kitchen employees who are not customarily tipped by the customers. The Court noted that the FLSA allows an employer to pay tipped employees a cash wage of $2.13/hour and make up the difference between that amount and the minimum wage with a "tip credit." Section 203 (m) conditions the employer's use of the tip credit on the employee's retaining all of the tips he or she receives. In addition, this section states that this condition "shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips." The Court reasoned that the tip-pooling with the kitchen employees, who are not customarily tipped by the customers, was permissible because the restaurant did not use the tip credit. The restaurant paid all its employees the statutory minimum wage in addition to their share of the pooled tips. The Court stated: "The FLSA does not restrict tip-pooling when no tip credit is taken."

IX. Compensatory Time

A. 29 U.S.C. 207(o) provides that a government employee who requests the use of accrued comp time "shall be permitted . . . to use such time within a reasonable period after making the request of the use of the compensatory time does not unduly disrupt the operations of the public agency."

B. *Heitmann v. Chicago*, 560 F.3d 642 (7th Cir. March 25, 2009): The Seventh Circuit held that Chicago violated the FLSA by offering police officers compensatory time credits in lieu of overtime, but then not granting them compensatory leave within a reasonable time. The Court reasoned that an employer must approve a leave request from an employee unless it would impose an unreasonable burden on the ability to provide public services; a "mere inconvenience" is insufficient.

X. Collective Actions

A. The "Class Remedy" Under the FLSA

Rule 2/3opt-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. *In re wells Fargo Home Mortgage Overtime Pay Litig.*, 2010 U.S. Dist. LEXIS 3132 (9th Cir. July 7, 2009): The Ninth Circuit held that the U.S. District Court for the Northern District of California abused its discretion in certifying an overtime pay class action on behalf of approximately 5,000 current and former home mortgage consultants. The Ninth Circuit reasoned that the lower court's reliance almost exclusively on Wells Fargo's policy of treating mortgage consultants as exempt was misplaced. The Court noted that individual facts "detailing the job duties and responsibilities of employees carry great weight for certification purposes."

2. *Vinole v. Countrywide Home Loans Inc.*, 571 F.3d 935 (9th Cir. July 7, 2009): The Ninth Circuit affirmed a lower court decision denying class certification for an overtime suit brought by two "external home loan consultants" on Countrywide's motion to deny class certification. The Court reasoned that there was nothing in the plain language of Rule 239(c)(1)(A) of the Federal Rules of Civil Procedure that gave plaintiffs the exclusive right to raise class certification or prohibited defendants from raising the issue. In addition, applying its holding in *In reWells Fargo Home Mortgage Overtime Litigation*, the Court found that Countrywide's policy of exempting external home loan consultants from overtime pay was an insufficient basis on which to base class certification.

3. *Bamgbose v. Delta-T Group In.,* 2010 U.S. Dist. LEXIS 10681 (E.D. Pa. Feb. 8, 2010): The federal district court for the Eastern District of Pennsylvania refused to certify a collective action of health care workers suing a temporary staffing agency. The Court reasoned that the "[e]valuation of whether the healthcare workers are employees or independent contractors, based on the

current record, would not be possible on a collective basis because it would require the Court to examine the healthcare workers' distinct relationships with Delta-T and its various clients."

XI. Litigation

A. *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241 (11th Cir. March 3, 2009): The Eleventh Circuit held that a federal trial court acted within its discretion in refusing to award attorneys' fees or costs to a FLSA plaintiff who obtained a judgment against her former employer. The trial court stated: "[T]here are 'special circumstances' that can render such an award of attorney's fees unjust. . . . . So called nuisance settlements represent such a circumstance. Put another way, there are some cases in which a reasonable fee is no fee. Upon hearing oral argument of the parties, the Court concludes that this case is such a circumstance."

B. *McGrath v. Central masonry Corp.*, 276 Fed. Appx. 797; 2008 U.S. App. LEXIS 9422; 155 Lab. Cas. (CCH) P35,432 (D. Colo. July 8, 2009): The United States District Court for Colorado held that a construction company was liable for liquidated damages under the FLSA. The Court reasoned that the jury found that the company's failure to pay overtime was willful due to the fact that they found the Plaintiff was entitled to the benefit of the three-year statute of limitations. Therefore, on plaintiff's motion for liquidated damages, the Court was precluded from reaching a contrary conclusion.

C. *Harris et al. v. Debt Settlement of America, LLC, et al.*, 2009 Mich. App. LEXIS 2543 (Mich. Ct. App. Dec. 10, 2009): The Court of Appeals held that the trial court did not abuse its discretion by failing to award plaintiffs liquidated damages required by 29 U.S.C. § 216(b) upon defendants' default. The Court reasoned that defendants presented sufficient evidence at the damages hearing to sustain the civil burden of proof that they did not violate the FLSA with respect to delivering paychecks late. Therefore, defendants acted in "good faith" with "reasonable grounds for believe" that their actions did not violate the FLSA.

XII. Coverage

A. *Wage and Hour Opinion Letter*, FLSA2009-20, 1/16/2009: A nonprofit institution's contract with an employee leasing company to provide employees does not make the nonprofit responsible for compliance with the minimum wage and overtime obligations of the FLSA.

B. *Lindsley v. BellSouth Telecomm'ns Inc.*, 2009 U.S. Dist. LEXIS 18482 (E.D. La. Feb. 21, 2009): The U.S. District Court for the Eastern District of Louisiana held that a telephone repair worker who helped repair New Orleans's telephone network after Hurricane Katrina was an independent contractor. The Court reasoned that the plaintiff supplied his own equipment; performed his job without supervision; and paid self-employment taxes to the IRS.

C. *Gayle v. Harry's Nurses Registry, Inc.*, 2009 U.S. Dist. LEXIS 17768 (E.D.N.Y. Mar. 9, 2009): The U.S. District Court for the Eastern District of New York held that a registered nurse was an employee of a temporary healthcare referral service, and, therefore, owed overtime. The Court applied the "economic reality" test, finding that the defendants: 1) Set plaintiff's rate of pay; 2) Could end plaintiff's association with defendants unilaterally; 3) Exercised control over plaintiff's nursing activity; 4) Reviewed plaintiff's progress notes; 5) Supervised plaintiff in the field on a monthly basis; and 6) prohibited plaintiff from assigning her shifts to others.

D. *Vondriska v. Paychex Business Solutions, Inc.*, 2009 U.S. Dist. LEXIS 19775 (M.D. Fla. March 11, 2009) vacated by, remanded by *Vondriska v. Paychex Business Solutions, Inc.*, 2010 U.S. App. LEXIS 2507 (11th Cir. Feb. 4, 2010): The U.S. District Court for the Middle District of Florida held that plaintiffs, workers at a company that went bankrupt, were not employees of the employee leasing company that provided the former employer with payroll, employee benefits and human resources services. The Court reasoned that the employee leasing company was not a "joint employer" because: 1) It did not control plaintiffs day-to-day activities; 2) plaintiffs would have remained employed with the bankrupt employer if that employer had cancelled its contract with the employee leasing company; 3) It was not involved in hiring or firing; 4) Precedent within the Eleventh Circuit dictated that the employee leasing company was not a "joint employer;" and 5) It never actually exercised control over plaintiff's employment.

E. *Anfinson v. FedEx Ground Package Sys. Inc.*, No. 04-2-39981-5, jury verdict (March 31, 2009): A Washington Superior Court jury determined that an individual plaintiff and a class of 320 FedEx Ground delivery drivers were independent contractors, not employees covered by the overtime requirements of the state law.

F. *Lin v. Great Rose Fashion Inc.*, 2009 U.S. Dist. LEXIS 46726 (E.D.N.Y. June 2, 2009): The U.S. district court for the Eastern District of New York held that garment workers were employees rather than independent contractors. The Court reasoned that the workers were "interviewed hired, fired, assigned work and hours and supervised and managed" by defendant. In addition, the defendant determined rate and method of payment and held the records showing the quantity of the piecework performed by the workers.

G. *Jacobs v. N.Y. Foundling Hosp.*, 577 F.3d 93 (2nd Cir. Aug. 11, 2009): The Second Circuit held that even though defendant provided social services to children and families under contracts with a city government agency, the private institution was not an "enterprise" covered by the FLSA. The Court reasoned that the FLSA's definition of a "covered enterprise" does not extend to a private nonprofit organization that is an independent contractor for a public agency.

H. *Estate of Suskovich v. Anthem Health Plans of Virginia*, 553 F.3d 559 (7th Cir. 2009): The Seventh Circuit held that a computer programmer was an independent contractor and not owed overtime under the FLSA. The Court applied the Restatement (Second) of Agency ten-factor test for employment status instead of the "economic realities" test. The Court reasoned that the "intent" of the parties was of particular importance.

Therefore, things such as the setting of work schedules, the providing of facilities and equipment, and the assignment of projects were insufficient to establish an employment relationship. The Court relied heavily on the fact that the plaintiff called himself a "sole proprietor" on his tax returns.

XIII. Retaliation

A. *Ramos v. Hoyle*, 2009 U.S. Dist. LEXIS 61062 (S.D. Fla. July 16, 2009): The U.S. District Court for the Southern District of Florida held that an employer who answered a domestic housekeeper's lawsuit for minimum wage violations with "baseless" counterclaims accusing the former employee of child abuse engaged in retaliation under the FLSA.

B. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 2010 U.S. LEXIS 2654 (U.S. March 22, 2010): The U.S. Supreme Court has agreed to consider whether the anti-retaliation provision of the FLSA covers an employee who made oral complaints to supervisors that the location of time clocks prevented employees from being paid for time spent donning and doffing required protective gear.