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HOT TOPICS IN WAGE AND HOUR LAW

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I. INTRODUCTION

The 21st century has brought increased attention to the Fair Labor Standards Act ("FLSA"), the 1938 federal statute that governs overtime, minimum wages and child labor in the public and private sectors. With the advent of the "virtual workplace," telecommuting by employees, and flexible scheduling arrangements, the FLSA has come under greater scrutiny by the practicing bar. Through 2008, the FLSA remains the most lucrative statute for the Department of Labor's Wage and Hour Division, which recovered $140.2 million in minimum wage and overtime payments on behalf of more than 197,000 employees. In addition, the agency concluded over 28,000 compliance actions resulting in more than $9.9 million in civil penalties.

Perhaps the most significant development has been felt in the rise of "collective actions" by groups of aggrieved workers seeking seven-figure damage awards. In the last several years, employers have agreed to huge settlements based on overtime claims based on alleged misclassification and "off-the-clock" work. Although each individual's claim for unpaid overtime and/or minimum wages is generally small, when plaintiffs join together in nationwide class actions, the resulting damages (and attorneys' fees) can be enormous. In 2008, Wal-Mart alone settled cases worth more than $700 million.

This paper focuses almost exclusively on federal legislation and litigation. However, this limited scope is not meant to downplay the importance of state law issues, but only recognize that a proper review of state law wage and hour developments would require a fifty-state survey and be a comprehensive paper onto itself. Certain state cases are mentioned throughout, but these citations do not represent an exhaustive review. State-level litigation can in some cases prove more accommodating of wage and hour cases, and as companies such as Wal-Mart and Starbucks continue to learn, result in very expensive verdicts and settlements.

II. FLSA BASICS

The FLSA establishes minimum wage, overtime pay, record-keeping and child labor standards for full-time and part-time workers in the private and public sectors. For every hour worked in excess of forty hours in a workweek, an employer must pay the employee at least one and one-half times her regular rate of pay.

While the FLSA sets the minimum wage and overtime pay standards, it does *not* require:

(1) vacation, holiday, severance or sick pay;
(2) meal or rest periods;
(3) premium pay for weekend or holiday work;
(4) pay raises or fringe benefits;
(5) a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees; or
(6) limitations on the number of hours in a day or days in a week an employee may be required to work, including overtime hours (if the employee is at least 16 years old).

The overtime and minimum wage requirements of the FLSA apply only to "employees." 29 U.S.C. §§ 206, 207(a)(1). To determine whether an individual is an employee under the FLSA, courts usually focus on the economic reality of the relationship. Courts look to whether the individual is "economically dependent on the business to which he renders service ... or is, as a matter of economic fact, in business for himself." *Johnson v. Unified Gov't. of Wyandotte County/Kansas City, KS*, 371 F.3d 723, 729 (10th Cir. 2004).

In making such a determination, courts generally consider the following six factors:

1) The degree of the alleged employer's right to control the manner in which the work is to be performed;
2) The alleged employee's opportunity for profit or loss depending upon his or her managerial skill;
3) Whether the alleged employee provides the equipment or materials required for his or her task or whether he or she employs helpers;
4) The degree of permanence of the working relationship;
5) Whether the service rendered requires a special skill; and
6) Whether the service is an integral part of the employer's business.

Rutherford Foods Corp. v. McComb, 331 U.S. 722 (1947); *Donovan v. DialAmerica Mktg., Inc.,* 757 F.2d 1376 (3d Cir. 1985); *Cleveland v. City of Elmendorf, Texas*, 388 F.3d 522 (5th Cir. 2004) (holding that officers known as "non-paid regulars" were "volunteers" under the FLSA, not "employees," even though by offering their services to the city they were allowed to maintain their commissions). As with all issues under the FLSA, the labels given to the relationship by the parties are given little weight by the courts. *Zavala v. Wal-Mart Stores*, 393 F. Supp. 2d 295 (D. N.J. 2005) (employees' undocumented status does not preclude relief under the FLSA).[1] Similarly, a prisoner doing work in or for the prison is not an "employee" under the FLSA. *Loving v. Johnson*, 455 F.3d 562 (5th Cir. 2006). Even where an individual does not work directly for the company paying his salary, such as a nurse temporarily assigned to a hospital by an employment agency, the agency is still responsible for paying full overtime rates to the employee, including situations where a nurse violates the overtime "pre-approval" policy held by the agency. *Chao v. Gotham Registry Inc*., 514 F.3d 280 (2nd Cir. 2008); *see also Torres v. Gristede's Operating Corp.*, 2008 WL 4054417 (S.D.N.Y. Aug. 28, 2008).

III. THE "WHITE-COLLAR" EXEMPTIONS

On August 27, 2004, the Department of Labor ("DOL") implemented sweeping changes to the Regulations governing the "white collar" overtime exemptions under the FLSA. The legal implications of these changes have yet to fully manifest themselves and are especially tricky in situations where the employer's actions span a time period both before and after August 27, 2004.

[1] The consequences of misclassification can be substantial. In December, 2008, FedEx settled a decade-long suit with more than 200 drivers who had been classified as independent contractors. While FedEx admitted no wrongdoing, it agreed to pay in the neighborhood of $27 million. With the average payout per driver at around $70,000, over $12 million in settlement funds were allocated to attorneys' fees and various costs.

Under the New Regulations, and as a general matter, the FLSA requires that every employee who works more than 40 hours in a workweek be compensated at a rate of one and one-half times his regular rate. 29 U.S.C. § 207(a)(1). However, executive, administrative, and professional employees are exempt from the overtime provisions of the FLSA. 29 U.S.C. § 213(a)(1). To qualify as an exempt employee, the employee must meet both a "duties test" and a "salary-basis test." In general, to qualify for the exemptions an employer must show:

1) The employee's duties fit the FLSA's test for the exemption; and

2) The employee is paid at least $455 per week on a salary basis.

The Regulations require that, even if an employee is adequately salaried, they still may not be exempt if their duties and responsibilities do not correspond with the tests established by the DOL's regulations. The burden falls upon the employer to prove that an employee is exempt. *Renfro v. Ind. Mich. Power Co.*, 370 F.3d 512 (6th Cir. 2004) (the court of appeals narrowly construed the FLSA's administrative exemption against the employer, placing on the employer the burden of proving that the exemption applies); *McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997 (8th Cir. 2003) (employer has burden to prove employee is exempt from overtime compensation under FLSA); *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150 (11th Cir. 2008) (exemptions to the FLSA's minimum wage and maximum hour requirements are to be construed narrowly, and the employer shoulders the burden of establishing that it is entitled to an exemption). Courts narrowly construe exemptions against the employer. *Auer v. Robbins*, 519 U.S. 452 (1997); *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496 (6th Cir. 2007) (FLSA overtime exemptions are to be narrowly construed against the employers seeking to assert them).

A common violation occurs when employers treat employees as exempt based upon their job titles. *Cash v. Cycle Craft Co., Inc.*, 482 F. Supp. 2d 133 (D. Mass. 2007) (job title of employee is not enough to satisfy FLSA exemption; instead, analysis focuses on whether employee meets salary and primary duty requirements of exemption). Employers frequently attempt to claim an exemption for employees who hold inflated titles but whose duties do not meet the DOL's regulatory tests. The Regulations organize general provisions under Section 541 (the "white collar exemptions") under the heading of Subpart A, which contains an admonition to employers: "a job title alone is insufficient to establish the exempt status of an employee." Reg. § 541.2.[2] This is consistent with existing FLSA case law. *See Astor v. United States*, 79 Fed. Cl. 303 (Fed. Cl. 2007).

[2] The Regulations are codified at 29 C.F.R. Part 541. For ease of reference here, we cite the Regulations as "Reg. § 541.__."

A. THE SALARY TEST

1. COMPENSATION REQUIREMENTS

The salary basis test appears in subpart G of the federal regulations. The $455 per week minimum requirement for exemptions is noted above. The remaining sections of subpart G are discussed below.

a. Highly Compensated Employees

An employee paid more than $100,000 per year who performs office or non-manual work is exempt from overtime premiums if he or she has one identifiable executive, administrative, or professional duty that he customarily and regularly performs. Reg. § 541.601.

In other words, if an employee qualifies as a highly compensated employee, the employee needs to meet only one part of the corresponding standardized duties test to qualify for the exemption. To discern whether an employee meets the $100,000 threshold, the courts will consider base salary, commissions, non-discretionary bonuses, and other non-discretionary compensation, even if not paid on a monthly basis. Additionally, if a particular employee's salary would not otherwise meet the $100,000 threshold by the end of the year, the employer could make a payment to the employee within one month of year-end that would bring that employee's total compensation above $100,000. Reg. § 541.601(b)(2). The total annual compensation must include at least $455 per week paid on a salary or fee basis. Reg. § 541.601(b)(1).

Highly compensated employees must also meet a duties test. The employee must "customarily and regularly" perform one or more exempt duties, as set for executive, administrative and professional employees in Section 541. The DOL uses this duties test because the FLSA does not allow a "salary only" test for an exemption. *See Darveau v. Detecon, Inc*., 515 F.3d 334 (4th Cir. 2008) ($150,000 salary not dispositive in finding plaintiff exempt, court required examination of other factors).

b. Salary Basis

An employee is paid on a "salary basis" where, on a weekly or less frequent basis, she receives a predetermined amount of pay, which is not subject to reduction regardless of the quality or quantity of work. Reg. § 541.602; *Cash v. Cycle Craft Co., Inc.*, 508 F.3d 680 (1st Cir. 2007) (employee fit within FLSA's overtime exemption based on his salary; employee earned more than statutorily specified amount, received that amount on a salary basis, and two aberrant paychecks out of approximately fifty paid to employee did not amount to an actual practice of employer not intending to pay employee on a salary basis). Further, the employee must receive her full salary for any week that she performs work without regard to the number of hours worked. Reg. § 541.602(b). However, a two-part salary scheme in which employees receive a set and non-adjustable predetermined amount plus an additional amount subject to deductions for quality errors does not violate the salary basis test unless the system is designed to circumvent the requirements of the FLSA. *Havey v. Homebound Mortgage., Inc.*, 547 F.3d 158 (2d Cir. 2008).

Because an employee's time-entry error or omission that results in an initial payment by the employer to an employee of less than the predetermined amount is not an unlawful docking or deduction, pay variations caused by sporadic under-reporting of hours worked do not alter an employee's exempt status. *ACS v. Detroit Edison Co.*, 444 F.3d 763 (6th Cir. 2006) (citing with approval DOL Wage & Hour Op. Ltr., No. FLSA2003-5 (July 9, 2003). *See also Guerrero v. J.W. Hutton, Inc.*, 458 F.3d 830 (8th Cir. 2006) (employers may require salaried employees to work a specific number of hours per week and to make up any missed time).

An exempt employee's salary may be subject to deductions in specific situations. The deductions explained in Reg. § 541.602 can only be made in increments of "one or more full days." Deductions may be taken when the employee has performed no work in a week, or when the employee is absent for a full day for personal reasons other than illness or an accident. Reg. § 541.602(b)(1). Deductions may also be made for absences of a day or more if the following two requirements are met: (1) the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary due to sickness, and (2) the employee has not yet become eligible to participate in the plan or has exhausted all accrued leave allowed under the plan. Reg. § 541.602(b)(2). Additionally, where an employee has violated a safety rule of major significance, an employer may deduct from the employee's salary. Reg. § 541.602(b)(4). Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days when imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a "written policy applicable to all employees." Reg. § 541.602(b)(5). Thus, an employer may have a non-harassment policy, applicable to all employees, under which a salaried employee is subject to a three-day unpaid suspension pending investigation of a complaint against the employee. Finally, partial pay deductions may be made for leave taken under the Family and Medical Leave Act without jeopardizing the FLSA exemption. Reg. § 541.602(b)(7).

2. THE EFFECT OF POLICIES AUTHORIZING IMPERMISSIBLE SALARY DEDUCTIONS

According to Reg. § 541.602(a), an employee is paid on a salary basis as long as the pay the employee regularly receives "is not subject to reduction because of variations in the quality or quantity of the work performed." Prior to August 23, 2004, the Supreme Court applied a somewhat more liberal interpretation to this regulation, finding that exempt status will be denied where an employee can show either (1) an actual practice of making deductions or (2) an employment policy creating a significant likelihood of improper deductions. *Auer v. Robbins*, 519 U.S. 452 (1997); *See also Norita v. N. Mariana Islands*, 331 F.3d 690 (9th Cir. 2003) (a written policy which is nominally applicable to all employees, both salaried and non-salaried, and authorizes deductions which would be proper only for non-salaried employees, does not, without more, satisfy the salary basis test). Thus, the controlling factor is whether the employer's practices create a significant likelihood of such deduction, rather than whether an exempt employee's salary is subject to impermissible deductions.

The DOL reigned in the Supreme Court's interpretation when it revised the final Part 541 regulations on August 23, 2004. The DOL specifically eliminated the Supreme Court's

"significant likelihood" test and now provides that "[a]n actual practice of making improper deductions demonstrates that the employee did not intend to pay employees on a salary basis." Reg. § 541.603(a). The Sixth Circuit held that this language and the Comment to the Regulation eliminated the "significant likelihood" test. *Baden-Winterwood v. Life Time Fitness*, 2009 WL 1375705 (6th Cir. May 19, 2009). The Sixth Circuit held that Life Time Fitness violated the salary basis test both pre-August 23, 2004 and after that date. The plaintiffs were not exempt from overtime pay pre-August 23, 2004 because there was a "significantly likelihood" that Life Time Fitness would make actual deductions from their pay based on performance. Although Life Time Fitness made improper deductions during three separate pay periods after August 23, 2004, overtime pay was limited to those pay periods because the DOL changed Reg. § 541.603(b). The current version of 541.603(b) provides that "the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions." Thus, while the New Regulations—requiring an actual violation during a pay period and limiting overtime pay to that period—are more employer-friendly, violations of the salary basis test pre-August 23, 2004 undergo a more employee-friendly analysis—requiring only a "significant likelihood" that the employer would actually deduct pay based on performance.

a. Sick Leave

The Regulations allow deductions to be made "when the employee absents himself from work for a day or more occasioned by sickness or disability… if the deductions are made in accordance with a bona fide plan, policy or practice of providing compensation for lost salary occasioned by other sickness and disability." Reg. § 541.602(b)(2); *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394 (6th Cir. 2004) (non-monetary deductions from fringe benefits such as personal or sick time do not destroy exempt status); *Jastremski v. Safeco Ins. Cos.*, 243 F. Supp. 2d 743 (N.D. 2003) (exempt status for employee who never actually received a partial day deduction nor offered any evidence that any employees received such deductions); *Nelson v. Ellerbe Beckert Constr. Serv., Inc.*, 283 F. Supp. 2d 1068 (D. Minn. 2003) (rejecting plaintiff's contention that employer's policy constituted "a clear and particularized policy... which 'effectively communicates' that deductions will be made in specified circumstances").

b. Other Deductions for Absences

In the past, the DOL opined that an employer would not violate the salary basis test by disciplining an exempt employee who failed to make up work time that was lost due to personal absences of less than a day. *See* DOL Wage & Hour Op. Ltr., No. FLSA 2006-6 (Mar. 10, 2006). However, the DOL noted that the failure to make up the time as required does not constitute a violation of a "workplace conduct rule," for which an employer may impose a disciplinary suspension for one or more full days pursuant to the new rule at 541.602(b)(5).

The DOL also opined that an employer would not violate the salary basis test by maintaining a disciplinary policy that exempt employees of a healthcare institution who missed work due to weather-related conditions would be docked a full days' pay. *See* DOL Wage & Hour Op. Ltr., No. FLSA 2005-46 (Oct. 28, 2005). An employer that remains open for business during adverse

weather conditions may make deductions for full day absences of exempt employees who chose not to report to work for the day because of the adverse weather emergencies and treat any such full-day absence as being for "personal reasons" under the applicable regulations.

In *Baudin v. Courtesy Litho Arts*, *Inc.,* 24 F. Supp. 2d 887 (N.D. Ill. 1998), the court refused to find that a pay deduction during an employee's first week of work resulted in the employee losing his exempt status. The court found that the deduction might have been proper under 541.602(b)(1), which allows deductions "when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident." Alternatively, even if the deduction was improper, a "one-time deduction under unusual circumstances" was permissible. *Id*. (*quoting Auer v. Robbins*, 519 U.S. 452 (1997)); *Smith v. C. Sec. Bureau, Inc.*, 231 F. Supp. 2d 455 (W.D. Va. 2002) (finding a disputed question of fact as to whether an impermissible deduction was made during plaintiff's initial weeks in his new position because the parties disagreed as to whether the pay period in question was the plaintiff's first pay period in his new position); *Mehrkar v. Schulmann,* 2001 WL 79901 (S.D.N.Y. Jan 30, 2001) (holding that the failure to pay an employee for his last four days of work is not an impermissible deduction which destroys an employee's exempt status; it merely exposes the employer to breach of employment contract liability).

c. FMLA Deductions

Under 541.602(b)(7), an employer may deduct from an employee's salary for partial day absences, if such absences constitute intermittent or reduced leave under the Family Medical Leave Act (FMLA), without losing the exempt status of the employee. In *Furlong v. Johnson Controls World Serv., Inc.*, 97 F. Supp. 2d 1312 (S.D. Fla. 2000), an employee suffering from a serious medical condition was released to return to work, but was only able to work on an intermittent basis over a two-week period. The employer treated this period as intermittent FMLA leave and deducted salary for the employee's partial day absences. The employee disputed the leave as FMLA-qualifying and sued for overtime, arguing that the deductions rendered him non-exempt. However, the employer then paid the employee for the alleged overtime under the window-of-correction provision of 541.603. The court held that the FMLA deduction did not cause a loss of the employee's FLSA exempt status and, even if the deductions were impermissible, the employer properly availed itself of the window-of-correction and did not owe any overtime. S*ee also Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115 (9th Cir. 2001) (providing undesignated but FMLA-qualifying leave did not affect the plaintiff's exempt status and ineligibility for overtime pay).

d. Disciplinary Deductions

The Sixth Circuit addressed a classic example of an employer whose disciplinary deduction policy met the test adopted by the Supreme Court in *Auer v. Robbins*, 519 U.S. 452 (1997). In *Takacs v. Hahn Auto. Corp.*, 246 F.3d 776, 781 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 202 (2001), the court held that not only did the employer's policy create a "significant likelihood" of pay deductions from its managers, but the employer actually had a practice of making such deductions. Such evidence precluded any finding that these managers were exempt employees.

See also Norita v. N. Mariana Islands, 331 F.3d 690 (9th Cir. 2003) (none of the plaintiffs claimed to actually have had their pay adjusted, nor did they establish personal knowledge of such deductions, or allege a significant likelihood that they would be subjected to such a policy); *Messmer v. Colors In Bloom, Inc.*, 67 Fed. Appx. 719 (3d Cir. 2003) (single deduction did not destroy exempt status because the deduction "arose in unique circumstances and was not for lack of work;" employer ordered to reimburse employee to maintain his exempt status); *Abramo v. City of New York*, 54 Fed. Appx. 708 (2d Cir. 2003) (employer did not engage in an actual practice of impermissible pay deductions given that suspensions without pay: rarely occurred; involved a small percentage of the officers; were imposed after negotiations and only in response to infractions of safety rules perceived as significant); *O'Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003) (finding that four isolated incidents of pay deductions for violations of non-safety rules did not show an actual practice of reducing employees' compensation to punish for the variations in the quality of the work performed).

In 2006, the DOL opined that an employer's policy requiring salary deductions from an exempt employee to pay for the cost of lost or damaged equipment issued to that employee violates the salary basis test, thereby necessitating an evaluation under 541.603 to determine the effect of the improper deduction. *See* DOL Wage & Hour Op. Ltr., No. FLSA 2006-7 (Mar. 10, 2006).

e. Reductions in Pay Due To Business Slowdowns

An employee does not qualify for exempt status when the employer makes deductions from the employees' predetermined compensation for "absences occasioned by... the operating requirements of the business." Reg. § 541.602(a); *Dingwall v. Friedman Fisher Assoc.,* 3 F. Supp. 2d 215 (N.D.N.Y. 1998) (finding that a pay reduction for an employer-imposed reduced workweek was a change in the employee's "regular" predetermined salary, not a deduction); *cf. Reeves v. Alliant Techsystems, Inc.*, 77 F. Supp. 2d 242 (D.R.I. 1999) (court held that employer's announcement that exempt employees could choose to work five mandatory uncompensated overtime hours per week to maintain their salaries, or work fewer hours for a reduction in pay, did not render exempt employees nonexempt under the FLSA; court distinguished this case from *Dingwall* because the number of hours to be worked was based on the individual employee's election of a reduced workweek, not on the amount of available work).

In *Archuleta v. Wal-Mart Stores, Inc.*, 395 F.3d 1177 (10th Cir. 2005), the court held that under the salary-basis test, an employer may prospectively make adjustments in salary with a like adjustment in scheduled hours to accommodate its business needs, but if salary changes are frequent enough to deem the salary the functional equivalent of an hourly wage, the employer will be denied the FLSA exemption for professional employees. *See also Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226 (10th Cir. 2008); *In re Wal-Mart Stores, Inc.,* 395 F.3d 1177 (10th Cir. 2005) (held Wal-Mart's full-time pharmacists were exempt salaried employees despite the fact that their hours and salaries were reduced occasionally to account for a drop in the demand for prescriptions).

f. The Effect of Additional Payments

Additional compensation, over and above the "predetermined amount," does not impact the employee's salaried status, even if that compensation comes in the form of pay at an hourly rate for each hour above the employee's regular schedule. *See* Reg. § 541.602(a); *ACS v. Detroit Edison Co.*, 444 F.3d 763 (6th Cir. 2006) (additional compensation at exempt employee's hourly rate for hours worked beyond forty in a workweek); *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365 (7th Cir. 2005) (lead work planners, first line supervisors, supply analysts and engineering/chemistry staff specialists at nuclear power plant are all exempt administrative employees despite fact that they may be given additional payments above their regular salary); *Fife v. Harmon*, 171 F.3d 1173 (8th Cir. 1999) (hourly overtime payments for hours worked in excess of forty in a week does not defeat the employee's exempt status).

g. Fee for Service Payments

The salary basis test can include compensation on a "fee basis." Reg. § 541.313. Some employers pay their employees on a set fee per service basis, such as, in the publishing industry, a fixed rate for each article written or photograph taken. Under the Regulations, if payment is at a rate that would exceed the statutory minimum if forty hours were worked, then the employee may qualify for the exemption. However, the employer also must demonstrate that the "fee payment is made for a job … which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again." Reg. § 541.605; *Fazekas v. Cleveland Clinic Found. Health Care Ventures, Inc.*, 204 F.3d 673 (6th Cir. 2000) (court found that nurses' fee basis arrangement was not like a repetitive piecework system and thus the nurses qualified as salaried employees); *cf. Elwell v. Univ. Hosp. Home Care Serv.*, 276 F.3d 832 (6th Cir. 2002) (court found that because nurse's compensation arrangement was based at least in part on the number of hours she worked, she should not have been classified as an exempt professional).

h. Exception for the Public Sector

An otherwise exempt public sector employee does not lose his or her exempt status because the employer's pay system requires pay reductions for partial day absences taken for personal reasons or because of an illness when the employee does not use accrued leave. This applies to pay systems where accrued leave is not used because: (1) the employee does not seek permission to use the leave; (2) permission to use the leave is denied; (3) all accrued leave has been exhausted; or (4) the employee elects to use leave without pay. Additionally, deductions from a public agency employee's pay for absences due to a budget-required furlough shall not disqualify the employee from satisfying the salary basis test except in the week in which the furlough occurs. Reg. § 541.710. *See White v. San Mateo County*, 37 Fed. Appx. 280 (9th Cir. 2002) (noting that the fact that the county required its exempt Sheriff's Office supervisor to use accrued personal or sick leave for absences of less than one day did not invalidate the executive exemption); *Demos v. City of Indianapolis*, 302 F.3d 698 (7th Cir. 2002) (finding that city's policy of docking for any hours short of forty hours worked during that workweek was established pursuant to principles of public accountability); *Clawson v. Grays Harbor Coll. Dist. No. 2*, 148 Wash. 2d 528, 61 P.3d

1130 (Wash. 2003) (community college's policy of deducting part-time instructors' pay for partial-day absences, after accrued sick leave had been exhausted, did not affect the instructors' exempt status as professional salaried employees because the college demonstrated that its pay-docking system was established pursuant to principles of public accountability).

3. SAFE HARBOR PROVISION

This provision permits employers to avoid losing the exempt status of all salaried employees for inadvertent but improper salary deductions. An employer who makes improper salary deductions loses the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An "actual practice" of making improper deductions demonstrates the employer's intent. Reg. § 541.603(a). When determining whether an employer has an actual practice of making improper deductions, the Regulations look to: (1) the number of improper deductions; (2) the time period during which improper deductions were made; (3) the number and location of employees affected and managers responsible for the improper deductions; and (4) whether the employer has a "clearly communicated policy" permitting or prohibiting improper deductions. Reg. § 514.603(a).

An improper deduction results in the loss of exemption only for employees with the same job classifications who work for the managers responsible for the improper deductions. Reg. § 541.603(b). The standard is more forgiving to employers as, under previous Regulations, a single improper deduction could result in a company-wide loss of the exemption for an entire class of employees.

Employers must reimburse employees who are subject to isolated or inadvertent improper deductions. Reg. § 541.603(c). The safe harbor provision is available to employers with a "clearly communicated policy" prohibiting improper pay deductions and the policy must contain a complaint mechanism. Reg. § 541.603(d). The best evidence of such a policy is a written policy distributed to employees at the time of hire, published in a handbook, or available on the company's Intranet. Reg. § 541.603(d). The DOL has published a model safe harbor policy on its internet site that is intended to comply with this new requirement.

Case law interpreting the prior Regulations remains valid for the "safe harbor" provision. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452 (1997) (under the regulations, "inadvertence" and "reasons other than lack of work" are alternative requirements); *Abramo v. City of New York*, 54 Fed. Appx. 708 (2d Cir. 2003) (holding that although some impermissible pay deductions were made, the city satisfied the window-of-correction test, because it submitted declarations promising to reimburse improperly docked employees and comply with exemption requirements in the future); *Kennedy v. Commonwealth Edison Co.*, 252 F. Supp. 2d 737 (C.D. Ill. 2003), *aff'd* 410 F.3d 365 (7th Cir. 2005) (finding that although ComEd, on seven occasions, made improper one-two-hour pay deductions from plaintiff's salary, summary judgment for ComEd was appropriate based on the "window-of-correction" because the deductions were relatively rare; ComEd corrected every deduction, and there was no evidence that the deductions were not inadvertent or were made for reasons other than a lack of work).

The current trend in the circuit courts follows the viewpoint taken by the DOL in an *amicus* brief on behalf of a group of employees in *Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000). In its brief, DOL interpreted its window-of-correction regulation to be limited to situations where the employer exhibited an "objective intention" to pay its employees on a salaried basis. *Klem*, 208 F.3d at 1091. *See also Smith v. C. Sec. Bureau, Inc.*, 231 F. Supp. 2d 455 (W.D. Va. 2002); *Yourman v. Giuliani*, 229 F.3d 124 (2d Cir. 2000); *Takacs v. Hahn Auto Corp.*, 246 F.3d 776 (6th Cir. 2001); *Whetsel v. Network Prop. Servs. L.L.C.*, 246 F.3d 897 (7th Cir. 2001) (partially overruling *DiGiore v. Ryan*, 172 F.3d 454 (7th Cir. 1999) to join other circuits in deferring to the Secretary of Labor's interpretation). *But see Moore v. Hannon Food Servs., Inc.*, 317 F.3d 489 (5th Cir. 2003) (finding that clear language of regulation does not permit narrow reading adopted by many courts).

B. THE DUTIES TEST

The duties test determines whether an employee's primary duties are sufficiently complex to justify exempting the employee from the minimum wage and overtime requirements. Each specific exemption has a different duties test.

1. EXEMPTION FOR EXECUTIVE EMPLOYEES

The executive exemption adopts a single duties test in Reg. § 541.100. An "employee employed in a *bona fide* executive capacity" shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $455 per week;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) 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."

Reg. § 541.102 through § 541.105 define these terms in ways that should foster the objective application of the exemption requirements. Each definition is accompanied by several illustrative examples.

As noted in 541.100(3), the employee must customarily and regularly direct the work of two or more employees. In *Perez v. Radioshack Corp.*, 386 F. Supp. 2d 979 (N.D. Ill. 2005), the court granted partial summary judgment for some members of a collective action who did not regularly and customarily supervise the work of two or more other employees. The court adopted the bright line standard from DOL regulations in existence prior to August 23, 2004, that an exempt executive must spend at least eighty percent of her time supervising two employees who work at least eighty hours. In *Rubery v. Buth-NaBodhaige,* 470 F. Supp. 2d 273 (WD NY 2007) this was

calculated by taking the total number of weeks the plaintiff worked, and dividing this by the total number of weeks that the plaintiff supervised eighty or more subordinate hours. The plaintiff in *Rubery* argued that he worked 158 weeks but only supervised eighty or more subordinate hours in 110 weeks, so the percentage was only seventy percent and a question of fact existed. Recently, the DOL opined that a store manager need not even be present in the store to be exempt, so long as she "customarily and regularly direct[s] the subordinate employee's work." DOL Wage & Hour Op. Ltr., No. FLSA 2006-35 (Sept. 21, 2006).

A "customarily recognized subdivision" must have a permanent status and a continuing function, and the Regulations offer as an example a human resources department that has permanent subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management. Reg. § 541.103(a). The Regulations define "particular weight" by incorporating factors relied on by the courts prior to the adoption of the current Regulations. Reg. § 541.105. *See Davis v. Mountaire Farms, Inc.*, 453 F.3d 554 (3d Cir. 2006) (reversing summary judgment due to fact question whether Crew Leaders at a chicken processing plant were responsible for hiring and firing or their recommendations on these issues were given "particular weight").

The Regulations do not require that executives devote a certain percentage of their time to exempt rather than non-exempt work. However, an exempt executive employee must have authority to "hire or fire" other employees or must make such recommendations which are given particular weight.

a. Twenty Percent Equity Owners

The Regulations recognize as an exempt executive any employee who owns at least a *bona fide* twenty percent equity interest in the enterprise in which he is employed, and who is actively engaged in its management. Reg. § 541.101. The salary basis test does not have to be met for this particular exemption. The DOL reasons that a partial owner will likely share in the profits of the enterprise and this profit-sharing is an appropriate indicator of the individual's exempt status.

b. Sole-Charge Executives

An employee who is placed in "sole charge" of an independent or branch establishment no longer qualifies for the executive exemption, unless he or she otherwise meets the standard duties test for an exemption. *See Rozenblum v. Ocean Beach Prop.*, 436 F. Supp. 2d 1351 (S.D. Fla. 2006) (analyzing hotel employee's overtime claims using the Old and New Regulations for the periods of his employment before and after the New Regulations respectively).

c. Working Supervisors; Retail and Fast Food

The subsection entitled "Concurrent Duties" discusses the status of "working supervisors." Reg. § 541.106. This subsection provides that an employee may be exempt even if she performs exempt and non-exempt work at the same time, so long as the other parts of the executive exemption are met. In this regard, the Regulations are consistent with case law, holding that an employee can

have a primary duty of management while concurrently performing nonexempt duties. *See Velazquez-Fernandez v. NCE Foods Inc.*, 99 FEP Cases 1031 (1st Cir. 2007) (an employee can manage while performing other work and the other work will not preclude the conclusion that his primary duty is management). The DOL has clarified that exempt executive employees need not spend fifty percent of their time on supervisory duties. While the fifty percent figure is a "useful guide" in determining the employee's primary duty, it is no longer a "rule of thumb." Federal courts have found employees—who spent less than fifty percent of their time performing exempt work—exempt.[3] However, the Regulations make clear that an employee with a primary duty of production work is not exempt even if the employee has some supervisory duties.

There have been a number of cases that deal with the executive exemption in the fast food industry. Such establishments often classify employees as managers or assistant managers even though their duties are largely the same as regular line workers. *See Donovan v. Burger King Corp.,* 672 F.2d 221 (1st Cir. 1982) (court held that despite employees' participation in ordinary line duties they were properly deemed exempt executives because management was their primary duty). *See also Mims v. Starbucks Corp.*, 2007 WL 10369 (S.D. Tex. Jan. 2, 2007) (despite spending between seventy–eighty percent of their time serving customers, managers' primary duty was management); *Jones v. Virginia Oil Co., Inc.*, 69 Fed. Appx. 633 (4th Cir. 2003) (plaintiff was exempt because she simultaneously performed many of her management tasks while performing non-exempt tasks)*; but see Jackson v. Go-Tane Servs., Inc.*, 56 Fed. Appx. 267 (7th Cir. 2003) (car wash manager who spent 95 percent of work time performing tasks identical to other car wash attendants not exempt as executive; nominal management tasks not overwhelmingly important).

In similar contexts, courts have upheld the executive exemption for store managers. *See Rodriguez v. Farm Stores Grocery, Inc*., 518 F.3d 1259 (11th Cir. 2008) (affirming a jury verdict finding grocery store managers non-exempt where at least some managers did not spend any time during a week performing managerial duties, and all the managers did not spend a majority of their time on managerial activities. The court noted that the title "store manager" is insufficient to qualify as exempt); *Posely v. Eckerd Corp.*, 433 F. Supp. 2d 1287 (S.D. Fla. 2006) (pharmacy store managers found exempt); *Jackson v. Jean Coutu Group USA, Inc*., 2007 U.S. Dist. LEXIS 46305 (S.D. Ga. June 26, 2007) (pharmacy store manager found exempt even where he was working directly under a district manager); *Severin v. Pasha's Rests.*, *Inc*., 2007 U.S. Dist. LEXIS 24834 (S.D. Fla. Mar. 21, 2007) (bakery manager who spent eighty percent of work time participating in non-managerial activities still exempt); *Allen v. Dolgencorp, Inc*., 513 F. Supp. 2d 1215 (N.D. Ala. 2007) ("dollar store" managers found exempt where they spent fifty percent or more of work time participating in non-managerial activities); *Langley v. Gymboree Operations, Inc.,* 530 F. Supp. 2d 1297 (S.D. Fla. 2008) (children's clothing store manager who spent a majority of time "on the floor" participating in sales found to simultaneously act in managerial

[3] *See, e.g.*, *Jones v. Virginia Oil Co*., 69 Fed. Appx. 633 (4th Cir. 2003) (management found to be the "primary duty" of employee who spent seventy-five–eighty percent of her time on basic line-worker tasks); *Murray v. Stuckey's, Inc.*, 939 F.2d 614 (8th Cir. 1991) (manager met the "primary duty" test despite spending sixty-five– ninety-percent of his time in non-management duties); *Stein v. J.C. Penney Co.*, 557 F. Supp. 398 (W.D. Tenn. 1983) (employee spending seventy–eighty-percent of his time on non-managerial work held exempt because the "overall nature of the job" is determinative, not "the precise percentage of time involved in a particular type of work").

capacity); *Addison v. Ashland, Inc.*, 2006 WL 752761 (E.D. Mich. Mar. 23, 2006) (exempt status for store managers at a nationwide chain of automobile oil-change service centers); *Bosch v. Title Max, Inc.*, 2005 WL 357411 (N.D. Ala., Feb. 7, 2005) (exempt status for managers of auto title loan stores). A recent DOL opinion letter regarding the status of gasoline service station managers who perform both exempt and non-exempt duties reiterated the DOL's view that "substantial non-exempt work cannot routinely be assigned to exempt employees without calling to question the application of the exemption." DOL Wage and Hour Op. Ltr., FLSA 2006-30 (Sept. 8, 2006). In the situation described, however, the managers performed non-exempt work—e.g. "working the drive" as an attendant at a store they do not otherwise manage—on a very infrequent basis, and usually for less than a full shift. The DOL stated this scenario would not destroy the executive exemption.

The DOL opined in late 2008 that exempt managers who participate in a seven-week training program to become eligible for a promotion do not lose their exempt status. Under the facts set forth in the letter, the managers spend the first week performing very little exempt work and likely spend less than half of their time performing exempt duties for the first several weeks of the training. Despite these facts, the DOL determined that the managers did not lose the executive exemption because the primary duty test need not be met each and every week in all cases. Instead, because the training does not constitute a separate employment position, and because the period in which their performance of exempt duties falls below the 50% threshold is of limited duration and seemingly does "not consist of the performance of work that would otherwise be performed by nonexempt workers," the managers maintain their exempt status. DOL Wage and Hour Op. Ltr., FLSA 2008-19 (Dec. 19, 2008).

However, this is not always the case. In *Morgan v. Family Dollar Store*, 551 F.3d 1233 (11th Cir. 2008), the Eleventh Circuit affirmed a jury verdict supporting the finding that store managers were not exempt even though they were the senior manager of a free-standing location. The Court first noted that defendants attempting to assert an exemption bear the burden of proving *each* requirement under the exemption. The court then focused chiefly on the second requirement that the employee must have as his or her primary duty management of the enterprise.

The *Morgan v. Family Dollar Store* court found ample evidence to support a finding that the store managers' primary duty was not store management. Rather, the evidence showed that the managers spent as much as eighty–ninety percent of their time on non-managerial tasks such as stocking shelves, running registers, unloading merchandise, maintaining the store, and other manual labor. The defendant's case was further weakened by its own corporate manuals, the bulk of which demonstrated that the store managers exercised very little discretion whatsoever.

Moreover, the plaintiffs had buttressed their case by providing evidence that the defendant's District Managers were the ones who really managed the stand-alone store even though each District Manager had between ten to thirty stores under his or her control. The fact that the District Managers commanded control over the individual stores through strict labor budgets, daily to-do lists and email instructions to store managers, regular store visits and phone calls, and a consistent flow of electronic data to and from the store and the District Manager, led the court to conclude, without significant mention of whose duty it was to manage or supervise the in-store

employees, that the store managers were merely lower-level employees whose manual tasks were too many and whose managerial tasks were too closely supervised to allow for the exemption to apply.

The court distinguished *Morgan v. Family Dollar* from cases such as *Donovan v. Burger King*, where managerial employees were exempt despite performing manual labor. The store managers in *Morgan v. Family Dollar* differed from those in *Donovan* in that the evidence supported the finding that the *Morgan* managers did not perform manual tasks and managerial tasks concurrently as is required by the Regulations. Further, the *Morgan* managers were distinguishable from those found exempt in *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 499 (6th Cir. 2007) and *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1108-09 (9th Cir. 2001) because in those cases the management employees in question spent far more time performing managerial duties that was the case in *Morgan* where the evidence showed the managers performing manual labor for as much as ninety percent of their work time.

In *English v. Ecolab, Inc.,* 2008 U.S. Dist. LEXIS 25862 (S.D.N.Y. Mar. 28, 2008), plaintiffs were local service technicians for a nationwide pest extermination company. Plaintiffs did not have a home office, but individually worked from home. The court found that their home office qualified as a "permanent establishment" under the retail exemption because it made them readily available for two-way communication with customers. After finding that pest extermination services are not sold for resale, nor sold as wholesale, the court defined the defendant as a retail establishment and plaintiffs therefore were exempt.

2. EXEMPTION FOR ADMINISTRATIVE EMPLOYEES

As with the executive exemption, the Regulations put forth a single, standard duties test for the administrative exemption in Reg. § 541.200. This test, however, does not make this exemption easy to decipher. The phrase "employed in a *bona fide* administrative capacity" means any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week;

(2) 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

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

a. Primary Duty

Case law indicates the primary duty requirement emphasizes that performing "work related to the management or general business operations of the employer or the employer's customers" refers to the work that the employee does. This work must be linked with the running or servicing of the business versus selling a product or working on an assembly line. The Regulations provide several illustrative examples of exempt work, including tasks in tax, finance, accounting, and

other areas. The Regulations include a separate subsection reminding employers that the administrative exemption extends to those employees who perform work related to the management or general business operations of the employer's customers. Therefore, consultants, tax experts, and the like can meet the exemption.

The Regulations also require that the primary duty be assessed based on all the facts of the case and "with the major emphasis on the character of the employee's job as a whole." Reg. § 541.700(a). In so doing, the DOL explicitly adopted the approach used by the Fourth Circuit in *Counts v. S.C. Elec. & Gas, Co.*, 317 F.3d 453 (4th Cir. 2003) (rejecting claim that limited time period each year in which employees performed nonexempt work entitled employees to overtime for those weeks).

Courts continue to grapple with the exact boundaries of the administrative exemption. In *Desmond v. PNGI Charles Town Gaming L.L.C.*, 564 F.3d 688 (4th Cir. 2009), the court reversed a district court ruling that Racing Officials, who prepared and officiated horse races, were exempt. The district court relied on the Racing Officials' "indispensability" based on West Virginia law. However, the Fourth Circuit held that the Racing Officials' duties did not satisfy the second or third prong of the administrative exemption test. The focus of the relation to the general management test is the "*type* of work performed by that individual, not whether business practice or applicable law require a particular position to exist." *Desmond*, 564 F.3d at 693. The court explained that Racing Officials are not administrative employees because their jobs only produced horse races by carrying out the day-to-day operations to the public and did not involve any supervisory or policy decision-making.

b. Discretion and Independent Judgment

The commentary to the DOL's Regulations states that the DOL intended to reduce emphasis on the "production versus staff" dichotomy, which was the subject of many court cases under the Old Regulations. The Regulations neither strengthen nor eliminate the dichotomy from consideration in the administrative exemption. The DOL believes the dichotomy is still a relevant and useful tool in appropriate cases. However, recent case law shows that federal courts are not inclined to use the dichotomy as an analytical tool.[4]

The Regulations require that an employee's primary duty must "include" the exercise of discretion and independent judgment—the old "short" duties test.[5] The Regulations prescribe a non-exclusive, ten-factor test for determining if an employee exercises discretion and independent judgment with respect to matters of significance. The DOL Preamble suggests that if the answers to any two or three of the ten factors are "yes," the employee will likely be found to exercise

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[4] *See McLaughlin v. Nationwide Mut. Ins. Co.*, 2004 WL 1857112 (D. Ore., Aug. 18, 2004); *see also Camp v. The Progressive Corp.*, 2004 WL 2149079 (E.D. La. Sept. 23, 2004).

[5] *See, e.g.*, *O'Dell v. Alyeska Pipeline Serv. Co.*, 856 F.2d 1452 (9th Cir. 1988) (court should have applied more lenient test of "includes" when using the short duties test); *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 395 (6th Cir. 2004) (court should apply "customarily and regularly" requirement even under the short duties test).

discretion and independent judgment with respect to matters of significance. The ten factors are as follows:[6]

- whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- whether the employee carries out major assignments in conducting the operations of the business;
- whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- whether the employee has authority to commit the employer in matters that have significant financial impact;
- whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- whether the employee has authority to negotiate and bind the company on significant matters;
- whether the employee provides consultation or expert advice to management;
- whether the employee is involved in planning long- or short-term business objectives;
- whether the employee investigates and resolves matters of significance on behalf of management; and
- whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Reg. § 541.202(b).

In *Austin v. CUNA Mut. Ins. Soc'y*, 240 F.R.D. 420 (W.D. Wis. 2006), the court ruled a "law specialist-case manager" working for an insurance agency fell under the administrative exemption in part because she was authorized to exercise discretion and independent judgment in her primary duty of managing lawsuits brought against the agency's policyholders, even though she was instructed to use, and did use, that discretion "conservatively." It was not the frequency

[6] Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required. *See, e.g.*, *Bondy v. City of Dallas*, 77 Fed. Appx. 731 (5th Cir. 2003) (making recommendations to management on policies and procedures); *McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997 (8th Cir. 2003) (independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval).

with which the employee used this discretion that mattered, but rather that she was authorized to use such discretion.

c. Examples of Administrative Employees

The Regulations include illustrations applying the administrative duties test to particular occupations. Reg. § 541.203. Insurance claims adjusters, employees in the financial services industry, and human resources personnel are among the examples that should provide useful guidance. Tax experts, credit managers, account executives, brokers, sales research experts and personnel/human resources directors are typical examples of employees who would be considered exempt.

Litigation over misclassification in the financial services industry has been noted in both the federal courts and the popular press over the last three years. While collective actions are pending in courts from coast to coast, large dollar settlements dominated the news stories.

- In May 2005, Countrywide Home Loans, Inc. agreed to pay $30 million to settle the claims of approximately 400 account executives who worked at Countrywide's California call center responding to consumer telephone inquiries about home loan products.

- In August 2005, Merrill Lynch reached a $37 million settlement with approximately 3,000 California stockbrokers under state and federal overtime laws.

- In February 2006, UBS settled for $89 million a series of FLSA collective actions concerning approximately 25,000 financial advisors and trainees nationwide who claimed to have been misclassified.

- In March 2006, Morgan Stanley reached a $42.5 million settlement with approximately 5,000 financial advisors in California. Similar suits remain pending in New York and New Jersey.

- In May 2006, Citigroup's Smith Barney brokerage unit agreed to pay $98 million to settle claims on behalf of thousands of current and former brokers that they are owed overtime pay and other reimbursements.

- In January 2007, E-Loan, Inc. agreed to pay $13.6 million to settle claims on behalf of 500 California mortgage loan consultants.

- In January 2007, Wells Fargo agreed to pay $12.8 million to some 4,500 business service workers in 39 states who alleged they illegally were denied overtime.

- In December 2008, Hewitt Associates, Inc. agreed to pay $4.9 million to some 1,200 benefits analysts who alleged that they were misclassified as exempt and thus denied overtime.

- In May 2009, AXA Equitable Life Insurance Co. got preliminary approval of a $6.5 million settlement for allegedly failing to pay overtime to financial sales representatives.

The settlement of these cases indicates uncertainty regarding the fine line between an exempt administrative employee in the financial services industry and the non-exempt employee whose primary duty is selling financial products. DOL regulations provide in part that:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

See Reg. § 541.203(b).

In an effort to provide much-desired guidance, and in response to a Securities Industry Association request, the DOL released an opinion letter in late 2006 stating that "certain registered representatives"[7] in the financial services industry can qualify for the administrative exemption. DOL Wage and Hour Op. Ltr., FLSA 2006-43 (Nov. 27, 2006). The letter states that when an employee's work includes:

> collecting and analyzing a client's financial information, advising the client about the risks and the advantages and disadvantages of various investment opportunities in light of the client's individual financial circumstances, and recommending to the client only those securities that are suitable for the client's particular financial status, objectives, risk tolerance, tax exposure, and other investment needs,

the employee falls under the exemption by performing work related to the employer's general business operations and by exercising discretion and independent judgment in their duties. *Id.* Though sales constituted a part of the brokers' duties, it was not the primary duty and as such, this did not put them outside the exemption. *Id.* In the scenarios provided by the Requestor, the brokers always received a weekly salary above the $455 minimum. In addition, the fact these employees use computer software to analyze the clients' financial situations and to suggest investment options does not mean the employee fails to exercise discretion and independent judgment. *Id.*; s*ee also* In re *Farmers Ins. Exch.*, 466 F.3d 853, 862 (9th Cir. 2006).

[7] The actual job titles for these employees included "account executive," "broker-representatives," "financial executives," "financial consultants," "financial advisors," "investment professionals," and "stockbrokers." DOL Wage and Hour Op. Ltr., FLSA 2006-43. The letter reiterated that job titles do not determine exemption status.

For case law developments involving the financial services industry, see *Hein v. PNC Fin. Servs. Group, Inc.*, 511 F. Supp. 2d 563 (E.D. Penn. 2007) (senior financial consultant responsible for analyzing customers' financial status and determining which financial products best met their needs was an exempt administrative employee. The exempt work was directly related to management and general business operations, was his primary duty and more important than his non-exempt activities, he spent a majority of his time on exempt work, he had minimal supervision, and he was paid more than twice as much as comparable employees who performed similar non-exempt work); *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100 (S.D. Cal. 2006) (paying stockbrokers in draws and commissions did not appear to meet "salary basis" requirement); *Howell v. Ferguson Enter., Inc.*, 93 Fed. Appx. 12 (5th Cir. 2004) (finding that employee who was engaged in duties directly related to employer's business operations and the operations of employer's principal customer was not entitled to overtime pay under the FLSA, where employee's duties included receiving purchase orders from customer, negotiating with customer, managing and promoting sales to customer, and offering customer discretionary discounts on employer's products); *Zacholl v. Fear & Fear, Inc.*, 2004 WL 725964 (N.D.N.Y. Apr. 5, 2004) (holding that plaintiffs' duties as branch managers of a bank were administrative in nature where duties included balancing the cash drawers at the close of the business day, selling insurance policies, ordering office supplies, making deposits, maintaining business books, and supervising other employees—docking their pay or even firing them for poor work or misconduct); *Saunders v. Ace Mortgage Funding*, 2007 U.S. Dist. LEXIS 28384 (D. Minn. Apr. 16, 2007) (finding a mortgage company that participated in direct lending part of the finance industry and not engaged in retail sales); *Wong v. HSBC Mortgage Corp.*, 2008 U.S. Dist. LEXIS 21729 (N.D. Ca. Mar. 19, 2008) (finding neither HSBC Bank nor HSBC Mortgage Corporation to be retail or service establishments).

Cases involving the exempt status of insurance claims adjusters have led to varying results. *See generally In re Farmers Ins. Exch. Claims Reps. Overtime Pay Litig.*, 466 F.3d 853 (9th Cir. 2006) (reversing District Court's $52.2 million verdict and finding that the discretion and independent judgment requirements were met regardless of whether the employees' decisions were final and un-reviewed, or of the dollar amount of claims processed); *Miller v. Farmers Ins. Exch.*, 481 F.3d 1119 (9th Cir. 2007) (finding a "$ 3,000 in claims paid per month" rule arbitrary in distinguishing between exempt and non-exempt claims adjusters, and holding all claims adjusters exempt regardless of size or type of claim); *Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004) (rejecting plaintiff-insurance agents claim that they were on the "production" side of the business, and holding that insurance agents fell within the administrative exemption, where they had spent the majority of their time servicing existing customers and exercising discretion and independent judgment in executing their duties). In *Robinson-Smith v. GEICO*, 323 F. Supp. 2d 12 (D.D.C. 2004), a district court ruled that auto insurance adjusters for GEICO are not exempt from FLSA overtime requirements. The court said the adjusters did not perform the majority of duties included in the Regulation's description of "insurance claims adjuster" and cannot be automatically classified as exempt employees. *See also In re Am. Family Mut. Ins. Co. Overtime Pay Litig.*, 2007 U.S. Dist. LEXIS 77548 (D. Colo. Oct. 9, 2007) (finding insurance claims adjusters non-exempt because their job duties did not match those listed by the DOL, they do not make coverage determinations, nor use their own judgment to determine claim value, nor determine liability). However, in *Roe-Midgett v. CC Servs.*, 512 F.3d 865 (7th Cir. 2008), the

court found "material damage appraisers" exempt due to their significant discretion in settling claims and the direct relation of their duties to business operations.

Two recent opinion letters from the DOL discuss the exempt status of insurance claims adjusters. *See* DOL Wage & Hour Op. Ltr., No. FLSA 2005-25 (Aug. 26, 2005) (examining the non-exempt status of position called "Claims Specialist I" and the exempt status of positions called "Claims Specialist II" and "Senior Claims Specialist"); DOL Wage & Hour Op. Ltr., No. FLSA 2005-2 (Jan. 7, 2005) (examining the non-exempt status of junior-level claims adjusters).

The Fifth Circuit found an automobile dealership's office manager exempt even though she spent a majority of her time performing bookkeeping, clerical work, preparing payrolls, financial reports, and supervising four employees, because her primary duties were directly related to both management policies and general business, and additionally required her to exercise discretion and independent judgment. *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326 (5th Cir. 2000); *see also Renfro v. Ind. Mich. Power Co.*, 370 F.3d 512 (6th Cir. 2004) (concluding that work planners' performance of manual labor did not preclude application of the exemption because planners performed work directly related to the company's general business operations; further, planners' primary duty was substantially important to the company's operations and required exercise of discretion and independent judgment); *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394 (6th Cir. 2004) (employee's primary work duty, the planning and oversight of shipments of radioactive materials, consisted of office or non-manual work); *Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453 (4th Cir. 2003) (affirming summary judgment for defendant, even though plaintiffs devoted most of their time to non-exempt work for five weeks out of every eighteen months, and holding that under a "holistic approach" for determining an employee's primary duty, these workers were not entitled to overtime compensation during any of the eighteen month period); *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527 (7th Cir. 1999) (holding that an accounting firm manager was exempt even if he did spend more than fifty percent of his time performing non-exempt functions, as he was also the primary contact for fifteen clients).

Even in traditionally blue-collar fields, such as the construction industry, courts recognize that some employees may be covered by the administrative exemption. *Reyes v. Hollywood Woodwork, Inc.*, 360 F. Supp. 2d 1288 (S.D. Fla. 2005) (project estimator for a Florida woodwork manufacturer is exempt administrative employee because he exercised substantial discretion and independent judgment in estimating costs of custom woodwork installation based on architect's plans). *See also Waugh v. Greenblades of Cent. Fla., Inc.*, 2007 U.S. Dist. LEXIS 50867 (M.D. Fla. July 12, 2007) (finding a landscape company manager non-exempt because he spent seventy-five percent of his time performing non-managerial tasks and was not given authority to hire or fire employees).

In *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365 (7th Cir. 2005), the court ruled that fifty-five nuclear power plant employees with various job titles—including work planner, lead work planner, first line supervisor, supply analyst, and staff specialist—were exempt as administrative employees. The court applied the "short" test and concluded the employees satisfied the three requirements. In *Zueber v. APC Natchiq, Inc.*, 114 Fed. Appx. 657 (6th Cir. 2005), "safety specialists" for an oil field service company were non-exempt due to close on the job supervision

and because their recommendations were subject to review. *See also Renfro v. Ind. Mich. Power*, 497 F.3d 573 (6th Cir. 2007) (finding "technical writers" at a nuclear power plant exempt because they were unsupervised and exercised significant discretion, even where that discretion was "channeled through" a company manual).

In an opinion letter, the DOL stated that investigators employed by a private company that contracts with the federal government to conduct background checks on potential employees do not qualify as administrative employees. The DOL based its conclusion on the following facts: the investigative work the employees performed was much more related to the ongoing day-to-day investigative service than to the administrative functions related to managing the company's business and their work involved the use of skills in applying known standards and established techniques. This was true even though the employees had a great deal of leeway in deciding how to perform their investigations. Finally, the DOL stated that the facts that the employees planned their own workload, prioritized the results of certain leads and assessed the value of leads, did not amount to exercising discretion and independent judgment with respect to matters of significance. DOL Wage & Hour Op. Ltr., No. FLSA 2005-21 (Aug. 19, 2005). *See also Adams v. United States*, 78 Fed. Cl. 556 (Fed. Cl. 2007) (criminal fraud investigators working for federal government did not engage in activities directly related to management policies or general business operations and were therefore non-exempt employees).

In *Darveau v. Detecon, Inc*., 515 F.3d 334 (4th Cir. 2008), the court held plaintiff's $150,000 salary was not dispositive. However, the court found him exempt because his position as an inside salesman and his active recruitment of new clients made his job duties sufficiently related to shaping business policy.

A March 6, 2008 DOL opinion letter determined a "purchasing agent" for a motor home manufacturer to be an exempt administrative employee because his job duties, including ensuring that material, equipment, and supplies are ordered, and his personal participation in the vendor selection process directly related to the management categories of "purchasing" and "procurement" listed in Reg. § 541.201(b). DOL Wage & Hour Op. Ltr., No. FLSA 2008-1 (Mar. 6, 2008). Likewise, an April 21, 2008 DOL opinion letter states that a "Product Technology Application and Market Analyst" falls under the administrative exemption where the employee develops tests that measure the performance of new products and assesses the feasibility of novel uses for current products. The DOL correlates these duties directly with the management categories of "research" and "quality control" listed in Reg. § 541.201(b). DOL Wage & Hour Op. Ltr., No. FLSA 2008-2 (Apr. 21, 2008).

The exempt status of postal inspectors is an open question in the Ninth Circuit. In *Nigg v. U.S. Postal Serv.*, 555 F.3d 781 (9th Cir. 2009), the Ninth Circuit reversed the district court's grant of summary judgment to the Postal Service. The court found that 39 U.S.C. § 1003(c), which provides that postal inspectors shall receive comparable compensation to other government employees who perform comparable levels of work, did not implicitly exempt postal inspectors from the FLSA overtime requirements. The court remanded to the lower court to determine "whether there are executive branch employees who perform work comparable to that of the postal inspectors and who are paid FLSA over-time, and whether the inspectors are entitled to

FLSA overtime or are administratively exempt." *Id.* at 789. The Postal Service argued that postal inspectors are exempt, relying on a 1976 DOL Opinion Letter. The inspectors argued that removing audits as one of their duties significantly changed their job and therefore they are no longer exempt. The Ninth Circuit remanded for determination of this issue of fact.

d. Educational Employees

Reg. § 541.204 addresses educational employees. The standard test is straightforward for these employees, utilizing the same $455 salary requirement and requiring that the employee's "primary duty consist of performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof." There is an additional section to the salary requirement that will not jeopardize the exemption if the employee makes less than $455, as long as he makes at least the entrance salary for teachers employed in the same educational establishment. This provision, combined with the admonition in the New Regulations that secretarial or clerical work is not exempt work, clearly extends to principals, superintendents and other school administrators. Principals and vice-principals are included as examples in this section, while maintenance workers, dieticians, and school nurses are excluded because their work does not directly relate to academic instruction or training.

3. PROFESSIONAL EMPLOYEES

The phrase "employed in a bona fide professional capacity" means any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $ 455 per week; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Reg. § 541.300.

a. Learned Professionals

Subsection 2(i) above refers to learned professionals. Reg. § 541.301. The Regulations define "advanced knowledge" as knowledge that is traditionally acquired through a prolonged course of specialized intellectual instruction. *See Corrigan v. United States*, 68 Fed. Cl. 589 (Fed. Cl. 2005) (Credit-union examiner qualified as a professional employee exempt from FLSA overtime requirements, where examiner earned bachelors and masters degrees in business with substantial course work in accounting and finance). Advanced knowledge also may be acquired through "a combination of work experience and intellectual instruction." Reg. § 541.301(d).

The Regulations list several occupations that have been predetermined to meet the requirements for learned professionals, including: registered nurses, physician assistants, accountants and athletic trainers. DOL's comments in the preamble clarify that no amount of military training can turn a technical field into a profession. Similarly, a veteran who received substantial training in the armed forces but is working on a manufacturing production line or as an engineering technician cannot be considered a learned professional because the employee is not performing professional duties. The Regulations make no reference to training in the armed forces, attending a technical school, or attending a community college. Regulation § 541.301(e)(2) states that licensed practical nurses and other similar health care employees do not qualify as exempt. *See also* DOL Wage and Hour Op. Ltr., FLSA 2006-26 (July 24, 2006) (respiratory therapists are not exempt).

In late 2008, the Department of Labor attempted to clarify the exemption status of Certified Occupational Therapist Assistants (COTAs). In a December 19, 2008 opinion letter, the Department opined that the employees were not exempt where the job required only sixty semester hours of study rather than the "more rigorous course of study required for the registered or certified medical technologists. The letter also briefly addressed whether the COTAs were exempt administrative employees, ultimately opining that they were not because Regulation § 541.204(c)(2) states that jobs relating to the health of the students do not result in qualification as academic administrative functions and do not fulfill the requirements for the educational establishments exception under Regulation § 541.204(a)(2). DOL Wage and Hour Op. Ltr., FLSA 2008-17 (Dec. 19, 2008).

b. Creative Professionals

Subsection 2(ii) applies to creative professionals. Reg. § 541.302. The distinction is between employees who must use their creativity to work, and employees who work around creativity or in a creative medium. For example, a journalist who gathers facts, conducts interviews, and combines information into a report, column, or broadcast, would be doing work that requires "invention, imagination, originality, or talent," and therefore qualify for the exemption. *See Wang v. Chinese Daily News*, 2007 WL 4355187 (C.D. Cal. Aug 3, 2007) (jury awarded over $700,000 to newspaper reporters for state overtime claims, and $1.8 million to non-reporter class members for both FLSA and state overtime claims). On the other hand, an animator for a Disney film may not be exempt, because he or she has no say in the story line, and must draw characters according to certain specifications. A DOL opinion letter provided some insight as to classes of employees the DOL does not deem to be creative professionals. Employees who install graphic arts "wraps" (advertisements printed on long sheets of flexible vinyl with an adhesive back) are not exempt because their work does not possess the requisite amount of originality and creativity. The DOL noted that the employees in question did not create the designs for the wraps. Rather, the employees were installers whose work involved a need for diligence and accuracy but not invention or originality. DOL Wage and Hour Op. Ltr., FLSA 2005-26 (Aug. 26, 2006).

The exemption is available for employees engaged in work that is original and creative in a recognized field of artistic endeavor, the result of which depends primarily on the invention,

imagination, or talent of the employee. Artistic professionals need not meet the discretion and independent judgment prong of the test. Reg. § 541.3(a)(2). *See Mertes v. Milardo Photography, Inc.*, 35 Conn. L. Rptr. 439 (Conn. Super. 2003) (employee considered an exempt professional, where primary responsibilities required invention, imagination, and talent in working with existing photographs, using digital techniques to enhance those photographs, using discretion in determining which poses were best suited to certain uses; artistic ability was clearly required in order for employee to lay out and prepare photographs for brochures, take raw portraits and change eye color, hair color, skin tone, and add special effects); *But see Asp v. Millardo Photography, Inc.*, 573 F. Supp. 2d 677 (D.Conn. 2008) (issue of material fact existed as to whether photographic studio employee's duties were artistic in nature); *Truex v. Hearst Commc'n., Inc.*, 96 F. Supp. 2d 652 (S.D. Tex. 2000) (court denied summary judgment to employer-newspaper, where there were disputed facts regarding whether the employee-reporter's primary duties consisted of "work requiring invention, imagination, or talent").

c. Teachers

The professional exemption for teachers requires that the employee must have a "primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge" and be employed as a teacher in an educational establishment. Reg. § 541.303(a). A DOL opinion letter stated that teaching involves, "by its very nature, exercising discretion and judgment." DOL Wage and Hour Op. Ltr., FLSA 2006-41 (Oct. 26, 2006).

Teachers who possess a "teaching certificate," regardless of the terminology used to describe the certificate, qualify for the exemption. However, not all educational establishments require their teachers to have an elementary or secondary education certificate. A teacher's certificate is not required for a teacher to qualify for the exemption, so long as the teacher is employed as a teacher by the employing school or school system. Reg. § 541.303(c). *See also* DOL Wage and Hour Op. Ltr., FLSA 2006-41 (Oct. 26, 2006) (vocational instructors with only a high school diploma are exempt primarily because they "impart knowledge" in a classroom setting); *WH Opinion Letter* (Mar. 5, 2001) WHM:99:8359 (certified scuba diving instructor, employed by a school certified by a national certification agency such as the National Association of Underwater Instructors or the Professional Association of Dive Instructors, was exempt); *WH Opinion Letter* (Sept. 20, 2000) WHM: 99:8327 (preschool teachers generally non-exempt because the educational activities are minimal and preschool employee's primary duty is to protect and care for the needs of the children).

In the final quarter of 2008, the Department of Labor issued three opinion letters addressing the teaching exemption. The first opinion letter found that substitute teachers who were not required to have a college degree or teaching certificate, but instead obtained a substitute teaching permit from the State Professional Teaching were nevertheless exempt so long as their primary duty was teaching. DOL Wage and Hour Op. Ltr., FLSA 2008-7 (September 26, 2008). The second letter opined that instructors at a cosmetology school were exempt where they teach classes all day and where the school is accredited by the NACCAS, a nationally recognized accrediting commission for cosmetology schools and therefore qualified as an "educational institution." DOL Wage and Hour Op. Ltr., FLSA 2008-9 (October 1, 2008). The third letter expressed the opinion that

Assistant Athletic Instructors qualify for the teaching exemption where their teaching responsibilities encompass fifty percent of their time. DOL Wage and Hour Op. Ltr., FLSA 2008-11 (December 1, 2008).

d. Practice of Law or Medicine

The $455 per week salary requirement does not apply to licensed lawyers and medical professionals. The requirements of this exemption are:

(1) any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(2) any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

Reg. § 541.304(a). The Fifth Circuit ruled that physician assistants and nurse practitioners are not practicing medicine and, therefore, must fully satisfy all aspects of the professional exemption, including the salary basis test, in order to be exempt from overtime pay. *Belt v. EmCare Inc.*, 444 F.3d 403 (5th Cir. 2006); *see also Parker v. Halpern-Ruder*, 2008 WL 4365429, slip op. (D.R.I. Sept. 16, 2008). Interestingly, by finding veterinarians exempt, the Ninth Circuit held that the statute does not limit the exemption to the practice of medicine on humans, and that the list of "other practitioners" is not exhaustive. *Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124 (9th Cir. 2004). A Tennessee Court found that Assistant District Attorneys were engaged in the practice of law despite a Tennessee statute prohibiting them from said practice because, the court ruled, that statute was intended only to preclude the ***private*** practice of law. *Wilcox v. Kirby*, 2009 WL 78436, slip op. (E.D. Tenn. Jan. 8, 2009) (altering earlier order denying exempt status because Assistant District Attorneys were precluded from practice of law by statute).

e. Examples of Exempt Professionals

Work requiring advanced knowledge in a field of science or learning customarily acquired by a long course of specialized study is considered exempt. Reg. § 541.300. Occupations such as lawyers, doctors, registered nurses, engineers and accountants meet this "advanced knowledge" requirement. A design engineer who worked for an engineering consulting firm was exempt as a professional employee. *Dingwall v. Friedman Fisher Assoc.,* 3 F. Supp. 2d 215 (N.D.N.Y. 1998). According to the First Circuit, pharmacists are also exempt professionals. *De Jesus-Rentas v. Baxter Pharmacy Servs. Corp.*, 400 F.3d 72 (1st Cir. 2005). In *Sansoucie v. Reprod. Assocs. of Delaware*, 2005 WL 1075596 (D. Del. May 4, 2005), the court held that an embryologist employed at a fertility treatment clinic was a "learned professional" under Reg. § 541.301 and thus exempt from overtime requirements. In *Cavanaugh v. So. Cal. Permanente Med. Grp., Inc.*, 583 F. Supp. 2d 1109 (C.D. Cal. 2008), the court found that a Certified Registered Nurse Anesthetist was an exempt learned professional.

After examining the purported duties and educational background necessary for the position, two DOL letters found that no exemption applied to paralegals. The DOL stated that paralegals, who generally have only an associates' degree from a community college or equivalent institution, ordinarily do not meet the definition of a learned professional. DOL Wage and Hour Op. Ltr., FLSA 2006-27 (Sept. 27, 2006); DOL Wage and Hour Op. Ltr., FLSA 2005-54 (Dec. 16, 2005) (facts described did not satisfy exemption for administrative employee).

For additional examples of the professional exemptions, see *Relyea v. Carman, Callahan, and Ingham, L.L.P.*, 2006 WL 2577829 (E.D.N.Y. Sept. 6, 2006) (real estate closers who examined closing documents and had the ability to halt closings if deficiencies were found did not meet exemption for professionals because they merely "applied existing policies and procedures on a case-by-case basis," and did not "craft" these policies); *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737 (6th Cir. 2000) (court held a licensed funeral director and embalmer qualified as an exempt professional employee because the director possessed advanced-type knowledge acquired by prolonged and specialized study); *Fairris v. City of Bessemer*, 2007 U.S. Dist. LEXIS 63204 (N.D. Ala. May 11, 2007) (court found that an environmental coordinator whose primary duties did not relate to his advanced degree, did not relate to a field of science, and whose title did not appear in the professions listed by the statute was non-exempt); *Galasso v. Eisman, Zucker, Klein & Ruttenberg*, 310 F. Supp. 2d 569 (S.D.N.Y. 2004) (employee was exempt as a learned professional, where employee was certified public accountant, studied accounting in college, was licensed by the state, represented clients before the IRS, gave clients professional advice regarding tax and accounting matters, prepared tax returns, conducted audits, was paid more than $600 per week in salary); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 247 F. Supp. 2d 728 (D. Md. 2003) (kosher supervisor in a nursing home was exempt, as he underwent intensive study and instruction on Jewish law at a Yeshiva, followed by four years of higher education at a rabbinical academy); *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521 (5th Cir. 1999) (athletic trainers required to have a bachelor's degree, apprenticeship, and state license, are exempt); *Balyasnikova v. Univ. of Ill. at Chicago*, 2007 U.S. Dist. LEXIS 66237 (N.D. Ill. Sept. 7, 2007) (post-doctoral research associate exempt because of advanced education and field of practice).

4. COMPUTER EMPLOYEES

The Regulations contain a separate exemption for computer employees outside of the professional exemption. The Regulations reiterate that job titles are not determinative for this exemption. It further states that to qualify for the computer occupation exemption, the employee must be:

> (1) compensated on a salary or fee basis at a rate of not less than $ 455 per week . . . exclusive of board, lodging or other facilities, or on an hourly basis at a rate not less than $ 27.63 an hour; and
>
> (2) Whose primary duty consists of:
>
> The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;

> The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
>
> The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
>
> A combination of the aforementioned duties, the performance of which requires the same level of skills.

Reg. § 541.400. This separate exemption has led to considerable confusion because many computer employees appear to *already* qualify as exempt under the § 13(a)(1) professional exemption, in addition to the newer § 13(a)(17) computer employee exemption. The difference between the two sections and their accompanying regulations is that an hourly employee can qualify under the computer exemption, while the professional exemption requires the employee to be paid a salary. If this were the only difference, it would seem redundant to have salaried computer employees exempted under two different regulations.

In January 2007, the DOL issued a bulletin in an effort to eliminate this confusion. According to the DOL, a computer employee (hourly or salaried) can be exempt under *either* exemption, despite the § 13(a)(1) salary requirement. DOL Wage and Hour Field Assist. Bull., 2006-3 (Dec. 14, 2006). The DOL said the creation of the new computer employee exemption showed that Congress intended to eliminate the salary requirement for the professional exemption for computer employees. Thus, salaried and hourly computer employees can be found exempt under either exemption, assuming they meet the other requirements.

The illustrative examples provided by DOL will hopefully eliminate some of the confusion that has surrounded the previous classification of computer employees within the professional employees' exemption. In a 2006 opinion letter, DOL opined that IT support specialists who spend a majority of time "conducting problem analysis, and researching and resolv[ing] complex problems," do not meet the computer employee exemption because the position does not require development and analysis skills. The position also would not fall under the administrative exemption because discretion and independent judgment was not required. The letter points out that employers should not make the mistake of designating a position as exempt simply because the work involved is "unusually complex or highly specialized along technical lines, or that significant consequences or losses may result from improper performance." DOL Wage and Hour Op. Ltr., FLSA 2006-42 (Oct. 26, 2006).

The DOL intentionally avoided citing specific job titles as examples of exempt computer employees due to rapidly changing technology and terminology in the computer field. The exemption does not apply to employees engaged in the manufacture or repair of computer hardware and related equipment. Reg. § 541.401. Computer employees who otherwise meet the executive or administrative definitions may be exempt even though they are outside the scope of the computer exemption. Reg. § 541.402.

An example of the potential consequences for misclassifying technical support workers is seen in the $65 million settlement approved November 11, 2007, in *Rosenburg v. Int'l Bus. Machs. Corp.*, No. 3:06-cv-0430 (N.D. Cal. Nov. 11, 2007). There, the plaintiffs alleged that IBM violated federal and state labor law by failing to pay overtime to 32,000 systems administrators, network technicians, and other technical staff in fifteen states.

In *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574 (6th Cir. 2004), the court found that a computer help desk employee who provided computer maintenance and support, Martin, was not covered by the computer professional exemption. Martin was not a programmer or software engineer, nor did he perform systems analysis, which would involve making actual analytical decisions about how the company's computer network should function. Instead, Martin was responsible for installing and upgrading hardware and software on workstations, configuring desktops, checking cables, replacing parts, and troubleshooting problems, all of which is nonexempt work. *See also Jackson v. McKesson Health Solutions*, 2004 WL 2453000 (D. Mass. Oct. 29, 2004) (employee's time spent trouble-shooting computer problems did not require the exercise of discretion and independent judgment of the sort exempted by the regulations); *Young v. Cerner Corp.*, 2007 U.S. Dist. LEXIS 63566 (W.D. Mo. Aug 28, 2007) (employee claimed he did not fall under the exemption because he did not write "source code," but rather "transformed data." The court rejected this argument and found his duties of "defect resolution" sufficient to fit within the exemption). *See also Turner v. Human Genome Science, Inc.*, 292 F. Supp. 2d 738 (D. Md. 2003) (computer system support technicians were not exempt because their primary duties, providing technical support by loading, monitoring and troubleshooting general software programs, failed to satisfy the duties test). *But see Medepalli v. Maximus, Inc.,* 2008 U.S. Dist. LEXIS 28509 (E.D. Ca. Apr. 8, 2008) (computer employee found to be exempt under the professional exemption because he had the necessary background, discretion, and his work was varied and intellectual—even though he had a manager and did not have absolute discretion).

5. OUTSIDE SALES EMPLOYEES

The phrase "employed in the capacity of outside salesman" means any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Reg. § 541.500.

To ensure clarity and consistent application, the Regulations provide that to determine the primary duty of an outside sales employee, work performed "incidental to and in conjunction

with" the employee's own outside sales or solicitations, including incidental deliveries and collections, counts as exempt work. Other work that furthers the employee's sales efforts is also regarded as exempt, including, for example, writing sales reports, updating or revising the employee's sales or display catalog, planning itineraries and attending sales conferences. Reg. § 541.500(b).

To qualify for the exemption, the time spent by an outside salesman on non-exempt work cannot exceed twenty percent of the hours worked in a workweek by nonexempt employees of the same employer. The twenty percent limit is calculated based on the hours worked by nonexempt employees of the employer, who perform similar nonexempt work to the outside salesman. However, where there are no employees performing comparable nonexempt work, and therefore no basis from which to derive a percentage, the timeframe is forty hours a week, and the amount of nonexempt work allowed is limited to eight hours per week. *McCluskey v. J.P. McHale Pest Mgmt., Inc*., 147 Fed. Appx. 203 (2d Cir. 2005). *See also* Reg. § 541.500.

This exemption has generated litigation distinguishing between the employee who "does not obtain a commitment for additional purchases," and is therefore non-exempt, from the exempt outside sales employee who consummates the sale. Employees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale. Further, "[e]xempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button."

Employees whose job involved attracting visitors and events to a particular locale were improperly classified as outside salespersons in *Heidtman v. County of El Paso,* 171 F.3d 1038 (5th Cir. 1999). The court found the jobs to be the equivalent of non-exempt inside sales jobs despite job descriptions indicating they initiated sales contacts, developed lists of prospective clients, attended trade shows, and prepared and participated in bid proposals.

Litigation brought by pharmaceutical sales representatives is an increasingly active area of litigation and did not slow in 2008 or the early part of 2009, with cases pending against nearly every major pharmaceutical company. The claims are based on the notion that the representatives don't actually close sales. Many decisions, though, have found the pharmaceutical representatives to be exempt. For example, in *Barnick v. Wyeth*, 522 F. Supp. 2d 1257 (C.D. Cal. 2007), the court found the plaintiff exempt where plaintiff's primary duty was to affect sales, without ever closing them, by educating doctors in their purchase of pharmaceuticals. The court rejected plaintiff's claim that he did not engage in direct sales, finding that he was hired for his sales experience, given further sales training, and was partially compensated through the sales he helped generate. *See also Menes v. Roche Labs., Inc.,* 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008) (finding pharmaceutical sales representative exempt on nearly identical facts to *Barnick*); *D'Este v. Bayer Corp*., No. 07-3206, slip op. (C.D. Cal. Oct. 9, 2007) (same).

In *Novartis Wage and Hour Litigation*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009), the court held that pharmaceutical sales representatives were exempt and not entitled to overtime pay under the outside sales employee exemption. The Plaintiffs were found to be exempt because they did not work under the direct supervision of the employer, were paid by salary and incentive payments

based on sales made, planned their own daily schedules, had discretion with respect to utilizing the company's prepared "scripts" and supporting materials, tailored their presentations based on a number of variables, worked out of their own homes rather than company offices, and spent most of their day traveling in company-provided vehicles.

In *Baum v. AstraZeneca*, 605 F. Supp. 2d 669 (W.D. Pa. 2009), the court granted summary judgment for AstraZeneca, concluding that pharmaceutical sales representatives do "make sales" and are exempt under the Pennsylvania Minimum Wage Act, which largely mirrors the FLSA. The court noted that decisions to the contrary ignore the realities of selling in the pharmaceutical industry, including that sales representatives perform all the functions of outside salespersons, even if they do not (and cannot) sell directly to patients.

However, the federal courts have been anything but consistent in applying the outside sales exemption to pharmaceutical sales representatives. For example, in *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385 (D. Conn. 2009), the district court found that the pharmaceutical sales representatives were not exempt because they did not "make sales or obtain contracts or orders," as required under the Regulations. The court noted that the sales representatives did not have the capacity to carry out sales with the physicians they visited because their employer prohibited them from entering into contracts with physicians for the prescription or purchase of their employer's product. Moreover, the court held that because pharmaceutical sales representatives do not make sales to the ultimate purchaser (the patient) they do not "make sales" under the FLSA. *See also Smith v. Johnson & Johnson*, 2008 WL 5427802, slip op. (D.N.J. Dec. 30, 2008) (pharmaceutical representatives are not exempt as they did not make sales because they obtained no commitment); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 308 (D. Conn. 2008) (refusing to read the term "sale" broadly and therefore finding pharmaceutical representatives non-exempt); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254 (D. Conn 2008) (same); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008) (same).

The Eleventh Circuit Court of Appeals recently extended the analysis of cases such as *Barnick v. Wyeth*, 522 F. Supp. 2d 1257 (C.D. Cal. 2007) to a title insurance executive who claimed that she did not qualify for the outside exemption because she was a "marketing representative" who merely induced realtors, brokers, and lenders to refer the customer (the end user) to her employer for title services rather than a "salesperson," who actually consummated sales with the end user. *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300 (11th Cir. 2009). The court disagreed, finding that her primary duty was obtaining orders within the meaning of section 3(k) of the Act. In doing so, the court relied on the fact that the plaintiff did not pave the way for others to make sales but instead focused her efforts on sales that would later be credited to her and which required no further sales efforts on the part of others at First Title. *Id.* at 1309 (also relying on the facts that (1) she was hired for her past sales experience, (2) she brought a book of clients to First Title, (3) her sole source of income was directly tied to the number of orders she brought in, and (4) she operated on her own with no real supervision). In this regard, *Gregory* is distinguishable from *Wirtz v. Keystone Readers Serv., Inc.*, 418 F.2d 249 (5th Cir. 1969) where the employee in question was not exempt because he turned documents on prospective buyers over to another employee who would explain the payment plan and execute the contract whereas Gregory's efforts directly led to First Title's sale of their product. *But cf. Clements v. Serco, Inc.*, 530 F.3d

1224 (10th Cir. 2008) (finding that civilian military recruiters do not fall under the outside sales exemption because although they 'sold' the idea of enlisting to recruits, they lacked the authority to "close the sale" by obtaining a commitment).

For further examples of the outside sales exemption, see *Belton v. Premium Mortgage, Inc.*, 2006 WL 561489 (W.D. Mo. Mar. 6, 2006) (denying summary judgment for employer because "loan originators" at a mortgage company rarely spent more than 3-4 hours a week on outside sales calls); *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260 (10th Cir. 1999) (sales representatives/account managers were exempt because they visited stores and inspected displays, determined the amount of inventory, set up advertising materials, spoke to sales managers about subsequent deliveries and obtained approval for additional shipments); *Nielsen v. Devry, Inc.*, 302 F. Supp. 2d 747 (W.D. Mich. 2003) (field representatives for company providing higher education were exempt as "outside salesmen;" recruitment efforts of representatives continued until prospective students paid tuition and began classes, salary enhancements and rewards were based on number of tuition-paying students enrolled, jobs were advertised as sales, representatives spent a month in sales training, and representatives were responsible for creating their own leads); *Fields v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 971 (W.D. Tenn. 2003) (employer established that direct sales representatives regularly conducted sales away from the employer's place of business by showing that employees spent the majority of their time selling door-to-door, collecting payments, completing cable residential audits, and collecting debts and cable equipment incidental to and in conjunction with the sales work).

A 2006 DOL opinion letter states that the outside sales exemption applies to certain "sales force mortgage loan officers" based on the representation that the employees were customarily and regularly engaged in obtaining mortgages from brokers and individuals away from their employer's place of business. DOL Wage & Hour Op. Ltr., No. FLSA 2006-11 (Mar. 31, 2006).

In February 2007, the DOL released three FLSA opinion letters explaining its view of the parameters of the outside sales exemption as applied to real estate sales persons. The DOL's analysis of the exemption turned on defining the location of the salesperson's business. First, the DOL found that timeshare sales representatives who work from a resort selling properties on the resort are not performing outside sales because the resort is their workplace. DOL Wage & Hour Op. Ltr., No. FLSA 2007-4 (Jan. 25, 2007). Second, the DOL opined that people selling newly constructed homes to the public qualified for the exemption because being stationed in a model home constitutes working away from the employer's place of business. DOL Wage & Hour Op. Ltr., No. FLSA 2007-2 (Jan. 25, 2007). Third, in the DOL's opinion, sales representatives selling new homes are exempt where they leave the sales "headquarters" to make sales at the lot or new home site. DOL Wage & Hour Op. Ltr., No. FLSA 2007-1 (Jan. 25, 2007).

6. COMBINATION EMPLOYEES

The Regulations also provide an exemption for employees who perform a combination of exempt duties:

> Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

Reg. § 541.708.

Employees who have a combination of exempt duties are not automatically exempt under the FLSA. In *IntraComm Inc. v. Bajaj*, 492 F.3d 285 (4th Cir. 2007), the Fourth Circuit held that employees must pass the salary test in addition to meeting the primary duties of a combination employee. The employee's primary duties consisted of exempt administrative and exempt outside sales duties. However, the employer paid the employee less than $455 per week. The Court, noting the ambiguity of Reg. § 541.708, gave deference to the Secretary of Labor's *amicus* brief which supported the interpretation that the combination exemption only presents an alternate method for satisfying the primary duty test. The exemption does not, according to the Secretary, relieve employers from their burden to independently establish the other requirements of each exemption (i.e., the salary test) when the duties are combined. The court agreed, noting that if an employer was not obligated to pass the salary test, employees under the salary floor could lose their FLSA protection whenever an employer combined their individual exempt duties with other exempt duties. *See also Pinillia v. Northwings Accessories Corp*., 2007 U.S. Dist. LEXIS 83842 (S.D. Fla. Nov. 13, 2007) (finding that a "machine shop manager" did not clearly meet the requirements for an executive exemption, but when aggregated with his duties as an engineer, the combined executive and professional activities created an exemption).

7. COMMISSIONED SALES EMPLOYEES

Under 29 U.S.C. § 207(i), an employee is excluded from coverage if he works for a retail or service establishment, his regular rate of pay is more than one and one-half the minimum wage, and more than half of his compensation for a representative period (not less than one month) represents commissions on goods or services. In *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505 (7th Cir. 2007), the Seventh Circuit affirmed that auto mechanics who are paid based on a formula related to job performance and hours worked are working on a "commission," and are exempt from earning overtime under the FLSA. The court determined the mechanics were paid commissions because they were compensated for the amount of work they did and not the number of hours they worked, a pay structure the court said was "common in the auto repair industry." Similarly, in *Gieg v. DRR, Inc.*, 407 F.3d 1038 (9th Cir. 2005), the court considered the exempt status of auto dealership finance managers whose pay came primarily from commissions on the sale of warranties, alarm systems, insurance policies, and paint protection services. The court concluded that the finance managers satisfied all of the criteria of Section 207(i) and thus were not entitled to overtime for hours worked in excess of forty hours per week. *See also Wilks v. Pep Boys*, 2006 WL 2821700 (M.D. Tenn. Sept. 26, 2006) (to be considered a commission, the "compensation must be linked to the cost passed on to the customer;" compensation paid for "labor hours" tied to each service provided, regardless of how long the work actually took to

complete, does not qualify, resulting in the employee being found non-exempt); *Schwind v. EW & Assocs., Inc.*, 371 F. Supp. 2d 560 (S.D.N.Y. 2005) (employee exempt under retail or service exemption).

The "retail or service establishment" prong of the 207(i) exemption has seen a rise in litigation in recent years. *E.g.*, *Liger v. New Orleans Hornets NBA Ltd. P'ship*, 565 F. Supp. 2d 680 (E.D. La. 2008) (operator of NBA franchise was not a retail or service establishment because, in part, it manufactured the product that it sold); *Saunders v. Ace Mortgage Funding*, 2007 U.S. Dist. LEXIS 28384 (D. Minn. Apr. 16, 2007) (finding a mortgage company that participated in direct lending part of the finance industry and not engaged in retail sales); *Wong v. HSBC Mortgage Corp.,* 2008 U.S. Dist. LEXIS 21729 (N.D. Ca. Mar. 19, 2008) (finding neither HSBC Bank nor HSBC Mortgage Corporation to be retail or service establishments).

8. SMALL NEWSPAPER EXEMPTION

Under 29 U.S.C. § 213(a)(8), employees employed at newspapers with a circulation of less than 4,000 are exempt from the minimum wage and overtime laws. *See Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3rd Cir. 1994) (reporters at nineteen small community papers were entitled to overtime under the FLSA because the aggregate circulation exceeded the maximum allowed under the small newspaper exemption).

9. DAY CARE CENTERS /HOME HEALTH AIDES/DOMESTIC SERVICE EMPLOYEES

Employees who perform casual baby-sitting or provide companionship services for those unable to care for themselves are exempt from the minimum wage and overtime exemptions of the FLSA under 29 U.S.C. § 213(a)(15). *But see Reich v. Miss Paula's Day Care Ctr., Inc.*, 37 F.3d 1191 (6th Cir. 1994) (court held that even if daycare did not provide education, it still must comply with the FLSA, which applies to purely custodial baby-sitting services by trained professionals or others engaged in baby-sitting as a full time occupation).

Companionship services do not include services which must be performed by trained personnel, such as a registered nurse or a licensed practical nurse. Reg. § 301(d) & (e)(2). Home health aides provide companionship services and perform duties which are often performed by nurses, but they do not qualify as "trained personnel" under the companionship services exemption. *See Armani v. Maxim Healthcare Servs., Inc*., 53 F. Supp. 2d 1120 (D. Colo. 1999) (to qualify as "trained personnel" and be entitled to overtime, person must have training equivalent in quantity and quality to R.N. or L.P.N.).

The Regulations define domestic service employment as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." Reg. § 552.3. *See Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004) (district court, in determining that employer was not entitled to "companionship services" exemption, committed reversible error when it improperly analyzed living arrangements of employer's clients as a group, rather than individually, and concluded that they did not qualify as

private homes); *Park v. Choe*, 2007 U.S. Dist. LEXIS 66978 (W.D. Wash. Sept. 10, 2007) (rejecting plaintiff's claim that the exemption does not apply in a "group home," and noting that the statutory term "household" includes more than a private home). *But see Chao v. Jasmine Hall Care Homes Inc*., 2007 WL 4591438 (E.D. Cal. Dec. 28, 2007) (residential care assistants living in group homes are non-exempt if they have to share a bedroom with one or more employees pursuant to two DOL opinion letters from the 1980s that define "private quarters" as separate from clients and other staff members).

The exempt status of a home care companion employed by a home care agency was called into question by the Second Circuit. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2d Cir. 2004), involved an overtime claim by a companion providing home care through a home care agency. The Second Circuit invalidated the DOL's regulation extending the home care companion exemption to agency-paid companions. The Supreme Court vacated the Second Circuit's ruling in *Coke* and directed the Second Circuit to reconsider its decision in light of the DOL's position that the exemption should be applied to companions employed by home care agencies. 126 S. Ct. 1189 (Jan. 23, 2006). In a December 1, 2005 Wage and Hour Advisory Memorandum (WHAM), the DOL wrote that:

> The Division has not changed this regulation or its interpretation thereof as a result of the circuit court's opinion in *Coke v. Long Island Care at Home*, 376 F.3d 118 (2d Cir. 2004). Therefore, it is still our opinion that employees engaged in companionship services, as defined in 29 CFR 552.6, who are employed by a third party are exempt from the minimum wage and overtime requirements of the FLSA.

WHAM No. 2005–1 (Dec. 1, 2005).

The DOL affirmed its opinion in a subsequent published opinion letter. DOL Wage & Hour Op. Ltr., No. FLSA 2006-14 (May 12, 2006). On remand, however, the Second Circuit again ruled that agency-paid companions were not exempt from the FLSA. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48 (2d Cir. 2006). The Second Circuit concluded Reg. § 552.109, which states that agency-paid companions are exempt, was not due a heightened level of deference by the court, given what the court viewed as the DOL's inconsistent interpretations of the regulation over the past thirty years. The Supreme Court unanimously disagreed with the Second Circuit. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007). Conceding the DOL's inconsistent interpretations in the past, the Court held that as long as changes created no surprise, the change in interpretation presented no separate ground for disregarding the present interpretation. Furthermore, the Court believed that the ultimate question was whether Congress would have intended courts to treat the DOL's action as within or outside the DOL's authority to fill the gaps of the FLSA. The Court held, "where an agency rule sets forth important individual rights and duties, where the agency has focused fully and directly on the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination." *See also*

Buckner v. Fla. Habilitation Network, Inc., 489 F.3d 1151 (11th Cir. 2007) (following *Long Island Care* in finding third-party employed domestic service worker exempt).

Recently, there has been some urging from the legislative branch to eliminate this exemption. At least fifteen U.S. Senators signed a letter sent to Secretary of Labor Hilda Solis urging her to change the Regulations. *See* Letter from Tom Harkin *et al.*, Sen., U.S. Senate, to Hilda Solis, Sec'y of Labor, Dep't of Labor (June 11, 2009), *available at* http://harkin.senate.gov/pr/p.cfm?i=314345. The letter explained that "Congress enacted the narrow 'companionship services' exemption to address concerns that the FLSA would be extended to cover services teenagers, friends and neighbors provided occasionally or informally, such as a babysitter. A professional caretaker is simply not the type of informal and casual relationship that Congress sought to exempt." Referencing now-confirmed-Secretary Solis's indication in her confirmation hearings of her willingness to close the loophole, the letter calls on her to inform Congress of the steps being taken to do so and of any assistance Congress can provide. Therefore, this is an important area to watch for future changes.

10. VOLUNTEERS

Volunteers are specifically exempted from all statutory requirements of the FLSA. The Supreme Court defined a "volunteer" as "an individual who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by another person either for their pleasure or profit." *Cleveland v. City of Elmendorf***,** 388 F.3d 522 (W.D. Tex. 2004) (plaintiff-third party officers were volunteers, not employees); *Todaro v. Twp. of Union,* 27 F. Supp. 2d 517 (D.N.J. 1998) (finding plaintiffs were volunteers); *Benshoff v. City of Virginia Beach,* 180 F.3d 136 (4th Cir. 1999) (court refused to find the city's involvement sufficient to render the firefighters' volunteer service "employment controlled or required" by the city for purposes of the FLSA).

The DOL addressed the issue of part-time volunteers in a 2008 opinion letter. The letter presented facts in which a paid firefighter employed by a private, nonprofit volunteer fire department volunteered to perform duties similar to his or her paid duties for the same fire department during off-duty hours. The DOL determined that the firefighter's regular hours and volunteer hours must be combined for purposes of calculating overtime and minimum wage compliance because while 29 U.S.C. § 203(e)(4)(A) permits public sector employees to volunteer their services to their employing agency so long as there is no coercion or undue pressure, that section does not apply where the employee volunteers to provide the same type of services for which they are employed. Thus, the firefighters could volunteer for unpaid shifts as *office* personnel or in a capacity different from that which they were employed to perform, but could not volunteer to perform firefighting duties while an office worker working at the same employer could volunteer to provide firefighting services but not office work. DOL Wage & Hour Op. Ltr., No. FLSA 2008-14 (December 18, 2008)

11. FIRE PROTECTION AND LAW ENFORCEMENT PERSONNEL

Under 29 U.S.C. § 207(k) and Reg. § 541.3, overtime pay for police officers, firefighters and related employees may be determined on a 28-day work period rather than the 7-day work week applied to other employees. The maximum number of hours that fire protection and law enforcement employees can work in the 28-day period without overtime is 212 and 171, respectively. These amounts are prorated for shorter work periods. Additionally, under 29 U.S.C. § 213(b)(20), small government agencies have a complete overtime exemption with respect to fire protection and law enforcement employees if the agency employs less than five employees in fire protection or law enforcement activities during the workweek. *See O'Hara v. Menino*, 312 F. Supp. 2d 99 (D. Mass. 2004) (city did not establish qualifying work period as would entitle it to FLSA's partial exemption for law enforcement personnel); *Harris v. City of Boston*, 312 F. Supp. 2d 108 (D. Mass. 2004) (because city did not adopt qualifying work period, it had to calculate police detectives' back overtime pay under FLSA's default maximum forty-hour threshold, rather than forty-three hour maximum threshold in FLSA exemption for public agency engaged in law enforcement activities). *See also Leever v. City of Carson*, 360 F.3d 1014 (9th Cir. 2004) (police officer may be compensated with contractual flat fee to care for police dog during off-duty hours, but fee must be reasonably based on estimate of hours worked); *Snyder v. Navajo Nation*, 371 F.3d 658 (9th Cir. 2004) (police officers for the Navajo nation are not covered by the FLSA, even when their work takes them off the reservation to interact with non-tribal law enforcement agencies or federal courts); *Johnson v. Unified Govt. of Wyandotte County/Kansas City, Kansas*, 371 F.3d 723 (10th Cir. 2004) (police officers who patrolled housing projects while off duty from the police department are not entitled to combine the hours worked for each job for purposes of determining overtime eligibility under the FLSA).

A frequent issue arises as to whether paramedics and emergency medical technicians are subject to the partial exemption for employees engaged in fire protection or law enforcement duties under 29 U.S.C. § 207(k) and Reg. § 541.3. *See McGavock v. City of Water Valley*, 452 F.3d 423 (5th Cir. 2006) (plaintiffs were engaged in fire protection activities even though they spent more than twenty percent of their workweek engaged in dispatching duties as opposed to actual fire protection activities); *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1344 (Feb. 21, 2006) (denying federal firefighter exemption for dual function paramedics who did not have the responsibility to engage in fire suppression while working as paramedics); *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001) (emergency medical technicians and paramedics are not entitled to overtime and did not qualify as "fire protection employees" because they do not regularly respond to fires, crimes, or accidents); *Adams v. City of Norfolk,* 274 F.3d 148 (4th Cir. 2001) (firefighters who are sometimes called upon to perform non-fire related emergency medical services are not entitled to overtime pay).

In another opinion letter, the DOL suggested that the section 7(k) partial exemption applied to dual-function firefighter/paramedics that were trained in fire suppression techniques and had the legal authority and responsibility to engage in fire suppression activities on behalf of their public agency employer. DOL Wage & Hour Op. Ltr., No. FLSA 2005-9NA (Sept. 9, 2005). A recent Georgia case came to the same conclusion. In *Huff v. Dekalb County*, 516 F.3d 1273 (11th Cir. 2008), the court held that paramedics employed by a fire department qualify as employees

engaged in fire suppression and thus are exempt from FLSA overtime requirements where the paramedics carried fire protective gear in their rescue vehicles, their vehicles were staffed with at least two employees with fire-suppression training, they were regularly dispatched to fire scenes, they could be disciplined for disobeying orders to engage in fire suppression, those employees with advanced firefighting certification did engage in fire suppression, and they were still obligated to engage in fire suppression even though they had yet to exercise that responsibility. *Cf. Lawrence v. City of Philadelphia*, 527 F.3d 299 (3d Cir. 2008) (determining that where fire service paramedics were not expected to or dispatched to fight fires as part of job duties and who did not have responsibility to engage in fire suppression, they fell outside exemption).

12. TRAINEES

Trainees usually are employees who must be compensated for their training time. Trainees must be treated as employees unless each element of the following six-part test is met:

1) The training is similar to what would be taught in vocational school;

2) The training is for the benefit of the trainees;

3) The trainees do not displace regular employees, but work under their close supervision;

4) The employer derives no immediate advantage from the activities of the trainees;

5) The trainees are not entitled to a job at the end of the training period; and

6) The trainees understand they are not entitled to wages for the time in training.

Donovan v. Am. Airlines, Inc., 686 F.2d 267, 273 n.7 (5th Cir. 1982); *Archie v. Grand Cent. P'ship,* 997 F. Supp. 504 (S.D.N.Y. 1998) (former homeless men in employment program were found to be employees rather than trainees where they provided productive work, expected to be paid and benefits to employer outweighed benefits to individuals); *Herman v. Hogar Praderas de Amor, Inc.*, 130 F. Supp. 2d 257 (D.P.R. 2001) (nurse's aides, maintenance/laundry workers, and kitchen workers that were required to participate in a mandatory two-day "training," which included little, if any, instruction, but considerable productive work, were entitled to compensation for work done during the training sessions).

13. AGRICULTURAL EXEMPTION

Even though a landscaping company was not actively involved in agriculture, the Eleventh Circuit joined the Second, Fifth, and Ninth Circuits in holding that the agricultural exemption of the FLSA also extends to subsidiary corporations. *Ares v. Manuel Diaz Farms, Inc.*, 318 F.3d 1054 (11th Cir. 2003). Ares worked for Diaz Landscaping and Nursery Inc., a corporation that leased land and employees to Diaz Farms Inc., which cultivated, harvested, and sold plants and trees. Ares alleged that Diaz Landscaping forced employees to work fifty–sixty hours a week

without overtime. The Eleventh Circuit held that Diaz Landscaping and Manuel Diaz Farms were two entities "so intertwined as to constitute a single agricultural enterprise," which was exempt from the overtime requirement. The Court explained that the FLSA exempts:

> "any employee employed in agriculture" from overtime requirements. Agriculture, within the meaning of the act, has two distinct branches: "(1) a primary meaning which includes farming in all its branches, such as cultivation and tillage of soil, growing and harvesting of crops; and (2) a secondary meaning which includes other farm practices, but only if they are performed by a farmer or on a farm."

Id. at 1056. *See also Jimenez v. Duran*, 287 F. Supp. 2d 979 (N.D. Iowa 2003) (employees engaged in inoculating, debeaking, and crating chickens and moving them from pullet site to layer barn, were participants in "primary agriculture," even though they were not employed by owner of chickens and did not provide daily care to chickens); *Rodriguez v. Whiting Farms, Inc*., 360 F.3d 1180 (10th Cir. 2004) (skinning and trimming of chickens to obtain pelts containing feathers eventually to be used in fly-tying was secondary "agriculture" where the employer bred chickens, raised them for one year prior to processing, only processed those chickens it raised, and merely isolated a product it had produced and prepared it for market); *Sariol v. Fla. Crystals Corp*., 490 F.3d 1277 (11th Cir. 2007) (employee who delivered fuel to farm machinery and performed maintenance qualified under the "secondary agriculture" standard; it was immaterial that he delivered fuel to independent contractors or worked for a Co-Op farm).

14. MODIFIED MOTOR CARRIER EXEMPTION AND OTHER EXEMPTIONS

Employers do not have to pay overtime to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service." 29 U.S.C. § 213(b)(1). This is known as the Motor Carrier Act (MCA) exemption. In the past, an employee was subject to regulation by the Secretary if the job involves operating a "motor vehicle". However, on August 10, 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA-LU) was enacted. The SAFETEA-LU amended the Motor Carrier Act by adding "commercial" to the beginning of the term "motor vehicle" and changing the definition to:

> "commercial motor vehicle" means any self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle (A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater; (B) is designed or used to transport more than 8 passengers (including the driver) for compensation; (C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or (D) is used in transporting material found by the Secretary of Transportation to be hazardous under Section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

Since many workers previously covered by the MCA exemption drive a vehicle that weighs less than 10,000 pounds, the amendment makes it difficult for these employees to retain their exempt status. The amendment has already gained the attention of the courts, which have recognized its impact on the exempt status of employees previously covered by the exemption. *See Musarra v. Digital Dish, Inc.*, 454 F. Supp. 2d 692 (S.D. Ohio 2006) (after passage of the SAFETEA-LU, vehicles that were previously exempt under the old definition of "motor vehicle" are no longer exempt because they are not "commercial motor vehicles"); *Dell'Orfano v. IKON Office Solutions, Inc.*, 2006 WL 2523113 (M.D. Ga. Aug. 29, 2006) (employee who used his personal car for employer's deliveries may fall outside MCA exemption because the definition of "commercial motor vehicle" in 49 U.S.C. § 13102(15) requires a vehicle weight of at least 10,001 pounds). Nearly two years after the SAFETEA-LU was signed into law, the DOL's May 23, 2007, field bulletin stated that after the amendment an employee is covered by the FLSA § 13(b)(1) exemption only if that employee is engaged in transportation involving a "commercial motor vehicle." DOL Wage and Hour Field Assist. Bull., No. 2007-02 (May 23, 2007).

More recently, courts have wrestled with the fleet-wide applicability of the MCA exemption in multi-plaintiff cases. In *Brooks v. Halsted Communications, Ltd.*, 2009 WL 1497182 (D. Mass. May 26, 2009), the court held that a "hybrid" motor carrier—i.e., one with drivers operating vehicles weighing both above and below 10,000 pounds—had to pay FLSA overtime to its drivers of lighter vehicles. *But cf. Hernandez v. Brink's, Inc.*, 2009 U.S. Dist. LEXIS 2726 (S.D. Fla. Jan. 15, 2009) (ruling that mixed fleets containing both commercial and non-commercial vehicles should be treated for FLSA purposes as two separate sub-fleets); *Tews v. Renzenberger, Inc.*, 592 F. Supp. 2d 1331 (D. Kan. 2009) (rejecting argument that "the mere presence of commercial motor vehicles in a fleet renders all employee-drivers exempt under the MCA exemption"); *Vidinliev v. Carey Int'l Inc.*, 581 F. Supp. 2d 1281 (N.D. Ga. 2008) (denying summary judgment regarding applicability of MCA exemption for claims arising after August 10, 2005, where defendant operated mixed fleet of commercial and noncommercial motor vehicles).

However, two district courts reached a different conclusion, ruling that once the employer is deemed to be a "motor carrier," the hours of its employees are subject to regulation by the Secretary of Transportation, and the MCA exemption applies *in toto*, including on the rare occasions when an employee drives a vehicle less than 10,001 pounds. *Collins v. Heritage Wine Cellars, Ltd.*, No. 07-1246, 2008 U.S. Dist. LEXIS 104555 (N.D. Ill. Dec. 29, 2008); *see also Tidd v. Adecco USA, Inc.*, No. 07-11214-GAO, 2008 U.S. Dist. LEXIS 69825 (D .Mass. Sept. 17, 2008).

Assuming an employee operates a "commercial motor vehicle," the employee must also transport goods in interstate commerce on public roadways. Thus, the court in *Barron v. Lee Enters. Inc.*, 183 F. Supp. 2d 1077 (C.D. Ill. 2002) ruled the plaintiffs were not entitled to overtime pay under the FLSA because they delivered newspapers that included preprinted supplements from out-of-state printers. *See also Bilyou v. Dutchess Beer Distribs.*, 300 F.3d 217 (2d Cir. 2002) (exemption for truck drivers transporting goods obtained from out of state); *Walters v. Am. Coach Lines of Miami, Inc.*, 569 F. Supp. 2d 1270 (S.D. Fla. 2008) (transportation of passengers was subject to Secretary of Labor and therefore triggered the MCA exemption as did the company's seaport-to-airport and airport-to-seaport routes because they constituted movement in interstate commerce);

Pravia v. Blasa Group, Inc., 2008 U.S. Dist. LEXIS 24321 (S.D. Fla. Mar. 27, 2008) (finding that plaintiffs were not exempt "loaders" simply because they occasionally loaded trucks bound for interstate transit but lacked discretion as to the manner in which loading occurred, and did not possess the knowledge or skill that would affect the operational safety of the truck); *Vaughn v. Watkins Motor Lines, Inc.*, 291 F.3d 900 (6th Cir. 2002) (although plaintiff dockworkers' supervisor always checked the trailer after they loaded it, they were exempt as "loaders" under the MCA because they exercised judgment and discretion as to the most appropriate way to load trailers, independently decided how to block freight and load it, and prepared diagrams designating any hazardous materials for safety workers to reach in case of accident); *Harrington v. Despatch Indus., L.P.*, 2005 WL 1527630 (D. Mass. June 29, 2005) (employee who transported tools and spare parts in interstate travel was exempt); *see also* DOL Wage & Hour Op. Ltr., No. FLSA 2006-3 (Jan. 13, 2006) (exemption for drivers who transport pallets and kegs to customers and return empties to warehouse).

A number of cases have found the MCA exemption applies to some employees even though their duties do not take them outside the state. *See Talton v. Caffey Distrib. Co.*, 124 Fed. Appx. 760 (4th Cir. 2005) (where delivery driver's route was solely in-state, MCA still applies because items temporally delivered to warehouse did not cease to be a part of interstate commerce); *Musarra v. Digital Dish Inc.*, 454 F. Supp. 2d 692 (S.D. Ohio 2006) (satellite TV technicians who deliver and install dishes to customers, but do not themselves leave the state, are exempt because the dishes were transported by vehicle in interstate commerce); *Jones v. Centurion Inv. Assoc., Inc.*, 268 F. Supp. 2d 1004 (N.D. Ill. 2003) (drivers delivering bread products on plastic delivery trays to customers in Illinois, and returning the trays to an Illinois warehouse for return to the defendant's bakery in Indiana, were engaged in transportation in interstate commerce, though the drivers did not actually drive out of state); *but see Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1786 (Apr. 17, 2006) (drivers who provided intrastate transportation for elderly and disabled persons pursuant to a federally funded program were not exempted by the MCA because the drivers' service was itself purely intrastate even though certain routes carried the drivers and passengers out of state).

Similarly, seamen have been found exempt from the overtime provisions of the FLSA, even though, in one case, the individual worked on a casino boat that rarely sailed. *See* 29 U.S.C. § 213(b)(6); *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580 (7th Cir. 2005).

The Seventh Circuit found an ordained minister working in a rehabilitation center for the Salvation Army exempt under the Ministerial exemption, even though the Salvation Army has commercial branches of its organization. The court reaffirmed the rebuttable presumption that all clergy are exempt from FLSA requirements, including minimum wage. *Schleicher v. The Salvation Army*, 518 F.3d 472 (7th Cir. 2008).

IV. "ON CALL" TIME

The two elements generally considered by the courts in determining whether on-call time is compensable are: (1) whether the wait predominantly benefits the employer; and (2) whether employees are able to use the time for their own purposes. As one court described the distinction:

for most purposes it is best to ask what the employees can do during on-call periods. Can the time be devoted to the ordinary activities of private life? If so, it is not "work." *Dinges v. Sacred Heart St. Mary's Hosps., Inc*., 164 F.3d 1056 (7th Cir. 1999). "[W]here the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable." *Id*. at 1058; Reg. § 785.17; Reg. § 553.221(d).

Factors frequently considered in determining whether on-call time is compensable include:

1) Required response time;

2) Use of a pager to ease restrictions;

3) Ability to trade on-call shifts;

4) Excessive geographical limitations;

5) The employees ability to engage in personal activities; and

6) Frequency of calls.

Dinges, 164 F.3d at 1057-59 *See also Loodeen v. Consumers Energy Co*., 2008 WL 718136 (W.D. Mich. Mar. 15, 2008) (employee taking college course necessary for job promotion was not entitled to compensation for time spent on travel, class, or homework because the classes were voluntary, outside regular work hours, and did not severely restrict his freedom); *Offutt v. S.W. Bell Internet Serv., Inc.*, 130 S.W.3d 507 (Tex. App. 2004) (time that employee, a computer systems engineer, was on call did not constitute working time for purposes of overtime compensation; employee was able to attend movies, spend time at home, eat dinner at restaurants, and was not confined to a certain location while on call); *Whitten v. City of Easley*, 62 Fed. Appx. 477 (4th Cir. 2003) (court held that the firefighters were "waiting to be engaged" during their 48-hour on-call shift, therefore on-call time was not compensable under the FLSA); *Edmiston v. Skinnys, Inc.*, 2003 WL 22228737 (N.D. Tex. Sept. 15, 2003) (plaintiff able to use her on-call time effectively for her own purposes and thus not owed compensation for the on-call time where she was not actually called); *Hiner v. Penn-Harris-Madison Sch. Corp.*, 256 F. Supp. 2d 854 (N.D. Ind. 2003) ("down time" of more than twenty minutes between bus drivers' morning and afternoon routes is not considered working time under the FLSA, provided the employees are not required to perform services for the employer and are able to use the time for personal pursuits); *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720 (8th Cir. 2001) (off-the-premises on-call hours of the nurses at a North Dakota hospital were not compensable because the limitations were minimal and there were few incidents where a nurse was actually called in to work). *But see Chao v. Self Pride, Inc*., 2005 WL 1400740 (D. Md. June 14, 2005) (community living assistants working in facilities caring for developmentally disabled adults entitled to pay for four-hour breaks during continuous shift from 8 am Saturday until 8 am Monday because breaks primarily benefited employer and employer made no effort to ensure that employees actually took the breaks).

In *Jonites v. Exelon Corp*., 522 F.3d 721, 726 (7th Cir. 2008), over 1,000 linemen for Commonwealth Edison sought overtime pay where they were required to respond to emergency calls thirty-five percent of the time, within two hours of notification, and likewise must stay alert during lunch breaks to monitor the worksite. Judge Posner found that the "on-call" requirement did not impose enough of a hardship on the plaintiff to qualify as work. Regarding meal periods, the court found that while meal period claims were covered by arbitration provisions, an employee's right to sue under the FLSA cannot be waived unless done so explicitly. However, the court affirmed the lower court's summary judgment because the plaintiffs' class was "hopelessly heterogeneous," and therefore unsuited to proceed as a class action, leaving arbitration as the only option. *Cf. Lee v. U.S. Sec. Assocs., Inc.*, 2008 WL 958219 (W.D. Tex. Apr. 8, 2008) (finding material issues of fact as to whether the plaintiff could use on call time for his purposes).

V. MEAL & REST PERIODS

Rest periods of five to twenty minutes are considered hours worked by DOL and employees are entitled to be paid during such periods. Reg. § 785.18. The FLSA does not require a specific number of rest periods or regulate their duration, although state laws may contain such requirements. Meal periods are not considered hours worked as long as the employee is "completely relieved from duty for the purpose of eating regular meals." Reg. § 785.19. Ordinarily, thirty minutes or more is long enough to be considered a bona fide meal period.

In determining whether meal periods are compensable time, courts examine: (1) the restrictions placed upon the employee; (2) the extent to which these restrictions benefit the employer; (3) the duties of the employee during the meal period; and (4) frequency of interruption. *Bernard v. IBP, Inc.*, 154 F.3d 259, 266 n.25 (5th Cir. 1998). *See also Beasley v. Hillcrest Med. Ctr.*, 79 Fed. Appx. 67 (10th Cir. 2003) (plaintiffs were restricted as to where they could take their meals, their meals were frequently interrupted, they spent their meal periods watching monitors or working on a computer). Increasingly, courts are finding meal periods compensable. *See Reich v. S. New Eng. Telecomm. Corp.*, 121 F.3d 58 (2d Cir. 1997) (court awarded $9 million back pay to telecommunications company employees who were required to eat lunch at the outside work site but did nothing more while eating than monitor the equipment for safety and security reasons).

Frequent interruptions cause meal periods to be compensable. In *Bernard*, the court upheld a jury verdict finding maintenance workers' meal periods compensable where they were interrupted frequently by supervisors to repair crucial equipment. Moreover, the workers were required to stay on the premises and supervisors often used the meal period as a meeting time to discuss the afternoon work schedule. *Bernard*, 154 F.3d at 263. *But see Arrington v. City of Macon*, 973 F. Supp. 1467 (M.D. Ga. 1997) (police officers were unsuccessful in obtaining compensation for meal times despite being required to maintain radio contact, remain in uniform, and remain in their assigned team area; they were, for the most part, able to "utilize their lunch periods for the intended purpose of eating a meal"); *Jones v. Philip Morris USA, Inc.*, 2004 WL 769456 (M.D.N.C. Apr. 8, 2004) (plaintiff not entitled to compensation where he could take lunch period whenever, was free to leave the premises, was not limited in activities he could pursue, could devote time to personal pursuits; only restriction was possibility that lunch period would be

interrupted for emergency, but no indication such interruptions occurred with great regularity); *Harris v. City of Boston*, 253 F. Supp. 2d 136 (D. Mass. 2003) and *O'Hara v. Menino*, 253 F. Supp. 2d 147 (D. Mass. 2003) (rejecting police detectives' and patrol officers' arguments that remaining on call to handle emergencies during meal breaks made their lunch period predominately for the benefit of the City and that the meal break was predominately for the benefit of the City because the City restricted the hours during which a break could be taken).

In *Hertz v. Woodbury County, Iowa*, 566 F.3d 775, 784 (8th Cir. 2009), the Eighth Circuit explained that meal periods are not exemptions from the FLSA, but simply are defined out of the FLSA because they do not constitute "work" time. (citing Reg. § 785.19). The court also explained that it is far more efficient to place the burden on employees because employees "are in the best positions to prove that their actions during their scheduled mealtimes were for the benefit of the employer and thus not part of a bona fide meal period." *Id.* Finally, the court explained that requiring employers to prove that employees were not doing work during times reserved for meals "perversely incentivize employers to keep closer tabs on employees during their off-duty time." *Id.*

Recent decisions in *Murphy v. Kenneth Cole Prod., Inc.* and *Savaglio v. Wal-Mart, Inc.* demonstrate the liability employers face if they contravene state wage and hour laws requiring employee meal and rest breaks. California state law makes clear that an employer cannot employ an employee for a work period of more than five hours per day without providing a meal period of at least thirty minutes. Cal. Lab. Code § 512. If the employer fails to provide an employee a meal or rest period, the employer must pay the employee one additional hour of pay at the employee's regular rate of compensation. Cal. Lab. Code § 226.7. In *Murphy*, the California Supreme Court ruled the "additional hour of pay" is a wage, and not a penalty. *Murphy v. Kenneth Cole Prod., Inc.*, 40 Cal. 4th 1094 (CA. Apr. 16, 2007). Consequently, the statute of limitations for claims under this section is three years, rather than the one-year limitation for penalty claims.

In *Savaglio v. Wal-Mart Inc.*, a California jury ordered Wal-Mart to pay $172 million for depriving employees of their lunch breaks; employees were not given thirty minutes of uninterrupted break time. 2006 WL 3626295 (Cal. Sup., Dec. 6, 2006) (denying defendant's motion for judgment notwithstanding the verdict). Significantly, of the $172 million award, $115 million was for punitive damages. Wal-Mart has appealed, claiming the additional hour of pay in meal and rest break cases is a penalty, and thus punitive damages are not available. Given the ruling in *Murphy*, it remains to be seen whether this argument will be successful on appeal. The appeal is still pending as of June 22, 2009.

Kenneth Cole's three-year extension of the statute of limitations did not go unnoticed by the plaintiffs' bar. *Martin v. FedEx Ground Package Sys.*, 2008 WL 5478576, slip op. (N.D. Cal. Dec. 31, 2008) is just one notable example of just how lucrative, and how damaging to an employer, meal break suits can be. On December 31, 2008 Judge Vaughn R. Walker closed out the year by granting preliminary approval to a settlement entitling FedEx employees and their attorneys to more than $8.1 million in unpaid wages stemming from allegedly missed meal breaks. Under the terms of the settlement, approximately 42,000 class members are eligible to

share in $5.14 million while the attorneys handling the case are set to recover $2.75 million in fees and costs.

Kenneth Cole and *Savaglio* were by no means last word on meal break requirements under California law, however. *Brinker Rest. Corp. v. Superior Court*, 165 Cal.App.4th 25 (2008) (subsequently depublished by 85 Cal.Rptr.3d 688 in a grant of review) opted for a narrow view of the California Labor Code's mandate that an employer "provide" its employees with meal periods. In short, *Brinker* interpreted Cal. Lab. Code § 512 as requiring only that employers make a meal period available rather than ensure that the meal break is taken.

While this may seem merely technical, in reality it is anything but insignificant. *Brinker*, if it is allowed to stand, means that employers in California are neither required to keep records of all meal breaks taken nor pay a one-hour premium in the cases where they are not recorded (likely even if they were taken). Considering the myriad meal break class actions currently pending in California courts (especially in the wake of *Murphy v. Kenneth Cole*), in total threatening to cost employers millions upon millions of dollars, and taking into account the record-keeping and logistical nightmare in many industries of ensuring that meal breaks are taken *and* properly recorded, this outcome is certainly a welcome one for management. Several other courts quickly followed *Brinker* by adopting its holding and reasoning. *See, e.g.*, *Brinkley v. Public Storage, Inc.*, 167 Cal.App.4th 1278 (2008) (depublished); *Martin v. FedEx Ground Package Sys., Inc.*, 2008 WL 5478576 (N.D.Cal. Dec. 31, 2008).

Petitions for review were filed in *Brinker* and its progeny and the Supreme Court has granted review. It remains to be seen how the issue will be determined, but the fact that the development of the meal period issue in *Brinker* has mirrored that of *Kenneth Cole* may not bode well. In any event, the issue will certainly be well briefed before the California Supreme Court considering that the Court granted leave to file an over-length brief that most reports put in the 130-page range. At that rate, the issue may be in a holding pattern for some time, and with it countless pending and potential meal break class action suits.

In 2006, a Pennsylvania jury awarded $78 million to a class of 170,000 Wal-Mart workers after finding that the employees were not compensated for missed meal breaks and off-the-clock work. *Braun v. Wal-Mart Stores, Inc.*, No. 020303127 (Pa. Ct. C.P. Oct. 13, 2006). A year later, the Pennsylvania state judge awarded an additional $62.2 million in damages, which included $45 million in attorney fees. *Braun v. Wal-Mart Stores, Inc.*, No. 020303127 (Pa. Ct. C.P. Oct. 3, 2007). Wal-Mart has appealed both awards. *See also Borja/Trujillo v. Wal-Mart Stores, Inc.,* (employees allegedly worked off-the-clock and without meal periods; Wal-Mart settled for an estimated $50 million).

VI. SLEEP TIME

Under the FLSA, for employees whose shifts are less than twenty-four hours long, any time in which an employee is permitted to sleep is compensable. Reg. § 785.21. However, if the employees are required to be on duty for more than twenty-four hours, up to eight hours of sleep time may be excluded from compensation by agreement between an employer and employee if

the employee's sleep time is not interrupted for at least five hours of that period and the employer provides adequate sleeping facilities. Reg. § 785.22. In the case of employees who reside on-site, the parties may also agree on additional amounts of private time to be excluded from hours worked. Reg. § 785.23. *See Braziel v. Tobosa Develop. Servs.*, 166 F.3d 1061 (10th Cir. 1999) (an agreement to exempt sleep time from hours worked may be implied and found it clear that the employees understood and acquiesced in the company policy when they were hired); *Ormsby v. C.O.F. Training Servs., Inc.*, 60 Fed. Appx. 724 (10th Cir. 2003) ("sleep time," during which the manager of a residential home for the mentally disabled was not to perform his routine duties but was not free to leave facility, was not overtime under the FLSA, where the employee expressly agreed to a working schedule that included unpaid sleep time); *Woolley v. State of N.Y.*, 299 A.D.2d 699 (N.Y. App. Div. 2002) (airport firefighters who worked 106 hours biweekly in four twenty-four-hour shifts and one ten-hour shift were not entitled to overtime pay, even though they were compensated the same as other similar grade state employees who worked only seventy to eighty hours per fourteen-day period; their meal and sleep times were included in the 106 hours, and the firefighter exemption in the FLSA permits 106 hours of work every two weeks without overtime liability).

In *Garofolo v. Donald B. Heslep Assocs., Inc.*, 405 F.3d 194 (4th Cir. 2005), the court took a decidedly hands off approach to the question of overtime eligibility of resident managers of a self-storage facility who lived on the employer's premises. The plaintiffs had signed a detailed employment contract that provided they were to live rent-free in an on-premises apartment provided by the employer and work forty hours per week. The agreement stated that they were free to divide their time between work and private pursuits as they saw fit as long as they worked forty hours weekly. The plaintiffs sued, claiming they worked well in excess of forty hours per week without receiving overtime compensation. The Fourth Circuit cited Reg. § 785.23, which governs employees who live on the employer's premises. The Regulation provides that because it is difficult to actually determine the number of hours worked, "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted."

In the well-publicized case of *United States v. Sabhnani*, 566 F. Supp. 2d 139 (E.D.N.Y. 2008), the defendants were indicted on several charges stemming from their holding alien workers and forcing them to perform work as domestic servants as well as subjecting them to various forms of cruel treatment. The court found that the workers' sleep time could not be excluded from the damages because their sleep periods were subject to such regular interruption—denying them a reasonable night's sleep throughout their "employment"—that the entire time must be counted toward work time.

VII. PRELIMINARY AND POSTLIMINARY TIME

The Portal-to-Portal Act generally excludes an employee's preliminary and postliminary activities from the minimum wage and overtime provisions of the FLSA. 29 U.S.C. § 254. This general exemption does not apply, however, if there is a contractual obligation or custom and practice which provides that employees are paid for this time.

Pre- and post-work activities are compensable if they are an "integral" and "indispensable" part of the employee's principal activities. However, even a principle activity is not compensable if it falls under the *de minimis* exception. To be *de minimis*, activities must be so "insubstantial and insignificant" that they ought not to be included as part of the workweek: "[A] few seconds or minutes of work beyond the scheduled working hours... may be disregarded. Split-second absurdities are not justified .... It is only where an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Reich v. Montfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998) (citing *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946)). *See Fast v. Applebee's Int'l, Inc.*, 502 F. Supp. 2d 996 (W.D. Mo. 2007) (time that a bartender spent straightening chairs or picking up trash between when he first arrived and when he clocked in was *de minimis* where the aggregate amount of compensable time that he spent on such activities was low and the practical difficulty of recording such time was immense). An Ohio Court ruled that forty-five current and former insulation installers were entitled to be paid for time they spent at the insulation shop before going out to perform their daily work. The employees' "official" start time was 7:30 a.m. but many arrived at work as early as 6:00 a.m. to load their truck, receive their assignments and drive to their jobsites. The company's president testified that the employees "voluntarily" came in early to drink coffee and socialize. But the court rejected this testimony, ruling that the preliminary time in question predominantly benefited the employer. *Chao v. Akron Insulation & Supply Inc*., 2005 WL 1075067 (N.D. Ohio, May 5, 2005).

Similarly, telecommunications giant Sprint/United Management agreed to pay $8.77 million to call center workers who, they alleged, were not compensated for time spent performing pre- and post-shift work such as booting computers, reviewing information about Sprint's promotions and services, and summarizing notes from previous calls. *Bruner v. Sprint/United Mgmt. Co.*, No. 07-2164 (D. Kan.), *settlement filed* 1/13/09). The terms of the settlement call for three separate class settlement funds covering workers in California, New York, Kansas, Oklahoma, Florida, New Mexico, North Carolina, and Texas. Each of the three class representatives are slated to receive a $10,000 incentive payment, and the attorneys will seek $1.93 million in fees and costs to be paid out of the $8.77 million settlement fund.

Factors that courts examine in determining if time is *de minimis* are:

1) The practical administrative difficulty of recording the additional time;

2) The size of the claim in the aggregate; and

3) Whether the work is performed on a regular basis.

Reich v. Montfort, Inc., 144 F.3d 1329, 1333–34 (10th Cir. 1998).

The ongoing debate over what constitutes "work" under the FLSA will not return to the Supreme Court in the coming term, following the Supreme Court's denial of certiorari in *De Asencio v. Tyson Foods Inc*., 500 F.3d 361 (3rd. Cir. 2007), *cert denied* 76 USLW 3417 (07-1014) (June 9, 2008). In its February 2008 petition, Tyson asked the Court to review the Third Circuit's

September 2007 decision (500 F.3d 361) ordering a new trial on whether workers at chicken processing plants must be paid for time spent donning, doffing, and washing sanitary and protective gear at the beginning and end of each shift and for two daily meal breaks. Tyson argued that there was a Circuit split as to whether the FLSA definition of "work" required "exertion" by the worker because the Third and Ninth Circuit had held that no exertion is required, which conflicted with the Tenth Circuit's ruling that "work" requires physical or mental exertion. *Compare Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (defining "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business") *with Armour & Co. v. Wantock*, 323 U.S. 126 (1944) (holding that "exertion" is not a necessary element when defining "work"). The Supreme Court recently followed the *Armour* definition in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), as did the Third Circuit in *De Asencio*. However, as the cert petition noted, the Tenth Circuit followed the *Tennessee Coal* definition in *Reich v. IBP, Inc*., 38 F.3d 1123, 1125-26 (10th Cir.1994), and likewise, the Seventh Circuit recently utilized the *Tennessee Coal* definition in *Jonites v. Exelon Corp*., 522 F.3d 721, 726 (7th Cir. 2008). Defendant Tyson argued that the two definitions may coexist where the non-exertive work referenced in *Armour* is limited only to situations that the parties intend and contract for an employee to do "work" that does not involve physical or mental exertion. The failure to certify this definitional question leaves the lower courts in limbo, struggling to find a workable definition of compensable work time.

The Court also denied certification in two other "donning and doffing" cases posing similar issues. In *Anderson v. Cagle's Inc.*, 488 F.3d 945 (11th Cir. 2007) *cert. denied* 76 USLW 3393 (June 9, 2008), union-represented employees working at a poultry plant sought review of the Eleventh Circuit's holding that under § 203(o) they were not entitled to be paid for time spent donning, doffing, and cleaning protective gear because the employer had a custom or practice of not paying for such time under a collective bargaining agreement. The workers pointed to a Circuit split between the Eleventh and Fifth Circuits on one hand and the Ninth Circuit on the other hand. In opposing review, Cagle's argued that the Eleventh Circuit decision is consistent with the view taken in opinion letters issued by the DOL that clothing, for purposes of § 203(o), includes items worn for protection or sanitation.

In *Gorman v. Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) *cert. denied* 76 USLW 3418 (June 9, 2008), workers at a nuclear power plant appealed the Second Circuit's June 2007 decision that they are not entitled to be paid for time spent going through security (wait in line at the vehicle entrance, swipe their cards, and provide their handprint for analysis) and donning and doffing protective glasses, boots, and helmets because the activity is "relatively effortless" and is not "integral" to the "principal activities" for which they were hired. The workers argued that the Second Circuit created a conflict with other circuits by finding that "an activity required by the employer, for the employer's benefit and indispensible to the performance of the employee's duties" is not a principal activity. Con Ed, in its brief opposing Supreme Court review, argued that "[n]o court of appeals has affirmed an award of compensation for the time spent donning and doffing minimal protective gear akin to that at issue here." Donning and doffing a helmet, glasses, and shoes is "preliminary" activity, the company said.

A. WALKING AND WAITING TIME

Under the Portal-to-Portal Act, time employees spend in "preliminary" and "postliminary" activities before and after the workday, such as "walking, riding or traveling to the actual place of performance of the principal activity," need not be compensated. 29 U.S.C. § 254. In a unanimous decision, the United States Supreme Court ruled that walking and waiting time may be compensable under the FLSA. In the consolidated cases of *Tum v. Barber Foods* and *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), the Court held that the time employees spend walking to their workstations after their first compensable act (donning unique protective gear) is part of their "continuous work day," and the walking time is compensable time under the FLSA. The "continuous work day" also includes the time employees spend waiting to take off protective gear at the end of their shift, but not the time they spend waiting to pick up protective gear before the shift begins.

The Court based its ruling on the text of the FLSA, the DOL's Regulations, and existing precedent. Employers are generally required to compensate employees for all time spent performing "work," but the 1947 Portal-to-Portal Act amended the FLSA to carve out certain walking, riding, and travel time, as well as other activities before and after ("preliminary and postliminary" to) the employee's "principal activity." In a prior case, however, the Court held that acts "integral and indispensable" to an employee's work are not excluded under the Portal-to-Portal Act because they are part of the "principal activity" itself. Further, the DOL regulations have long supported the "continuous workday rule," which defines the workday as that period of time between commencement and completion of an employee's "principal activity." Reg. § 790.6(b).

In *Alvarez*, the Court held that donning and doffing of unique protective gear was an "integral and indispensable" part of the "principal activity," such that the Portal-to-Portal Act did not apply. The meat packers in *Alvarez* were required to wear extensive outer garments and protective gear stored in company locker rooms. According to the Court, the employees' workday began in the locker room when they put on the gear. Relying on the "continuous workday" rule, the Court also held that the time spent walking between the locker room and the production floor when an employee was in protective gear at the start and end of a shift was covered under the FLSA. However, time spent walking to the locker room before donning the protective gear was not compensable.

While the poultry processors in *Tum* also benefited from the Court's walking-time decision, the Court refused to expand the employer's liability under the FLSA to include time that the employees spent waiting to pick up their gear. According to the Court, such waiting time is excluded by the Portal-to-Portal Act and, being "two steps removed" from the production line, is not "integral and indispensable" to a "principal activity." Time spent walking and waiting before donning gear "always comfortably qualif[ies] as a 'preliminary' activity" excluded from the FLSA.

1. DEVELOPMENTS AFTER ALVAREZ

On May 31, 2006, DOL Wage and Hour Division Acting Administrator Alfred Robinson issued a WHAM setting forth the DOL's position on two issues that were not squarely decided by the Supreme Court in *Alvarez* and *Tum*. Contrary to the position taken by the Ninth Circuit, the DOL takes the position in the May 31, 2006 WHAM that there is no distinction between the donning and doffing of unique and non-unique safety equipment and all such time should be treated as compensable as long as it is not *de minimis*. The only exceptions noted by the DOL Administrator in which equipment donning and doffing time would never be compensable involve: (1) the putting on and taking off of items used only to keep the employees' personal clothing from getting soiled since it is not "required by the nature of the work" and, (2) if employees are given the option to take the protective equipment home and have the ability to change into the equipment before coming to work, the donning and doffing time is no longer a principal activity or compensable, even when the employee chooses to perform this activity at the plant. The second issue addressed in the WHAM concerns whether otherwise compensable *de minimis* activities must may be aggregated for purposes of applying the *de minimis* exception. Although again acknowledging that the Supreme Court did not directly address the scope and meaning of the *de minimis* rule in the *Alvarez* case, the DOL takes the position in the WHAM that this rule only comes into play where the combined time spent donning, doffing, walking and waiting falls below the *de minimis* threshold.

In *Twaddle v. RKE Trucking Co.*, 2006 WL 840388 (S.D. Ohio Mar. 29, 2006), truck drivers were required to arrive at 6:00 a.m. to warm up their trucks, perform pre-trip inspections, and await dispatch. The court found the truck drivers' waiting time was predominantly for the employer's benefit and that the drivers were not free to use the waiting time for their own purposes.

In *Bonilla v. Baker Concrete Constr. Inc.*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit held that construction workers required to pass through security had no right to compensation under the FLSA for the time spent being cleared by security because such conduct is not integral and indispensable to the construction jobs. *See also Sisk v. Sara Lee Corp*., 590 F. Supp. 2d 1001 (W.D. Tenn. 2008) (giving deference to DOL opinion letters on donning and doffing and, as a result, finding that employees' activities were not compensable).

In *Kasten v. Saint-Gobain Performance Plastics Corp*., 556 F. Supp. 2d 941 (W.D. Wis. 2008), workers were entitled to compensation for time spent donning and doffing the protective gear their employer required them to wear as well as the time spent walking to their work areas. There, the court not only denied the defendant's Motion for Summary Judgment, but granted in part Plaintiffs' Motion for Summary Judgment and allowed the case to proceed as a collective action. Saint Gobain has obtained preliminary approval to settle for $675,000. Such proceedings underscore the dangers of failing to heed the FLSA compensation mandates. *See also Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714 (E.D.La. 2008) (granting final approval to a settlement of claims with a settlement fund of $3.12 million for approximately 8,300 employees); *Gatewood v. Koch Foods Of Miss., LLC*, 569 F. Supp. 2d 687 (S.D. Miss. 2008) (finding genuine

issues of material fact as to whether donning and doffing of sanitary equipment in poultry processing plant was both integral and indispensible to workers' principal activities).

Federal courts in California have issued varying decisions regarding donning and doffing pay under the FLSA for police officers. *Martin v. City of Richmond*, 504 F. Supp. 2d 766 (N.D. Cal. 2007) (finding police officers who were not entitled to pay for time donning and doffing a police uniform because it was not integral or indispensable to an officer's principle activities of law enforcement, but time spent donning and doffing "duty equipment" was a compensable activity); *Abbe v. City of San Diego*, 2007 WL 4146696 (S.D. Cal. Nov. 9, 2007) (noting that because donning and doffing took less than ten minutes per day, the activity was non-compensable under the *de minimis* rule); *Lemmon v. City of San Leandro*, 2007 WL 4326743 (N.D. Cal. Dec. 7, 2007) (holding that time spent donning and doffing required uniform and gear is compensable under FLSA as long as time spent is not *de minimis*); *Maciel v. City of Los Angeles*, 2008 U.S. Dist. LEXIS 22623 (C.D. Cal. May 29, 2008) (holding that time spent donning protective gear is compensable and not *de minimis*). The Seventh Circuit addressed donning and doffing for Postal Service employees in a case determining whether donning and doffing time counted towards the required 1,250 minimum hours to qualify for FMLA leave. *Pirant v. U.S. Postal Serv.*, 542 F.3d 202 (7th Cir. 2008). The court held that a Postal Service employee was not entitled to compensation for the three to five minutes she spent each workday putting on and removing gloves, shoes, and a work shirt because she was not required to wear extensive and unique protective equipment.

In January, 2009, the DOL announced that Nestle Prepared Foods Co. had paid almost $5.1 million in back wages to more than 6,000 current and former employees for time spent putting on and taking off required equipment and clothing. Although the DOL's investigation, with which Nestle cooperated, covered facilities in California, Utah, and Arkansas, it reportedly prompted Nestle to conduct reviews at its other facilities and could potentially lead to further payments of back wages.

B. TRAVEL TIME

Ordinary commuting time between home and work is not considered compensable time, even for employees whose worksites may vary. Reg. § 785.35. As long as the use of the vehicle is pursuant to an agreement between the employer and the employee and the travel is within the normal commuting area, this time is not compensable even if the employee commutes in the employer's vehicle. 29 U.S.C. § 254(a). *See Bonilla v. Baker Concrete Constr. Inc.*, 487 F.3d 1340 (11th Cir. 2007) (construction workers required to travel on employer-provided buses to an airport worksite have no right to compensation under the FLSA because employees did not perform any work-related activities before they reached the worksite). An employee is not entitled to payment for work done before they travel to workplace if it can be done at the workplace. *See Powell v. Carey Int'l Inc.*, 514 F. Supp.2d 1302 (S.D. Fla. 2007) (time spent by limousine drivers on preparatory activities before the commute to the employer's workplace cannot make the commute compensable when the preparatory activities could have been performed at employer's place of business). An employee is entitled to payment for any work that the employer actually requires the employee to perform during the commute. Reg. § 785.41.

However, the time spent working on the commute must be more than a *de minimis* amount to be compensable. *See, e.g.*, *Adams v. United States*, 471 F.3d 1321 (Fed. Cir. 2006) (federal law enforcement officers not entitled to pay for commuting time in "take home" agency vehicles despite fact that they were required to monitor radios during commute and respond to emergencies as needed); *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999) (when police officers transporting police dogs with them to work were occasionally required to stop to feed, walk and clean the dogs, such time was compensable except where *de minimis*); *Bull v. United States*, 68 Fed. Cl. 212 (Fed. Cl. 2005) (U.S. Customs canine officers must be paid for job-related training of their narcotic-sniffing dogs but not for dog grooming or practicing with firearms); *Reich v. New York City Transit Auth.*, 45 F.3d 646 (2d Cir. 1995) (where police officers required to feed, train and walk police dogs during commute, such time is compensable except where *de minimis*); *Leever v. City of Carson*, 360 F.3d 1014 (9th Cir. 2004) (police officer may be compensated with contractual flat fee to care for police dog during off-duty hours, but fee must be reasonably based on estimate of hours worked); *Kavanagh v. Grand Union Co.,* 192 F.3d 269 (2d Cir. 1999) (no violation where worker who did not have a fixed work location but instead traveled to more than fifty stores was paid for the time he spent traveling from site to site, but not to the first site or from the last site; *Smith v. Aztec Well Servicing Co.*, 321 F. Supp. 2d 1234 (D.N.M. 2004), *aff'd*, 462 F.3d 1274 (10th Cir. 2006) (activities performed by rig hands while traveling, such as discussing job safety, occasionally transporting paperwork and equipment to and from well sites, and infrequently getting out of truck to put chains on tires, dig truck out of mud, change flat tires, or open and close gates were not compensable); *O'Brien v. Encotech Const.*, 2004 WL 609798 (N.D. Ill. Mar. 23, 2004) (if principal activity was performed before travel time or after travel time, the travel time was a compensated activity even if the principal activity could have been performed at the job site instead of at the yard); *Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234 (D. Mass. 2004) (automobile damage appraisers who can show they work at home at start of day are entitled to compensation for morning commutes; those who can show work at home at end of day are entitled to compensation for evening commutes); *Kuebel v. Black & Decker*, 2009 WL 1401694, slip op. (W.D.N.Y. May 18, 2009) (time spent commuting to first job and to home from last job was not compensable where the employee only checked email, synced his PDA, printed sales reports and received directives from his manager at home before and after work).

The Second Circuit found that fire alarm inspectors required to commute and to keep safe inspection documents were not entitled to compensation under the FLSA. *Singh v. City of New York,* 524 F.3d 361 (2d Cir. 2008) (holding that carrying a brief case during a commute inflicts only a minimal burden on the inspectors still "permitting them to freely use their commuting time as they otherwise would have without the brief case").

On the other hand, employers must compensate employees who have a *fixed work location* and who travel on one-day assignments. 29 U.S.C. § 254(b); Reg. § 785.36-785.37. Overnight travel during the employee's regular working hours or their weekend equivalent is also compensable. For instance, an employee must be paid for traveling between 9 a.m. and 5 p.m. on Saturday if that employee works 9 a.m. to 5 p.m. during the week. Reg. § 785.39. Employees on overnight trips who are merely passengers and who are not actually working need not be compensated for

the travel time. On the other hand, an employee who drives or works as a passenger must be paid for this time. Reg. § 785.41.

Employers must compensate employees who are required to drive employer-owned vehicles during the time those employees drive to pick up the car and return the car to its designated parking spot. *Burton v. Hillsborough County*, 181 Fed. Appx. 829 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 556 (2006) (county engineers required to drive county-owned vehicles during inspections and not allowed to take vehicles home); *see also McGuire v. Hillsborough County*, 511 F. Supp. 2d 1211 (M.D. Fla. 2007) (fire inspectors in Florida were entitled to overtime pay for the time they spent driving from county offices to their first job). Employers also must compensate employees for time spent attending and traveling to and from counseling sessions if the employer requires the counseling. *See Sehie v. City of Aurora*, 432 F.3d 749 (7th Cir. 2005) (employer ordered to pay for the time spent attending and traveling to counseling sessions mandated by employer because employer must pay for any physical or mental exertion controlled or required by the employer that is pursued necessarily and primarily for the benefit of the employer).

C. CHANGING OF CLOTHES

Generally the FLSA requires employers to compensate employees for donning, doffing or otherwise changing clothes when the activity is integral and indispensable to the employee's principal duties and is not *de minimis*. Reg. § 785.26. This general requirement is subject to 29 U.S.C. § 203(o), which states that time spent "changing clothes" or washing (the person) is excluded from compensable "working time" at the beginning or end of each workday when the "express terms" or the "custom or practice" under a bona fide collective bargaining agreement applicable to the particular employee exclude such time.

1. CHANGING CLOTHES GENERALLY

FLSA regulations provide that hours spent changing clothes are compensable if such activity "is indispensable to the performance of the employee's work or is required by law or by the rules of the employer." Reg. § 785.26; *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004) (finding compensable work time where employer required workers to change into and out of their uniforms at the plant, and only at the plant, in the normal course of the employees' jobs); *Perez v. Mountaire Farms*, 610 F. Supp. 2d. 499 (D. Md. 2009) (time spent donning and doffing protective clothing in a chicken processing plant, including time spent doing so during unpaid meal periods, was compensable where it was required by the employer and for the primary benefit of the employer); *Jordan v. IBP, Inc*., 542 F. Supp. 2d 790 (M.D. Tenn. 2008) (the donning and doffing of frocks was compensable where it included the collecting, sanitizing, and stowing of gear, as well as walking and waiting); *Hoyt v. Ellsworth Coop. Creamery*, 579 F. Supp. 2d 1132 (W.D. Wis. 2008) (finding that because plaintiffs are required by their employer to wear hairnets and hard hats, plaintiffs activities are considered "work"); *Spoerle v. Kraft Foods Global, Inc*., 527 F. Supp. 2d 860 (W.D. Wis. 2007) (donning and doffing at chicken processing plant did not constitute noncompensable preliminary and postliminary activities under the Portal-to-Portal Act); *Garcia v. Tyson Foods, Inc.,* 474 F. Supp. 2d 1240 (D. Kan. 2007) (finding

material facts exist as to sufficiency of time spent under *Alvarez* and current DOL policy); *Lopez v. Tyson*, 2007 WL 1291101 (D. Neb. Mar. 20, 2007) (following *Garcia* holding). *Davis v. Charoen Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314 (M.D. Ala. 2004) (employees who brought action against chicken processor, stemming from alleged failure to pay overtime wages, failed to offer any evidence that it was processor's practice or custom to pay employees for pre-shift donning and post-shift doffing of clothing and protective gear; collective bargaining agreement entered into between parties did not mandate compensation for donning-and-doffing time); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912 (N.D. Ill. 2003) (pace boners' and pace trimmers' donning and doffing of sanitary and protective safety equipment was not "changing clothes" within the meaning of the FLSA provision); *Bejil v. Ethicon Inc.*, 269 F.3d 477 (5th Cir. 2001) ("[b]y not incorporating compensation for clothes changing before and after work into the collective bargaining agreement between [the employer] and the union, nonpayment became the 'custom and practice'"); *Reich v. Montfort,* 144 F.3d 1329 (10th Cir. 1998) (the preliminary time spent donning safety and sanitary clothing before and after shifts was compensable, not *de minimis*).

Expectation of donning and doffing pay under the FLSA is not adequate to establish an offer of compensation for donning and doffing clothing/equipment. *See Rios v. Jennie-O Turkey Store, Inc.*, 27-CV-03-020489 (Minn. Oct. 6, 2006) (employees' expectation to be paid according to the FLSA was an impermissible attempt to bootstrap FLSA law into the terms of the employees' common law contracts claims).

Recently, some circuit court opinions have recognized a distinction between general and specialized protective clothing. For example, in *Gorman v. Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) *cert. denied* 76 USLW 3418 (June 9, 2008), employees of a nuclear plant were required to wear a helmet, safety glasses, and steel-toed boots. The Second Circuit held that the donning and doffing of generic protective gear is not made integral by being required by the employer or by government regulation. The Court distinguished the donning and doffing of this "generic protective gear" from that in an earlier Supreme Court case where the protective gear was found to be integral and indispensable to the lethal atmosphere of a battery plant. *See Steiner v. Mitchell*, 350 U.S. 247 (1956). *See also IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (distinguishing between unique protective gear and non-unique protective gear such as hardhats and safety goggles); *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (the donning and doffing of standard safety equipment such as safety glasses, a pair of ear plugs, and a hard hat was not "work" under the FLSA whereas the time spent donning, doffing, and cleaning the special protective gear used by the knife workers was); *Adams v. Norman W. Fries, Inc. d/b/a Claxton Poultry Farms*, No. 06-CV-017, (S.D. Ga. Feb. 23, 2009) (holding that time spent donning and doffing generic gear was not compensable and that the time spent on specialized gear was *de minimis*); *Alford v. Perdue Farms, Inc.*, 2008 WL 879413 (M.D. Ga. Mar. 28, 2008) (the donning of protective gear such as hair nets and goggles by employees at a poultry processing plant is a "preliminary or postliminary" activity, and therefore excluded from FLSA coverage). Additionally, two Texas courts have found that there is a distinct difference between the safety equipment worn by meatpacking workers versus poultry workers. This difference precludes a finding that the poultry workers' time spent donning and doffing is compensable, as that time is *de minimis*. *See Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, (E.D. Tex. 2001), *aff'd*,

44 Fed. Appx. 652 (5th Cir. 2002); *Pressley v. Sanderson Farms, Inc.*, 2001 WL 850017 (S.D. Tex. Apr. 23, 2001), *aff'd*, 33 Fed. Appx. 705 (5th Cir. 2002).

2. EXCLUSION OF "CLOTHES CHANGING" TIME UNDER § 3(O)

The FLSA also contains a provision, § 3(o), which excludes all time spent changing clothes when "the express terms of or by custom or practice under a bona fide collective bargaining agreement []" calls for such exclusion. In a June 6, 2002 opinion letter, DOL Wage and Hour Division Administrator Tammy McKutchen reversed the DOL's position taken in a December 1997 opinion letter and concluded that the term "clothes" in § 3(o) included the mesh protective equipment worn by knife-wielding employees in the meatpacking industry. DOL Wage & Hour Op. Ltr., No. FLSA 2002-2 (June 6, 2002). Therefore, companies and unions were free to negotiate provisions which expressly or by custom and practice exclude donning and doffing activities, but not post-shift equipment washing, from paid time. On May 14, 2007, the DOL weighed in again on whether time donning and doffing protective safety equipment worn by employees in the meat packing industry is compensable under the FLSA. Consistent with its opinion of June 6, 2002, the DOL opined that "changing clothes" applies to putting on and taking off protective equipment typically worn by employees in the meatpacking industry, such as mesh aprons, sleeves and gloves, plastic belly guards, arm guards, shin guards, and other heavy protective safety equipment. DOL Wage & Hour Op. Ltr., No. FLSA 2007-10 (May 14, 2007). While this opinion contradicted the Ninth Circuit ruling in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), the DOL stated that its interpretation remains unchanged from 2002 and that meatpacking industry employers outside of the Ninth Circuit can continue to rely on DOL's interpretation

In *Anderson v. Cagle's Inc.*, 488 F.3d 945 (11th Cir. 2007) *cert. denied* 76 USLW 3393 (June 9, 2008), employees of a chicken processing plant argued that the employer's pay policy, which did not compensate the employees for the donning and doffing of clothing, was not a custom or practice under a bona fide collective bargaining agreement because the issue was never addressed in past collective bargaining agreements. The Court rejected this argument and held that the absence of negotiations cannot equate to ignorance of the pay policy, but rather, demonstrates acquiescence to it. Another example is *Turner v. City of Philadelphia*, 96 F. Supp. 2d 460 (E.D. Pa. 2000) *aff'd*, 262 F.3d 222 (3d Cir. 2001), where a group of city correctional officers sued for unpaid overtime, after having spent a part of each day changing into and out of their uniforms. The City maintained a practice of not paying officers for their time spent changing into and out of their uniforms. Although the parties' collective bargaining agreement did not address this issue specifically, the Union assented to the practice for over thirty years. Therefore, the court held that the employer was not obligated to pay for the time, as the practice had established a custom under a collective bargaining agreement. *See also Sisk v. Sara Lee Corp.*, 590 F. Supp. 2d 1001 (W.D. Tenn. 2008) (court found that the employer, who only paid pork cutting employees for ten minutes of donning and doffing time, was not liable to pay for any more time employees spent donning and doffing because there was a custom established under a collective bargaining agreement not to pay for more than ten minutes); *Andrako v. U.S. Steel Corp.*, 2009 WL 1765847, slip op. (W.D. Pa. June 22, 2009) (granting summary judgment for defendant on plaintiffs'

donning/doffing claims after giving "clothes" under § 3(o) its ordinary dictionary meaning that includes all "'garments and accessories worn by one person at any one time'"); *Sepulveda v. Allen Family Foods, Inc.*, No. MJG-07-97, (D. Md. Sept. 16, 2008) (following the Eleventh Circuit and holding that time spent donning and doffing protective clothing at a chicken processing plant was not compensable under § 3(o)); *Davis v. Charon Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314 (M.D. Ala. 2004) (where union raised issue of pay for donning and doffing clothing but bargaining agreement was silent on issue, custom and practice was not to pay for such activities); *but see Figas v. Horsehead Corp.*, 2008 WL 4170043, slip op. (W.D. Pa. Sept. 3, 2008) (denying summary judgment to the employer because the employer had not proved the existence of a custom or practice of excluding donning and doffing from paid time where the collective bargaining agreement was silent).

3. WHETHER ACTIVITIES EXCLUDED UNDER § 3(O) START THE CONTINUOUS WORKDAY

In its May 14, 2007 opinion letter, the DOL opined that Congress "excluded activities covered by § 3(o) from time that would otherwise be '[h]ours worked.'" DOL Wage & Hour Op. Ltr., No. FLSA 2007-10 (May 14, 2007). DOL explained that § 3(o)-excluded activities were not principal activities and could not start the workday. Thus, in the DOL's opinion, the walk time that follows a § 3(o) activity is not compensable. In *Sisk v. Sara Lee Corp.*, the court heavily relied on this letter to find that excluded activities such as donning, doffing, and washing were not principal activities. 590 F. Supp. 2d 1001 (W.D. Tenn. 2008). The viability of the argument that § 3(o)-excluded activities do not start the continuous workday was bolstered by the Second Circuit's ruling in *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008), where the Second Circuit concluded that the *de minimis* test plays an important role in the application of the continuous workday rule, because an activity that is *de minimis* cannot commence the continuous workday. *Id.* at 372, n.8. In *Figas v. Horsehead Corp.*, 2008 WL 4170043, slip op. (W.D. Pa. Sept. 3, 2008), however, the court rejected the DOL's interpretation and held that donning and doffing under § 3(o) were principal activities that started the workday. The court reasoned that excluding donning and doffing from compensation does not change the character of donning and doffing. Simply put, to qualify as a § 3(o) activity, donning and doffing must first be integral and indispensible—i.e., a principal activity. *See also Andrako v. U.S. Steel Corp.*, 2009 WL 1765847, slip op. (W.D. Pa. June 22, 2009) ("Section []3(o) relates to the compensability of time spent donning, doffing, and washing in the collective-bargaining process. It does not render such time any more or less integral or indispensible to an employee's job.") (underlining in original).

VIII. CALCULATING THE WORKWEEK

The maximum number of hours that non-exempt employees may work in a week without receiving overtime compensation is forty. There is no limitation on the number of hours that an employee may work in a workweek. The FLSA does not require that the employee be paid overtime for hours worked in excess of eight hours per day, or for work on Saturdays, Sundays, holidays or regular days of rest. Reg. §§ 778.101–102.

Each single workweek is viewed separately for the purposes of overtime compensation. The workweek is seven consecutive twenty-four-hour periods, and it need not coincide with the

calendar week. The beginning of a workweek may be changed only if the change is intended to be permanent. The DOL opined that a "compressed" workweek complies with the FLSA. DOL Wage & Hour Op. Ltr., No. FLSA 2009-16 (Jan. 16, 2009). he compressed workweek involves employees working nine-hour shifts Monday through Thursday and working one eight-hour shift every other Friday. Employees choose one of two alternatives for their compressed workweek. It can begin at 11:31 a.m. on Friday and end at 11:30 a.m. the following Friday with the workday beginning at 7:30 a.m. or the workweek can began at 12:31 p.m. on Friday and end at 12:30 p.m. on the following Friday with the workday beginning at 8:30 a.m. Under such a schedule, the employee works no more than forty hours in a workweek. As a general rule, overtime for a particular workweek must be paid on the regular payday for the period where such workweek ends. Reg. §§ 778.104–106.

The "fluctuating workweek method" is available to employers as an alternative method to calculate pay for non-exempt employees where hours worked vary from week to week. The Regulations require that:

1) There is a clear mutual understanding between the parties;
2) The employee's hours worked fluctuate from week to week;
3) The employee receives the same fixed salary regardless of the number of hours worked during a particular week;
4) The salary provides an average hourly rate of more than the minimum wage; and
5) The employee receives pay, in addition to salary, for overtime hours worked.

Reg. § 778.114(a); *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008) (civilian military recruiters back pay was properly calculated on a fluctuating workweek basis rather than a time-and-a-half basis because the parties had a clear understanding they would be paid salary for all hours worked and while the hours may vary, the salary would not); *But see Allen v. Suntrust Banks, Inc.*, 2008 WL 4394732 (N.D.Ga. Sep. 24, 2008) (finding genuine issue of material fact with respect to the number of hours the plaintiffs' salary was intended to cover).

IX. FLSA RETALIATION

The FLSA's anti-retaliation provisions protect employees who formally lodge a complaint with a court of law or agency, 29 U.S.C. § 215(a)(3), and also protects employees who complain to their employers about wage and hour violations. *See Williamson v. Gen. Dynamics Corp.,* 208 F.3d 1144 (9th Cir. 2000) (FLSA's anti-retaliation provision protects not only employees who file complaints in courts or with an agency such as the DOL, but also employees who complain to their employers); *Cordero v. Turabo Med. Ctr. P'ship*, 175 F. Supp. 2d 124 (D.P.R. 2001) (an internal complaint to the employer satisfies § 215(a)(3)).

A majority of courts assign protected activity to both formal complaints—where the employee has filed a complaint, instituted a proceeding, testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee—and informal

complaints—where the employee has communicated the substance of his allegations to the employer prior to the adverse action. *Dearmon v. Texas Migrant Council, Inc.*, 252 F. Supp. 2d 367 (S.D. Tex. 2003), *citing Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999) (finding that the language of § 215(a)(3), as well as the statute's remedial purpose, provide the need for a broad interpretation of "filing a complaint"). *See also Chennisi v. Commc'n Constr. Group, LLC*, 2005 WL 387594 (E.D. Pa. Feb. 17, 2005) (raising an internal complaint to an employer is a protected activity and falls within the meaning of "filed any complaint" as required by § 215(a)(3)); *Reed v. Monahan's Landscape Co., Inc.*, 2004 WL 422686 (N.D. Ill. Mar. 4, 2004) (the hallmark of protected activity under § 215(a)(3) is taking some action adverse to the company—whether via formal complaint, providing testimony in an FLSA proceeding, complaining to superiors about inadequate pay, or otherwise); *Hernandez v. City Wide Insulation of Madison Inc*., 508 F. Supp. 2d 682 (E.D.Wis. 2007) (finding an informal complaint to either a superior or the NLRB sufficient to gain FLSA protection, but noting that the complaint must relate in some way to a FLSA violation).

However, the Seventh Circuit recently held that an employee who only makes a verbal complaint to the employer is not protected from retaliation. *Kasten v. Saint-Gobain Performance Plastics Corp.*, --- F.3d ----, 2009 WL 1838291 (7th Cir. June 29, 2009). The Seventh Circuit explained that the language of the FLSA anti-retaliation provision requires an employee to "file" a complaint and a purely verbal complaint cannot be filed. Thus, the court found that the employee was not protected. *See also Boateng v. Terminex Int'l Co*., 2007 WL 2572403 (E.D. Va. Sept. 4, 2007) (finding that an employee who informally complained to his superior about overtime compensation cannot state a claim for retaliation because internal and informal complaints are not covered by the FLSA).

While informal complaints have *generally* been held to constitute protected activity, the *particular* complaint at issue may still be found insufficiently clear or not specific enough to qualify as a protected activity. In *Hagan v. Echostar Satellite LLC*, 529 F.3d 617 (5th Cir. 2008), Hagan, a field service manager, told his technicians that a recent policy change would decrease their overtime pay, and conveyed their concerns to Human Resources (HR). Shortly thereafter, Echostar fired Hagan. In affirming summary judgment for Echostar, the court joined the majority of appellate circuits in finding that employees have retaliation protection when making informal, internal complaints regarding FLSA issues. However, because Hagan did not "frame any of his objections in terms of the potential illegality," his complaints to HR were not protected activity. Further, his communications to HR did not go beyond the normal boundaries of his job because "part of any management position often is acting as an intermediary between the manger's subordinates and the manager's own superiors." The First Circuit held that the employee must do something outside his job role in order to signal his adverse position to the company and participation in a protected activity. *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99 (1st Cir. 2004) (plaintiff's written and oral disclosure that certain employees were not being paid overtime did not constitute protected activity where such disclosure was mandated by normal job duties, and refusal to sign invoices regarding denied overtime pay to employees was also not protected activity because the "whistle had been blown and corrective actions were being taken to remedy any FLSA violations"); *Porter v. Roosa,* 259 F. Supp. 2d 638 (S.D. Ohio 2003) (holding that plaintiff's vague, informal complaint regarding overtime pay did not amount to a protected

activity, finding "at the very least the protected activity being asserted must be identified with some certainty and precision"); *Etienne v. Muvico Theaters, Inc.*, 2003 WL 21184268 (S.D. Fla. Mar. 11, 2003), *aff'd*, 90 Fed. Appx. 383 (11th Cir. 2003) (plaintiff's informal complaints about child labor law violations were not protected activities because he failed to threaten to "report" the complaints to an outside agency); *Stein v. Rousseau*, 2006 WL 2263340 (E.D. Wash. Aug. 8, 2006) (a manager warning employer that company overtime policy for other employees may violate FLSA does not constitute "asserting" another's FLSA rights).

The conduct that the employee complains about need not be an actual violation of the FLSA; the employee's good faith belief is sufficient. *Cordero v. Turabo Med. Ctr. P'ship*, 175 F. Supp. 2d 124 (D.P.R. 2001), *citing Malone v. Signal Processing Techs., Inc.*, 826 F. Supp. 370 (D. Colo. 1993) (FLSA's anti-retaliation provision protects complaint based on good faith, though mistaken belief that conduct is illegal).

Even with protected activity, though, the plaintiff must prove a causal connection between the protected activity and the adverse employment action. In *Raspanti v. Four Amigos Travel, Inc*., 266 Fed. Appx. 820 (4th Cir. 2008), the court found no causal link between plaintiff's termination and her filing a FLSA lawsuit because it was too remote in time to be relevant and other circumstantial evidence was not supportive of plaintiff's claim. The court noted that three to four months was likely too long to permit an inference of causation, and the nearly eight month gap in this case was certainly too extensive. The court outright rejected the argument that the temporal proximity should be measured from the date of settlement, which in this case left only a two month gap, finding the time frame should be measured from when the employer became aware of the protected action by the plaintiff.

In *Kearney v. Town of Wareham,* 316 F.3d 18 (1st Cir. 2002), the First Circuit held that the FLSA does not constrain an employer who, despite harboring animosity towards an FLSA complainant, makes employment decisions on other grounds and does so with due deliberation and objectivity. *See also Harper v. Wilson*, 302 F. Supp. 2d 873 (N.D. Ill. 2004) (security guard was not terminated in retaliation for complaints he made regarding his failure to be paid proper overtime; rather, the guard was fired because no more work was available and for poor job performance); *Smith v. Parish of Washington*, 318 F. Supp. 2d 366 (E.D. La. 2004) (following an officer's earlier resignation, he failed to show that the town and police chief declined to re-hire him based on his participation in a prior lawsuit against the police department). *But see Ellis v. Yum! Brands, Inc*., 556 F. Supp. 2d 677 (W.D. Ky. 2008) (aviation mechanic—who complained to superior about overtime pay and later quit—allowed to proceed under claim of constructive discharge and retaliation after his superior gave him an ultimatum to "change his attitude, quit, or be fired").

X. REMEDIES AVAILABLE FOR THOSE WHO SUFFER FLSA RETALIATION

A number of remedies are potentially available to employees subjected to retaliation. For example, an employee may request injunctive relief from the court in the form of an order reinstating the employee to his or her former position prior to the adverse action. In addition to injunctive relief, an employee may also request that he or she be given a job promotion that was

denied based on the discrimination. In *Bailey v. Gulf Coast Transp., Inc*., 280 F.3d 1333 (11th Cir. 2002), the court said the plain language of FLSA lets plaintiffs bring retaliation claims for preliminary injunctive relief. *See generally Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004) (damages for violation of the anti-retaliation provisions of the FLSA are controlled by 29 U.S.C. § 216(b), which provides in pertinent part: "any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, the payment of wages lost and an additional equal amount as liquidated damages, and damages for mental and emotional stress").

In a separate issue, a district court ruled that aliens who were unauthorized to work in the United States could recover only compensatory damages—not front or back pay—for their FLSA retaliation claim. *Renteria v. Italia Foods, Inc.*, 2003 WL 21995190 (N.D. Ill. Aug. 21, 2003). Applying the Supreme Court's holding in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the district court found that unlike front or back pay, a compensatory damages award in an FLSA retaliation case would not interfere with the policies underlying the Immigration Reform and Control Act.

XI. OTHER SIGNIFICANT ISSUES

A. STATE IMMUNITY FROM FEDERAL COURT SUITS UNDER FLSA

In June 1999, the Supreme Court ruled that the Eleventh Amendment bars FLSA suits by state employees against states in either federal or state court. *Alden v. Maine*, 527 U.S. 706 (1999). The plaintiffs in *Alden* were state employees who alleged Maine had violated the FLSA with regard to overtime payments. The Court disagreed, finding that the Eleventh Amendment barred such a federal claim made directly against the state. *See also Rodriguez v. Puerto Rico Fed. Affairs Admin.*, 435 F.3d 378 (D.C. Cir. 2006) (Puerto Rico enjoys immunity from private FLSA enforcement suits); *Wilcox v. Tenn. Dist. Attorneys Gen. Conference*, 2008 WL 4510031 (E.D. Tenn. Sep. 30, 2008)) (Attorney General Conference was an arm of the state and therefore immune from suit). *Compare Abner v. Dept. of Health of Ind.*, 777 N.E.2d 778 (Ind. App. 2002) (dismissing FLSA claim by state employees who worked as "house parents" in the residential division of a children's home and sought unpaid overtime under various statutes including the FLSA), *with Norita v. N. Mariana Islands*, 331 F.3d 690 (9th Cir. 2003) (Commonwealth of the Northern Mariana Islands was not entitled to sovereign immunity defense to an FLSA suit by Commonwealth employees, either under the Eleventh Amendment or the common law of sovereign immunity).

The Court's ruling does not prevent employees of state political subdivisions (such as municipal corporations or school districts) from suing under the FLSA. The Court held that states may enact statutes allowing for suit against them under federal law or may enact parallel statutes which are not limited by the Court's decision. Finally, although the Court ruled that states may not be sued by employees for alleged FLSA violations, they may still be sued on behalf of employees by the Secretary of Labor. Even given these possible challenges to state immunity, the Supreme Court of Montana found that police officers were not covered by the FLSA and therefore could bring state

wage-hour claims. *In re Babinecz*, 68 P.2d 715 (Mont. 2003). Specifically, the court found that the Montana laws covered claims not permitted under the FLSA. The court found that because the police officers had no true right of action against the state, the FLSA did not cover them.

B. COMPENSATORY TIME IN LIEU OF OVERTIME

Private sector employers cannot offer time off to nonexempt employees in lieu of payment for overtime worked. However, public sector employers may provide compensatory time off ("comp time") in lieu of overtime pay as long as the employees agree to do so and the agreement is embodied in a collective bargaining agreement or some other understanding prior to the performance of the work in question. 29 U.S.C. § 207(o). In general public sector employees may accrue up to 240 hours of comp time (480 hours for employees engaged in public safety, emergency response or a seasonal activity). Section 207(o)(5) also provides that employers must honor requests to use comp time within a reasonable period of time following the request, as long as the time off does not unduly disrupt operations. *E.g.*, *Heitmann v. City of Chicago*, 560 F.3d 642 (7th Cir. 2009) (holding that the employer must grant an employee's request to use compensatory time off within a reasonable period of time after the employee's request); *Houston Police Officers' Union v. Houston*, 330 F.3d 298 (5th Cir. 2003) (public employer need only permit compensatory time within a reasonable time after it is requested—it does not have to fit employee's request exactly); *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999) (public employer's restrictions on use of comp time were reasonable where the collective bargaining agreement provided that employees had a 30-day period to request comp time off, which period would close when the number of officers requesting the use of comp time on a given date would bring the City's staffing levels to the minimum level necessary for efficient operations).

Under certain circumstances, if employees do not use their accumulated compensatory time, the employer is obligated to pay cash compensation. The question then arises as to whether an employer can compel employees to use compensatory time rather than to pay them their accrued balance. This situation arose in *Christensen v. Harris County,* 529 U.S. 576 (2000). The county had an agreement with its deputy sheriffs permitting them to use comp time in lieu of overtime, but fearing the fiscal consequences of having to pay for accrued comp time, Harris County required the sheriffs to take comp time off. The sheriffs sued, claiming that the FLSA prohibits such a policy. The Fifth Circuit rejected the claim, finding that, in the absence of an agreement to the contrary, employers can place reasonable restrictions on the use of comp time.

Finding the statute silent on this issue, the Supreme Court concluded that the better reading of § 207(o)(5) is that it imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when employees request to do so; however, it says nothing about restricting an employer's efforts to *require* employees to use comp time. Accordingly, because the FLSA otherwise allows employers to require employees to take time off from work (the FLSA was in part intended to prevent the evils of overwork), and explicitly permits an employer to cash out accumulated comp time by paying the employee his regular hourly wage for each hour accrued, Harris County was simply combining these two permissible steps into one.

Under § 5543 of the Federal Employees Pay Act (FEPA), a federal employee may take compensatory time equal to the amount of overtime hours worked. In *Doe v. United States*, 513 F.3d 1348 (Fed. Cir. 2008), employees at the Social Security Administration challenged this interpretation, claiming that they should receive one and half hours of compensatory time for each hour of overtime worked, as they would under 207(a)(1) of the FLSA. The court rejected this argument, finding that the statutory language clearly provides an hour-for-hour formula. The court noted that nothing prohibits the plaintiffs here from exercising their rights under the FLSA by exchanging their compensatory time for monetary compensation at one and one-half times their hourly rate. *Cf Abbey v. United States*, 82 Fed. Ct. 722 (2008) (FAA did not have authority under statutes authorizing FAA to establish its own personnel management system to compensate its employees with compensatory time or credit hours at a rate of one hour for each hour of overtime worked instead of paying them at the FLSA's overtime pay rate).

Public agencies can also compensate part-time employees, who work less than forty hours a week, with compensatory time off instead of cash payments as long as the employees' rate of pay is not less than the federal minimum wage for all hours worked. DOL Wage & Hour Op. Ltr., No. FLSA 2007-9 (May 14, 2007). The DOL noted that while § 207(o) did not apply to employees working less than forty hours per week, the FLSA does not preclude an employer from compensating an employee of a public agency with compensatory time off for non-overtime hours worked, as long as the employee's regular rate of pay is at least the federal minimum wage for all hours worked.

C. TIP POOLING

Section 203(m) of the FLSA allows valid tip pooling agreements among employees who regularly receive tips. 29 U.S.C. § 203(m); *see* 29 C.F.R. § 531.54. However, the FLSA has been historically interpreted as prohibiting such agreements between employees who normally receive tips, such as waiters, and those who do not, such as chefs. *See Chisholm v. Gravitas Rest. Ltd.*, 2008 WL 838760 (S.D. Tex. Mar 25, 2008); *Sorensen v. CHT Corp.*, 2004 WL 442638 (N.D.Ill. Mar. 10, 2005).

Several cases suggest that an employee's level of customer interaction is the most significant factor in evaluating whether he qualifies as a "tipped employee" under the FLSA. *See, e.g.*, *Roussell v. Brinker Intern., Inc.*, 2008 WL 2714079 at *7, *10 (S.D. Tex. July 9, 2008) (agreeing with the Sixth Circuit that the level of customer interaction is "highly relevant" and that the extent of an employee's interaction with customers is "critical" in determining whether an employee may participate in a valid tip pool); *Morgan v. SpeakEasy, LLC*, 2007 WL 2757170, *18 (N.D. Ill. Sept. 20, 2007) (court focused on employees' customer related activities to determine whether they were properly included in tip pool).

Although the widely publicized case in which Starbucks was ordered to pay more than $100 million to baristas whose tips were shared with shift managers was overturned based on California state law, *Chau v. Starbucks Corp.*, --- Cal.Rptr.3d ----, 2009 WL 1522708 (Cal Ct. App. June 2, 2009), tip-pooling remains a hot litigation issue. As Celebrity Chef Bobby Flay has learned, employers are not immune from collective actions under the FLSA based on allegations

that tip-pooling compensation arrangements violate § 203. In January 2009, servers, bussers and hourly food service workers brought a class action seeking to represent all individuals who were hourly service workers at Bold Food LLC in the past five years. *DeMunecas v. Bold Food LLC*, No. 09-CV-00440, (S.D.N.Y.). They are seeking to recover minimum wages, overtime and allegedly misappropriated tips. Also in early 2009, a class of waiters and bus staff employed at three Manhattan restaurants owned by the Nobu chain asked a federal judge to grant approval to a settlement totaling $2.5 million. *Agofonova v. Nobu Corp.*, No. 07-06926 (S.D.N.Y.). There, the waiters had alleged that their tips were illegally shared with managers, floor captains, and sushi chefs. Although Nobu argued that the sushi chefs were servers and should be entitled to tip-pooling privileges, its argument did not carry the day. The settlement received final approval in February, 2009.

On December 19, 2008, the DOL issued an opinion letter opining that because sushi chefs (who prepare the meal at the sushi bar) and teppenyaki chefs (who prepare the meals at the table) serve the customers directly, they are eligible to share in the server tips. DOL Wage & Hour Op. Ltr., No. FLSA 2008-18 (Dec. 19, 2008).

D. DAMAGES UNDER THE FLSA

The damages available to employees under the FLSA are potentially huge. Unlike other federal employment laws, this statute imposes fines and criminal penalties (up to $11,000) for willful violations of the statute (although imprisonment is only authorized for second and subsequent convictions). 29 U.S.C. § 216(a). Furthermore, individuals can be held personally liable for civil damages under the FLSA, generally when they act so as to effectively control the employer and/or serve as an alter ego of it. The available civil remedies include all unpaid compensation, mandatory liquidated damages (equal to the amount of the unpaid compensation), equitable relief (such as reinstatement) and attorneys' fees. 29 U.S.C. § 216(b).

If the employer acts with a reasonable and good faith belief that its conduct is not in violation of the FLSA, the court may deny an award of liquidated damages. 29 U.S.C. § 260. Further, an attorney fee award may be significantly reduced due to limited success on the merits. *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795 (5th Cir. 2006).

The Eleventh Circuit, in *Rodriguez v. Farm Stores Grocery Inc*., 518 F.3d 1259 (11th Cir. 2008), recently ruled on the issue of a plainly excessive jury award. There, the jury returned damages $100,000 over the mathematical amount allowed for by the evidence. The court found that the jury instructions were flawed, in that it applied a formula where the "regular rate" was computed by dividing all the hours worked into the total wages for those hours. This was in contrast to a DOL interpretive bulletin that required the rate be calculated by dividing the individual's weekly salary by the number of hours the salary was intended to compensate. Reg. § 778.113. Because applying the correct standard required determinations of fact, the court could not allow for remittitur, and remanded for a new trial on damages.

At the trial level, the judge awarded liquidated damages after the jury concluded the FLSA violations were not willful. Normally, liquidated damages will be awarded only where the jury

finds the violations willful or the trial judge determines that the defendant failed to prove the affirmative defense of good faith. In *Rodriguez*, the defendant argued that the judge could not contradict the jury's finding—however, the court parsed the different burdens applied to "willful violation" and "good faith," and found the opposite findings of judge and jury "not necessarily inconsistent." The Eleventh Circuit's ultimate ruling—that if seen fit, the judge may grant liquidated damages on remand—left the question undecided, and further expands the circuit split on the issue.

Punitive damages are also available for violations of the FLSA's anti-retaliation provisions set forth at 29 U.S.C. § 216(b). Although § 216(b) limits damages for minimum wage and overtime reimbursement claims to unpaid compensation and an additional equal amount as liquidated damages, the damage provision for retaliation claims is open-ended and allows "such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act] ...." Given the open-ended nature of this provision, plaintiffs have attempted to seek punitive damages by filing retaliation claims and the courts have been quite receptive. *See generally Shea v. Galaxie Lumber & Const. Co., Ltd*., 152 F.3d 729, 736 (7th Cir 1998); *Marrow v. Allstate Sec. & Investigative Servs.*, 167 F. Supp. 2d 838 (E.D. Pa. 2001); *Travis v. Knappenberger*, 2000 WL 1853084 (D. Or. 2000); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc*., 25 F. Supp. 2d 1053 (N.D. Cal. 1998).

Two federal courts have rejected these attempts. In *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000), the court found that, although the statutory language is ambiguous, the "evident purpose" of Section 216(b)'s damages provision is compensatory in nature, not punitive. Similarly, in *Lanza v. Sugarland Run Homeowners Ass'n, Inc.*, 97 F. Supp. 2d 737 (E.D. Va. 2000), the court reached the same result, noting that the punitive portion of the statute is limited to the criminal penalty provisions of § 216(a). Conversely, the Seventh Circuit held that punitive damages are available for retaliation claims. *Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108 (7th Cir. 1990).

E. CALCULATING THE REGULAR RATE

In determining an employee's "regular rate," the employer must include the employee's hourly wages and any bonuses, incentive pay, or commission. Even if the employee will not receive the bonus or commission until later (for example, a quarterly incentive bonus), the payments must be included in the overtime compensation determination, even if this means retroactively adjusting those computations once the amount of the bonus is determined. The commission or bonus is apportioned back over the workweeks of the period in which it was earned, with the employee being paid one-half the increase in the regular rate attributable to the bonus or commission. Reg. §§ 778.109, 778.209, 778.117–120. *See also Singer v. City of Waco*, 324 F.3d 813 (5th Cir. 2003) (affirming lower court calculation using overtime hours worked in figuring the regular rate of pay for damages purposes). The only exception is bonuses which are purely discretionary and are not pursuant to any prior agreement or arrangement, such as a holiday bonus, which is not routinely given. Reg. § 778.211–212. Note, however, that the Eighth Circuit recently ruled that Columbia, Missouri firefighters should have had lump-sum buyouts of their sick leave included in their

regular rate of pay for purposes of calculating overtime because the money paid was for a "general duty of employment." *Acton v. City of Columbia*, 436 F.3d 969 (8th Cir. 2006).

In *Bell v. Iowa Turkey Growers Coop.*, 407 F. Supp. 2d 1051 (S.D. Iowa 2006), the court ruled that shift differentials are a type of premium pay that must be included as part of determining an employee's regular rate of pay for purposes of calculating overtime pay. The *Bell* court further ruled that, unlike shift differentials, other premiums paid to employees who worked on a sixth day of the work week did not have to be included in the regular rate. The *Bell* court also allowed the employer to apply the sixth day premium pay as credit against the amount it owed as overtime pay.

As clearly stated in a recent interpretative bulletin from the DOL, as well as in the Fourth Circuit's *Rodriguez v. Farm Stores Grocery* ruling, when calculating the regular rate, the "divisor" should be the amount of hours the salary intends to compensate—i.e., when an employee is expected to work fifty hours in a week on a $500 salary, even if she regularly works sixty hours per week, the regular rate is calculated by dividing total wages earned (salary plus bonuses, incentive pay, or commission) by fifty. Reg. § 778.113.

In a recent opinion letter, the DOL clarified that required "tips" paid to limousine drivers, called "imposed gratuities," must be counted as part of the drivers' base wages. The DOL explained that a compulsory service charge imposed on customers is not truly a tip. DOL Wage & Hour Op. Ltr., No. FLSA 2005-31 (Sept. 5, 2005). An employer may deduct from an employee's tips, however, an amount equal to the service charge assessed by a credit card company. *Gillis v. Twenty Three E. Adams St. Corp. d/b/a Miller's Pub*, 2006 WL 573905 (N.D. Ill. March 6, 2006).

The regular rate under the fluctuating hours' method is calculated by dividing the employee's salary by the actual hours worked in a given workweek. The employer need only pay one-half this regular rate multiplied by the hours worked over forty. While this method poses difficulties in administration, it generally results in greater cost savings to the employer. For example, in *Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264 (5th Cir. 2000), the employer paid its employees on a flat, day rate basis, regardless of the number of hours worked per day. Pursuant to Reg. § 778.112, the employer calculated the regular rate (for the purposes of overtime) by totaling all weekly compensation paid at the day rate and dividing by the total hours actually worked. This amount was the "regular rate" and was used by the employer to determine overtime compensation. The court affirmed summary judgment for the employer, holding that the DOL's interpretation of the law in Reg. § 778.112 was entitled to deference.

The court in *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998) applied a five-factor analysis to find that the employer could not meet the requirements because the plaintiff had not been paid any overtime compensation. The court rejected the employer's contention that the requirement could be met by the retroactive payment of any overtime due—i.e., as part of the judicially crafted remedy. In the alternative, the court found that the fluctuating workweek would not apply because the mutual understanding requirement had also not been met. The court disagreed with the employer's claim that it could pay a misclassified employee a one-half rate for overtime even though the employee understood his or her salary covered all hours

worked in the workweek. *See also Dingwall v. Friedman Fisher Assoc., P.C.*, 3 F. Supp. 2d 215 (N.D.N.Y. 1998) (employer cannot meet its burden of proving clear, mutual understanding that employee would be paid under the fluctuating workweek plan where employment manuals described the normal workweek as being a forty-hour week); c*f. Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35 (1st Cir. 1999) (employer's statement to employee who was misclassified as exempt that her salary would cover as many hours as she worked each week was sufficient to form basis of mutual understanding required under fluctuating workweek analysis).

In January 2007, the DOL and Wal-Mart Stores Inc. agreed to a $33 million settlement to resolve alleged FLSA violations involving 86,680 employees nationwide. *Chao v. Wal-Mart Stores, Inc.*, No. 07-2007 (W.D. Ark., Jan. 25, 2007). According to the DOL, the alleged violations primarily involved how Wal-Mart treated incentives and other premium payments in the calculation of employees' overtime pay.

F. FLSA AND ARBITRATION

The Supreme Court recently expanded the breadth and use of arbitration. In *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009), a 5–4 decision, the Court held that a provision in a collective bargaining agreement (CBA) that "clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." *Id.* at 1474. The CBA had a "No Discrimination" clause providing that all discrimination claims must go through arbitration, which specifically included claims under the ADEA. The Court found that there are only two exceptions to its holding. First, the CBA's arbitration provision may not be honored if the statute expressly removes the particular class of grievances from the National Labor Relations Act's grant of bargaining authority. Second, the CBA's provision is not enforceable if it operates as a substantive waiver of the Union member's statutory rights because it both precludes a federal lawsuit *and* allows the Union to block arbitration of those claims.

In light of the Supreme Court's decision in *14 Penn Plaza*, the ability of employees covered by a collective bargaining agreement to bring FLSA lawsuits in federal court without exhausting the grievance procedure remains an unclear picture. Prior to *14 Penn Plaza*, most courts addressing the issue had held that while an individual worker can waive his right to a judicial remedy, a union cannot do so on his behalf. *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008). In *Nelson v. American Standard Inc.*, 2007 WL 2329827 (E.D. Tex. Aug. 13, 2007), the court held unenforceable an arbitration provision in a union-negotiated collective bargaining agreement purporting to waive any rights to a federal forum. Concerning public employees, in *Doe v. U.S.*, 513 F.3d 1348 (Fed. Cir. 2008), the court found that section 7121(a)(1) of the Civil Service Reform Act no longer prevents federal employees subject to a collective bargaining agreement from seeking a judicial remedy for claims arising under the FLSA or other laws or regulations, even if those claims could also be raised as grievances under the applicable collective bargaining agreement.

However, in *Townsend v. BC Natural Chicken LLC*, 2007 WL 442386 (E.D. Pa., Feb. 2, 2007), the court ruled that union-represented food service workers could not pursue their FLSA claim for donning and doffing personal protective equipment when they failed to seek arbitration under a

collective bargaining agreement that arguably addressed the issue. The court granted defendants' motion to dismiss, explaining that when an employee's statutory claim under the FLSA requires interpretation of a collective bargaining agreement, the employee must file a grievance and submit to arbitration before suing under the FLSA.

Courts have generally enforced individual agreements to arbitrate FLSA claims. *E.g.*, *Hicks v. Macy's Dep't Stores, Inc.*, 2006 WL 2595941 (N.D. Cal. Sept. 11, 2006) (plaintiff's failure to opt-out of grievance arbitration agreement with employer prior to filing FLSA overtime claim resulted in dismissal); *Johnson v. Long John Silver's Rest.*, 414 F.3d 583 (6th Cir. 2005); *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002); *Wilks v. Pep Boys*, 241 F. Supp.2d 860 (M.D. Tenn. 2003); *Dantz v. Apple Ohio LLC*, 277 F. Supp.2d 794 (N.D. Ohio 2003). However, if the arbitration agreement is lacking in fundamental fairness to the employee, a court will generally not enforce it. *E.g.*, *Ramirez de Arellano v. American Airlines, Inc.*, 133 F.3d 89 (1st Cir. 1997); *Floss v. Ryan's Family Steakhouses, Inc.*, 211 F.3d 306 (6th Cir. 2000).

G. RELEASES

The Supreme Court has interpreted the FLSA to prohibit private releases of certain FLSA statutory coverages and rights, even though the statute is silent on the subject. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945). After a group of construction firm workers brought an action under the FLSA and state wage laws, the employer requested the employees to execute a release of his or her claim in return for monetary payment. In *O'Brien v. Encotech Constr. Serv., Inc.*, 183 F. Supp. 2d 1047 (N.D. Ill. 2002), the court found the agreements voided by public policy and that "permitting an employer to violate a minimum wage law, and escape legal consequences by paying an employee something to forget about the violation, undermines the proper functioning of these laws almost as effectively as simply failing to follow them in the first instance."

In *Wineman v. Durkee Lakes Hunting & Fishing Club, Inc.*, 352 F. Supp. 2d 815 (E.D. Mich. 2005), the plaintiffs entered into an employment contract stipulating a six-month statute of limitations period for all claims arising out of the employment contract. In holding that the shortened limitations period violated public policy when applied to FLSA claims, the court explained that parties cannot preempt the labor market by making their individual services more attractive to an employer.

H. DEFENSES

There are several affirmative defenses available to employers. Statutory defenses include statute of limitations defense and two "good faith" defenses. Section 6 of the Portal-to-Portal Act provides the following statute of limitations:

> Any action ... to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidate damages, under the Fair Labor Standards Act ... may be commenced within two years after the cause of action accrued, except

> that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

Portal-to-Portal Act § 6(a), as amended, 29 U.S.C. § 255.

With respect to non-willful wage violations, a plaintiff has two years after the cause of action accrues to file suit. With respect to *willful* wage violations, the limitations period extends to three years after the cause of action accrues. However, equitable estoppel principles can toll the limitations period. *Prange v. Borders, Inc.*, 2006 WL 2632013 (N.D. Ill. Sept. 11, 2006) (limitations period tolled for four years because employee did not file suit within limitations period after employer assured her it would investigate her overtime claims).

The Portal-to-Portal Act also created two affirmative "good faith defenses." Section 10 of the Portal-to-Portal Act provides an absolute defense to FLSA back pay liability. 29 U.S.C. § 259. A § 10 defense will completely relieve an employer of liability "if he pleads or proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" issued by the Administrator of the Wage and Hour Division of the DOL. In other words, an employer is protected from liability if it in good faith relies on the agency's interpretation which is subsequently held to be wrong.

Section 11 of the Portal-to-Portal Act provides a discretionary defense as to liquidated damages only. Unless an employer presents a proper defense of "good faith," liquidated damages are mandatory. 29 U.S.C. § 216(b). At the most, an employer's showing of good faith with reasonable grounds for believing that it was not in violation of the act will allow a judge to exercise discretion to deny or reduce liquidated damages. This does not affect attorneys' fees and costs. Reg. § 790.22(d). Accordingly, the "good faith" standard is less stringent than it is under a § 10 defense. The Section 11 defense is comprised of two conditions: (1) the act or failure to act must have been in good faith and (2) the employer must have had reasonable grounds for believing that its act or omission was not in violation of the Act.

The decision in *Rodriguez v. Farm Stores Grocery,* 518 F.3d 1259 (11th Cir. 2008), highlighted the difficulties of applying the "good faith" defense, where the trial judge awarded liquidated damages after the jury concluded the FLSA violations were not willful. The defendant argued that the judge could not contradict the jury's finding. However, the court parsed the different burdens applied to "willful violation" and "good faith," and found the opposite findings of judge and jury "not necessarily inconsistent." There is no clear standard for determining if lack of willful conduct automatically means the employer acted in good faith, or vice versa. The Eleventh Circuit did not clearly resolve the issue, and several other circuits disagree. *Compare Brinkman v. Dep't of Corr*., 21 F.3d 370, 373 (10th Cir. 1994) (the willfulness and good faith standard are the same) *with Broadus v. O.K. Indus., Inc*., 226 F.3d 937, 944 (8th Cir. 2000) (the judge retains exclusive discretion to decide if the employer acted in good faith); *Fowler v. Land Mgmt. Group, Inc*., 978 F.2d 158, 162 (4th Cir. 1992) (same).

There are also *non-statutory* defenses that may apply in FLSA actions: laches, estoppel, mootness, *res judicata* and collateral estoppel, and exhaustion of remedies and arbitration. *See Briggs v. Arthur T. Mott Real Estate LLC*, 2006 WL 3314624 (E.D.N.Y. Nov. 14, 2006) (plaintiff's rejection of a Rule 68 offer of judgment, where no other similarly situated individuals opted in, rendered FLSA action moot, resulting in dismissal); *Hicks v. Macy's Dep't Stores, Inc.*, 2006 WL 2595941 (N.D. Cal. Sept. 11, 2006) (plaintiff's failure to opt-out of an employee grievance arbitration agreement with employer prior to filing FLSA overtime claim results in dismissal). Whether derived from statute or common law, the defense must plead the affirmative defenses, otherwise the defense may be waived.

I. COLLECTIVE ACTIONS

Recent years have seen a staggering increase in the number of lawsuits filed under the federal and state wage and hour laws. An action to recover relief under the FLSA can be brought in any Federal or State court of competent jurisdiction, by any one or more employees. 29 U.S.C. § 216(b). An action can also be brought by an individual, or by a group, on behalf of other employees who are "similarly situated." *Id.* Collective actions under the FLSA, often appended with class actions for state law claims, have received much attention in this growing litigation. The increasing use of collective actions may be a result of many factors including:

- The Supreme Court, in *Hoffmann-La Roche, Inc. v. Sperling* (discussed below) authorized federal courts to grant collective action status and approve notice to putative class members;
- Near-automatic double-damages for successful plaintiffs and attorneys fees;
- Uncertainty on the part of employers about proper classification of employees as exempt under the overtime exemptions;
- Workers and their advocates becoming more informed as to their rights to private enforcement of FLSA claims;
- Competitive forces in an economy where increasing production and lowering costs is of paramount concern for employers.

1. THE UNIQUE PROCESS OF AN FLSA COLLECTIVE ACTION

In a collective action under the FLSA, a named plaintiff sues on behalf of himself and "other employees similarly situated." No employee may be a party plaintiff to any such action "unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). *Compare id.*, *with* Fed. R. Civ. P. 23(b)(3) (under Rule 23, the consent of class members is not required; instead they have a right to be notified of the class action and to opt out of it and seek their own remedies). The statute is unambiguous: if an individual has not given written consent to join the suit, or if the individual has given consent but not filed the consent with the court, that individual cannot be a party. *Harkins v. Riverboat Servs., Inc.*, 385 F.3d 1099 (7th Cir. 2004).

For each plaintiff who opts in to the case after the filing of the complaint, the action is not considered commenced for purposes of the statute of limitations until the date on which the plaintiff's written consent is filed with the court. *Quintanilla v. A&R Demolition Inc.*, 2006 WL 1663739 (S.D. Tex. June 13, 2006); *Robinson-Smith v. GEICO*, 424 F. Supp. 2d 117 (D.D.C. 2006); *El v. Potter*, 2004 WL 2793166 (S.D.N.Y. Dec. 6, 2004). Signed consents filed after the filing of the complaint do not relate back to the date the complaint was filed. *In re Food Lion, Inc.*, 151 F.3d 1029 (4th Cir. 1998). Although it is not the norm, courts may equitably toll the statute of limitations pending the notice procedure. *See Boldozier v. Am. Family Mut. Ins. Co.*, 375 F. Supp. 2d 1089 (D. Colo. 2005) (tolling the statute of limitations as of the date of plaintiffs' complaint).

District courts have discretionary power to authorize the sending of notice to potential class members in a collective action brought pursuant to § 216(b). *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001). In determining if the named plaintiff is "similarly situated" to putative members of a collective action, the majority of courts use an ad-hoc, two-tier approach. *E.g.*, *Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (applying the two-tier approach); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001) (same). Under this approach, two tiers of review are utilized, depending on the procedural stage of the case. The first tier, which typically occurs very early in the litigation, before any discovery has taken place, is known as the notice-stage determination and typically results in "conditional certification" of a representative class. *Thiessen*, 267 F. 3d at 1102. At the notice stage, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination. To establish that employees are similarly situated, a plaintiff must show that they are similarly situated with respect to their job requirements and with regard to their pay provisions. The positions need not be identical, but similar. *Tucker v. Labor Leasing, Inc.*, 872 F. Supp. 941, 947 (M.D. Fla. 1994).

The second tier involves a more strict level of scrutiny and typically follows a defendant's motion for decertification at or near the close of discovery. In the second-tier inquiry, the court reviews several factors, including: "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; [and] (3) fairness and procedural questions." *Thiessen*, 267 F.3d at 1103. At either the first or second stage, a plaintiff bears the burden of establishing that he and the group he wishes to represent are similarly situated. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996).

2. CASES INVOLVING FLSA COLLECTIVE ACTIONS AND RULE 23 CLASS ACTIONS

Under the FLSA, plaintiffs can proceed under the § 216(b) "opt-in" collective action procedure, but only state law claims allow for an "opt-out" class actions under Fed. R. Civ. P. 23. Combining a FLSA collective action and state-law class action claims in one proceeding has been labeled a "hybrid" wage and hour action. Some courts have allowed plaintiffs to proceed with a hybrid or "opt in/opt out" approach under both FLSA Section 216(b) for opt in notice and Fed. R. Civ. P. 23 for class notice as to state law claims (on an opt-out basis). *See McLaughlin v. Liberty*

Mut. Ins. Co., 224 F.R.D. 304 (D. Mass. 2004); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001); *O'Brien v. Encotech Constrs. Servs., Inc.*, 203 F.R.D. 346 (N.D. Ill. 2001).

The conflict between "opt-in" and "opt-out" provisions has presented itself in many cases, resulting in inconsistent outcomes. For example, in *Long John Silver's Rests.*, the Fourth Circuit affirmed a district court's decision, holding that Congress did not preclude parties from waiving the "opt-in" procedure for class arbitration of FLSA claims, and that the arbitrator did not exceed the scope of his authority under the arbitration agreement by certifying an opt-out class of FLSA claimants. *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345 (4th Cir. 2008) *cert denied sub nom. Long John Silver's, Inc. v. Cole*, 129 S. Ct. 58 (2008). The court found the employer's arguments unpersuasive regarding whether the arbitrator ignored established law and acted outside his scope when he certified an "opt-out" class. As recognized by the district court, the arbitrator "did what he was supposed to do: he analyzed two conflicting interpretations of the arbitration agreement and made a reasoned decision as to why an opt-out class should be certified."

Some courts have allowed the hybrid action, but have limited the scope of the state law class, if any, to just those individuals who opted in to the FLSA action. In these cases, the district courts have either denied class certification or deferred ruling on the class certification issues until after the court sees how many plaintiffs opted into the FLSA Action. *See Bartleson v. Winnebago Industries, Inc.*, 219 F.R.D. 629 (N.D. Iowa 2003) (district court judge ruled that supplemental jurisdiction over the state law claims was limited to the twenty-one plaintiffs who opted in with FLSA claims); *Thiebes v. Wal-Mart Stores, Inc.*, 2002 WL 479840 (D. Ore. Jan. 9, 2002); *Muecke v. A-Reliable Auto Parts*, 2002 WL 1359411 (N.D. Ill. June 21, 2002); *De La Fuente v. FPM Ipsen Heat Treating, Inc.*, 2002 WL 31819226 (N.D. Ill. Dec. 13, 2002).

The hybrid class/collective action was rejected in *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3rd Cir. 2003) *cert. denied* 76 USLW 3393 (June 9, 2008). The Third Circuit granted the employer's Rule 23(f) appeal of the class certification for the Pennsylvania state law wage claims. The district court had initially granted a notice motion for the workers' claims under Section 216(b). After only a limited number of workers opted in, the district court later granted class certification on a much larger class for state law claims under Pennsylvania law. The Third Circuit ruled that it was an error to exercise supplemental jurisdiction over the state law claims due to the novelty of the Pennsylvania wage claims and that the sheer number of state law claims that would predominate over the FLSA claims. The Third Circuit decertified the state law class and instructed the district court to permit an additional notice and opt-in period as to the FLSA claims only.

There have been a number of cases siding with *De Asencio*. *See e.g., Evans v. Lowe's Home Ctrs., Inc.*, 2006 WL 1371073 (M.D. Pa. May 18, 2006) (following *De Asencio*); *Glewwe v. Eastman Kodak Co.*, 2006 WL 1455476 (W.D.N.Y. May 25, 2006) (declining to exercise supplemental jurisdiction over state law claims in FLSA action); *Jackson v. City of San Antonio*, 202 F.R.D. 55 (W.D. Texas 2003) (court relied on the *De Asencio* analysis to decline jurisdiction over the state law claims, noting concerns that the size of the state law claims would overwhelm the FLSA case and that such a procedure might be an end run around the § 216(b) process); *but*

see Gonzalez v. Nichols Zito Racing Stable Inc., 2008 WL 941643 (E.D.N.Y. May 31, 2008) (exercising supplemental jurisdiction where there were no complex issues of state law and where the state law claims in question essentially replicated the FLSA claims).

The Eleventh Circuit's ruling in *Fox v. Tyson Foods Inc*., 519 F.3d 1298 (11th Cir. 2008) examined the separate issue of a Rule 24 intervention following an opt-in denial. Originally, ten employees from eight chicken processing plants filed a "donning and doffing" action against Tyson, to which several thousand employees filed consents to opt-in. However, the district court denied class certification and dismissed the consents. Eight years later, 161 Tyson employees moved to intervene in the now severed *Fox* case and were denied because there was no company-wide policy regarding compensation and other administrative practices. The Eleventh Circuit affirmed the lower court, finding that the lack of consistency between the plants not only prevented certification, but also protected the potential plaintiffs' interests under *res judicata* and *stare decisis*.

In *Jonites v. Exelon Corp*., 552 F.3d 721 (7th Cir. 2008), the Seventh Circuit raised the collective action issue *sua sponte*, referring to the plaintiffs' alleged class as "preposterous." There, plaintiffs argued that their meal breaks should be compensated, including those working the night shift, because some employees sometimes do work during lunch. While Judge Posner noted that some workers may have an individual claim, or the larger class could be broken into subclasses, the collective group as formulated could not advance.

In *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574 (N.D. Ill. 2004), the court denied plaintiffs' motion to certify a class of plaintiffs with state-law claims. The court did allow notice to be sent out regarding the FLSA claims, but denied class treatment of the state-law claims because allowing the plaintiffs to create an "opt out" class in federal court would undermine Congress' intention to limit such claims to the "opt in" procedure of § 216(b). The Judge was clearly troubled by having an FLSA collective action with a few plaintiffs who affirmatively opted in and, potentially, a much larger class of plaintiffs who had only state law claims at issue. Judge Castillo noted the oft-repeated phrase that to do so would effectively "allow a federal tail to wag what is in substance a state dog." (citing *De Asencio*).

In *Harper v. Yale Int'l Ins. Agency, Inc.*, 2004 WL 1080193 (N.D. Ill. May 12, 2004), the plaintiffs did not try to proceed with an FLSA collective action (maintaining only individual FLSA actions), but tried to pursue class treatment of their state-law claims. The court granted defendant's motion to decertify the state-law class, and further declined to exercise supplemental jurisdiction over any of the state law claims. Rulings such as this have led some plaintiffs to avoid FLSA claims altogether, opting instead to seek redress under analogous state laws or under common law. *See* Noah A. Finkel, *State Wage-and-Hour Class Actions: The Real Wave of "FLSA" Litigation?,* 7 EMP. RTS. & EMP. POL'Y J. 159, 160–62 (2003).

In *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462 (N.D. Cal. 2004), the court allowed notice of the FLSA collective action, but denied class certification of California state-law claims. The court ruled that plaintiffs could not meet Fed. R. Civ. P. 23(b)'s requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *See*

also Hasken v. City of Louisville, 213 F.R.D. 280 (W.D. Ky. 2003) (court denied motion for class certification of the state law claims because the court found that the superiority requirement could not be met).

However, in March, 2006, the D.C. Circuit Court of Appeals reversed a lower court's decision that it did not have supplemental jurisdiction over the plaintiff's state law overtime claims. In *Lindsay v. GEICO*, 448 F.3d 416 (D.C. Cir. 2006), the D.C. Circuit held, as a matter of first impression, that the district court erred in refusing to exercise supplemental jurisdiction, and in denying class action certification, to those state law class action claimants who did not also opt in to a FLSA overtime class action. In addressing the employer's contention that the opt-in procedure under FLSA and the opt-out procedure under Rule 23 created a conflict, the D.C. Circuit concluded that the conflict was merely procedural: "[w]hile there is unquestionably a difference - indeed, an opposite requirement - between opt-in and opt-out procedures, we doubt that a mere *procedural* difference can curtail section 1367's *jurisdictional* sweep." *Lindsay*, 448 F.3d at 424 (italics in original).

3. CERTIFICATION AND NOTICE TO CLASS

Section 216(b) does not contain any guidelines or directives as to how or when an action under the FLSA can or should become more than a single-plaintiff case. As a result, case law, which continues to evolve, sets forth some general principles through which collective actions are created and develop.

First, there must be some showing of sufficient evidence that a group of "similarly situated" individuals exists who can be lumped together in one action. Courts across the country have noted the absence of clear, uniform standards defining the term "similarly situated." The district court in *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 527 F. Supp. 2d 1053 (N.D. Cal. 2007), discussed the three approaches courts use to determine whether an individual is similarly situated. One approach incorporates the current requirements of Fed. R. Civ. P. 23. The second approach incorporates the pre-1966 requirements of Fed. R. Civ. P. 23. The third approach uses a two-tier case-by-case analysis.

Notwithstanding the lack of uniformity, a majority of courts including the Fifth, Tenth and Eleventh Circuits, apply the two-tiered approach. *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995); *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102–03 (10th Cir. 2001); *White v. Rakhra Mushroom Farm Corp.*, 2009 WL 971857, slip op. (D. Or. Apr. 8, 2009) ("The majority of courts, including three circuit courts, have adopted th[e two-tiered] approach."). Under this approach, courts recognize the inherent difficulty in demonstrating that plaintiffs are similarly situated without at least some discovery. Thus, a court may allow limited discovery before determining whether the case will proceed with a single plaintiff or as a collective action. Such discovery may include the names and addresses of the allegedly similarly situated individuals. *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001) (holding that plaintiffs have the burden of showing that their positions are similar to the positions held by putative class members). If this first hurdle is cleared, a "conditional" class of the potential plaintiffs who may

opt-in is created. Second, the plaintiffs can ask for permission to send notice to current and former employees who fall within the scope of the conditional class of similarly situated individuals. Further discovery can be sought to assist in that process, including the names and addresses of the current and former employees. Third, after the notices go out, individuals opt in, and all discovery is complete, the court is given another opportunity to decide if the "class" really is similarly situated. If the court does not find such similarity exists, the "class" can be "decertified" or redefined.

There is nothing in the FLSA stating that opt-in forms may only be filed after the district court approves notice. *Melendez Cintron v. Hershey P.R., Inc.*, 363 F. Supp. 2d 10, 17 (D.P.R. 2005); *see also Hoffmann-La Roche, Inc. v. Sperling*, 492 U.S. 165, 169 (1989) (declining to reverse district court's decision to allow opt-ins filed before it authorized notice). However, courts are split on whether to allow opt-ins filed prior to the sending of court-approved notice to potential class members. *See Melendez Cintron,* 363 F. Supp. 2d 10 (D.P.R. 2005) (court struck all opt-in consent forms filed before court gave approval to providing notice to potential class members); *Chemi v. Champion Mortgage*, Letter Order, 05-cv-1238 (D.N.J. June 19, 2006) (striking all filed opt-in forms because plaintiff-maintained website with a downloadable opt-in form constituted impermissible solicitation of potential plaintiffs, and neither the court nor defendant had the opportunity to review and approve the content of the notice or website); *Bernard v. Household Int'l, Inc.*, 231 F. Supp. 2d 433 (E.D. Va. 2002) (notice denied because of ads in local paper about the action); *but see Threatt v. Residential CRF, Inc.*, 2005 WL 2454164 (N.D. Ind. Oct. 4, 2005) (allowing opt-ins filed before court-approved notice because the potential class members initiated the contact with plaintiff's counsel); *Wertheim v. State of Arizona*, 1993 WL 603552 (D. Ariz. Sept. 30, 1993) (motion to strike opt-ins filed before court approval of notice denied because § 256(b) only requires that a written consent be filed.). Some courts hold the plaintiff need not first receive authorization, but need merely notify the defendant before distributing notice and consent forms in FLSA cases. *See Heitmann v. City of Chicago*, 2004 WL 1718420 (N.D. Ill. July 30, 2004) (requiring the plaintiff to amend the notice and consent form after notifying the defendant).

The following are cases where the courts granted the plaintiff's motion to certify the action as a collective action and send notice. *See Sexton v. Franklin First Fin., Ltd.*, No. 08-CV-04950, (E.D.N.Y. June 16, 2009) (certifying a class of inside loan officers for denial of overtime and minimum wage claims); *Loomis v. CUSA LLC*, No. 09-CV-00026, (D. Minn. June 12, 2009) (certifying a class of over-the-road rail crew transportation drivers); *Frank v. Gold'n Plump Poultry, Inc.*, 2005 WL 2240336 (D. Minn. Sept. 14, 2005) (certifying a class of production line and sanitation workers for claims related to time spent donning, doffing and sanitizing equipment in poultry processing plant); *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50 (S.D.N.Y. 2005) (notice allowed where plaintiffs performed the same job duties and defendant admitted it classified plaintiffs as exempt and did not pay overtime); *Bosley v. Chubb Corp.*, 2005 WL 1334565 (E.D. Pa. June 3, 2005) (after limited discovery, plaintiffs met lenient standard to justify collective action notice); *Jacobsen v. Stop & Shop Supermkt. Co.*, 2003 WL 21136308, (S.D.N.Y. May 15, 2003) (granting motion for class certification and notification where plaintiff made the required "modest factual showing" that putative class members were "victims of a common policy or plan that violated the law"); *Torres v. CSK Auto, Inc.*, 2003 WL 24330020 (W.D. Tex. Dec. 17, 2003) (granted motion to conditionally certify a class of employees who alleged that the

company's software-based program edited time cards to reflect fewer hours than were actually worked); *Roebuck v. Hudson Valley Farms, Inc.*, 239 F. Supp. 2d 234 (N.D.N.Y. 2002) (affidavits from three employees sufficient); *Barron v. Henry County Sch. Sys.*, 242 F. Supp. 2d 1096 (M.D. Ala. 2003) (similar legal issues alleged); *Goldman v. Radioshack Corp.*, 2003 WL 21250571 (E.D. Pa. Apr. 16, 2003) (retail store managers); *Taillon v. Kohler Rental Power, Inc.*, 2003 WL 2006593 (N.D. Ill. Apr. 29, 2003) (plaintiff does not need to provide evidence of others who wish to opt-in); *Champneys v. Ferguson Enters., Inc.*, 2003 WL 1562219 (S.D. Ind. Mar. 11, 2003) (court followed the two-step analysis, and concluded that there was a sufficient showing that at least some sales representatives performed similar functions and were compensated in a similar manner); *Javier H. v. Garcia-Botello*, 211 F.R.D. 194 (W.D.N.Y. 2002) (plaintiffs allowed to proceed anonymously out of fear of retaliation from their employers); *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623 (D. Colo. 2002).

The FLSA has a three-year statute of limitations for willful violations. Accordingly, a number of courts have limited notice to a three-year period. *See, e.g.*, *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966–67 (6th Cir. 1991) (*citing McLaughlin v. Richland Shoe Co.*, 486 U.S. 135 (1988)). A conditional order approving notice to prospective co-plaintiffs in a suit under § 216(b) is not appealable. *Comer v. Wal-Mart Stores, Inc.*, 2006 WL 1999135 (6th Cir. July 19, 2006); *Baldridge v. SBC Commc'ns*, *Inc.*, 404 F.3d 930 (5th Cir. 2005).

4. DENIAL OF MOTION TO SEND CLASS-WIDE NOTICE OR TO CERTIFY COLLECTIVE ACTION

In *Carlson v. Leprino Foods Co.*, 2006 WL 1851245 (W.D. Mich. June 30, 2006), the district court denied a motion to send nationwide notice, but granted notice and conditionally certified a collective action for a single facility where workers alleged failure to pay for donning and doffing time. Nationwide notice was denied because of significant factual differences between various plants. The court stated that minor fact differences among class plaintiffs at the certified plant did not warrant defeating certification at an early stage of the litigation.

In *Clausman v. Nortel Networks, Inc.*, the district court granted defendant's motion to withdraw a court order approving class notification to a group of "outside salesmen." The plaintiffs had alleged that the company had not paid them overtime due under the FLSA. The court ruled that because "an inquiry into the employee's specific job duties ... is not appropriate in a class lawsuit under Section 216(b)," certification of a collective action was inappropriate. *Clausman v. Nortel Networks, Inc.*, 2003 WL 21314065 (S.D. Ind. May 1, 2003) (*quoting Donihoo v. Dallas Airmotive, Inc.*, 1998 WL 91256 (N.D. Tex. Feb. 23, 1998)).

In *Basco v. Wal-Mart Stores, Inc.*, the district court denied plaintiffs' motions for class certification and notification of 100,000 potential class members. Plaintiffs alleged Wal-Mart pursued a pattern of conduct that resulted in employees working off the clock, being "locked-in" at night off-clock while waiting for management to let employees out, and missing rest and meal breaks. Lacking a "single decision, policy or plan," the court ruled that plaintiffs had failed to demonstrate facts binding the claims so that certification would promote judicial economy. *Basco v. Wal-Mart Stores Inc.*, 2004 WL 1497709 (E.D. La. July 2, 2004).

For additional cases where the court denied a motion to certify a collective action, see *Galban v. Bill Seidle's Nissan*, No. 09-CV-20301, (S.D. Fla. Apr. 9, 2009) (denying conditional certification to a proposed class of auto sales workers because the lead plaintiffs did not show that other auto sales workers were willing to join the class); *Trinh v. J.P. Morgan Chase & Co.*, 2008 WL 1860161, slip op. (S.D. Cal. April 22, 2008) (refusing to certify a class of all current and former loan officers); *Sheffield v. Orius Corp.*, 211 F.R.D. 411 (D. Or. 2002) (putative class members were employed by different subsidiaries and affiliates of employer, held different job titles, were under different payment structures, and worked at different job sites); *Marsh v. Butler County Sch. Sys.*, 242 F. Supp. 2d 1086 (M.D. Ala. 2003) (employees' argument that the presence of other FLSA violations made employees similar was insufficient); *Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941 (W.D. Ark. 2003) (argument that the employees were similarly situated simply because they claim violations by the same employer, regardless of their duties, was insufficient); *Reed v. Mobile County Sch. Sys.*, 246 F. Supp. 2d 1227 (S.D. Ala. 2003) (the included jobs differed in responsibilities, in schedules, in supervisors and in locations and in reasons for denial of overtime from the plaintiffs and each other).
For cases where the court denied a plaintiff's motion to facilitate FLSA collective action notice, see *Williams v. Accredited Home Lenders, Inc.*, 2006 WL 2085312 (N.D. Ga. July 25, 2006) (collective action denied at second stage for loan officers seeking unpaid overtime due to alleged off-the-clock activities due to "fact-specific, individualized inquiry into each Plaintiff's day-to-day activities"); *Rodgers v. CVS Pharmacy, Inc.*, 2006 WL 752831 (M.D. Fla. March 23, 2006) (plaintiff failed to show others who desire to opt in to action and failed to show similarly situated with regard to job requirements); *Mackenzie v. Kindred Hosps. East, L.L.C.*, 276 F. Supp. 2d 1211 (M.D. Fla. 2003) (pharmacist failed to identify any similarly situated individual who had expressed an interest in filing a written consent to join the lawsuit); *Horne v. U.S. Auto. Ass'n*, 279 F. Supp. 2d 1231 (M.D. Ala. 2003) (affidavit stating that plaintiff "believed" that there were other similarly situated appraisers who would join the lawsuit found insufficient).

While there is not a particular methodology endorsed regarding how to make a class certification decision, courts' tendency is to deny motions for decertification where employees appear to be similarly situated. *See Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528 (S.D. Tex. 2008) (denying defendant's motion for decertification where the court found that the plaintiffs were similarly situated, the defenses to plaintiffs' claims are individualized, and litigating the claims as a single action would not be unfair to defendants or unmanageable at trial). Ultimately, whether to decertify a collective action is within the district court's discretion. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995) (affirming the district court's decertification of a class based of abuse of discretion review). Once the initial, conditional, certification has been granted, and discovery is nearly complete, the court makes a factual determination on the "similarly situated" standard. In doing so, the courts generally consider a number of factors, including the disparate factual and employment settings of the individual plaintiffs, the various defenses available to defendant which appear to be individual to each plaintiff, as well as fairness and procedural considerations. *See Kautsch v. Premier Commc'ns*, 2008 WL 294271, slip op. (W.D. Mo. Jan. 31, 2008) (denial of a motion for decertification where the weight of authority and the preservation of judicial resources favor collective adjudication, and where the difficulty of handling the claims in a single lawsuit is less than handling them separately); *Fasanelli v. Heartland Brewery, Inc.*, 516

F. Supp. 2d 317 (S.D.N.Y. 2007) (after discovery in FLSA collective action, court reexamines the record to determine whether claimants are indeed similarly situated and if they are not, the class can be decertified at that time and claims of dissimilar opt-in plaintiffs would be dismissed without prejudice).

However, if discovery shows that certain class members are not similarly situated, some courts have chosen to decertify by creating subclasses. *See, e.g.*, *King v. Koch Foods of Mississippi, LLC*, 2007 WL 1098488 (S.D. Miss. Apr. 10, 2007) (in FLSA collective action, court may decertify the class or can create subclasses); *Aguilar v. Complete Landsculpture, Inc.*, 2004 WL 2293842 (N.D. Tex. Oct. 7, 2004) (where certain plaintiffs are not similarly situated due to differences in employers, the court can decertify the class or can create subclasses); *Dice v. Weiser Sec. Servs., Inc.*, 2008 WL 249250, slip op. (S.D. Fla. Jan. 29, 2008) (court finds that considerations of convenience, cost, judicial economy, and expeditious trial practice are best met by creating a subclass, as some, but not all, of the class was similarly situated to the named plaintiffs). Courts may also choose to decertify the collective action altogether and dismiss the claims of all opt-in plaintiffs without prejudice. *See Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567 (E.D. La. 2008).

5. DISCOVERY AS AN AID TO PLAINTIFF'S MOTION FOR CLASS NOTICE

In general, courts have held that "some discovery is necessary prior to a determination of class certification" in an FLSA collective action. *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303, 304 (D. Colo. 1998). The Supreme Court has held that a district court that permitted the plaintiffs' discovery regarding the names and addresses of other potential plaintiffs was "correct" in doing so. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("The District Court was correct to permit discovery of the names and addresses of the discharged employees."). Specifically, in *Hoffman-LaRoche*, the Court allowed an Age Discrimination in Employment Act (ADEA) plaintiff, who had been discharged by his employer as a result of a reduction in force, to discover at the beginning of the case, the names and addresses of other employees similarly discharged. Following up on the Court's confirmation of district court discretion in this area, many courts have permitted the discovery of names and addresses. *E.g.*, *Sexton v. Franklin First Fin., Ltd.*, No. 08-CV-04950, (E.D.N.Y. June 16, 2009) ("Courts often grant [names-and-addresses] request[s] in connection with a conditional certification of an FLSA collective action, and this Court concludes that such a request is appropriate in this case."); *Hens v. ClientLogic Operating Corp.*, 2006 WL 2795620, slip op. (W.D.N.Y. Sept. 26, 2006) (holding that class member names, last known mailing addresses and telephone numbers, work location, and dates of employment are essential to notification and should be disclosed); *Titre v. S.W. Bach & Co.*, 2005 WL 1692508 (S.D. Fla. July 20, 2005) (overruling defendant's objection to an interrogatory requesting names of all employees similarly situated to plaintiffs even after the class was closed because the information could lead to admissible evidence if those employees were paid overtime but plaintiffs were not).

A minority view exists, though, under which plaintiffs may not obtain discovery regarding the putative class prior to conditional certification. *E.g.*, *Stevens v. Erosion Containment Mgmt., Inc.*,

2008 WL 2157095 (M.D. Fla. May 21, 2008) (holding that a request for information in preparation of identifying class members was premature because no class was conditionally certified); *Metzger v. American Fidelity Assur. Co.,* 2006 WL 3097178 (W.D. Okla. Oct. 31, 2006) (same); *Crawford v. Dothan City Bd. of Educ.*, 214 F.R.D. 694 (M.D. Ala. 2003) (same). *Brooks v. BellSouth Telecommunications, Inc.*, 114 F.3d 1202 (11th Cir. 1997); *Adams v. United States*, 21 Cl. Ct. 795, 797 (Cl. Ct. 1990) (refusing to allow discovery of names and addresses of allegedly similarly-situated individuals).

6. STRATEGIES FOR EMPLOYERS TO REDUCE RISK OF COLLECTIVE ACTIONS

Employers seeking to reduce their exposure to FLSA claims and ward off costly collective actions should acknowledge the forces identified at the beginning of this section and take measures to limit the impact on their workplace. Steps that employers can take include:

- Auditing the exempt classifications of the workforce in light of the new Section 541 regulations to ensure that employees are properly classified as exempt or non-exempt;
- Audit payroll practices to ensure that any deductions from an employee's pay are consistent with the salary basis test;
- Implement a safe harbor policy that communicates the employer's intention to avoid improper deductions and requires employees to notify the employer of improper deduction with assurances that improper deductions will be reimbursed;
- Ensure that record-keeping policies are intact and that the employer maintains the appropriate documents, either on paper or electronically, to substantiate its classification and payroll practices;
- Train management-level and supervisory employees regarding compensable off-the-clock activities, proper deductions for disciplinary violations and enforcement of overtime policies;
- Consult an experienced labor lawyer before making wide-scale changes to any overtime classification, payroll practice or wage and hour policy.