Chapter Six

WAGE AND HOUR – FAIR LABOR STANDARDS ACT

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I. INTRODUCTION

The Fair Labor Standards Act (FLSA) governs the minimum wage as well as overtime pay and is the basic wage and hour law under which most problems and litigation arise. This Chapter provides a detailed summary of the FLSA. Wage and hour laws affecting federal contractors are discussed in the *Government Contracting* Chapter of the SourceBook. Individual state wage and hour laws are not addressed in this Chapter. Specific state laws should be consulted when making decisions potentially affected by wage and hour laws.

II. FLSA AND AMENDMENTS

The FLSA, 29 U.S.C. §§ 201-219, is administered by the Department of Labor (DOL), Wage and Hour Division (WHD). The FLSA sets minimum wage rates, establishes overtime requirements, contains record keeping provisions, and imposes child labor standards and penalties.

A. President Pursues Regulatory Revision of Wage Hour Laws in the Absence of Congressional Cooperation on New Legislation. In 2014, faced with Congressional gridlock, President Obama used his executive power to increase wages where possible and urged states to raise their minimum wage rates. As of June 30, 2015, 29 states and the District of Columbia had minimum wage rates higher than the federal minimum wage. *See State Minimum Wage/Minimum Wage by State,* http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx. Additionally, in February 2014, the President issued an Executive Order (EO) raising the minimum wage rate for certain federal contractors to $10.10 per hour effective January 1, 2015. The EO authorized the DOL to make an annual determination of the minimum wage rate for subsequent years, and the agency has announced that the federal contractor minimum wage will be $10.15 per hour effective January 1, 2016. *See DOL Announces Increase in Minimum Wage Rate for Federal Contractors,* http://www.fordharrison.com/dol-announces-increase-in-minimum-wage-rate-for-federal-contractors.

The President also directed the DOL to "update" and "modernize" overtime rules to expand the number of workers eligible for overtime pay. Accordingly, on June 30, 2015, in a 295-page report, the DOL released proposed changes to the "white collar" exemption tests for executive, administrative, and professional employees (located in 29 CFR Part 541).[1] The DOL refrained from amending the duties portion of the tests; however, it did revise the salary basis and salary level tests. If adopted, the DOL estimates that the new regulation will eliminate the exempt status for approximately 21.4 million employees — increasing the financial and regulatory burdens on employers throughout the United States. Although it did not propose amendments to the duties portion of the white collar exemptions in the proposed changes, the DOL discussed in detail the long and short tests, which were eliminated in 2004, and suggested that it may revisit the issue.

The proposed rule more than doubles the annual salary required for an employee to be considered exempt from overtime or minimum wage under the FLSA's white collar exemptions. Historically, the

1 On May 18, 2016, the DOL published its Final Rule amending the white collar exemption tests. The new regulations are to become effective by December 1, 2016. The new regulations are discussed in more detail in the appendix to this Chapter, available on our website at http://www.fordharrison.com/sourcebook.

DOL relied on weighted data to determine the salary levels that would serve as the threshold for the exemptions. Doing so minimized the impact on depressed regions and industries. The proposed amendments alter this approach and instead look at Bureau of Labor Statistics (BLS) data related to the compensation of all American salaried employees — without regard to low-wage regions or low-wage industries. The DOL takes this position even though it considers similar regional and industry factors with respect to the prevailing wage for government contracts.

Currently, the white collar exemptions in 29 CFR Part 541 require employers to pay employees a salary of at least $455 per week ($23,660 annually) and to perform certain exempt duties. The "highly-compensated" exemption currently requires employers to pay a salary of over $100,000 annually. The proposed amendments increase the salary basis test from $455/week to $970/week ($50,440 annually) beginning in 2016. This new salary represents the 40th percentile of earnings for all full-time salaried workers throughout the United States. Similarly, the "highly-compensated" exemption under the FLSA has been increased from $100,000 to $125,148 annually, which is tied to the 90th salary percentile. Unlike the 2004 regulations, these amounts are not stagnant but will be automatically updated each year to the applicable 40 percent or 90 percent thresholds. This means each year employers may need to modify their payrolls to ensure their employees are properly classified as exempt.

Rather than proposing any changes to the duties portion of the test, the DOL solicited comment in response to specific questions:

- What, if any, changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?
- Should the Department look to the State of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today?
- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider its decision to eliminate the long/short duties tests structure?
- Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?

B. Increased DOL Aggressiveness Continues. The DOL's WHD also has been increasingly aggressive in pursuing violations of the FLSA, especially in specific industries that traditionally pay lower wages. In its *Strategic Plan for 2011-2016,* the DOL stated that its directed investigations will be concentrated in "high-risk fissured industries that employ vulnerable workers." The DOL specifically identified certain industries it views as high risk including the agricultural, janitorial, construction, and hotel/motel industries. In an October 31, 2014 blog post, DOL Administrator David Weil emphasized that the DOL has been targeting investigations "where evidence shows labor law violations are greatest" and it is now "taking strategic enforcement to the next level." Weil stated that the agency needs to create "ripple effects" that reach beyond the specific workplace being investigated. According to Weil, "we need to continue to find ways to make our investigation of one employer resonate throughout that particular sector and influence the behaviors of employers across that entire industry, to promote compliance across networks of business organizations." To create these ripple effects, the DOL is doing several things, including using all enforcement tools available including civil money penalties, liquidated damages, and debarments. Weil also stated that the DOL is identifying the contracting stream, or supply chains, "so those at the top of the chain will evaluate the compliance practices of those below them and consider whether it's worth their own good name and possibly their own bottom line to utilize the services of subcontractors or suppliers who skirt the law." Additionally, Weil emphasized publicizing the results of investigations through traditional and digital media. "Publicizing wage and hour violations is an effective way to educate other employers about their responsibilities and encourage compliance." *Strategic Enforcement to Maximize Impact,* October 31, 2014, http://blog.dol.gov/2014/10/31/strategic-enforcement-to-maximize-impact/. In a later blog post, Weil stated that the DOL recovered over $240 million owed to more than 270,000 workers nationwide in fiscal year 2014 alone. *See Are You Owed Back Wages as a Result of a Wage and Hour Investigation?* June 16, 2015, https://blog.dol.gov/2015/06/16/are-you-owed-back-wages-as-a-result-of-a-wage-and-hour-investigation/.

The DOL's aggressiveness has backfired on it in at least one case. In *Gate Guard Services v. Perez,* 792 F.3d 554 (2015), the Fifth Circuit imposed attorneys' fees in favor of an employer against the DOL as a sanction for the DOL's bad faith investigation. The Fifth Circuit found that "At nearly every turn, this Department of Labor ("DOL") investigation and prosecution violated the department's internal procedures and ethical litigation practices." *Id.* at 555. The court further noted that even after discovering that the lead investigator:

- conducted an investigation for which he was not trained,
- concluded that the employer was violating the FLSA based on just three interviews destroyed evidence,
- ambushed a low-level employee for an interview without counsel, and
- demanded a grossly inflated multi-million dollar penalty,

the government "pressed on." "In litigation, the government opposed routine case administration motions, refused to produce relevant information, and stone-walled the deposition of its lead investigator." *Id*. Additionally, during litigation "the government opposed nearly every motion — even routine case administration motions — on spurious grounds and filed specious motions of its own." *Id. at* 557. "Predictably, given the legal precedents and botched investigation, the district court found the DOL's case so weak, it granted summary judgment for Gate Guard — a disposition the DOL has not appealed. *See Gate Guard Servs. L.P. v. Solis*, No. V–10–91, 2013 WL 593418, at *13–14 (S.D.Tex. Feb. 13, 2013)." *Id.* at 559. Subsequently the district court awarded Gate Guard over $565,000 in fees under the "substantially justified" provision of the Equal Access to Justice Act (EAJA), although it denied fees under the bad faith provision, finding the government's position was not "entirely frivolous." On appeal, the Fifth Circuit held that attorneys' fees were appropriate under the EAJA's bad faith provision. The Fifth Circuit adopted a position similar to that of the Ninth Circuit, holding that a "finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Id.* at 561. The court held that the "government's intransigence in spite of its legally deteriorating case, combined with extreme penalty demands and outrageous tactics, together support a bad faith finding. Thus, the government's bad faith is established under either our disjunctive or other circuits' conjunctive tests." *Id.* The government subsequently settled the case for $1.5 million. *See DOL Pays $1.5M In Oil Field Service Co.'s Bad Faith Case,* September 17, 2015, Law360, http://www.law360.com/articles/704211/dol-pays-1-5m-in-oil-field-service-co-s-bad-faith-case.

III. PORTAL TO PORTAL ACT

The Portal to Portal Act, 29 U.S.C. §§ 251-262 (the Act), supplements and limits the FLSA. It provides, in part, that time spent by an employee on incidental activities before and after work that are not an integral part of the employee's principal work activities is not compensable working time. It also provides that travel by an employee to or from home to work is not working time.

A. Statute of Limitations. The Act establishes a two-year statute of limitations for unpaid minimum wages, overtime compensation, or liquidated damages under the FLSA, running from the date an action is filed in court. If the action is willful, a three-year statute of limitations applies. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (violation of the FLSA was "willful" when the employer acted with actual knowledge or reckless disregard of whether its conduct was prohibited).

B. Employer's Defenses. An employer may avoid liability if it can show that an action that violates the FLSA was taken in good faith reliance on a written administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy. 29 U.S.C. § 258. The DOL no longer issues opinion letters in response to fact-specific requests submitted by individuals and organizations but instead will issue an Administrator Interpretation (AI) when it determines that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. See Wage and Hour Division, Rulings and Interpretations, http://www.dol.gov/whd/opinion/opinion.htm. AIs will set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. *Id.*

C. Liquidated Damages. Under the FLSA, courts have discretion to deny liquidated damages, in whole or in part, whenever an employer's violation occurred in "good faith" and when the employer had "reasonable grounds" for believing that it was not violating the FLSA. 29 U.S.C. § 260. Ignorance and clerical mistakes are not reasonable grounds. *See Thomas v. Howard Univ. Hosp.*, 39 F.3d 370 (D.C. Cir. 1994). Reliance on the advice of counsel may demonstrate good faith sufficient to avoid imposition of liquidated damages. *Dalheim v. KDFW-TV*, 712 F. Supp. 533 (N.D. Tex. 1989), *aff'd*, 918 F.2d 1220 (5th Cir. 1990). *See also Zachary v. Rescare Oklahoma, Inc. and ResCare, Inc.*, 471 F. Supp. 2d 1183 (N.D. Okla. 2006) (letter from Wage and Hour investigator advising employer that investigation was closed and no violations were found defeated claim of willfulness).

For DOL interpretations of the Portal to Portal Act, see 29 C.F.R. §§ 778.320, 785.9, 785.24, 785.25, 785.26, and 790.

IV. DETAILED ANALYSIS OF THE FLSA

A. Coverage.

1. In General. Coverage of employees under the FLSA is determined by the type of work performed by the individual employee (individual coverage), or by the volume or type of work performed by the employer (enterprise coverage). An employee is covered if she or he is employed by "an enterprise" engaged in commerce or the production of goods for commerce. 29 U.S.C. §§ 203(r) and (s). Even if there is no enterprise coverage, the employee may be covered by the FLSA if the employee individually is engaged in commerce or the production of goods for commerce. The result is that all employees of a business may be covered under the enterprise concept, but if they are not, one or more employees may still be covered by individual employee coverage.

Congress explicitly extended FLSA coverage to "domestic service" workers in 1974, amending the Act to apply to employees performing household services in a private home, including those domestic service workers employed directly by households or by companies too small to be covered as enterprises under the Act. The minimum wage and overtime pay requirements apply to domestic service employees if they earn more than the applicable dollar threshold for coverage under Social Security and Medicare as defined by section 3121(x) of the Internal Revenue Code ($1,900 for 2015) or work eight or more hours during a workweek in one or more homes. 29 U.S.C. § 206(f). The DOL amended its regulations governing the employment of live-in domestic service workers. Under the revised regulations, effective January 1, 2015, third party employers, such as home care agencies, may not claim the overtime exemption for live-in domestic service workers, and must pay such workers at least the federal minimum wage for all hours worked and overtime pay at one and a half times the regular rate of pay for all hours worked over 40 in a workweek, even if the worker is jointly employed by the household. *See Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA)*.

2. "Commerce" Defined. "Commerce" means trade, transportation, transmission, or communication among the several states or between any state and any place outside the state. 29 U.S.C. § 203(b). For an employee to be covered by the FLSA under the individual coverage provision, the employee must engage in interstate commerce on a regular and recurring basis. 29 C.F.R. §§ 776.3, 776.25 (individual coverage in the construction industry). It is likely that the WHD will assert coverage based on an employee handling interstate mail, telephone calls, credit card transactions, or receipt of interstate shipments of merchandise. However, in *Duran v. Wong*, 2012 WL 5351220 (S.D. Tex. Oct. 23, 2012), the court held (in a case involving individual coverage only) that the employee's use of cleaning materials that had traveled in interstate commerce did not establish individual coverage. The employee failed to show that his "work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity," and the court held that the use of cleaning products that had traveled in interstate commerce was insufficient, by itself, to establish individual coverage under the FLSA. *Id*. at *3 (citing *Sobrinio v. Med. Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829 (5th Cir.2007)). *See also Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264 (11th Cir. 2006) (assuming, without deciding, that credit card transactions alone could constitute an instrumentality of interstate commerce, the plaintiff did not produce sufficient evidence of interstate activity for the purposes of establishing individual coverage to overcome the employer's motion to dismiss, because he did not produce evidence that he corresponded with merchants outside the state of Florida using the mail, phone, or fax, nor did he produce evidence that he made purchases of goods from out-of-state vendors); *Sandoval v. Fla. Paradise Lawn Maint., Inc*., 303 F. App'x 802 (11th Cir. 2008) (affirming summary judgment on the plaintiffs' FLSA claims, holding that the defendant (a lawn maintenance company) was not engaged in interstate commerce – the evidence showed that the defendant's customers were located in Florida, all of the grading of ground and planting of trees was done in Florida, all of the trees were purchased in Florida, and all of the trees were grown in Florida).

3. "Enterprise" Defined. "Enterprise" is defined in the FLSA as "related activities performed … by any person or persons for a common business purpose." 29 U.S.C. § 203(r). Merely establishing and maintaining separate corporations will not avoid FLSA coverage. For most businesses, all employees of the enterprise are covered by the FLSA if two tests are met. The commerce test is met if the following conditions are satisfied:

- First, two or more employees must be engaged in one of the following: interstate or foreign commerce; producing goods for transportation in interstate or foreign commerce; or handling, selling, or otherwise working on goods or materials that have been moved in or produced for interstate or foreign commerce by any person. 29 U.S.C. § 203(s). In *Polycarpe v. E&S Landscaping Servs., Inc.*, 616 F.3d 1217 (11th Cir. 2010), the Eleventh Circuit held that the "coming to rest" doctrine, that is, the belief that interstate goods or materials can lose their interstate quality if they have already come to rest within a state before intrastate purchase by a business, does not apply in the enterprise coverage context. Accordingly, the Eleventh Circuit held that the lower courts in several cases erred in ruling in favor of the employers after applying the "coming to rest" doctrine in the enterprise coverage context.
- Second, the threshold level for FLSA coverage is gross revenue of $500,000 on a 12-month basis. Hospitals, nursing homes, schools, and public employers are covered regardless of their gross receipts. The "dollar test" applies to annual gross income or receipts, exclusive of excise taxes at the retail level that are separately stated, and that may be determined by a rolling four-quarter test. 29 U.S.C. §§ 203(s)(1), (3)-(6); 29 C.F.R. §§ 779.258-779.269.

4. Coverage of State and Local Governmental Functions. The FLSA originally did not apply to state and local employees, but has been amended and now does so. The FLSA was amended in 1985 to provide for comp-time plans, part-time employment, and the use of volunteers by public employers. The amendment also prohibited retaliation and fixed a date of liability. *See* 29 C.F.R. § 553.1, *et seq.* In *Alden v. Maine*, 527 U.S. 706 (1999), however, the U.S. Supreme Court, in a five to four decision, held that states could not be sued in federal or state court under the FLSA unless the state had specifically waived its sovereign immunity. The decision does not protect cities, counties, school boards, or public hospitals that are not a part of the state government.

5. Personal Staff and Legislative Staff Exclusions from Coverage. The FLSA contains a specific description of the types of individuals employed by state and local government employers who will not be considered "employees" covered by the FLSA's requirements. This is an exclusion from all coverage rather than merely an exemption from minimum wage and overtime pay requirements. 29 U.S.C. § 203(e)(2)(C).

6. Joint Employer Status. An employer may be liable for wage payments to employees shared with another employer. The DOL's regulations provide that:

> [A] determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.

29 C.F.R. 791.2(a). The regulation also provides that if the employee is jointly employed by two or more employers (that is, employment by one employer is not completely disassociated from employment by the other employer), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. *Id.* In this situation, all of the joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the FLSA, including the overtime provisions, with respect to the entire employment for the workweek. *Id.* Each employer may take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers. *Id.*

In *Chao v. A-One Med. Servs.*, 346 F.3d 908, 917 (9th Cir. 2003), the court noted that the determination of whether two companies constitute a single enterprise for FLSA coverage and whether they are liable as joint employers under § 207 are technically separate issues. In *Chao,* the court noted that the "economic realities" test frequently used in cases of "vertical" joint employment (that is, where a company has contracted for workers who are directly employed by an intermediary company) was not applicable to the facts in that case, which involved "horizontal" joint employment (two separate companies whose operations were closely related). In this case, the court relied on the DOL regulations to determine whether a joint employment relationship existed. The regulations provide that a joint employment relationship generally will be considered to exist when:

- There is an arrangement between employers to share an employee's services;
- One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or
- The employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 791.2(b). The court found joint employment in *Chao* based on the interrelationship between the two companies, home health care providers, including the transfer of patients and nurses from one company to another (even though there was no official agreement for sharing employees), management of the employees of both companies by the owner of one, and use of the same nursing supervisors and scheduler for both companies. Based on these facts, the court found that the two companies were not completely dissociated with respect to the employment of the individuals in question. Accordingly, the companies were required to aggregate, for FLSA compliance purposes, the work done by their employees for both companies. *See also, e.g., Ash v. Anderson Merchandisers, L.L.C.*, 799 F.3d 957 (8th Cir. 2015) (noting that "'the test of employment under the FLSA is one of 'economic reality.'"); *Roeder v. DIRECTV, Inc*., 2015 WL 5603050, at *5 (N.D. Iowa Sept. 22, 2015) ("In applying the economic reality test to determine whether an entity is an employer, federal courts look to who has operating control over the employees, and consider whether the alleged employer: (1) possessed the power to hire and fire employees; (2) supervised or controlled employee work schedules or conditions of employment; (3) determined the rate or method of payment; and (4) maintained employee records"; evaluating these factors the court found that under the totality of the circumstances the plaintiffs had pled sufficient facts to show that DIRECTV was their employer under the FLSA and, accordingly, denied the defendant's motion to dismiss).

However, in *Lepkowski v. Telatron Mktg. Group*, 766 F. Supp. 2d 572 (W.D. Pa. 2011), the court held that Bank of America (BOA) was not a joint employer with a marketing group that handled and processed customer telephone calls for the bank. Accordingly, the court dismissed BOA as a defendant in an FLSA claim filed by an employee of the call center. In reaching this decision, the court considered the "real economic relationship" between the employee, employer, and putative joint employer and noted that there is no mechanical test to evaluate the economic reality between employees and putative joint employers. *Id.* at 577. Instead, joint employment is to be assessed in light of the totality of the circumstances. *Id.* The court discussed the various tests that courts have utilized in analyzing the joint employer issue. The court considered the following factors in determining that BOA was not a joint employer with the call center: (a) whether BOA had the power to hire or fire Telatron employees; (b) whether BOA had authority to supervise and control work schedules or employment conditions; (c) whether BOA had authority to determine rates and methods of payment; (d) whether BOA maintained employment records for Telatron employees; (e) whether plaintiffs could use BOA's premises and equipment for their work; (f) whether the plaintiffs were part of a business that could shift as a unit from one putative joint employer to another; and (g) whether the responsibilities of the direct employer could be transferred to the putative joint employer without material changes. *Id*. at 577-582.

In *Olvera v. Bareburger*, 73 F. Supp. 3d 201 (S.D.N.Y. 2014), the court held that employees of a hamburger chain franchisee could proceed with their FLSA claims against the franchiser. The court found that the franchiser guided the franchisees in employee training, required franchisees to use particular payroll practices and timekeeping systems and monitored employee performance. The court held that these factors, "if true, would satisfy the 'economic reality' test for establishing employer status." *Id.* at 208. However, in *Orozco v. Plackis,* 757 F.3d 445 (5th Cir. 2014), the Fifth Circuit held that a franchiser was not liable as a joint employer for the plaintiff's wage and hour claims. The court held that the plaintiff failed to show that the franchiser had the power to hire and fire him, that he supervised and controlled employee work schedules or conditions of employment, or that he determined the plaintiff's rate and method of payment.

There is an exception to the general rules on joint employer status for the public sector. Public safety employees such as firefighters and law enforcement officers may voluntarily accept employment from independent third party employers for special duty work during off-duty hours without those hours counting as compensable hours worked for the public sector employer. The independent employer must be truly independent, however, and the public safety employee must be free to accept or reject the special assignment. The exception of joint employer status applies even if the public sector employer places restrictions and terms and conditions under which special assignments may be offered and accepted, and even if a local law or regulation requires the independent employer to hire employees of the jurisdiction in which the special assignment or duty is to be conducted. 29 C.F.R. § 553.227.

For more information regarding joint employer issues, see the SourceBook Chapter entitled *Joint Employment, Independent Contractors and Staffing Issues.*

B. Status as Employee or Independent Contractor. An employer should be particularly careful when dealing with potential independent contractor situations. Individuals designated "independent contractors," "subcontractors," "contract workers," or "consultants" may be held to be "employees" eligible to receive the minimum wage and overtime pay and as to whom recordkeeping obligations apply. *See Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308 (5th Cir. 1976). As noted above, the DOL has indicated that the investigation of misclassification of employees as independent contractors continues to be one of its top priorities.

Employees cannot waive the requirements of the FLSA. A contract designating an individual as an "independent contractor" does not control the employment relationship. *Mitchell v. Strickland Transp. Co.*, 228 F.2d 124 (5th Cir. 1955); 29 C.F.R. § 778.316.

In July 2015, the DOL issued an Administrator's Interpretation in furtherance of its Misclassification Initiative, which concludes that "most workers are employees under the FLSA's broad definitions." *See Administrator's Interpretation 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.* The Interpretation does not change the "economic realities" test courts currently apply in determining whether a worker is an independent contractor. It does, however, emphasize that each factor of the economic realities test must be applied consistently with the broad definition of "employ" found in the FLSA; that is, whether the worker is economically dependent on the employer and is, therefore, "suffered or permitted to work" by the employer.

Depending on the court, the economic realities test generally includes the following factors:

- the extent to which the work performed is an integral part of the employer's business;
- the worker's opportunity for profit or loss depending on his or her managerial skill;
- the extent of the relative investments of the employer and the worker;
- whether the work performed requires special skills and initiative;
- the permanency of the relationship; and
- the degree of control exercised or retained by the employer.

While the Interpretation did not change the factors most courts consider in determining the economic realities of a work relationship, the Interpretation did provide some important takeaways regarding each factor:

- The DOL specifically noted that work performed away from the employer's premises, whether in the worker's home or at the employer's customer, can still be integral to the employer's business.
- If a worker is truly in business for him or herself, and, therefore, an independent contractor, the worker should be at some risk of loss due to the managerial decisions he or she makes. Merely being able to work more hours is not a managerial skill that affects the worker's opportunity for profit or loss.
- In evaluating the relative investments of the employer and worker, courts should consider whether the worker has made investments in his or her business to further its ability to expand, reduce its cost structure or extend its business plan. Courts should also consider how that investment compares to the employer's investment, not just to the work performed by the worker but to the employer's overall investment in the project.

- Merely having specialized skills does not mean that the worker is an independent contractor. There is a difference between providing skilled labor and demonstrating the skill and initiative of an independent contractor. The Interpretation states, in probably its most telling sentence: "Only carpenters, construction workers, electricians, and other workers who operate as independent businesses, as opposed to being economically dependent on their employer, are independent contractors."
- Courts should also consider whether the lack of permanence or indefiniteness in the worker's relationship with the employer is the result of operational characteristics of the business (i.e., whether the work is typically transient or seasonal) or the result of the worker's own independent business initiative.
- Control exerted due to the nature of the business, regulatory requirements and/or customer satisfaction are indicative of an employee/employer relationship. The issue is how much control is exercised by the employer, not why the employer is exerting it.

While no single factor is determinative, the DOL emphasized that the "control factor" should not be given undue weight. Ultimately, according to the DOL, the "factors should be considered in totality to determine whether a worker is economically dependent on the employer, and thus an employee." If the worker is in business for him or herself, and not economically dependent on the employer, then he or she is an independent contractor.

C. Status as Employee or Student/Trainee. Whether trainees or students are employees under the FLSA depends on all of the circumstances surrounding their activities on the premises of the employer. If all of the following criteria apply, the trainees or students are not employees within the meaning of the Act:

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainees or students;
- The trainees or students do not displace regular employees, but work under their close observation;
- The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion its operations may actually be impeded;
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

See McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989); *Ulrich v. Alaska Airlines, Inc.*, 2009 WL 364056 (W.D. Wash. Feb. 9, 2009) (flight attendant candidates in training were not employees and, thus, were not entitled to pay for time spent training); *Winfield v. Babylon Beauty School of Smithtown Inc*. 89 F. Supp. 3d 556 (E.D.N.Y. 2015) (in determining whether an employment relationship exists, the court must consider the "economic reality" of the parties' relationship on a case-by-case basis. The court denied the defendants' motion to dismiss, finding the plaintiffs, students of different beauty schools, had alleged sufficient facts which, if true, would show that the defendants are employers under the FLSA.).

D. Interns. The DOL has issued a Fact Sheet adopting a similar test to that discussed above for trainees for determining when an intern in the "for-profit" private sector will be viewed as an employee versus a trainee. *See Fact Sheet #71: Internship Programs under the Fair Labor Standards Act*, http://www.dol.gov/whd/regs/compliance/whdfs71.htm. According to the DOL, internships in private sector will most often be viewed as employment, unless the six-part test described below relating to trainees is met. Interns in the "for-profit" private sector who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for hours worked over 40 in a workweek. Some courts have rejected the DOL's six-part test. *See, e.g., Solis v. Laurelbrook Sanitarium and School,* 642 F.3d 518 (6th Cir. 2011) (holding that students of a boarding school founded by Seventh-Day Adventists who received practical training in a nursing home run by the school were exempt from the FLSA; noting that the proper focus should be on "which party receives the primary benefit of the work performed" by the students – the students or the school – and finding in this case that the primary benefit of the work flowed to the students).

E. Volunteers. The FLSA and its regulations define volunteers for the purpose of *public* agency employment. 29 USC § 203(e)(4); 29 C.F.R. §§ 553.100-106. The concept of "volunteer" for private employers, however, has been defined by the courts and opinions issued by the DOL's WHD. *See Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). The principles, nevertheless, are basically the same. In the public setting, individuals will be volunteers when they:

- Perform hours of service for civic, charitable or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered. The statute clarifies that a volunteer performing such service can either receive no compensation or be paid expenses, reasonable benefits or a nominal fee to perform such services.
- Offer their services freely and without coercion, direct or implied, from the employer.
- Are not otherwise employed by the same agency to perform the same services as those for which they propose to volunteer. In other words, individuals can qualify as volunteers if they either volunteer for different agencies or perform different services than they are otherwise employed to perform.

The *Alamo* U.S. Supreme Court decision simply held there must be no promise or reasonable expectation that the person will receive compensation for labor provided. *Alamo*, 471 U.S. 290. These persons can be provided payment for expenses, reasonable benefits or a nominal fee, but care must be taken that these "payments" do not become compensation in kind. For example, if the organization provides room and board and spending money for the individuals, upon which the individuals depend for their livelihood, the payments or benefits will be considered compensation. *Id*.

Unfortunately, the DOL appears to take a much more restrictive stance when determining volunteer status in the non-profit or for-profit setting. The Wage and Hour Field Operations Handbook notes that here are certain circumstances where an employee may donate services as a volunteer and the time will not be considered compensable work. For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. The DOL would not consider that an employee-employer relationship exists with respect to this time between either the hospital and the volunteer or the volunteer and the person for whom the services are performed. *See DOL Field Operations Handbook 10b03(c),* http://www.dol.gov/whd/FOH/FOH_Ch10.pdf, (discussing employees of nonprofit organizations who also volunteer for the employer). However, the employee cannot volunteer to perform work on an uncompensated basis that is similar to the work the person performs for the employer as part of his or her job. *Id.*

In an opinion letter released January 6, 2009, the DOL opined that allowing full-time paid firefighters working for a private nonprofit fire department to perform extra hours of service without pay would violate the FLSA. *See* Wage and Hour Opinion Letter, FLSA 2008-14, Dec. 18, 2008 (released Jan. 6, 2009), http://www.dol.gov/whd/opinion/FLSA/2008/2008_12_18_14_FLSA.pdf. According to the opinion letter, the volunteer fire department is a nonprofit corporation that provides fire protection service for several municipalities. The organization, staffed by both volunteers and paid firefighters, asked DOL for an opinion on whether the paid firefighters may volunteer to perform during off-duty hours without pay duties similar to their paid work. The opinion stated that allowing paid employees to perform the same duties on a volunteer basis that they handle during their paid employment would improperly allow the employees to waive their FLSA rights. The DOL stated that office employees of a volunteer fire department can volunteer to perform firefighting duties without pay, and paid firefighters can perform office work without being paid, but "VFD firefighters may not work some shifts for pay and other shifts on a volunteer, unpaid basis in the manner proposed, because the volunteer and paid work consist of the same type of service."

In another opinion letter, also released January 6, 2009, the DOL opined that emergency medical technicians employed by a county government can volunteer to work without pay for a local emergency crew that is funded partially by the county but is still a separate and independent entity. *See* Wage and Hour Opinion Letter, FLSA 2008-13, December 18, 2008, (released January 6, 2009), http://www.dol.gov/whd/opinion/FLSA/2008/2008_12_18_13_FLSA.pdf. The opinion stated that because the connections between the county and the local crew had not "eviscerated" the crew's independence, it would not violate the FLSA to allow the county employees to perform volunteer service for the local unit without pay.

In a third opinion letter issued January 6, 2009, the DOL stated that hours that a police department victim assistance specialist who served as a reserve police officer for the same agency must be counted in overtime pay calculations when the officer is performing special reserve assignments and receiving more than nominal compensation. *See* Wage and Hour Opinion Letter, FLSA 2008-16, December 18, 2008 (released January 6, 2009), http://www.dol.gov/whd/opinion/FLSA/2008/2008_12_18_16_FLSA.pdf. In this situation, the victim specialist also volunteered as a reserve police officer for the same police department; however, when the specialist performed reserve officer duties he was paid $17.31 per hour. Although the DOL found that the jobs of victim assistance specialist and reserve police officer did not consist of providing services that were the same or similar, the payment of $17.31 per hour could not be considered a "nominal fee" under the FLSA. Paying the victim specialist such an amount during a week when he served as a reserve officer indicated that his service was part of an employment relationship with the police department.

F. Ministerial Exemption. The U.S. Supreme Court has held that there is a ministerial exception to the application of employment discrimination laws grounded in the Establishment and Free Exercise Clauses of the First Amendment. *See Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (Jan. 11, 2012). In *Hosanna-Tabor* the Court held that a teacher at a Lutheran School could not maintain an action under the Americans with Disabilities Act (ADA) arising out of her discharge. This decision is the first time the Court has recognized a ministerial exception to the employment discrimination laws. The Court also held that the plaintiff in this case, who was a commissioned minister and had undergone substantial religious training, qualified as a minister for the purposes of the exception. Additionally, the Court held that the ministerial exception is an affirmative defense to a discrimination lawsuit, not a jurisdictional bar. 132 S. Ct. at 709 fn. 4. The Court's decision only bars discrimination suits by ministers against religious employers, not lawsuits filed by lay employees against religious employers. Although the Court did not specifically address FLSA claims, it cited with approval *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008), which held that there is a ministerial exception to the FLSA. Thus, lower courts may rely on *Hosanna-Tabor* to find a ministerial exception under the FLSA. Even before the Court issued this decision, some federal appeals courts found a ministerial exception to the FLSA. *See Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 305 (4th Cir. 2004) (employee who served as a Mashgiach or kosher supervisor in a predominantly Jewish nursing home was not an employee under the FLSA because he was employed in a ministerial position by a religious institution; noting that the exception is derived from the Congressional debate about the FLSA and delineated by DOL guidelines); *Schleicher,* 518 F.3d at 478 (finding that the Salvation Army is a church, thus two ordained ministers could not sue it for alleged FLSA violations because of the "ministerial exception" to federal employment statutes, including the FLSA).

G. Minimum Wage Issues, Generally. The federal minimum wage currently is $7.25 per hour. The minimum wage requirement does not have to be met through the payment of an hourly wage rate. The law requires only that all compensation for a given workweek average the applicable minimum wage rate. 29 U.S.C. § 206(a). Under the rule established by the *Klinghoffer* case (the "Klinghoffer rule"), if hours of work are 40 or less for the workweek, each hour of working time does not have to be compensated so long as the average compensation per work hour equals the applicable minimum wage rate. *See United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2d Cir. 1960).

Employees covered by the minimum wage and overtime requirements of the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek of at least one and one-half times their regular rates of pay. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, unless overtime hours are worked on such days. 29 C.F.R. §§ 778.315, 778.317; *Fact Sheet #23: Overtime Pay Requirements of the FLSA,* http://www.dol.gov/whd/regs/compliance/whdfs23.pdf*.* The minimum wage (and overtime pay) must be paid on a workweek basis, which is any seven consecutive 24-hour periods starting on any day, at any time, as long as it is consistently applied. 29 C.F.R. § 778.105. Changes of the beginning and end of the workweek can be made if they are intended to be permanent in nature and if the purpose of the change is not to evade minimum wage or overtime pay requirements. 29 C.F.R. §§ 778.301, 778.302. The Fifth Circuit has held that an employer is not required to set the workweek in a way that maximizes an employee's overtime pay. *See Johnson v. Heckmann Water Res. (CVR), Inc.,* 758 F.3d 627 (5th Cir. 2014). In *Johnson,* the employees worked 12-hour shifts for seven consecutive days beginning every other Thursday. The employer paid its employees bi-weekly and used a Monday through Sunday workweek to calculate overtime under the FLSA. The employees sued, claiming the employer violated the FLSA by using the Monday through Sunday workweek because doing so meant they received less overtime pay than they would have if the employer had used a Thursday through Wednesday workweek. In rejecting the employees' argument, the court noted that the DOL's regulations state that an employer's workweek is not required to coincide with a calendar week, and the employer can establish different workweeks for different groups of employees. Additionally, the regulations provide, "[o]nce the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him." *Id.* Citing *Abshire v. Redland Energy Services,* 695 F.3d 792 (8th Cir. 2012), as well as a DOL opinion letter, the court held that under the FLSA, an employer has the right to establish a workweek and is not required to begin it on any given day. "The mere fact that an established workweek does not maximize an employee's overtime compensation does not, standing alone, violate the FLSA." *Id.* Accordingly, the court affirmed the lower court's grant of summary judgment in favor of the employer.

Because the FLSA requirements are based on a "workweek" concept, a week in which the minimum wage (or overtime) is underpaid cannot be averaged with prior or subsequent weeks in which excess wages are paid. 29 C.F.R. §§ 778.103, 778.104. Because the minimum wage requirement does not require an hourly wage rate, the statutory requirement can be fulfilled through various compensation plans including an hourly wage rate, fixed weekly, biweekly, semimonthly or monthly salaries, piece rates, commissions, or a combination payment plan.

The minimum wage and overtime provisions of the FLSA may not be waived through collective bargaining. *Utility Workers Union of America, Local 246 v. Southern California Edison Co.*, 83 F.3d 292 (9th Cir. 1996). Nor may they be waived in individual agreements.

H. Uniforms. Several factors may have an impact on the minimum wage requirement, including uniform purchases, tip credits, and wage deductions. Employers cannot deduct the cost of purchasing, renting, or laundering uniforms if doing so cuts into the minimum wage or required overtime pay for a nonexempt employee.

The employer may prorate deductions for the cost of the uniform over a period of paydays provided the prorated deductions do not reduce the employee's wages below the required minimum wage or overtime compensation in any workweek. *See Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA),* http://www.dol.gov/whd/regs/compliance/whdfs16.pdf; Wage and Hour Opinion Letter FLSA2001-7 (Feb. 16, 2001), http://www.dol.gov/whd/opinion/flsa/2001/2001_02_16_7_FLSA.pdf.

One hour's worth of pay per week, at the minimum wage rate, is acceptable as a uniform laundry allowance according to the WHD. The one hour of pay may be turned into a daily rate based on a five-day workweek and the daily rate paid for each day the employee works. *See* Wage and Hour Division Field Operations Handbook § 30c12, http://www.dol.gov/whd/FOH/FOH_Ch30.pdf;

Wage and Hour Opinion Letter FLSA2006-21 (June 9, 2006), http://www.dol.gov/whd/opinion/FLSA/2006/2006_06_09_21_FLSA.pdf.

Courts have found that the failure to meet the uniform and laundry maintenance requirements violates the minimum wage provisions. *See Hodgson v. Newport Motel, Inc.*, 1979 WL 1975 (S.D. Fla. 1979). If uniforms can be cleaned with the employee's regular laundry, a laundry allowance is not required. Wage and Hour Division Field Operations Handbook § 30c12, http://www.dol.gov/whd/FOH/FOH_Ch30.pdf; Wage and Hour Opinion Letter FLSA2006-21 (June 9, 2006), http://www.dol.gov/whd/opinion/FLSA/2006/2006_06_09_21_FLSA.pdf. Also, if an employer requires its employees to wear street clothes, such as a white shirt and dark pants, the clothes do not constitute a uniform even though the employees may look "uniform" in appearance. Wage and Hour Division Field Operations Handbook § 30c12, http://www.dol.gov/whd/FOH/FOH_Ch30.pdf; Wage and Hour Opinion Letter FLSA2008-4 (May 15, 2008), http://www.dol.gov/whd/opinion/FLSA/2008/2008_05_15_04_FLSA.htm. (Specifying style of shirt or pants, or type of material, however, could create a problem.)

I. Tip Credits. An employer may take a credit against the minimum wage requirement for tipped employees. A "tipped employee" is an employee who customarily and regularly receives more than $30 per month in tips. 29 U.S.C. § 203(t).

If an employee's tips combined with the employer's direct wages of at least $2.13 an hour do not equal the minimum hourly wage, the employer must make up the difference. A tip credit may be taken for a workweek only to the extent that an employee receives tips. If reported tips fall below the tip credit, the employer remains liable to pay wages for the difference between the credit taken and the tips received. 29 C.F.R. § 531.59.

The "tip credit" pursuant to 29 U.S.C. § 203(m) was amended in 1996 as follows:

In determining the wage an employer is required to pay a tipped employee, the amount paid to such employee by the employee's employer shall be an amount equal to:

> **a.** [T]he cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph; and
>
> **b.** [A]n additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the [current minimum wage].

The interpretation of this amendment by the DOL is based on its understanding of the Congressional intent to freeze the cash wage payments required by employers to tipped employees at $2.125 (the DOL rounds this up to $2.13) per hour. The remainder of the minimum wage requirement can be taken as a tip credit up to the minimum wage rate. With regard to overtime hours, the DOL's interpretation is that one-half of the applicable minimum wage must be paid in cash wages. Currently, the one-half time rate will be $3.63 and the total overtime cash wages will be $5.76 per hour ($2.13 + $3.63). The employer cannot pay less than $2.13 per hour to tipped employees, but it can pay more. For example, if the employer pays $3.00 per hour, the overtime rate would remain $3.63 and the total overtime cash wages would be $6.63 ($3.00 + $3.63).

Although Congress increased the federal minimum wage in July 2009, it did not change the tip credit provision. Thus, employers who use the tip credit may continue to pay employees $2.13 per hour; however, they must ensure that the employees' total compensation, including tips, meets the new required minimum wage.

1. General Requirements. If an employer elects to use the tip credit provision the employer must:

- Inform each tipped employee about the tip credit allowance (see the discussion of the DOL's recently issued regulations requiring employers to provide employees with certain information) before the credit is utilized (it is a good idea to have the employee sign a statement acknowledging that the tip credit has been explained to him or her, to show an understanding or agreement to work under the system);

- Be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined; and
- Allow the tipped employee to retain all tips, regardless of whether the employer elects to take a tip credit for tips received, except to the extent the employee participates in a valid tip pooling arrangement.

2. DOL Regulations. On April 5, 2011 the DOL issued final regulations on the tip credit. The final regulations clarify the DOL's position on many issues surrounding an employer's use of the tip credit. Some of the changes include:

a. Notice Requirements. If an employer elects to take a tip credit, the final regulations require that an employer inform employees:

- Of the amount of the cash wage to be paid to the employee;
- Of the value of which may not exceed actual tips received;
- That all tips must be retained by the employee (except for a valid tip pooling arrangement); and
- That the tip credit shall not apply to any employee who has not been informed of the requirements stated above.

b. No Maximum Percentage for Tip-Pooling Agreements. The DOL previously took the position that tip-pooling agreements cannot require employees to contribute more than 15 percent of their tips. The final regulations acknowledge that the FLSA does not impose a maximum tip pool contribution percentage.

c. Employer May Not Retain Any Employee Tips. Even for employers who do not take the tip credit, the DOL has expressly taken the position in the preamble to the final regulation that tips are the property of employees. Therefore, by deleting some of the language previously used in the regulations, the DOL has clarified its position that an employer may not retain employee tips regardless of (1) whether they take a tip credit; or (2) whether they pay an employee cash wages in excess of the minimum wage.

d. Validity of DOL Regulation. In *National Restaurant Ass'n v. Solis*, 870 F. Supp. 2d 42 (D.D.C. 2012), a federal district court in Washington, D.C. held that the DOL complied with the requirements of the Administrative Procedures Act (APA) when it promulgated the tip credit regulation. However, in *Oregon Restaurant and Lodging Assoc. v. Solis*, 948 F.Supp.2d 1217 (D. Or. 2013), a federal district court in Oregon invalidated the provisions in the regulations that: (1) prohibit employers from reaching agreements with their employees to allow the employer to retain all or some of the employee's tips; and (2) prohibit tip pools that include nontipped employees even when the employer does not take a tip credit. The court held that § 203(m) of the FLSA is clear on its face that the prohibitions on retention of employee tips and the inclusion of nontipped employees in tip pools only applies when the employer takes a tip credit. The court noted that § 3(m)'s requirement that employees retain all tips except in the case of valid tip pools is a *condition* of taking a tip credit and not a free-standing *requirement* pertaining to all tipped employees.

3. Tip Pools. For the employer to be entitled to the tip credit, employees must be allowed to retain the tips. However, an employer may require employees to pool tips as long as they do so with other employees who customarily and regularly receive tips. For example, an employer could not lawfully require tipped waitresses and waiters to share tips with nontipped employees such as cooks and dishwashers. 29 U.S.C. § 203(m); *Chung v. New Silver Palace Restaurant, Inc.*, 246 F. Supp. 2d 220 (S.D.N.Y. 2002) (restaurant employees could not be required to pool tips with other workers who were part owners of the restaurant, even though the part-owners performed duties in which they traditionally received tips, such as seating customers, delivering food, and clearing tables).

4. "Tip" vs. Service Charge. A "tip" is a gratuity or gift paid by a customer to the employee. *See Heng Chan v. Triple 8 Palace Inc.*, 2006 WL 851749 at *3 (S.D.N.Y. March 30, 2006) ("the payment ordinarily must be an optional 'gift or gratuity' in order to be legally considered a 'tip' for purposes of the FLSA."). A mandatory service charge assessed by an employer, even if it is paid to the employee, is not a "tip," and the tip credit may not be used. 29 C.F.R. § 531.55.

In July of 2013, the DOL issued a fact sheet on tip credits and clearly stated that under the FLSA, mandatory gratuities are considered to be "wages," not tips paid by customers. *See* http://www.dol.gov/whd/regs/compliance/whdfs15.pdf. According to the DOL, even though these mandatory gratuities would need to be considered wages, employers may still use the charges to satisfy prerequisites that employers must meet to claim a "tip credit" against the minimum wage. The tip credit allows employers to pay a reduced federal minimum wage of $2.13 to tipped employees who earn at least $30 dollars in tips a month. For example, in the case of tipped employees for whom a tip credit is taken, an employer could use money derived from mandatory service charges to pay the $2.13 cash wage required by the FLSA, or could use service charges to satisfy the entire minimum wage of $7.25 per hour, thus eliminating the need to apply a tip credit at all. Additionally, because mandatory service charges are not tips, they are not subject to the restrictions against tip sharing and tip pooling that apply to tips. Note that state wage and hour laws may have different or more restrictive requirements regarding the use of mandatory service charges and the compensation of tipped employees, thus employers should ensure they are in compliance with any applicable state laws.

The Internal Revenue Service (IRS) has also issued a Revenue Ruling stating that it will no longer consider "mandatory gratuities" or services charges to be "tips." Thus, these amounts are not excludable from Federal Insurance Contributions Act (FICA) withholding. *See* Rev. Rul. 2012-18.

5. Administrative Charges on Credit Card Tips. The WHD has issued an opinion letter stating that restaurant employers may deduct an average standard composite amount from tips included on customers' credit card payments to recover the charges imposed by the credit card companies for liquidating the tip amounts, rather than deducting the precise amount charged by each credit card company. However, the employer may not deduct an amount that exceeds the employer's actual expenses incurred in transferring to cash the tips charged on a credit card. Additionally, an employer cannot deduct its administrative costs associated with credit card transactions from an employee's tips. Wage and Hour Opinion Letter, FLSA2006-1 (January 13, 2006), http://www.dol.gov/whd/opinion/FLSA/2006/2006_01_13_01_FLSA.pdf.

J. Deductions from Wages. Deductions from wages for merchandise, tools, and protective clothing may also infringe on the minimum wage. For example, for the purchase of tools, protective clothing, or other items that are required by the employer or the nature of the job, neither payroll deductions nor cash transactions in any amount may be made that take an employee's wages below the minimum wage or cut into overtime pay. Payroll deductions for cash register shortages, check errors, damages, personal loans, and similar items that are not deductions to recoup prior wage advances also may not cut into an employee's minimum wage. However, even if an employee is paid at or near the minimum wage, a payroll deduction for the reasonable cost of voluntary employee purchases of merchandise such as meals, lodging, or other facilities may be made, or a separate voluntary cash transaction in any amount may be made. 29 C.F.R. § 531.32. *See also* Wage and Hour Opinion Letter FLSA2008-4 (May 15, 2008), http://www.dol.gov/whd/opinion/FLSA/2008/2008_05_15_04_FLSA.htm.

The WHD takes the position that meals are for the employee's benefit. The reasonable cost to the employer of furnishing meals may either be deducted from wages or considered as an addition to wages if furnished to the employee free of charge and voluntarily accepted by the employee. 29 C.F.R. §§ 531.30-.32; Wage and Hour Opinion Letter FLSA2004-3 (May 13, 2004), http://www.dol.gov/WHD/opinion/FLSA/2004/2004_05_13_3_FLSA.pdf.

According to the Wage and Hour Division's Field Operations Handbook, as amended in 2000, in non-overtime weeks, where 40 hours or fewer have been worked, the employer may make deductions for articles that do not qualify as "board, lodging or other facilities" under FLSA § 3(m), such as tools, equipment, cash register shortages, and other similar items as long as the employee still receives the minimum wage on average for all hours worked. Of course, state laws may be more stringent, and there may be minimum prevailing wages set under other laws.

In an overtime week (where more than 40 hours have been worked), the rules are different. The WHD's current enforcement policy is that wage deductions are not permitted unless the following conditions are met:

- Deductions must be for particular items according to an agreement or understanding between the parties. The agreement must be reached before the employee performs the work that becomes subject to the deductions. The agreement must specify the particular items for which the deductions will be made and the employee must know how the amount of the deductions that are included in the agreement (such as cash register shortages) will be determined. The employee must affirmatively agree to the employer's deduction policy. While the employee's assent to the policy may be written or unwritten, the employer bears the burden of proving that an employee has agreed to the deduction policy.
- Only bona fide deductions, made for particular items, are permitted. Deductions that are otherwise prohibited by law or authority (federal, state, or local) are not bona fide (for example, if a state law prohibits any deductions from employees' wages for tools and similar items or equipment that are business expenses of the employer, the WHD would not allow any such deductions in that state in an overtime workweek, regardless of whether the minimum wage was paid (net after the deductions)). Deductions for amounts above the reasonable cost to the employee for furnishing a particular item to an employee for his or her benefit are also not bona fide (such as furnishing items to employees "at a profit" or deductions for substandard housing). Deductions from wages where no prior agreement exists as to particular items are never permitted in an overtime workweek.
- The regular rate of pay must be based on the stipulated wage before any deductions are made. Deductions for items that do not directly benefit the employee, which reduce an employee's rate of pay to below the highest applicable minimum wage, are illegal unless the law establishing the particular minimum wage allows the specific deductions. In overtime weeks (where overtime requirements apply), deductions may be made according to an agreement that reduces the effective hourly rate down to the highest required minimum wage, but only from the first 40 hours in the week. Time and one-half the full regular rate (pre-deductions) must be paid for all statutory overtime hours.

See Wage and Hour Opinion Letter FLSA2001-7 (Feb. 16, 2001), http://www.dol.gov/whd/opinion/flsa/2001/2001_02_16_7_FLSA.pdf; 29 C.F.R. §531.37; 29 C. F.R. §778.315.

An employee may voluntarily direct an employer to make deductions and payments for the benefit of the employee to a creditor or other third party; however, neither the employer nor any person acting on its behalf may derive any profit or benefit from the transaction if that deduction results in the employee being paid below the minimum wage. *See* Wage and Hour Division Field Operations Handbook § 30c10(a), http://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

K. Computation of Hours Worked. The definition of "employ" under the FLSA is broader than under the common-law concept and includes "suffering or permitting" one to work. 29 U.S.C. § 203(g). If an employer knows or has reason to know that work is being performed, the work time may be compensable under the FLSA even if it has not been authorized or requested, and even if the employee "volunteered" to work for free. 29 U.S.C. §§ 203(e) and 203(g); 29 C.F.R. §§ 785.6, 785.7, 785.11. *But see Kellar v. Summit Seating Inc.,* 664 F.3d 169 (7th Cir. 2011) (acknowledging that the FLSA imposes an obligation on the employer "to exercise its control and see that work is not performed if it does not want it to be performed," but affirming summary judgment in favor of employer where the employer was not aware that the plaintiff was performing work after she clocked in early since many other employees clocked in early but spent the time before their shifts socializing and not working; additionally, the plaintiff was a manager, was aware the employer prohibited overtime work absent express permission, and had reprimanded another employee for clocking in early); *Gaines v. K-Five Constr. Corp.*, 742 F.3d 256 (7th Cir. 2014) (citing *Kellar* and rejecting the plaintiff's claim for unpaid wages). In *Gaines,* the court found no evidence that the plaintiff's arriving at work early should have raised a red flag that he was working unauthorized overtime. Additionally, the plaintiff's notations on the bottom of his Daily Driver's Report did not create a reasonable inference that the employer knew the plaintiff was working unauthorized overtime, since the payroll department reviewed the top of the form to determine hours worked and mechanics reviewed the bottom of the form to determine whether there were any mechanical problems with the truck. Finally, the court found no evidence the plaintiff told anyone he was working unauthorized overtime, thus the court affirmed the trial court's award of summary judgment in favor of the employer.

To determine compliance with minimum wage and overtime pay requirements, the hours worked by an employee must be accurately accounted. The facts will govern the "hours worked" determination in most situations, depending on the nature of the employee's duties, the employer's requirements, any restrictions on the employee's free time, and the employer's adoption and enforcement of rules prohibiting unpaid work time.

The basic rule is: "hours worked" in general includes all the time an employee is required to be on duty or on the employer's premises or at a prescribed workplace, and all the time the employee is permitted to work for the employer.

Employers should implement and strictly enforce rules prohibiting off-the-clock work. Such strictly enforced rules could later be used as a defense to overtime claims based on off-the-clock work. *See In re Food Lion Effective Scheduling Litigation*, 861 F. Supp. 1263 (E.D.N.C. 1994) (employer did not approve of the off-the-clock work and had a strictly enforced off-the-clock policy); *but see Reich v. Department of Conservation and Natural Resources*, 28 F.3d 1076 (11th Cir. 1994) (despite an employer's written policy prohibiting employees from engaging in unauthorized overtime, the state agency was properly charged with actual and constructive knowledge of overtime violations because it knew that the officers were working more than 40 hours each week but did nothing to discourage the overtime).

1. Incidental Activities. Incidental activities that are an integral part of an employee's principal duties generally must be counted as working time. For example, stopping to pick up supplies on the way to the office or depositing the mail or banking after the close of business and on the way home is counted as working time. Also, time for changing clothes, showering, and washing up is considered working time if required by the employer or if the employee cannot perform the job without doing so. 29 C.F.R. § 785.24. Such activities are compensable even if done before or after usual working time.

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the U.S. Supreme Court set forth a test to determine whether activities were an "integral and indispensable" activity that should be compensated. Those factors are: whether the activities are necessary due to the nature of the employee's work; whether the activities fulfill employer/employee obligations; whether the activities directly benefit the employer's business; and whether the activities are so closely related to the other duties performed by the employee that they are an integral part of the job.

However, in *Integrity Staffing Solutions, Inc. v. Busk,* 135 S. Ct. 513 (2014), the Supreme Court greatly narrowed the test for determining whether preliminary and postliminary activities are compensable by requiring that they constitute an "intrinsic element" of the principal activities and "one with which the employee cannot dispense if he is to perform his principal activities." In doing so, the Court held that whether an employer required a particular activity or whether the activity was for the benefit of the employer is insufficient to call an activity "integral or indispensable."

The Court closely examined the ordinary definitions and its prior usage of the terms "integral" and "indispensable" in analyzing whether hourly warehouse workers were entitled to compensation for time spent undergoing security screenings at the end of the work day. After conducting this analysis, the Court ultimately held that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." In applying this holding to the case at hand, the Court noted that Integrity did not employ its warehouse workers to undergo security screenings, but to retrieve products from warehouse shelves and package them for shipment. In fact, Integrity could have eliminated the security screenings altogether without impacting or impairing the employees' ability to perform and complete their work. Most importantly, the Court stated that the Ninth Circuit erred by focusing on whether an employer required a particular activity and whether the activity was for the benefit of the employer. The Court noted that the test is tied to the productive work that the employee is "employed to perform." The Court further noted that a test which can be satisfied merely because an employer required an activity would sweep into compensable principal activities the very activities the Portal-to-Portal Act was designed to address. In addition, the Court held that a test that turns on whether the activity is for the benefit of the employer is similarly overbroad. Finally, the Court rejected the argument that Integrity could have reduced security screening time. The Court held that the fact that an employer could conceivably reduce time spent on preliminary or postliminary activities does not change the nature of the activity or whether it is compensable.

Cleanup (that is, time spent changing clothes or washing) can be excluded from compensable hours worked under a collective bargaining agreement (CBA) or by custom or practice under such a contract. 29 U.S.C. § 203(o); 29 C.F.R. § 785.26. *See, Sandifer v. U. S. Steel Corp.*, 134 S. Ct. 870 (2014). In *Sandifer,* the U.S. Supreme Court held that time spent by employees putting on and taking off various types of protective gear was time spent changing clothes, and thus, noncompensable under the CBA covering their employment. The Court upheld the Seventh Circuit's decision that § 203(o) of the FLSA allowed the company to withhold compensation from employees for time spent changing clothes, in accordance with the company's CBA with the United Steelworkers. The plaintiffs in *Sandifer* claimed that the time they spent donning protective gear, including flame-retardant pants and jacket, work gloves, metatarsal boots, a hard hat, safety glasses, ear plugs, and a "snood" (a hood that covers the top of the head, the chin, and the neck) was safety equipment or "personal protective equipment," not "clothes" and, accordingly, they were entitled to compensation for the time spent donning and doffing that gear. The U.S. Supreme Court rejected the employees' argument that the term "clothes" excludes items designed and used to protect against workplace hazards. The Court held that such a distinction ran the risk of reducing § 203(o) to "near nothingness." *Id.* at 877. The Court held that the statutory context of § 203(o) makes clear that "clothes" are "items that are integral to job performance; the donning and doffing of other items would create no claim to compensation under the Act, and hence no need for the §203(o) exception." *Id.* at 878. The Court, however, rejected the view adopted by some federal appeals courts that clothing is essentially anything worn on the body, "including accessories, tools and so forth," specifically citing *Salazar v. Butterball, LLC,* 644 F.3d 1130, 1139-1140 (10th Cir. 2011), which held that "clothes" are "items or garments worn by a person" and include "knife holders." *Id.* The Court stated that its construction of the term "clothes" is "considerably more constrained," noting that accessories such as necklaces and backpacks, for example, are not "both designed and used to cover the body." Additionally, the Court noted that tools are not commonly regarded as "articles of dress." *Id.* The Court also stated that its "definition leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices." *Id.* The Court also refused to adopt a definition of "changing" that includes only "substituting" clothes. Instead, the Court held that changing included time spent altering one's dress, such as putting a protective garment on over the employee's street clothes. *Id.* at 879. The Court held that the time the employees in this case spent donning and doffing protective gear was time spent changing clothes under § 203(o). Although the Court acknowledged that certain items, such as earplugs and safety glasses, are not items of clothing, the time spent putting on and taking off these items was noncompensable because the majority of the employees' time was spent putting on and taking off actual clothing. *See also Anderson v. Cagle's, Inc*., 488 F.3d 945 (11th Cir. 2007) (holding that "smocks, hair/beard nets, gloves, and hearing protection" are "clothing" and that the employer was not required to pay employees for time spent donning and doffing this clothing based on an established practice of not doing so when the collective bargaining agreements covering the workers were negotiated); *Franklin v. Kellogg Co.,* 619 F.3d 604 (6th Cir. 2010) (employer's practice of not paying employees for time spent donning and doffing uniforms and equipment, which existed long before the employer and union entered into CBA, had been in effect for at least 19 years, and was known to the union and employees, was excluded from "hours worked" under § 203(o)); *but see Kassa v. Kerry, Inc*., 487 F. Supp. 2d 1063 (D. Minn. 2007) (lack of knowing acquiescence on part of employees and union precluded a finding of a "custom or practice" of nonpayment).

2. Rest Periods and Meal Periods. Short rest periods and coffee breaks are compensable because they promote employee efficiency and therefore are considered to be for the employer's benefit. 29 C.F.R. § 785.18. However, meal periods are not working time under the following circumstances:

- The employee is given 30 minutes or longer for meals. *But see Myracle v. General Elec. Co.*, 33 F.3d 55 (table), 1994 WL 456769 (6th Cir. Aug. 23, 1994), (20 minute meal time not compensable).
- The employee is completely relieved of all duties.
- The employee is free to leave his or her post but can be confined to the employer's premises.

29 C.F.R. § 785.19. *See also Mendez v. Radec Corp.*, 232 F.R.D. 78 (W.D.N.Y. Nov. 22, 2005) (finding issues of fact that precluded summary judgment on the issue of whether plaintiffs should have been paid for meal breaks; holding, "[t]he question is not whether an employee did any work at all during his meal period, but whether that period itself is used primarily to perform activities for the employer's benefit").

A special provision applies to public sector firefighters subject to the § 7K exemption who are on duty 24 hours or less. Their mealtime may not be deducted from the count of hours worked. 29 C.F.R. § 553.223.

3. Breaks to Express Breast Milk. The Patient Protection and Affordable Care Act (ACA) amended the FLSA to require covered employers to provide employees with a "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." The law also requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." The requirement took effect when the ACA was signed into law on March 23, 2010.

The DOL has also issued a Fact Sheet, Fact Sheet #73: Break Time for Nursing Mothers under the FLSA, designed to provide guidance on this new requirement. The Fact Sheet is available on the agency's web site at: http://www.dol.gov/whd/regs/compliance/whdfs73.htm. The Fact Sheet notes that the law requires employees to be given breaks to express milk as frequently as needed by the employee and that the frequency as well as the duration of the break will likely vary. The Fact Sheet also notes that although a bathroom is not a permissible location under the ACA, a space that is temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient, as long as the space is shielded from view and free from any intrusion from co-workers and the public.

The FLSA only requires employers to provide breaks for expressing breast milk to nonexempt employees. However, employees who are considered exempt under the FLSA may still be entitled to such breaks under applicable state laws. The new law does not pre-empt state laws that provide for greater protection to employees.

Under this provision, employers with fewer than 50 employees are not required to provide breaks to express breast milk if doing so would impose an undue hardship. The Fact Sheet notes that the determination of whether compliance would be an undue hardship is made by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature and structure of the employer's business. The Fact Sheet also notes that all employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

Although employers are not required to compensate employees for breaks taken to express breast milk, if the employer provides compensated breaks and the employee uses that time to express breast milk, the employee must be compensated in the same way that other employees are compensated for break time. Additionally, the FLSA's general requirement that an employee must be relieved from duty or else the time must be compensated as work time applies to breaks taken to express breast milk.

At least one court has held that the break provision does not provide for a private right of action. *See Salz v. Casey's Mktg. Co.,* 2012 WL 2952998 at *2-3 (N.D. Iowa July 19, 2012) ("Since Section 207(r)(2) provides that employers are not required to compensate employees for time spent [expressing milk], and Section 216(b) provides that enforcement of Section 207 is limited to unpaid wages, there does not appear to be a manner of enforcing the express breast milk provisions. A recent notice from the Department of Labor corroborates Defendant's interpretation and limits an employee to filing claims directly with the Department of Labor … The Department of Labor may then 'seek injunctive relief in federal district court … '"); *but see Miller v Roche Sur. & Cas. Co.,* 502 F. App'x 891 (11th Cir. Dec. 26, 2012) (affirming a trial court order granting the employer's motion for judgment as a matter of law following a jury trial on a former employee's claim the employer violated the FLSA by failing to give her a time and place to express breast milk and fired her after she asked for a time and place to do so; the evidence showed that the woman was given the necessary breaks to express breast milk and a private place to do so; additionally, an e-mail she sent to the employer asking where she could express breast milk when she was temporarily working at a different location did not put the employer on notice that she was making a complaint under the FLSA).

The Department of Health and Human Services has information available on its web site that may be helpful to employers who are interested in establishing a workplace lactation support program: http://www.womenshealth.gov/breastfeeding/government-in-action/index.html.

4. Travel Time. Travel from the employee's home to the initial worksite and from work to home usually is not considered working time. 29 U.S.C. § 254; 29 C.F.R. §§ 785.34, 785.35. Travel time may be converted to work time if an employee is required to report to a particular location before traveling to the actual worksite or receives orders and picks up tools or supplies at the employer's facilities before traveling to the worksite. If work of any consequence is performed for the employer before travel commences, the travel time may become working time. Unpaid preliminary work followed by travel time to the first job site of the day is a problem often found in construction, repair, and service activities.

In *Bonilla v. Baker Concrete Construction*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit held that time spent at a security checkpoint and time spent on employer-provided transportation from a remote parking lot to the work site at an airport was not compensable work time. The court noted that its decision regarding time spent on employer-provided vehicles is consistent with the decisions of other federal courts that have addressed this issue. With regard to time spent at the security checkpoint, the court held that this activity was not an integral and indispensable part of the employees' principal work activities because the FAA required the security screening; the employer did not require – or even particularly benefit from – the screening. Relying on the U.S. Supreme Court's decision in *IBP v. Alvarez*, 546 U.S. 21 (2005) (discussed below), the Eleventh Circuit held that the time spent at the security screening point was not compensable merely because it was necessary for the employees to perform their jobs. "[I]t is clear to us from the Act's language and history that the activity in question must be work in the benefit of the employer, and that the security screening mandated by the FAA in this case is not compensable work." *Id.* at 1345.

Any work an employee is required to perform while traveling must be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer. 29 C.F.R. § 785.41.

The WHD considers travel away from home during an employee's regular working hours, even during nonscheduled workdays, such as Saturday and Sunday, to be hours worked, even if the transportation is in a public conveyance and the employee is relieved of duties, as long as the stay is overnight. If employees are offered public transportation but elect to drive their own car, the employer has the option of counting as hours worked either the actual driving time or the time that would have been counted as hours worked had the employees used a public conveyance. 29 C.F.R. §§ 785.39, 785.40.

The WHD takes the position that travel time, regardless of whether it occurs during the employee's regular working hours, should be compensated during a one-day assignment in another community (no overnight stay). 29 C.F.R. § 785.37. The employer does not have to pay for travel time that would have occurred without the special work assignment (normal home to work travel time and meal time). *Id.*

The Portal to Portal Act, 29 U.S.C. § 254(a), states that employers do not have to pay employees for traveling to work merely because they use the employer's vehicle, if the travel is within the normal commuting area for the employer's business. The use of the vehicle must be pursuant to an agreement between the employer and employee or the employee's representative. The employer also does not have to pay the employee for activities performed by the employee that are incidental to the use of the employer's vehicle. The same rules apply to home-based employees. A home-based field service employee who travels to the customer's location directly from his or her home need not be compensated for that commute, even if using a company vehicle. Extraordinary travel time must be partially compensated, however, such as by paying for three hours of a four-hour commute to a customer site (for example). Wage and Hour Opinion Letter (Jan. 29, 1999). *See also Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008) (requiring New York City fire alarm inspectors to carry 15 to 20 pounds of files with them every week as they traveled to and from work and around the city did not transform employees' commuting time to compensable work and did not significantly affect the time normally required for commuting); *Easter v. United States*, 575 F.3d 1332 (Fed. Cir. 2009) (commuting time by government employees was not compensable under the FLSA, even though the employees were required, as a condition of their employment, to use government vehicles when driving between their homes and their places of work as part of their daily commutes, were not allowed to use the vehicles for personal purposes and were required to transport work-related equipment with them when they used the vehicles for commuting).

5. Waiting Time and On-Call Time. The availability of an employee for work is not sufficient to make it "working time." The facts may show that an employee was engaged to wait or they may show that she or he was waiting to be engaged. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). When an employee is on duty and a waiting period occurs, the waiting period is deemed to be working time if it is short and controlled by the employer, is unpredictable, and the employee is unable to use the waiting time effectively for his or her own purposes. 29 C.F.R. § 785.15. Waiting time is considered nonworking time if: (a) the employee is told in advance she or he may leave a job at a particular time and does not have to recommence work until a specific time or until called in; and (b) the period of time is long enough for him or her to use the time effectively for his or her own purposes. 29 C.F.R. § 785.16.

"On-call" time is generally considered working time if the employee is required to remain at the employer's premises. If the employee is allowed to remain at home, receive forwarded messages, or use a pager, on-call time generally need not be counted as working time. 29 C.F.R. § 785.17. *See also Jonites v. Exelon Corp.* 522 F.3d 721 (7th Cir. 2008) (finding that linemen were not working during on-call time because they only had to be reachable by telephone or beeper and stay within a two-hour drive of their normal duty station during on-call time).

Some WHD officials take the position that if an employee is required to remain at home or at any other single location in an "on-call" status, then the time on call is working time. Other officials take the position that if the employee is allowed to remain at home, where she or he can engage in personal pursuits, the time is not working time. If an employee is given the option to be on call at home, or can either use call forwarding, a beeper, or leave a telephone number where she or he can be reached, without other restrictions, such time is not working time. *See, e.g.*, *Owens v. Association of Western Pulp and Paper Workers*, 971 F.2d 347 (9th Cir. 1992) (reversing damages award of nearly $58 million in overtime for 24-hour on-call time; appellate court held that mechanics who were able to engage in personal activities such as shopping, attending out of town sporting events, engaging in bowling and golf tournaments in and out of town, attending church, taking out of town vacations on the weekends, engaging in other employment, building homes, going to the movies, and who were required to respond to an average of three to five call-backs per year, were not so restricted during their on-call hours as to be effectively engaged to wait and thus entitled to overtime).

Time Spent Waiting While Donning and Doffing Uniforms. In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), the U.S. Supreme Court held that employees must be paid for time spent walking to their work stations after putting on (donning) specialized protective gear required by the job and for time spent walking from work stations to the place the gear is removed (doffing). The Court also held that employees must be paid for time spent waiting to remove required specialized protective gear, but not for time spent waiting to don such gear. *See also Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) (nuclear plant employees required to don special equipment and undergo a security screen to get to their work areas were not entitled to compensation under the FLSA).

6. Attendance at Training or Educational Programs. WHD enforcement policy states that time spent attending training or educational programs is not working time if:

- Attendance occurs outside the employee's regular working hours;
- Attendance is voluntary;
- The employee does no productive work while in attendance; and
- The program, lecture, or meeting is not directly related to the employee's job. It will be considered directly related to the job if it aids the employee in handling the present job better, as distinguished from teaching the employee another job or a new skill. 29 C.F.R. § 785.27; Wage and Hour Opinion Letter FLSA 2006-5 (March 3, 2006), http://www.dol.gov/whd/opinion/FLSA/2006/2006_03_03_05_FLSA.pdf, (employer not required to pay employees for time spent studying English outside of regular working hours).

But see Loodeen v. Consumers Energy Co., 2008 WL 718136 (W.D. Mich. 2008) (finding the four-part "working time" test as set forth in § 785.27 was not applicable because the courses taken by the plaintiff were not "employer-sponsored lectures, meetings, and training programs," but were, instead, regular college classes taken apart from the plaintiff's employment, as part of a multi-year attempt to qualify for a new position in the company; thus, the time spent in the classes was not compensable).

Voluntary attendance outside work hours at courses offered by independent institutions, or at employer-sponsored courses corresponding to courses offered by independent institutions, need not be counted as hours of work even if the course of instruction relates to the employee's job or is paid for by the employer. *See* 29 C.F.R. §§ 785.30, 785.31. There is a special rule on training time in the public sector. If the training is required for both private and public sector employees, the training time is not compensable even when required by the employing agency's government, such as a state requirement applicable to state employees as well as private sector employees. If the training is required by a higher level of government such as a state or county, the training time is not compensable unless it occurs during regular working hours. *See* 29 C.F.R. § 553.226.

7. Sleeping Time. Sleeping time is compensable if the employee is on duty less than 24 hours. 29 C.F.R. § 785.21. Sleeping time of up to eight hours may be excluded if the employee is on duty for 24 continuous hours or more, if adequate sleeping facilities are furnished. If the employee is interrupted such that at least five hours of sleep cannot be reasonably obtained, then the entire period becomes hours of work. 29 C.F.R. § 785.22(b). Calls to duty during the sleep period are counted as time worked even if five hours or more of sleep time are available.

An express or implied agreement is required to exclude sleep time from the count of hours worked. 29 C.F.R. § 785.22 (and 29 C.F.R. § 553.222, applicable in the public sector only); *Fire Fighters Local 349 v. City of Rome*, 682 F. Supp. 522 (N.D. Ga. 1988) (holding that a continuation of work and acceptance of paychecks by firefighters after the employer had instituted a policy excluding sleep time from compensable work time did not constitute an implied agreement to exclude such time).

When an employee resides on the employer's premises on a permanent basis or for extended time periods, any reasonable agreement of the parties as to the amount of hours worked will be accepted. 29 C.F.R. § 785.23.

Public safety personnel under § 7K, pursuant to 29 C.F.R. § 553.222, are subject to special sleep time rules requiring shifts to be greater than 24 hours in length so that up to eight hours of sleep time can be excluded from the count of hours worked.

L. Overtime Pay.

1. In General/Regular Rate. One and one-half times a covered nonexempt employee's regular rate (not merely one and one-half times the minimum wage) must be paid for overtime work. 29 U.S.C. § 207.

Problems may arise complying with overtime pay requirements when nonexempt employees are paid on a salary or commission basis versus an hourly basis. Even under methods other than an hourly wage, a nonexempt employee's "regular rate" must be determined. The regular rate is determined by dividing the total number of hours worked by the employee into his or her total regular compensation for that week. *See Kohlheim v. Glynn County*, 915 F.2d 1473 (11th Cir. 1990). For most covered employees, time and one-half the regular rate must be paid for all hours in excess of 40 per workweek. 29 U.S.C. § 207(a). Again, hours worked in separate workweeks may not be averaged to determine if overtime is owed.

The half-time pay is the actual "overtime pay" premium that is required. For example, if a nonexempt employee earns $400 on a commission basis and works a 50-hour week, his or her regular rate would be $8.00 per hour ($400 divided by 50 hours for that week). Since the employee has already been paid $8.00 per hour for all 50 hours worked, the employee is only entitled to overtime pay for 10 hours at half the regular rate, or $4.00 per hour, which is an additional $40.00. *See Zoltek v. Safelite Glass Corp.*, 884 F. Supp. 283 (N.D. Ill. 1995); *Donovan v. Maxwell Products*, 1983 WL 2055 (M.D. Fla. July 6, 1983). If the same employee works a different number of hours the next week, a new regular rate is computed for that week based on the number of hours and total straight-time compensation.

If an employee has a specific number of working hours compensated by a fixed weekly salary, the regular rate is determined by dividing the salary by the fixed hours. An additional one-half of the regular rate must be paid for any hours in excess of 40 that are a part of the employee's regular workweek.

Exclusions from the Regular Rate Calculation. Reimbursement for lodging, transportation, and similar actual expenses related to the employer's business may be excluded from the regular rate determination. 29 C.F.R. § 778.217. However, the reasonable cost to the employer of non-cash wages (for example, free meals for employees) must be added in computing the regular rate. 29 C.F.R. § 778.116 and 29 C.F.R. § 531.

The Worker Economic Opportunity Act, Public Law 106-202, 114 Stat. 308 (May 18, 2000), amended §§ 7(e) and 7(h) of the FLSA. 29 U.S.C. 207(e), (h). In § 7(e), a new subsection (8) added to the types of remuneration that are excluded from the computation of the regular rate when determining overtime pay "[a]ny value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program" meeting particular criteria. In § 7(h), the amendment clarified that the amounts excluded under § 7(e) may not be counted toward the employer's minimum wage requirement under section 6, and that extra compensation excluded pursuant to the new subsection (8) may not be counted toward overtime pay under § 7. *See Updating Regulations Issued Under the Fair Labor Standards Act,* 76 Fed. Reg. 18832-01 (April 5, 2011). The DOL has incorporated the provision of the Act into its regulations. It has also published a Fact Sheet addressing stock options under the FLSA, which is available at: http://www.dol.gov/whd/regs/compliance/whdfs56.pdf.

2. Effect of Bonuses on Regular Rate. Production, incentive, and attendance bonuses generally constitute earnings that must be included in the regular rate computation. Only bonuses that are discretionary with the employer as to the amount and fact of payment and not announced ahead of time, or that are based on a percentage of the employee's total earnings (both straight-time and overtime pay), or are paid under a formal approved profit sharing plan, may be excluded from the regular rate calculation. If not excluded, the bonus payments have the effect of increasing the regular rate, which in turn increases the amount of overtime pay owed. 29 C.F.R. §§ 778.210, 778.211, 778.213. In *Acton v. City of Columbia*, 436 F.3d 969 (8th Cir. 2006) the court affirmed a trial court's determination that payments made to firefighters for their unused sick time must be included in the firefighters' regular rate calculation because these payments operate as a nondiscretionary attendance bonus. *See also* Wage and Hour Opinion Letter, FLSA 2004-16NA (Sept. 28, 2004), http://www.dol.gov/whd/opinion/FLSANA/2004/2004_09_28_16FLSA_NA_lump_sum.pdf (hypothetical weekly lump sum bonus based on delivery person's volume of deliveries for the week must be included in the employee's regular rate of pay calculation and does not count against the overtime premium owed the employee; "As indicated in section 778.310 of Part 778, a premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium under the FLSA even though the amount of money may be equal to or greater than the sum owed on a per hour basis.").

Bonuses includable in the regular rate, even if payment is not actually paid for many weeks, must be apportioned back over the workweeks in which the bonus amounts were earned and additional overtime pay calculated for those weeks in which more than 40 hours were worked. 29 C.F.R. § 778.209.

3. Job Rate, Day Rate, Piece Rate, or Commissions. For employees paid on the basis of a job rate, a day rate, piece work, or commissions, the total compensation earned during a workweek should be divided by the total hours worked. One-half of the resulting hourly rate (that is, the regular rate) is owed for each hour of overtime. 29 C.F.R. §§ 778.111, 778.112, 778.118.

4. Use of Two or More Compensation Methods. Different wage rates or compensation plans may be adopted for different job duties even if the different jobs are performed in the same workweek. Similarly, different or lower wage rates may be adopted to compensate employees for nonproduction time that must be counted as hours of work, such as travel time, waiting time, or sleep time. *See* 29 C.F.R. §§ 778.115, 778.318(b).

If two or more wage rates or compensation methods are used during any one workweek, one-half the weighted average regular rate is required for overtime hours. Alternatively, an agreement may be made before the work is performed to pay overtime on the basis of the specific rate in effect during the overtime hours. 29 U.S.C. § 207(g)(1) and (2); 29 C.F.R. §§ 778.115, 778.415-.421. Note, however, that the 1985 FLSA amendments permitted state and local government employers to compensate employees with compensatory time off in lieu of overtime, and, therefore, a different analysis may apply in the public sector. (See subsection 8 below)

5. Trading Hours of Work. Public employees may voluntarily trade hours of work without creating overtime pay liability for the employer. The traded hours are excluded from the count of hours worked when computing overtime pay. 29 U.S.C. § 207(p)(3). The regulations provide that public employees may voluntarily substitute for one another, with the approval of the employer, without creating overtime pay liability to the employee performing substitute work. 29 C.F.R. § 553.31. The employee scheduled to work receives credit and compensation as if she or he had worked, while the employee actually working (substituting) receives no credit or compensation from the employer for the hours involved. This applies to the public sector only. *See* Wage and Hour Opinion Letter, FLSA2008-2 (March 17, 2008), http://www.dol.gov/whd/opinion/FLSA/2008/2008_03_17_02_FLSA.pdf (public employer that allows employees in the same job classification to substitute for one another generally will not incur any overtime liability under the FLSA for the additional hours worked by the substituting employee; however, § 207(p)(3) is only an exception from the overtime requirements of the FLSA, thus a public employer must adjust the pay of an employee who worked so many substitute shifts that his or her own hourly rate of pay fell below the FLSA's minimum wage rate).

6. Paid Leave Time. In both the private and public sector, paid sick leave, paid holidays, paid vacations, and paid meal periods (if off-duty) need not be counted as actual hours worked unless the employer so desires. Also, payments provided as employee benefits for such nonwork time may be excluded from the regular rate calculations. 29 C.F.R. §§ 778.216-224 and 320. However, in *Acton v. City of Columbia*, 436 F.3d 969 (8th Cir. 2006), the court held that money earned under the city's sick leave buy-back program should be included in the employee firefighters' regular rates because it was remuneration for employment. The court noted that the city's policy was used to encourage regular workplace attendance, which was a general duty of employment.

7. Effect of Premium Pay. Some employers provide premium pay that is not required by the FLSA. Employers can exclude a voluntary premium payment from the regular rate calculation and can offset the voluntary payment against required overtime pay in the following situations:

- Premium pay of any amount for hours worked in excess of eight a day or in excess of 40 per week. Example: An employee receives an $8 per hour wage rate and an additional $1 per hour for any hours worked in excess of eight per day. The $1 per hour is excludable from the regular rate calculation and also creditable against any overtime pay owed for working in excess of 40 that week.
- Premium pay of any amount for hours worked in excess of daily or weekly normal or regular working hours. Example: An employee receives an additional $1 per hour for time worked between the seventh and eighth hour for an employee working a seven-hour standard workday.
- Premium pay resulting from time and one-half or higher rates paid for actual hours of work on a Saturday, Sunday, holiday, day of rest, or a sixth or seventh day of work. Payment of less than time and one-half, for example 125 percent, of the regular wage rate would not be sufficient and the 25 percent premium would be includable in the regular rate.
- Clock time premiums of time and one-half or higher rates paid for work outside of the contractual daily time period not exceeding eight hours, or outside of a contractual weekly time period not exceeding 40 hours. Example: 8:00 a.m. to 5:00 p.m. with a one hour lunch period. 29 C.F.R. §§ 778.201-778.207.

8. Compensatory Time Off (Public Sector vs. Private Sector). There is no true compensatory time off plan that can be used for nonexempt employees of a private sector employer whereby overtime hours worked in one workweek are compensated in a subsequent workweek by paid time off.

In the public sector, FLSA amendments allow comp-time plans to be used to compensate nonexempt state and local government employees with a number of restrictions, 29 U.S.C. § 207(o):

- One and one-half hours of paid time off must be provided for each overtime hour worked.
- The comp-time plan must be pursuant to a prior agreement or understanding or be a practice in effect before April 15, 1986. 29 C.F.R. §§ 553.20-.28. The regulations allow employees to designate a representative for the purposes of reaching an agreement or understanding where a comp-time plan is to be implemented. A CBA, memorandum of understanding, or other agreement must be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The DOL recognizes that there are a wide variety of state laws that may be pertinent in this area and that "it is the Department's intention that the question of whether employees have a representative … shall be determined in accordance with state or local law and practices." A notice to the employee regarding the comp-time plan is sufficient if it is given prior to the performance of the work. The agreement or understanding to provide comp-time off in lieu of cash overtime may be made a condition of original employment.
- Comp-time taken is not counted as hours worked.
- Public safety and seasonal employees may accumulate a maximum of 480 hours of comp-time (320 overtime hours of work), while all other employees may accumulate a maximum of 240 comp-time hours (160 overtime hours of work).
- Accumulated comp-time must be paid out when employment ends, and it must be paid at the average regular rate received by the employee during the last three years of employment, or the final regular rate received by the employee, whichever is higher.
- During employment, comp-time taken must be paid at the regular rate earned by the employee at the time she or he receives the payment.
- The employer must allow comp-time to be taken within a reasonable time after an employee makes a request unless to do so would unduly disrupt the public employer's operations. "Unduly disrupt" means something more than "mere inconvenience." 29 U.S.C. § 207(o). The DOL has stated that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off and that such a situation would not be sufficient for an employer to claim that it is unduly disruptive. The DOL also has taken the position that a "reasonable time" means the date requested by the employee absent undue disruption to the public employer. S*ee Updating Regulations Issued Under the Fair Labor Standards Act,* 76 Fed. Reg. 18832-01 (April 5, 2011).

In *Christensen v. Harris County*, 529 U.S. 576 (2000), the U.S. Supreme Court held that public sector employees could be compelled to use accrued compensatory time off so that the county employer would not be required to pay the employees the accrued time off. The Court held that the FLSA does not prohibit such a requirement even if there is no agreement between the employer and employee on this issue.

Public sector comp-time plans and use of a salaried fluctuating workweek (FWW) pay plan may be inconsistent. The DOL's position is that employers who use the FWW method of calculating overtime compensation for salaried employees may not pay the half-time premium in an equivalent amount of comp-time. The DOL has cited to statutory language in § 7(o) that provides that public agency employees must receive comp-time " … at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required … ” *See* DOL comments on 29 C.F.R. § 553.233.

M. Child Labor Restrictions Under FLSA. Oppressive child labor, defined as allowing a child to work who is below the minimum age specified for a particular occupation, is prohibited. 29 U.S.C. §§ 203(1), 212; 29 C.F.R. § 570. Federal and state child labor laws should be read together because state laws that are more stringent than the FLSA must be observed. 29 U.S.C. § 218(a). Child labor laws are designed to protect the educational opportunities of minors and to prohibit their employment in hazardous jobs and under conditions detrimental to their health or well-being. The provisions include lists of hazardous occupational orders for both farm and nonfarm jobs banned by the Secretary of Labor as being too dangerous for minors to perform.

Employers are subject to a penalty of up to $11,000 per violation for child labor violations. 29 C.F.R. § 579.1. Additionally, the Genetic Information Nondiscrimination Act (GINA) amended the FLSA's child labor penalty provisions to impose a civil penalty of up to $50,000 for each child labor violation that causes the death or serious injury of any employee under 18 years of age. This penalty may be doubled where the violation is repeated or willful. The law defines "serious injury" as: permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation); permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

On May 20, 2010, the DOL released new regulations implementing changes to seven non-agricultural hazardous occupation orders (HOs) and revisions to the rules for 14- and 15-year-olds. The new regulations also incorporate statutory changes regarding the assessment of child labor civil money penalties. The regulations were effective July 19, 2010.

Under the regulations, 14- and 15-year-olds may now perform safe tasks in work environments other than retail, food service and gasoline service establishments. Previously, 14- and 15-year-olds were limited to working in these three occupations.

Some of the other changes include:

- A clarification of the hours of work permitted for 14- and 15-year-olds. The regulations clarify that the three hour limit on employment on a school day includes Fridays. They also clarify that the prohibition on working during "school hours" refers to the hours that the local public school where the minor resides while employed is in session.
- So long as certain requirements are met, 14- and 15-year-olds may "perform work of an intellectual or artistically creative nature, such as, but not limited to, computer programming, the writing of software, teaching or performing as a tutor, serving as a peer counselor or teacher's assistant, singing, playing a musical instrument and drawing."
- A 15-year-old minor may now work as a lifeguard at a swimming pool or water amusement park under certain conditions. The new regulations also specifically set forth the DOL's longstanding position that prohibits anyone under 16 from working as a dispatcher on elevated water slides or as a lifeguard at natural environment swimming facilities (lakes, rivers, ocean beaches, quarries, piers).
- The regulations incorporate the provisions of the 2004 changes to the FLSA that allow 14- and 15-year olds to be employed inside and outside places of business that use power-driven machinery to process wood products under specific conditions.
- The regulations specifically state that 14- and 15-year-old minors may not engage in youth peddling or door-to-door sales; the prior rule did not address this. An exception is made for fundraising activities "such as cookie sales conducted by the Girl Scouts of America or school fund-raising events."

- The regulations specifically add poultry catching and cooping as a prohibited occupation. This clarifies the previous rule, which did not specifically address this occupation. However, under the prior rule, such work was prohibited because it is a "processing occupation."
- The regulations require employers to use the same "week" (168-hour period) for determining compliance with the child labor provisions as it establishes for determining if employees are due overtime. The prior rule did not define the term "week."
- The regulations specifically address work-study programs.
- The regulations clarify when 14- and 15-year olds can ride inside and outside of passenger compartments of motor vehicles and coordinates rules with the hazardous occupation regulation addressing motor vehicles. The regulations also allow minors to load and unload hand tools and personal items that they will use at the job site onto and from motor vehicles.
- The regulations clarify the provisions regarding youth working inside meat coolers and freezers and allow youth, on an occasional basis, to momentarily enter a freezer (but not a meat cooler) to retrieve items. The prior regulation prohibited 14- and 15-year olds from working inside meat coolers and freezers.
- The regulations also implement the changes to the child labor penalties enacted by the GINA.

1. Minimum Ages for Employment. Minimum ages for employment vary. 29 C.F.R. § 570. The following is a general outline of standards:

- 16 years is the general minimum age;
- 16 years is the minimum age in hazardous agricultural occupations;
- 18 years is the minimum age in hazardous nonagricultural occupations; and
- 14- and 15-year olds may be employed but numerous occupational and time restrictions apply. (See the discussion, above, of the new regulations addressing the child labor restrictions.)

2. Restrictions on Hours Worked. There are specific hour limitations on work by minors. Under federal law, those ages 16 or 17 may work during school hours and for any number of hours during any periods of time. Many states, however, restrict the number of hours 16- and 17-year-old employees can work. Under federal law, employees ages 14 or 15 can work outside school hours only. The federal standards for the hours 14- and 15-year-olds can work are:

- Maximum three hours on a school day;
- Maximum eight hours on a non-school day;
- Maximum 18 hours in a school week;
- Maximum 40 hours in a non-school week; and
- Work allowed only between 7 a.m.–7 p.m., except from June 1st to Labor Day, when work until 9 p.m. is permitted. 29 C.F.R. § 570.35.

In 2010, the DOL implemented a tougher penalty structure against employers who violate child labor laws. Under the new penalty structure, employers who illegally employ individuals ages 12 or 13 will face a penalty of at least $6,000 per violation. If a worker is under 12 years of age and illegally employed, the penalty will be at least $8,000. Penalties for illegally employing workers under age 14 could be raised to $11,000 under certain conditions. *See* http://www.dol.gov/opa/media/press/ilab/ILAB20100843.htm.

Various states may impose stricter child labor laws. Check your state's statutes.

N. Record Keeping Obligations. Any employer subject to any provision of the FLSA must make and preserve records of wages, hours, and other conditions and practices of employment. 29 C.F.R. § 516. No particular form for records is required. Maintaining accurate wage and hour records protects the employer who is in compliance and aids government enforcement when the employer is not in compliance.

1. General Information Required. Generally, employers must keep the following information on each nonexempt employee: name; home address; birth date; sex; occupation or position; time and day workweek begins; hourly rate of pay; hours worked each day and week; straight time earnings; overtime earnings; credits to or deductions from wages; total wages each workweek; and date of payment and pay period covered.

2. Specific Information Required. Specific requirements exist in addition to or in lieu of the above for certain types of employees. 29 C.F.R. §§ 516.11, *et seq.* Examples:

- Documentation must be prepared and retained relating to the cost of furnishing board, lodging, or other facilities (wage credit or wage deduction).
- For employees exempt from overtime pay requirements only, such as interstate truckers, most of the general recordkeeping requirements apply except those relating to overtime. In addition, information must be retained on the basis on which wages are paid, such as $10.00 per hour or $250 per week plus 5 percent commission on sales over $1,000 per week.
- For tipped employees, records should be maintained on the weekly amount of tips received, the tip credit claimed, the hours worked as a tipped and nontipped employee, and who is a tipped employee.
- For "white-collar" exempt employees, an employer should record the basis on which the employee is paid and the fringe benefits provided or available.

3. Length of Time Records Must be Maintained. Payroll ledgers and other similar records must be maintained for three years. 29 C.F.R. § 516.5. Time-earning cards, production cards, and other supplementary records must be maintained for two years. 29 C.F.R. § 516.6.

4. Timeclocks and Rounding. Employers are not required to use timeclocks in recording the work time of nonexempt employees, but they generally are a more accurate method for recording hours of work. Employers are not required to pay employees who voluntarily come into their employment area before their regular starting time or remain after their quitting time, if these employees do not engage in any work; however, employers should discourage this practice. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records. Likewise, rounding practices have historically been used by many companies, and the DOL's regulations recognize and allow for the practice of recording employees' starting and stopping times to the nearest five, six, or 15 minutes. Allowance of rounding is based on the premise that the arrangement averages out so that the employees are fully compensated for all time actually worked over a period of time. The rounding practice used should not consistently benefit the employer to the detriment of the employee such that over a period of time actual hours of work go uncompensated. 29 C.F.R. § 785.48.

O. Exemptions from Minimum Wage, Overtime Pay, Equal Pay, Child Labor, and Record Keeping Obligations. Employers are not required to pay the minimum wage or an overtime premium to employees who are "exempt" from the FLSA's requirements. Exemptions are narrowly defined under the law, and the employer has the burden to raise and prove an exemption as an affirmative defense. *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290 (1959). Official regulations or interpretations exist on most exemptions. *See*, *e.g.*, 29 C.F.R. § 541 for regulations on white-collar exemptions.

A few categories of employees are exempt from all the requirements except those pertaining to record keeping. These categories include employees engaged in the delivery of newspapers and homeworkers who make evergreen wreaths. Most categories, however, are exempt from some, but not all, of the above requirements.

1. Complete Minimum Wage, Equal Pay, and Overtime Pay Exemptions. These include certain agricultural employees meeting specific requirements; fishing industry employees, including employees engaged in offshore seafood processing; employees of small, local circulation newspapers; switchboard operators of some independently owned public telephone companies; seamen on non-American vessels; casual babysitters (under 20 hours per week); or employees of seasonal amusement or recreational establishments.

2. White-Collar Exemptions.[2] The FLSA provides that minimum wage and overtime pay requirements do not apply to executive, administrative, professional, or outside sales personnel. 29 U.S.C. § 213(a)(1). There is a separate provision exempting certain types of computer employees from the overtime and minimum wage requirements. These are known as the white-collar exemptions.

As discussed in the Introduction to this Chapter, the DOL on June 30, 2015 issued proposed revisions to the white collar regulations including increasing the salary level to be considered exempt. The proposed revisions would eliminate the exempt status for approximately 21.4 million employees, according to the DOL. The 60 day comment period ended on September 4, 2015 and it is anticipated that the Final Rule will be published in 2016. The release of these new regulations in 2016 will be the first change to the white collar exemptions since it was last revised in April 2004.

a. Salary Level Test (29 C.F.R. § 541.600).

(1) Salary Level to Qualify As Exempt. The 2004 regulations currently provide for a minimum salary level that an employee must earn before he or she can qualify for any of the white-collar exemptions. This amount is $455 per week ($23,660 per year) for executive, administrative, and most professional employees. This means that no employee who earns less than $455 per week is exempt under the white-collar provisions (except as noted below) regardless of the employee's job duties.

There is no salary level test for certain professionals (doctors and other medical professionals, lawyers, teachers, 29 C.F.R. § 541.600(e)) and outside sales people (29 C.F.R. § 541.500(c)). The minimum rate for hourly paid computer professionals is $27.63, but salaried computer professionals must meet the $455 weekly minimum (29 C.F.R. § 541.600 (d)). The compensation requirement may be met for academic administrative employees if they are compensated on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed (29 C.F.R. § 541.600(c)).

Additionally, administrative and professional employees may be paid on a fee basis instead of a salary basis.

(2) Highly-Compensated Employees (29 C.F.R. § 541.601). Employees who receive total annual compensation of at least $100,000 (including $455 per week paid on a salary or fee basis), customarily and regularly perform one (or more) of the exempt duties of an executive, administrative, or professional employee, and are paid on a salary basis are considered exempt.

The $100,000 is prorated for employees who do not work a full year due to hire or termination. Additionally, if an employee's pay does not total the $100,000 minimum by the last pay period of the 52-week pay period, the employer may make one final payment to the employee that will enable the employee to meet the $100,000 minimum. This payment must be made during the last pay period or within one month after the end of the 52-week pay period. Any such payment made after the end of the 52-week pay period may count only

2 On May 18, 2016, the DOL published its Final Rule amending the white collar exemption tests. The new regulations are to become effective by December 1, 2016. The new regulations are discussed in more detail in the appendix to this Chapter, available on our website at http://www.fordharrison.com/sourcebook.

toward the prior year's total annual compensation, not toward the annual compensation in the year it was paid.

This provision applies only to highly-compensated executive, administrative, and professional employees. The DOL has specifically stated that computer and outside sales employees are not eligible for this exemption. Additionally, the highly compensated provision applies only to employees who perform office or non-manual work.

b. Salary Basis Requirement. The executive, administrative, and professional exemptions each require that the employee be paid a salary, which is not subject to reduction on the basis of quantity or quality of work. An employee is compensated on a salary basis if she or he "regularly receives each pay period … a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602. An employee is not paid on a salary basis if deductions from the employee's compensation are made for absences caused by the employer or business operations. *Id.* If the employee is ready, willing, and able to work, deductions may not be made for the time when work is not available. *Id.*

(1) Permissible Deductions. The regulations permit deductions for:

- Absences of one or more full days for personal reasons other than illness or disability.
- One or more full days for sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide sickness or disability plan of providing compensation for loss of salary occasioned by such sickness or disability.
- Offsets for pay for jury duty, service as a witness or military duty (while the employer cannot deduct the employee's salary for absences caused by jury duty, service as a witness, or temporary military leave of less than a week, it may offset any amounts received by the employee for such duty or service against the salary due for the week of the service or duty).
- Penalties for infractions of safety rules of major significance.
- Initial or terminal weeks of employment.
- Intermittent leave under the FMLA.
- Unpaid disciplinary suspensions of one or more full days for infractions of significant workplace conduct rules, such as those prohibiting sexual harassment or violence in the workplace. 29 C.F.R. § 541.602(5). These suspensions may not be used for routine performance or attendance issues and must be pursuant to a written policy applicable to all employees. While the written policy need not detail every violation that could result in a suspension and need not contain a definitive declaration of when a suspension will be imposed, it should be sufficient to put employees on notice that they could be subject to an unpaid disciplinary suspension.

This is a significant departure from prior law, under which suspensions of one or more full days, but less than one week, would run afoul of the salary basis standard and result in a loss of the exemption in all cases other than suspensions for safety rule infractions.

(2) Effect of Improper Deductions From Salary (29 C.F.R. § 541.603). An employer who makes improper deductions from salary will lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. According to the DOL regulations, an actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors the DOL will consider in determining whether an employer has an actual practice of making improper deductions include: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

If the DOL determines that the employer has an actual practice of making improper deductions, the employer will lose the exemption for the period of time during which the improper deductions were made for all employees in the same job classification working for the same managers who made the improper deductions. Employees in different job classifications or working for different managers will not lose the exempt classification. This is a departure from prior interpretations of the regulations and the U.S. Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997).

Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to the improper deduction, if the employer reimburses the employee for the improper deduction. 29 C.F.R. § 541.603(c). Inadvertent deductions are those made unintentionally, such as those caused by clerical errors.

(3) Safe Harbor Provision (29 C.F.R. § 541.603(d)). Because exempt status is based on meeting each of three tests (salary level, salary basis, and duties), improper deductions from salary that negate the salary basis may destroy the exemption. The DOL regulations provide for a safe harbor for situations where improper deductions from salary have been made. Under this provision, the exemption will not be lost because of improper deductions, regardless of the cause of the deduction, if the employer:

- has a "clearly communicated" policy prohibiting improper pay deductions, which includes a complaint mechanism;
- reimburses employees for any improper deductions; and
- makes a good faith effort to comply going forward. The exemption will be lost if improper deductions continue to be made.

This safe harbor applies to improper deductions – those that are neither inadvertent nor isolated – and thus provides more protection for employers than did interpretations of the prior regulations. Employers should note that reimbursing employees for improper deductions may amount to an admission that an improper deduction has been made. It is critical, therefore, that all employees affected by the improper deductions be identified and properly reimbursed. If not, there is still a risk that the exemption will be lost, making the employer liable for any overtime pay plus liquidated damages.

Employers wishing to take advantage of the safe harbor provision should adopt a policy prohibiting improper deductions from the pay of salaried exempt employees that:

- Includes a complaint mechanism (which can be part of any employee complaint mechanism currently in place. However, the person designated to receive complaints about improper pay deductions should be instructed to forward them to a knowledgeable compensation specialist);
- States that claims of improper deductions will be investigated promptly, and, if valid, the employee will be reimbursed as soon as possible after the conclusion of the investigation; and
- Clearly prohibits retaliation against any employee for filing a complaint.

Employers should clearly communicate the policy to all employees. Although the DOL states that the policy need not be written, as a practical matter a written document will be the best proof of communication. The policy can be given to new employees either separately or as part of an employee manual; it should also be posted on the employer's Intranet if there is one.

Additionally, employers should instruct managers that they are responsible for compliance with the policy, and for ensuring that, if a complaint is found valid, the improper deductions will cease. Make sure they understand that managers who willfully make improper deductions will be subject to discipline.

Employers should also thoroughly investigate all complaints to ensure that all employees who are subject to the improper deductions, not merely those who complained, are identified and properly reimbursed.

Once the policy is in effect, employers should consider proactively reviewing pay policies and procedures to ensure that no improper deductions are being made, rather than wait for employee complaints.

(4) Minimum Guarantee Plus Extras (29 C.F.R. § 541.604). An employer can pay an exempt employee additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly amount of $455 paid on a salary basis. Such additional amounts may include things such as commissions or percentages of sales or profits. Additionally, an exempt employee does not lose the exemption if he or she is paid an additional amount based on the hours of work beyond the normal workweek, if the employee is also paid the minimum weekly amount on a salary basis. *See* Wage and Hour Opinion Letter, FLSA2005-20 (Aug. 19, 2005), http://www.dol.gov/whd/opinion/FLSA/2005/2005_08_19_20_FLSA_Nurses.pdf (DOL opinion letter stating that an employee who otherwise fulfills the requirements for the professional employee exemption may be paid a shift differential in addition to his or her regular salary without jeopardizing the exemption. The letter also states that an employee who meets the requirements for the professional employee exemption does not lose that exemption because a temporary employee in the same position is paid on an hourly basis and is nonexempt.).

29 C.F.R. § 541.604 states that an exempt employee's earnings may be computed on an hourly, daily or shift basis without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test incorporates the DOL's longstanding interpretation of the salary basis requirement.

The reasonable relationship requirement is met if the guarantee is roughly equivalent to the employee's usual earnings at the assigned rate. This requirement applies only when the employee's actual pay is computed on an hourly, daily or shift basis and not, for example, when an employee receives a guaranteed salary plus a commission on sales.

(5) Payment on a Fee Basis (29 C.F.R. § 541.605). Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee is paid on a fee basis if he or she is paid an agreed amount for a single job regardless of the time it takes to complete the job. Generally, a fee is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. A payment is not made on a fee basis if it is based on the number of hours or days worked and not on the accomplishment of a particular task.

To determine whether the fee payment meets the required minimum salary amount, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours.

(6) Board, Lodging, or Other Facilities (29 C.F.R. § 541.606). To be exempt under § 13(a)(1) of the FLSA, an employee must earn the minimum amount required without considering the value of board, lodging or other facilities. This means that an employer cannot claim any credit for the value of board, lodging or other facilities that it supplies to the employee in determining whether the employee has met the minimum salary amount for the white-collar exemptions. The term "other facilities" means items similar to board and lodging, such as meals, housing furnished for dwelling purposes, and transportation furnished to employees for commuting between their homes and work.

c. **Executive Employees.** An executive employee is any employee who:

- Is compensated on a salary basis of not less than $455 per week;
- Has the primary duty of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- Customarily and regularly directs the work of two or more other employees; and
- 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.

See Rainey v. McWane, Inc., 314 F. App'x 693, 695 (5th Cir. 2009) (citing 29 C.F.R. § 541.100(a); production supervisors in a foundry fell within the executive exemption where each supervisor was responsible for supervising a team of between 10 and 30 employees, the plaintiffs spent most of their time "[w]atching, making sure [the employees were] working safe and doing, putting out good work," the plaintiffs performed nonexempt work only in narrow circumstances and they were paid more than double what the regular workers were paid).

(1) Exemption for Bona Fide Business Owners (29 C.F.R. § 541.101). The DOL regulations provide that a business owner who has at least a bona fide 20 percent equity interest in the business and is actively engaged in the management of the business is exempt regardless of salary.

(2) Change of Status. Although the regulations do not define the term "change of status," the preamble states that the DOL intends this term be given the same meaning as that given by the U.S. Supreme Court in defining the term "tangible employment action" for the purposes of Title VII liability. The Court has defined this as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998).

(3) Management (29 C.F.R. § 541.102). The regulations provide a nonexhaustive list of the types of duties that would be considered management duties. The preamble to the 2004 regulations states that management can include the management of processes, projects, and contracts in addition to employees. Such activities may also be considered exempt administrative duties.

(4) Department or Subdivision (29 C.F.R. § 541.103). A customarily recognized department or subdivision must have a permanent status and a continuing function. When an enterprise has more than one establishment, the employee in charge of each establishment may be considered exempt. A recognized department or subdivision is not required to be located physically within the employer's establishment and may move from place to place. Additionally, continuity of the same subordinate personnel is not essential for the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

(5) Two or More Employees (29 C.F.R. § 541.104). To qualify as an exempt executive, the employee must customarily and regularly direct the work of two or more other employees. 29 C.F.R. § 541.104. This means two full-time employees or their equivalent. While supervision can be distributed among two, three or more employees, each employee must customarily and regularly direct the work of two or more other employees (or the equivalent) to be considered an exempt executive. An employee who merely assists the manager of a particular department and only supervises two or more employees in the manager's absence does not qualify as an executive employee. Hours worked by an employee cannot be credited more than once for different executives. Thus, if two supervisors share responsibility for two employees in the same department, they do not meet the requirements for this exemption. However, if each supervisor supervises the employees for four hours, each would be considered responsible for the supervision of a half-time employee.

(6) Particular Weight (29 C.F.R. § 541.105). Factors to be considered in determining "particular weight" include, but are not limited to:

- Whether it is part of the employee's job duties to make such suggestions and recommendations;
- The frequency with which the employee does so or is requested to do so; and
- The frequency with which the employee's suggestions and recommendations are relied upon.

Generally, an executive's suggestions and recommendations must pertain to the employees the executive directs; this does not include an occasional suggestion with regard to the change of status of a co-worker. An employee's suggestions and recommendations may be considered to have particular weight even if a higher-level manager's recommendation has more importance and even if the employee does not have the authority to make the ultimate decision as to the employee's change in status.

(7) Concurrent Duties (29 C.F.R. § 541.106). A manager can perform exempt and nonexempt duties concurrently and not lose the exemption, as long the manager meets all requirements of the executive exemption. The DOL states that an exempt manager will typically have discretion to decide when to perform nonexempt duties and remains responsible for the operation even while performing nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods.

d. Administrative Employees (29 C.F.R. § 541.200). The term administrative employee means any employee:

- Who is compensated on a salary or fee basis of not less than $455 per week;
- Whose primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customer; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(1) Discretion and Independent Judgment (29 C.F.R. § 541.202). 29 C.F.R. § 541.202 states that the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after these alternative courses have been considered. The regulations note that an employee may exercise discretion and independent judgment even if the employee's decisions are reviewed at a higher level.

The exercise of discretion and independent judgment must involve more than the use of skill in applying well-established techniques or procedures such as those described in manuals. Such work also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical or repetitive work.

The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment merely because the employer will experience a financial loss if the employee does not perform the job properly. The DOL has issued an opinion letter stating that an analyst who works with engineering, design, and sales employees of a firm engaged in providing products and services related to soil erosion and structural supports is an exempt administrative employee. Wage and Hour Opinion Letter, FLSA2008-3 (April 21, 2008), http://www.dol.gov/whd/opinion/FLSA/2008/2008_04_21_03_FLSA.pdf. The DOL noted that the analyst exercised discretion and independent judgment with regard to matters of significance to the employer in finding that she would be exempt.

(2) Production Versus Staff Dichotomy. The preamble to the DOL regulations notes that the DOL has not completely eliminated the concept of "production versus staff" from the administrative exemption, but views it as a tool in appropriate cases to determine which employees should be excluded from the exemption.

Directly Related to Management or General Business Operations (29 C.F.R. § 541.201). To meet this requirement, the employee must perform work directly related to assisting with the running or servicing of the business as opposed to working on a manufacturing production line or selling a product in a retail or service establishment. *See, e.g., Adams v. BSI Mgmt. Sys. Am.,* 523 F. App'x 658, 659 (11th Cir. Ga. 2013) (holding that an employee's duties, which included running a project for one of her employer's clients and ensuring the client's expectations were met, organizing and managing the creation of BSI's supply chain security solution for one of its clients, as well as conducting client meetings, marketing the company and researching industry trends, were directly related to the management or general business operations of BSI and its customers).

Employees whose work primarily relates to the management or general business operations of the employer's customers, such as tax experts or financial consultants, may also qualify for this exemption. The DOL has opined that that the duties of the purchasing agents who work for a motor home manufacturer "ensuring that materials, equipment, and supplies are ordered and delivered and participating in the vendor selection process" – satisfied the administrative exemption regulation because these duties "directly relate to the functional areas of purchasing and procurement." Wage and Hour Opinion Letter, FLSA2008-1 (March 6, 2008), http://www.dol.gov/whd/opinion/FLSA/2008/2008_03_06_01_FLSA.pdf. In the opinion letter, the DOL also stated that the purchasing agents' freedom to authorize purchases up to $25,000 had a "significant financial impact" on the manufacturer.

In *Roe-Midgett v. CC Servs. Inc.*, 512 F.3d 865 (7th Cir. 2008), the court held that damage appraisers who estimated and settled property damage claims for insurance company clients were administrative employees of the service firm that employed them and, thus, were exempt from the FLSA's requirements.

In March 2010, the DOL issued an Administrator Interpretation (AI) stating that employees who perform the usual duties of mortgage loan officers do not meet the requirements of the administrative employee exemption because their primary duty is selling mortgage loan products, which does not relate to the internal management or general business operations of the employer. The Interpretation is available on the DOL's web site at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf.

According to the DOL, mortgage loan officers' duties involve the day-to-day carrying out of a financial service company's marketplace offerings and, "thus, fall squarely on the production [rather than administrative] side of the business."

Based upon its analysis of the duties generally performed by mortgage loan officers, the DOL determined that such employees are primarily engaged in selling lending products. In support of this determination, the DOL noted that mortgage loan officers frequently are compensated, at least in part, on a commission basis and often are evaluated based upon sales volume. The DOL then determined that sales of lending products is not work that is directly related to the management or general business operations of the employer, but is instead work related to the "production operations" of the employer – i.e. work related to the goods and services that constitute a financial services company's marketplace offerings.

In *Mortgage Bankers Assoc. v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), the D.C. Circuit vacated the March 2010 AI because the DOL reversed its position on the exempt status of mortgage loan officers without adhering to public notice and comment rulemaking requirements. However, the Supreme Court subsequently reversed this decision, holding that a federal agency is not required to engage in notice-and-comment rulemaking when it issues an interpretation of a regulation that is significantly different from its prior interpretation. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015). In *Perez,* the Court overruled a line of cases established by the Ninth Circuit, which required administrative agencies to engage in notice-and-comment rulemaking when changing a prior administrative interpretation of an agency regulation.

Under the Administrative Procedures Act (APA) federal agencies have authority to issue two types of rules: legislative and interpretive. Legislative rules have the force and effect of law, and agencies must engage in notice-and-comment rulemaking before issuing such rules. In notice-and comment rulemaking, the agency publishes a proposed rule in the Federal Register, accepts comments on the rule for a specific period of time, and, after reviewing the comments, publishes a final rule. Interpretive rules do not have the force and effect of law, thus agencies are not required to engage in notice-and-comment rulemaking before issuing such rules.

In *Perez*, the Mortgage Bankers Association (MBA) challenged the DOL's change in its position regarding whether mortgage loan officers fall within the administrative employee exemption to the FLSA's minimum wage and overtime requirements. The MBA filed suit in federal court, challenging the substance of the 2010 AI, as well as the procedure by which it was issued. The Court's decision in *Perez* addresses only the procedural challenge – it did not rule on the substantive validity of the DOL's interpretation. MBA claimed the AI was procedurally invalid in light of *Paralyzed Veterans of Am. v. D. C. Arena*, a Ninth Circuit decision requiring administrative agencies to engage in notice-and-comment rulemaking before significantly revising an interpretation.

The Supreme Court held that the decision in *Paralyzed Veterans* is contrary to the text of the APA's rulemaking provisions and "improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA." The Supreme Court held that the decision in *Paralyzed Veterans* improperly conflated two different sections of the APA to find that notice-and-comment rulemaking is required when an agency significantly changes an earlier interpretation. "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule."

e. Professional Employees (29 C.F.R. § 541.300). Under the DOL regulations, an employee qualifies as an exempt professional if he or she is compensated on a salary or fee basis of not less than $455 per week and has, as his or her primary duty, the performance of work:

- Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
- Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(1) Learned Professionals (29 C.F.R. § 541.301). Learned professionals are those employees who perform work requiring advanced knowledge. The advanced knowledge must be in a field of science or learning and customarily must be acquired through a prolonged course of specialized instruction. Such work must be predominantly intellectual in character and require the consistent exercise of discretion and judgment as opposed to the performance of routine work. Advanced knowledge cannot be obtained at the high school level.

(2) "Field of Science or Learning." The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades.

(3) Specialized Academic Instruction. Although the best evidence that an employee meets the requirement of having completed a prolonged course of specialized academic instruction is the possession of an academic degree, the exemption is also available to employees who have substantially the same knowledge level and perform the same type of work as those with an advanced academic degree, but who acquired the advanced knowledge through a combination of work experience and intellectual instruction. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes.

The Second Circuit has held that accountants employed as "audit associates" are exempt under the learned professional exemption. *See Pippins v. KPMG LLP*, 759 F.3d 235 (2d Cir. 2014). The court found that the audit associates met the requirements for the professional exemption because they: (a) were employed in a field of science and learning; (b) relied on knowledge customarily acquired through prolonged specialized instruction; and (c) consistently exercised professional judgment in performing their jobs. The court further held that the audit associates "are precisely the types of professionals the regulations seek to exempt from FLSA—well-compensated professionals at a top national accountancy practice, performing core accountancy tasks." *Id*. at 252.

A DOL opinion letter has stated that paralegals do not qualify for the learned professional exemption because "no minimum education or training requirements are established that a person must satisfy before using the occupational title 'paralegal.'" *See* Wage and Hour Opinion Letter, FLSA2005-54 (Dec. 16, 2005), http://www.dol.gov/whd/opinion/FLSA/2005/2005_12_16_54_FLSA.pdf.

This indicates that the occupation lacks a requirement of "knowledge of an advanced type … customarily acquired by a prolonged course of specialized intellectual instruction" as required under 29 C.F.R. §541.300(a)(2). *Id.* The letter notes, however, that the learned professional exemption is available when "a paralegal, who possesses an advanced specialized degree in other professional fields, applies advanced knowledge in that field to the performance of his or her primary duty. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer could qualify for exemption." *Id.* The DOL also stated that paralegals do not qualify for the administrative exemption because their duties generally do not involve the exercise of discretion and independent judgment of the type required by the administrative exemption.

The Ninth Circuit has held that social workers do not qualify for the learned professional exemption because the degree requirements for social worker positions do not "plainly and unmistakably" include a specialized course of study directly related to the positions. *See Solis v. Washington*, 656 F.3d 1079 (9th Cir. 2011) ("An educational requirement that may be satisfied by degrees in fields as diverse as anthropology, education, criminal justice, and gerontology does not call for a 'course of specialized intellectual instruction.'").

The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

(4) Creative Professionals (29 C.F.R. § 540.302). Creative professionals are employees whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work. Recognized fields of artistic or creative endeavor include fields such as music, writing, acting, and the graphic arts.

(5) Teachers (29 C.F.R. § 541.303). A teacher is an exempt professional if his or her primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and he or she is employed as a teacher in an educational establishment. Employees who are engaged as teachers but also spend a considerable amount of their time in extra-curricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. The salary requirement and the general duties requirement of the professional exemption do not apply to teaching professionals described in this section.

(6) Practice of Law or Medicine (29 C.F.R. § 541.304). An employee who holds a valid license or certificate permitting the practice of law or medicine and is actually engaged in the practice thereof is an exempt professional. Additionally, interns and residents who hold the requisite academic degree for the practice of medicine are exempt. The salary requirements and the general duties requirements of the professional exemption do not apply to employees described in this section.

f. Computer Employees (29 C.F.R. § 541.400). Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under §§ 13(a)(1) and 13(a)(17) of the FLSA. An employee's job title does not determine the applicability of the exemption.

The regulations adhere closely to the statutory language. The DOL has stated that computer job classifications created since the computer amendments were added to the FLSA in 1996 could still qualify for the exemption, but will not identify any specific job titles due to rapid changes in the industry. The regulations also state that employees who do not qualify for the computer employee exemption, as well as some who do qualify, may qualify for exemption as administrative or executive employees.

(1) Compensation. Employees exempt under § 13(a)(1) must be compensated on a salary or fee basis of not less that $455 per week; those exempt under § 13(a)(17) must be compensated on an hourly basis of not less than $27.63 per hour.

(2) Primary Duties. The computer employee exemptions apply only to employees 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.

See Wage and Hour Opinion Letter, FLSA 2006-42 (October 26, 2006), http://www.dol.gov/whd/opinion/FLSA/2006/2006_10_26_42_FLSA.pdf, (employee help desk support specialist position does not qualify for the computer employee exemption because it does not involve the exercise of discretion and independent judgment; maintaining a computer system and testing to see that a particular piece of equipment or an application is working properly according to specifications designed by others lacks the required exercise of independent judgment and discretion to qualify for the administrative employee exemption).

(3) Computer Manufacture and Repair (29 C.F.R. § 541.401). Employees engaged in the manufacture or repair of computer hardware and related equipment do not qualify for the computer employee exemption. Additionally, employees who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer occupations are not exempt.

g. Outside Sales Employees (29 C.F.R. § 541.500). An employee is exempt as an outside sales employee if he or she is: primarily engaged in making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by a client or customer, and customarily and regularly engaged away from the employer's place of business in performing such duty. The salary requirements do not apply to outside sales employees.

The 2004 regulations eliminated the requirement that no more than 20 percent of an outside sales employee's time may be spent performing nonexempt duties unrelated to the employee's own sales. The DOL stated that this was not a substantive change, because outside sales must still be the employee's primary duty for the exemption to apply.

(1) Incidental Work. Work performed incidental to an employee's own outside sales, such as incidental deliveries and collections, will be regarded as exempt outside sales work. Other work, such as writing reports, updating or revising the employer's catalogues, planning itineraries, and attending sales conferences, if it furthers the employee's sales efforts, will be considered exempt work.

(2) Examples of Exempt Outside Sales Work. Types of exempt outside sales work include selling time on radio or television, soliciting advertising for newspapers or other periodicals, or soliciting freight for railroads and other transportation agencies. Taking orders for services may also be exempt outside sales work.

(3) Away From the Employer's Place of Business (29 C.F.R. § 541.502). An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. An employee who works from a fixed site, whether home or office, is considered to be working from the employer's place of business and thus does not qualify for the outside sales exemption. This is true even though the employer is not the owner or tenant of the property.

(4) Promotional Work (29 C.F.R. § 541.503). Promotional work that is incidental to and in conjunction with an employee's outside sales work is exempt work. However, promotional work that is incidental to sales made by someone else is not exempt outside sales work. The regulations provide examples of promotional work that would be considered exempt.

(5) Drivers Who Sell (29 C.F.R. § 541.504). Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Work performed incidental to and in conjunction with the employee's own sales activities, such as loading, driving, or delivering products, will be regarded as exempt work.

To determine whether a driver who sells is engaged in exempt work, the DOL will consider several factors: a comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in CBAs; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales.

The 2004 regulations provide several examples of the types of employees engaged in both driving and sales duties who may qualify as exempt under the outside sales provision.

(6) Pharmaceutical Sales Reps (PSR). In *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156 (2012), the U.S. Supreme Court held that pharmaceutical sales representatives qualify as "outside salesmen" and, accordingly, are exempt from the FLSA's overtime requirements. The Court also refused to give controlling deference to the DOL's change of position in interpreting the regulation to exclude these employees, which was first announced in amicus briefs filed in court litigation. The Court noted that where, as here, an agency's announcement of its interpretation is preceded by a lengthy period of conspicuous inaction, "the potential for unfair surprise is acute." The employees in this case were pharmaceutical sales reps who were assigned a portfolio of the company's drugs and whose primary duty was to obtain nonbinding commitments from physicians to prescribe those drugs in appropriate cases. The employees were compensated through a base salary and incentive pay, but did not receive time and a half for hours worked in excess of 40 in one week. They sued the employer, claiming the failure to pay them overtime violated the FLSA. The Supreme Court rejected the plaintiffs' claims, finding that they are exempt under the outside sales regulation. In reaching this decision, the Court rejected DOL's interpretation that "[a]n employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue."

The Court held that controlling deference, which is usually given to an agency's interpretation of its own ambiguous regulation, was not appropriate in this case for a number of reasons. First, the agency's interpretation would impose potentially massive liability on the employer for action that occurred well before the DOL announced its interpretation. Thus, to defer to that interpretation would "seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires.'" The Court held that to defer to the DOL's interpretation in this case would result in precisely the kind of "'unfair surprise' 'against which our cases have long warned.'"

After rejecting the DOL's interpretation, the Court then analyzed the text of the FLSA and the DOL's regulations and determined that the PSRs make sales for the purposes of the FLSA and, thus, are exempt outside salesmen within the meaning of the DOL's regulations.

h. Primary Duty (29 C.F.R. § 541.700). The term "primary duty" means the principal, main, major, or most important duty that the employee performs. *See, e.g.*, *Rainey v. McWane, Inc.*, 314 F. App'x 693 (5th Cir. 2009) (in applying the DOL's definition of primary duty, a court looks to the aspect of the employee's job that is "of principal value to the employer").

i. Customarily and Regularly (29 C.F.R. § 541.701). The regulations define this phrase as a frequency that is greater than occasional but less than constant. The term includes work normally and recurrently performed during every workweek but does not include isolated or one-time tasks. The preamble to the regulations notes that a similar definition of the term "customarily and regularly" has appeared for decades in § 541.107(b) of the prior regulations and that "case law does not indicate significant difficulties with applying the definition." The preamble clarifies that nothing in the definition of customarily and regularly requires that a task be performed more than once a week or each and every workweek.

j. Directly and Closely Related (20 C.F.R. § 541.703). Section 541.703 states that the term "directly and closely related" means tasks that are related to exempt duties and that contribute to or facilitate the performance of exempt work.

Work “directly and closely related” to the performance of exempt duties may also include: recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine.

Work is not “directly and closely related” if the work is remotely related or completely unrelated to exempt duties.

k. Special Public Sector Salary Rules (29 C.F.R. § 541.710). An employee of a public agency who otherwise meets the salary basis requirements is not disqualified from the white-collar exemptions because the employee is paid according to a pay system established by statute, ordinance, or regulation or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the employee’s pay to be reduced or the employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one day when the employee does not use accrued leave because: the employee did not have permission to use accrued leave; the employee’s accrued leave had been exhausted; or the employee chose to use leave without pay.

Deductions from an employee’s pay for absences caused by budget-required furlough do not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee’s pay is accordingly reduced.

l. Leave Bank Deductions. Although the regulations do not specifically address whether private and public sector employers may deduct from an employee’s accrued leave balances for absences of less than a day without defeating the white-collar exemption, the preamble to the regulations states that employers may, without affecting an employee’s exempt status, take deductions from accrued leave accounts; require exempt employees to record and track hours; require exempt employees to work a specified schedule; and implement across-the-board changes in schedules under certain circumstances. Additionally, the DOL has issued an opinion letter stating that employers may deduct from an exempt employee’s paid time off leave bank for partial day absences for personal reasons, accidents, or illness without jeopardizing the employee’s exempt status. *See* Wage and Hour Opinion Letter, FLSA2005-7 (Jan. 7, 2005), http://www.dol.gov/whd/opinion/FLSA/2005/2005_01_07_7_FLSA_PaidTimeOff.pdf. The DOL notes that the deductions from the leave bank do not jeopardize the employee’s salaried status as long as the employee actually receives his or her guaranteed salary. The employee must receive his or her full salary even if the employee has no accrued benefits in the leave plan and the plan has a negative balance, where the employee’s absence is for less than a full day. *Id.* The opinion letter also notes that deductions may be made from an exempt employee’s salary for absences of one or more full days for illness or injury, if the deduction is made in accordance with a bona fide leave plan, policy or practice. *Id.*

m. Effects of the Family Medical Leave Act (FMLA). The FMLA mandates that covered employees get 12 workweeks of unpaid leave per year for the birth or adoption of a child or the serious health condition of an employee or family member or for a qualifying exigency due to the active duty or call to active duty status of a covered servicemember. 29 U.S.C. §§ 2611-12. Pursuant to these provisions, an employee can take leave in any increments that are medically necessary, including partial days. The DOL, which enforces both statutes, has issued regulations that permit an employer to legally make deductions from an employee’s salary for any hours taken as intermittent or FMLA leave within a workweek, without affecting the employee’s exempt status. This partial day deduction can only be taken during FMLA-mandated leave time by employees who qualify for FMLA leave.

3. Partial Minimum Wage Exemptions. Partial minimum wage exemptions (i.e., authorization to pay subminimum wages) may apply to the certain categories of employees pursuant to authorization granted by administrative regulations or wage orders.

4. The Federal Motor Carrier Act Exemption. The Federal Motor Carrier Act provides for an exemption from the FLSA's overtime requirements (although minimum wage must still be paid) for "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of § 31502 of Title 49 [the Motor Carrier Act]." *See, e.g., Walters v. Am. Coach Lines of Miami, Inc*., 575 F.3d 1221 (11th Cir. 2009); *Talton v. I.H. Caffey Dist. Co., Inc.,* 124 F. App'x 760, 764 (4th Cir. 2005).

The Department of Transportation (DOT) may establish these requirements for employees who: "(1) [a]re employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the [MCA] ... and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the [MCA]." *Allen v. Coil Tubing*, 755 F.3d 279 (5th Cir. 2014) (citing 29 C.F.R. § 782.2(a)). "For the motor carrier exemption to apply ... [the employees] must meet both of these requirements." *Id.* (citations omitted). In *Allen,* the court addressed whether an "employee-by-employee," "district-by-district," or "company-wide" analysis is appropriate in determining whether employees engaged in activities that affected "the safety of operations of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce." The court held that a company-wide analysis was appropriate in that case because the court's precedent effectively foreclosed an employee-by-employee analysis, and the facts of the case and arguments advanced by the parties did not support a district-by-district analysis. Using this analysis, the court affirmed the lower court's decision that the Motor Carrier Act applied to the employees in question. *See also Barlow v. Logos Logistics, Inc.,* 34 F. Supp. 3d 686 (E.D. Mich. 2014) (holding that the Motor Carrier Act exemption barred drivers' overtime claims against a staff leasing agency because the DOT's jurisdiction extends even to leased drivers when the safety of interstate commerce is concerned).

The Motor Carrier Act gives the Secretary of Transportation jurisdiction over, among other things, interstate transportation by a motor carrier, and the authority to establish qualifications and maximum hours of service for covered employees. Courts have interpreted this authority to extend not just to carriers who actually cross state lines while transporting goods, but also to carriers whose cargo originates from outside the state or is ultimately bound for a destination outside the state, even where the carrier's route is entirely intrastate. In *Walters*, *supra*, the Eleventh Circuit held that a bus company engaged in interstate commerce for the purposes of the Motor Carrier Act exemption even though the number of interstate trips made was relatively small. In *Walters*, the company had the appropriate federal licensing and the U.S. Supreme Court had previously determined (in another case) that the percentage of revenue derived from those trips (4.06 percent) was sufficient to establish interstate commerce for purposes of the Motor Carrier Act. *See also Abel v. Southern Shuttle Servs.,* 631 F.3d 1210 (11th Cir. Fla. 2011) (relying on *Walters* and holding that "the purely intrastate transport of passengers to and from an airport may, under certain circumstances, constitute interstate commerce and thus bring the transportation company within the jurisdiction of the Secretary of Transportation).

5. Complete Overtime Pay Exemptions (With Minimum Wage Required). Although there is a requirement that the minimum wage be paid, certain classes of workers (in addition to those that fall under the Federal Motor Carrier Act, discussed above) fulfilling detailed regulations do not fall under the FLSA overtime provisions:

- Certain employees of radio and television stations in small communities.
- Taxicab drivers.
- Drivers and helpers making local deliveries.
- Employees of railroads subject to Part I of the Interstate Commerce Act.
- Employees of air carriers subject to Title II of the Railway Labor Act (RLA). *See, e.g.*,

Valdivieso v. Atlas Air Inc., 305 F.3d 1283, 1286-87 (11th Cir. 2002) (a business that leased aircraft and crew to other airlines was a common carrier covered by the RLA and thus exempt from the FLSA's overtime requirements).

- Salespersons, partsmen, or mechanics of auto, truck, or farm implement dealers and salespersons for trailer, boat, or aircraft dealers.
- Seamen on American vessels.
- Agricultural employees and certain employees closely connected to the agricultural field.
- Household domestics, such as service employees, who reside in the household. These employees must be paid at least the federal minimum wage for all hours worked.
- House parents of nonprofit educational institutions.
- Employees of motion picture theaters.
- Employees in certain forestry or logging operations.
- Employees of certain fire protection and law enforcement agencies. 29 U.S.C. § 213(b)(20) exempts any employee of a public agency who is engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) if the public agency employs fewer than five full- or part-time firefighters or fewer than five full- or part-time law enforcement officers.

6. Companionship Exemption. There is also an exemption from the overtime pay requirements for individuals "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 13(a)(15). *See also Fact Sheet #79B: Live-in Domestic Service Workers Under the Fair Labor Standards Act (FLSA),* http://www.dol.gov/whd/regs/compliance/whdfs79b.htm. In September 2013, the DOL revised its regulations to eliminate the companionship exemption for direct care workers employed by third parties. It has developed a portal on its web site to provide direction on the treatment of direct care workers, including fact sheets and frequently asked questions regarding the revision of the rule. *See* http://www.dol.gov/whd/homecare/. *See also Can Your Home Care Agency Afford to Employ "Sleep-Ins"?* December 12, 2104, http://www.fordharrison.com/can-your-agency-afford-to-employ-sleep-ins-1. The D.C. Circuit Court of Appeals upheld the final rule on August 21, 2015. *See DOL's Final Rule Upheld By D.C. Court Of Appeals,* August 21, 2015, http://www.fordharrison.com/dols-final-rule-upheld-by-dc-court-of-appeals.

7. Partial Overtime Pay Exemptions. Some partial overtime pay exemptions (29 U.S.C. § 207) may apply to the following entities:

a. Employees in Retail Sales or Service Establishments Who are Paid Primarily Commissions. Employees must receive earnings in excess of one and one-half times the minimum wage for each hour worked, and more than half of the compensation from a prior "representative period" must be income from commissions. 29 U.S.C. § 207(i).

A "retail or service establishment" "is a business that engages in the making of sales of goods or services, 75 percent of whose annual dollar volume of sales must be recognized as retail in character in the particular industry and not for resale." 29 C.F.R. § 779.313. Over the years, fairly detailed regulations on the topic of "retail or service establishment" have emerged. *See* 29 C.F.R. § 779. Employers should be aware that the DOL defines "retail or service establishment" strictly. In *Gieg v. DRR, Inc.*, 407 F.3d 1038, 1049 (9th Cir. 2005), the Ninth Circuit held that the exemption found in 29 U.S.C. § 201(i) applies to "any employee" of a retail or service establishment who meets the compensation requirements; the exemption is not limited to those employees who sell retail goods and services. In *Gieg*, the court held that commissioned finance employees working for an automobile dealership are exempt under § 207(i). *See also Wilks v. Pep Boys*, 2006 WL 2821700 (M.D. Tenn. Sept. 26, 2006) (employees who were paid on a complicated flat rate system were not exempt under the retail commission exception because the employer failed to establish that the plaintiffs received more than half their compensation in the form of commissions; the court held that to qualify as a "commission" under the exemption, the employer must compensate employees at a rate that is proportionally related to the amount it charges its customers. The court held that the pay system failed to meet the commission exemption because the amount charged to the customer was not related to the number of hours the employee actually took to complete a particular task), *aff'd*, 278 F. App'x 488 (6th Cir. 2008).

b. Nursing Home and Hospital Employees (8/80 Plans). Employers may obtain an advance agreement with employees providing that no overtime is owed unless more than 80 hours are worked in a 14-day period. However, overtime is owed after eight hours per day if this 8/80 plan is used. This is the only daily overtime pay requirement in the FLSA.

c. Employees of Certain Wholesale Petroleum Distributors.

d. Employees Working Under Certain Collective Bargaining Contracts Meeting Specific Hour and Wage Rate Qualifications.

e. Employees Processing and Handling Leaf Tobacco.

f. Cotton Gin and Sugar Processing Employees Under Specific Circumstances. The exemption is limited to 14 work weeks in a year and requires overtime pay for employment in excess of 10 hours in a day and 48 hours in a workweek.

g. National Park Concessionaires. Employees must be paid at least the minimum wage rate for each hour worked and one and one-half times their regular rate of pay for all hours over 56 in a week.

h. Police and Firefighters Under the "7K" Exemption. 29 U.S.C. § 207(k), implemented by 29 C.F.R. § 553.201, *et seq.*, allows public agencies to adopt a partial overtime pay exemption for employees engaged in fire protection or law enforcement activities (including security personnel in correctional institutions and employees who are engaged in ambulance or rescue service activities that are substantially related to fire protection or law enforcement activities). A "work period" between seven and 28 days may be elected rather than the traditional seven-day "workweek" time frame in which overtime hours and overtime pay are calculated. If a 28-day work period is established, overtime pay is owed after 171 hours for law enforcement officers and after 212 hours for firefighters, according to current WHD enforcement policy. Pro-rata hour limits apply to work periods of less than 28 days. There does not have to be a relationship between the designated "work period" and the schedule of hours for any particular employee. An employer may have one work period applicable to all of its employees or different work periods for different employees or groups of employees. The DOL analysis is that civilian support personnel, including dispatchers, are excluded from the definition of fire protection and law enforcement personnel.

In addition, public agencies that adopt the exemption are subject to special rules regarding the calculation of compensable working time in situations such as voluntary early relief of one employee by another and exclusion of sleep time and meal periods from the count of hours worked.

Section 7K public sector comp time plans and use of a salaried FWW pay plan are deemed to be inconsistent by the DOL. The DOL has informally stated that all three exemptions or plans (the 7K exemption, comp time, and FWW pay plan) cannot be combined, but any two can be combined. Further, the DOL's position is that employers who use the FWW method of calculating overtime compensation for salaried employees may not pay the half-time premium in an equivalent amount of comp time. The DOL has cited to statutory language in § 7(o) that provides that public agency employees must receive comp time " … at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required." *See* DOL comments on 29 C.F.R. § 553.233.

i. Certain Mass Transit Employees.

j. Employees of employers that provide remedial education. 29 U.S.C. § 207(q) applies to employers who provide remedial education to employees who lack a high school diploma or educational attainment at the eighth grade level. If an employer provides remedial education to an employee, which does not include job-specific training, the employer may require the employee to participate in remedial education, which is considered work time, for up to 10 hours overtime in any workweek. The employer does not have to pay the employee overtime for the additional 10 hours spent in the remedial education. The employee would still be entitled to receive straight time pay for the 10 overtime hours, but would not receive the half-time overtime.

k. Public court reporters. Hours spent and pay received by a court reporter employed by a public entity for preparing transcripts outside of the court reporter's regular schedule will not be included with hours worked or wages paid in their primary job for purposes of overtime calculation. 29 U.S.C. § 207(o)(6).

8. Child Labor Exemptions. Farm employment for children is allowed in nonhazardous occupations outside of school hours with restrictions based on the minor's age. Parental employment of children is allowed outside of school hours other than in manufacturing, mining, or hazardous occupations. Employment of children as actors or performers is allowed, but state law may restrict employment. The Secretary of Labor can waive child labor restrictions under limited circumstances for employment of children as hand harvest agricultural laborers paid on a piece rate basis.

9. Record Keeping Exemptions. Exemptions from the minimum wage, equal pay, overtime pay, and child labor provisions do not excuse employers who are otherwise subject to the FLSA from the record keeping requirements imposed by the Act. The only exemption from record keeping is for overseas employment in certain areas. 29 U.S.C. § 213(f).

V. ALTERNATIVES FOR FLSA COMPLIANCE

A. Salaried Exempt Personnel. Qualified individuals may be designated as exempt or nonexempt under the executive, administrative, and professional employee exemptions. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541. Employers should not take chances and designate questionable nonexempt personnel as exempt. While job titles and written job descriptions may be used for assistance in classification, the actual duties and salary being paid to a specific individual control whether an exemption applies.

Payroll or personnel records should clearly reflect the salaried status of an individual and the amount of the salary for a week, month, etc., as opposed to an hourly wage rate. Avoid partial day salary deductions for absences or discipline.

If an employee does not fulfill the exempt duties test because of excessive hands-on or rank-and-file work, consider restructuring the job and assigning nonexempt duties to lower grade classifications as one of the other alternatives for compliance.

B. Reduced Hourly Wage Rate and Work Schedules. The FLSA mandates payment of one and one-half times an employee's regular rate for overtime hours. Other than the minimum wage the FLSA does not mandate that the hourly wage rate or regular rate be a specific amount.

Employers who have not been in compliance with the FLSA and desire to come into compliance and cut off the accumulation of liability for unpaid wages should be able to reduce base wage rates to take required overtime pay into account. Wage and Hour Opinion Letter (Sept. 17, 1961); 29 C.F.R. § 778.408(b). Likewise, there is no apparent restriction that would prohibit employers desiring to avoid overtime pay requirements from rearranging employees' work schedules to restrict employees to 40 hours per week. *See Abshire, et al., v. Redland Energy Services, LLC,* 695 F.3d 792, 796 (8th Cir.

2012) (employer's change of workweek designation did not violate FLSA; noting that so long as the change to the workweek is "intended to be permanent, and it is implemented in accordance with the FLSA, the employer's reasons for adopting the change are irrelevant").

If an employer waited until an investigation or lawsuit occurred to reduce wage levels generally to take overtime pay into account, it is conceivable, but unlikely, that the DOL would claim retaliation. It is more likely that a creative plaintiff's lawyer would raise a court challenge. If it appeared that certain employees were singled out for a reduction in wage levels because of their participation in a WHD audit or legal proceeding, a retaliation charge would be much more likely.

Employers with collective bargaining obligations need to engage in timely, good faith negotiations regarding changes in the regular wage rate before a reduction can be implemented. In the private sector, concession bargaining, during which hourly wage rates and the regular rate are adjusted downward, has become commonplace.

C. Fluctuating Workweek Salaried Pay Plan. For employees who are salaried but who fall into a "gray" area in terms of whether they qualify under the executive, administrative, or professional employee exemption, one alternative method of compliance is to adopt a FWW pay plan. 29 C.F.R. § 778.114. A FWW pay plan involves payment of a base salary covering straight time wages for all hours worked in a workweek. Overtime pay is calculated on the basis of a half-time rate calculated by dividing the base salary by the number of hours worked that week[3].

Example: An employee receives a salary of $300 per week under a FWW plan. She or he works 40 hours in week one, 50 hours in week two, 60 hours in week three and 30 hours in week four. His or her lawful compensation would be:

Week One = $300 ($300 divided by 40 hours at a regular rate of $7.50 but no OT).

Week Two = $330 ($300 divided by 50 hours = $6.00 regular rate) .5 x $6.00 x 10 OT hours = $30 OT. $300 + $30 = $330.

Week Three = $360.50 ($300 divided by 60 hours) = $5 (but at least $5.15 must be paid, therefore, 60 x $5.15 = $309). $5.15 x .5 x 20 = $51.50. $309 + $51.50 = $360.50.

Week Four = $300 ($300 divided by 30 hours at a regular rate of $10, no OT but paid full salary).

Although the above examples used figures that took the employee below the minimum wage in week three, failure of the salary to cover minimum wage requirements should be rare. Wage and Hour Opinion Letter No. 896 (Dec. 2, 1968) and No. 945 (Feb. 6, 1969). Since a FWW pay plan involves payment of a guaranteed salary, it may be used not only to comply with the FLSA but also to differentiate between certain low-level administrative, quasi-supervisory, or para-professional employees, and rank-and-file nonexempt hourly workers.

There is no minimum salary threshold level for use of a FWW pay plan. Any type of employee may lawfully be placed on a FWW pay plan, although from a practical standpoint, its use should be carefully considered since it may not be advisable for use with employees who need close supervision or have high absence rates. The title of the plan comes from the fact that the regular hourly rate, rather than the hours of work, fluctuates from week to week. Wage and Hour Opinion Letter No. 693 (Oct. 27, 1967). A primary distinction between FWW pay plans and other pay plans is that traditional sick leave policies cannot be used because, if an employee works any time at all during a workweek, the entire base salary must be paid. Wage and Hour Letter Opinion No. 479 (May 18, 1966). Reasonable controls could be adopted, however, such as requiring a doctor's certificate for absences of two days or more, or after the sixth day of absence in a year.

For leaves of absence that qualify as leave under the FMLA, the DOL's interpreting regulations have created two options when an employee on a salaried fluctuating work week pay plan takes FMLA-

3 The FWW method has been prohibited by Wage and Hour laws and the courts in the states of California and Missouri; Pennsylvania courts have taken the position that this method cannot apply to workers paid a weekly salary. Employers should review the applicable state law before adopting a FWW plan.

qualified leave. For an employee paid in accordance with the FWW play plan, during the period in which intermittent or reduced schedule FMLA leave is scheduled, the employer may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking FMLA intermittent leave, including weeks in which no leave is taken. An employer must uniformly apply its FMLA leave provisions to all employees on the FWW pay plan. Therefore, if the employer chooses to convert employees to an hourly rate, it cannot pick and choose which employees to convert. All employees on a FWW pay plan who take FMLA leave must be converted to hourly rate. This leaves the possibility that an employee could take one hour of FMLA leave a week and be entitled to overtime for the whole year.

If an employer chooses not to convert the employee's compensation to hourly pay, no deduction from base salary may be taken for FMLA leaves of absence in which the employee works at all during the workweek. For a more detailed discussion of this issue, see the *Employee Leaves* Chapter of the SourceBook.

To use the FWW method of payment, certain requirements must be satisfied:

- There must be an understanding between the employer and the employee that the employee will be paid using the FWW method and how it works. We recommend that employers document this "understanding" in writing and have it acknowledged and signed by each impacted employee.
- The workweek of the employee must be a fluctuating one (some weeks when the employee works fewer than 40 hours as well as some weeks when the employee works more than 40 hours – however, the frequency of this "fluctuation" remains undefined in the regulation).
- The employee must be paid a fixed salary regardless of the number of hours worked each week.
- The salary must be sufficiently large enough so that the regular rate of pay will never drop below the minimum wage (federal or state, whichever is greater).
- In addition to the fixed salary, the employee must be paid overtime premiums for any hours worked over 40 in the workweek. The overtime premium rate is 5 percent of the regular rate of pay for that workweek (can be tricky since the "regular rate of pay" may vary week to week, decreasing as the employee works longer hours).

On April 5, 2011, the WHD amended its regulations pertaining to the FWW. The amended regulations, which were effective May 5, 2011, provide, among other things, that an attempt to use the FWW pay arrangement without guaranteeing the "fixed salary" (i.e., the salary cannot be docked in short weeks, for tardiness, etc. – unless under a specific disciplinary action) will result in back wage liability. In defining "fixed salary," the revised regulations specifically prohibit the receipt of bonuses (other than purely discretionary bonuses such as a holiday bonus), commissions, or any other compensation in addition to salary, stating that such payments are inconsistent with the FWW concept and would invalidate the FWW methodology. The WHD adopted this narrow definition in spite of its own statement that "employers sometimes pay employees other types of compensation in addition to salary as incentive compensation or for certain activities (such as working undesirable hours)" and that this practice is a beneficial practice for employees. More revealing of its disfavor of the fluctuating workweek method, the WHD made clear that its decision to not allow additional payments was intended to deter the expanding use of the FWW method of computing overtime beyond the scope of the current regulation.

D. Fluctuating Day Rate Plan. A Fluctuating Day Rate (FDR) Plan can be used when an employer anticipates that on a regular basis, hours of work will fluctuate above and below eight hours per day and above and below 40 hours per week, although fluctuation in hours is not a legal requirement for use of the plan. A set amount of wages may be paid for each day worked regardless of the number of hours worked. 29 C.F.R. § 778.112. The regulation also requires that the employee "receives no other compensation for services[.]" *Id.* An FDR plan has most of the practical advantages of a FWW Pay Plan, but does not contain the "downside" risk that an employee may work only one day in a week and then be entitled to receive an entire week's pay as under a FWW plan. However, the day rate must be paid for any day in which the employee performs any work. Under an FDR plan, if more than 40 hours are worked in any workweek, the employee must receive an additional one-half of the regular hourly rate for each hour of overtime worked, as illustrated below.

Example: Assume that an employee receives a day rate of $80 and that his or her hours of work Monday through Friday fluctuate between six and 10 hours – Monday 10, Tuesday nine, Wednesday six, Thursday seven, and Friday 10; for a total of 42 hours. The employee also works seven hours on Saturday due to heavy business. Thus a total of 49 hours are worked that week but the employee's compensation is calculated by the day, not by the hour. 6 days x $80 = $480 for the week. However, under the FLSA there are nine overtime hours that must be compensated. Calculate the regular rate by dividing the total straight time pay of $480 by total hours worked of 49 hours, which equals $9.80 per hour. One-half x $9.80 per hour = $4.90 per hour x 9 overtime hours = $44.10 total overtime pay for the week.

The FDR plan creates an incentive for the employee to complete his or her work quickly each day. The FDR plan is especially useful for employees who have significant control over work completion. The FDR plan may also be useful for employees who are away from central employer locations and without supervision during large portions of a workday.

E. Belo Contracts. A Belo compensation plan is the only "salary-like" payment method for nonexempt employees in which the set payment lawfully includes overtime compensation. 29 U.S.C. § 207(f); 29 C.F.R. §§ 778.402, *et seq.* A bona fide individual contract or CBA is required. The contract must specify a regular rate of pay at least equal to the minimum wage.

The agreement must specify that at least one and one-half times the regular rate will be paid for hours worked in excess of 40. A weekly guaranteed amount of pay must be specified, but it cannot cover any more than 60 hours. The nature of the job itself, as opposed to either the employer's or employee's discretion, must necessitate irregular hours of work that fluctuate above and below 40 hours weekly over a period of time. Paying bonuses that are includable in the regular rate could jeopardize use of the plan, although payment of premiums for work on holidays, for extraordinary excess work, year-end bonuses, and similar payments, which are not regularly paid as part of the employee's usual wages, will not invalidate a Belo contract.

The weekly guaranteed amount must be paid for any workweek in which an employee performs any duties. There must be a reasonable relationship between the number of hours covered by the weekly guarantee and the number of hours expected to be worked by the employee on average, such that additional overtime wages above and beyond the weekly guaranteed amount will be due in a significant number of workweeks.

Belo contracts require ongoing review to determine continuing compliance. Jobs for which a Belo contract has possible use, depending on the circumstances, include: certain newspaper reporters, executive secretaries, crime scene law enforcement personnel, vice and narcotics investigators, or undercover detectives.

VI. MISCELLANEOUS FLSA VIOLATIONS

A. Retaliation. 29 U.S.C. § 215(a)(3) makes it unlawful to discharge or discriminate against any employee because that person has filed a complaint or instituted or caused to be instituted any proceeding relating to the FLSA. The U.S. Supreme Court has held that oral complaints are covered by the FLSA's anti-retaliation provision, resolving a split of authority among the federal appeals courts on this issue. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011). Kasten sued his former employer for retaliation under the FLSA, claiming he was terminated because of his oral complaints about the location of the company's time clocks. Interpreting the provision protecting employees who "file" a complaint, the Court held that the dictionary definition of "file" did not necessarily limit the scope of its use to written complaints. Because the word's ambiguous usage in other parts of the Act did not provide guidance to its meaning, the Court turned to "functional considerations" to determine whether the phrase "file any complaint" included oral complaints. First, the Court asserted that not allowing an individual to receive protection for oral complaints would undermine the basic objectives of the FLSA. Second, the National Labor Relations Act (NLRA), which the Court posited had similar enforcement needs, has been given a similarly broad interpretation. Third, taking into account Congress' delegation of enforcement powers to administrative agencies, the Court also gave weight to the interpretation of both the EEOC and the DOL. According to both of these agencies, the term "file any complaint" includes both oral and written complaints. T h e Court also held that to fall within the protection of the anti-retaliation provision, a complaint "must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."

In *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428 (4th Cir. 2012), the Fourth Circuit held that *Kasten* did not specifically address whether intracompany complaints are protected under the anti-retaliation provision, but followed the U.S. Supreme Court's reasoning finding they are. The court also distinguished its decision in *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360 (4th Cir. 2000), because that case addressed the provision in the anti-retaliation statutes protecting an employee who "has testified or is about to testify." In *Ball,* the Fourth Circuit held that the term "about to testify" does not apply when no complaint or administrative proceeding is pending; the existence of a "proceeding" is essential to the statutory circumstance. In *Minor,* the court noted that *Ball* interpreted the testimony clause, not the complaint clause. *See also Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (*en banc*) (internal complaint to employer is protected activity under § 215(a)(3)).

Applying the standard for retaliation in Title VII cases set forth by the U.S. Supreme Court in *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006), the Fourth Circuit held that "a plaintiff asserting a retaliation claim under the FLSA need only allege that his employer retaliated against him by engaging in an action 'that would have been materially adverse to a reasonable employee' because the 'employer's actions … could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008). The Fourth Circuit held that the plaintiff had alleged such an action in this case – that his employer sued him for fraud after he was no longer employed, and that the lawsuit was filed with a retaliatory motive and without a reasonable basis in fact or law. Thus, the court found that the trial court erred in granting summary judgment on the plaintiff's retaliation claim.

The DOL has issued a fact sheet on retaliation, which is available on the agency's web site. *See Fact Sheet # 77A: Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)*, http://www.dol.gov/whd/regs/compliance/whdfs77a.pdf.

B. Back Pay Awards to Undocumented Aliens. The U.S. Supreme Court in *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002), held that the National Labor Relations Board (NLRB) could not award back pay to an illegal alien because to do so would run counter to the policies of the Immigration Reform and Control Act (IRCA), which prohibits the employment of illegal aliens. Subsequent to *Hoffman*, a federal court in California held that an illegal alien who claimed his employer reported him to the INS in retaliation for his successful claim for back wages under the FLSA could proceed with his case. *See Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002). The court held that *Hoffman* did not preclude a claim for back wages for work performed but for which the employee was not paid, even if the employee was an undocumented alien. However, in *Lucas v. Jerusalem Café,* 721 F.3d 927 (8th Cir. 2013), the Eighth Circuit held that undocumented workers were entitled to recover for unpaid overtime and minimum wage violations under the FLSA. In *Lucas*, the employer failed to properly complete Form I-9s verifying its workers' employment eligibility. The workers later sued the employer for unpaid minimum and overtime wages. A jury ruled in favor of the workers, and the employer appealed this decision to the Eighth Circuit. The court of appeals rejected the employer's argument that the workers could not recover overtime or minimum wage because they were undocumented workers. In doing so, the court noted that employers who unlawfully hire unauthorized workers must otherwise comply with federal employment laws. Addressing the decision in *Hoffman,* above, the court reasoned that requiring the payment of overtime and minimum wage for undocumented workers reduces any economic incentive to hire undocumented workers. Conversely, exempting unauthorized workers from overtime and minimum wage would frustrate the purposes of the IRCA because the acceptance of substandard wages and working conditions for undocumented workers could seriously depress the wage scales and working conditions of authorized foreign workers.

C. Unpaid Wages. The failure to issue paychecks promptly when due has been held to be a violation of the FLSA. *See Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993) (reading a requirement of promptness into the FLSA and holding that wages are "unpaid" for purposes of the FLSA unless they are paid on the employee's regular payday).

VII. FLSA ENFORCEMENT

A. Inspections and Investigations by WHD.

1. In General. A WHD investigator may show up at an employer's place of business unannounced or after making an appointment. Investigations may be conducted at random or may be based on employee complaints, but the reason for the investigation does not have to be disclosed. Most investigations seem to be based on complaints by former employees. An investigator usually will ask to see all payroll and time records for a two-year period and may want to speak with employees. Employers may retain legal counsel instead of providing immediate access to records and employees. Employers should consider not routinely turning over records of any type without prior consultation with counsel.

The investigators apply regulations and official interpretations found in the Code of Federal Regulations to specific factual situations. Just as findings of liability need not be readily accepted, the employer should not rely on the investigator's failure to find liability. An employer's reliance on informal statements by investigators does not provide a defense in future situations. Indeed, in situations involving employee complaints, investigators do not always conduct an all-encompassing investigation of all possible wage and hour issues. Investigators do not, however, limit their inquiries only to the employee who has filed a complaint. Instead, the investigator may review the cases of all similarly situated employees, and perhaps others.

The investigator consults with his or her superiors in the local area offices, and as needed with administrators in the Regional WHD offices and the Regional Solicitor's office. In most cases, employers or their legal representatives will not deal with the investigator's superiors, although it may be necessary to do so if problems develop in dealing with a particular investigator, or if there are substantial questions of fact and law.

2. Subpoenas: Removal of Records. The government has subpoena power to aid its inspections and investigations, but obtaining and enforcing subpoenas is time consuming.

Without a subpoena or court order, the investigator cannot examine or remove records from the employer's place of business or attorney's office unless the employer consents. If removal is permitted, an itemized receipt should be obtained. The employer has discretion regarding whether to allow the investigator to make photocopies of any records at the employer's place of business.

The U.S. Supreme Court has held that the DOL can, without a search warrant, issue an administrative subpoena requiring the production of documents. *See Donovan v. Lone Steer*, *Inc.*, 464 U.S. 408 (1984). In *Donovan*, the Court explained that the DOL did not seek nonconsensual entry and search at nonpublic areas of protected premises.

3. Post-Investigation Conference. At the conclusion of the investigation, the investigator will have a conference with the employer to discuss the findings. If the investigator feels there are violations, the employer is advised of this and what is necessary to bring the employer's operation into compliance with the FLSA. The investigator will attempt to obtain an agreement from the employer to comply with the provisions of the Act in the future and to remedy any past noncompliance by payment of unpaid minimum or overtime wages as found by the investigator. Depending on the circumstances, actual calculations of back wages may be made by the investigator or left to the employer after agreement is reached on general terms for settlement and the method of calculation to be used. If there are factual discrepancies or omissions, such as in regard to actual hours worked, employee duties or wages, a number of conferences may be held in an effort to resolve the factual situation to which the "law" has been applied by the investigator.

Acceptance by an employee or former employee of payment supervised by the WHD constitutes a waiver of any right the employee may have under 29 U.S.C. § 216(b) to liquidated damages and attorney fees in addition to any back pay that may be owed.

4. Courses of Action After Finding of Liability. If the WHD finds liability but the employer does not settle, the Division may forward the matter to the Solicitor's Office of the DOL for court action. Alternatively, the Division may advise the employee(s) that the Division has found that she or he is owed certain amounts as unpaid minimum or overtime wages and that the employee(s) is free to have an attorney of his or her choosing file a court action. There is no requirement that an employee file a complaint with the WHD before resorting to a court action.

5. Arbitration of FLSA Claims. FLSA claims can be properly resolved through arbitration and an employee can be required to arbitrate such claims based upon a mandatory arbitration agreement contained in an employment application. *See Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003) (account executives' overtime claims under FLSA were subject to arbitration agreement but arbitrator had authority to enforce statutory rights in conflict with contractual limitations and to sever unenforceable terms); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) (finding arbitration agreement enforceable even though the arbitration procedure did not permit class action claims). *See also Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (upholding the validity of a mandatory arbitration agreement containing a class action waiver and ordering the arbitration of an employee's collective action under the FLSA; rejecting the NLRB's analysis in *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), which held that class action waivers in mandatory arbitration agreements violate the NLRA[4]).

6. Removal of FLSA Actions Filed in State Court. The U.S. Supreme Court has held that FLSA lawsuits filed in state court can be removed to federal court. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). In *Breuer*, the Court held that language in the FLSA, which states that a case "may be maintained against any employer … in any Federal or State court of competent jurisdiction," did not mean that a claim brought in state court could not be removed to federal court. The Court's decision resolved a split of authority among the federal appeals courts on this issue.

B. Penalties for Violations of FLSA.

1. Recovery of Unpaid Wages and Liquidated Damages. FLSA actions may be brought in state or federal court. An employee or group of employees may recover unpaid wages by direct court action (§ 16(b)) or through the Solicitor's Office of the DOL (§ 16(c)). In both situations, the employee is entitled to a jury trial. The court, in its discretion, may award liquidated damages up to an amount equal to the unpaid wages. No liquidated damages will be awarded, however, if the employer acted in good faith and had reasonable grounds to believe it was not violating the FLSA.

Private settlements between the employer and employee as to back wages only may not completely protect the employer against claims for liquidated damages. Court costs and attorneys'

4 The Fifth Circuit has since overruled the Board's decision in *D.R. Horton*. *See D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013).

fees may be awarded to successful plaintiffs in an employee action. Successful defendants may recover attorneys' fees and costs against private plaintiffs in state court proceedings, and recovery against the federal government may be possible for smaller employers under the Federal Equal Access to Justice Act, 28 U.S.C. § 2412, *et seq.* But, generally, a prevailing defendant in an FLSA action may **not** recover its attorneys' fees.

In *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247 (5th Cir. 2012), the Fifth Circuit upheld the private settlement of employees' claims for unpaid overtime under the FLSA. The court held that "the payment offered to and accepted by Appellants, pursuant to the Settlement Agreement, is an enforceable resolution of those FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves." The court distinguished the Eleventh Circuit's decision in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982), in which the court held that FLSA claims may not be settled without the approval of the DOL or the courts. The Fifth Circuit noted that the dispute in *Lynn's Food Stores* arose as a result of a DOL investigation and "the employees seemed unaware that the Department of Labor had determined that Lynn's owed them back wages under the FLSA, or that they had any rights at all under the statute. There is no evidence that any of the employees consulted an attorney before signing the agreements. Some of the employees who signed the agreement could not speak English." *Id.* at 256, n. 10 (quoting *Lynn's Food Stores,* 679 F.2d at 1353-54). In *Martin,* the court found that the employees were already benefitting from legal counsel before the Settlement Agreement was signed. "The money Appellants received and accepted, pursuant to the Settlement Agreement, for settlement of their bona fide dispute did not occur outside the context of a lawsuit, hence the concerns that the Eleventh Circuit expressed in Lynn's Food Stores are not implicated." *Id.* at 256.

2. Civil Monetary Penalties. Employers are subject to a penalty of up to $11,000 per violation for child labor violations. 29 C.F.R. § 579.1. Additionally, the GINA amended the FLSA's child labor penalty provisions to impose a civil penalty of up to $50,000 for each child labor violation that causes the death or serious injury of any employee under 18 years of age. This penalty may be doubled where the violation is a repeated or willful violation. The law defines "serious injury" as: permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation); permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part. Additionally, up to $1,100 in penalties may be assessed against any person who "repeatedly or willfully" violates the minimum wage or overtime pay requirements. 29 U.S.C. § 216(e). (WHD interpretation is that up to $1,100 per violation may be assessed.)

3. Injunctive Relief. Injunctions to restrain future violations and obtain unpaid wages may be sought by the Solicitor's Office without a jury trial. If settlement is reached only after an injunction action is filed, the DOL will seek a consent injunction as a part of the settlement. In recent years, the DOL's insistence on an injunction has become a serious stumbling block to settlement. Unless the injunction is limited by its terms, the order against future violations of the FLSA may be held to run in perpetuity, in effect eliminating the FLSA's three-year statute of limitations.

When an injunction is in effect, the DOL can return to court by merely filing a petition to hold an employer in contempt. The court may also impose fines. In addition, the court may assess the costs of investigation and litigation incurred by the DOL in pursuing the petition for contempt. The petition for contempt also may be based on alleged violations of the FLSA that were not part of the prior investigation that led to the consent injunction.

The usual two- or three-year statute of limitations may not be applied in a contempt proceeding, because violation of an injunction is a violation of a continuing court order. Expedited hearing and discovery procedures may also apply. There is even a remote possibility of incarceration of the employer or the employer's officials, depending on the circumstances involved.

4. Criminal Penalties. Criminal penalties are enforced by the U.S. Attorney General against willful violations of the FLSA, but are rarely sought. There is a $10,000 maximum fine and a six-month maximum term of imprisonment, but there is no imprisonment for a first offense. Criminal penalties may also be assessed under state law. Egregious situations may result in criminal prosecution, however. For example, in October 2013, the DOL announced that a company and its officials had been found guilty of felony counts, including making a false statement, aiding and abetting illegal re-entry into the U.S. and withholding information about a crime. The criminal action resulted from a two-year DOL investigation, which resulted in a finding that the employer failed to pay its workers time and one-half for hours worked over 40 in each workweek. A second investigation revealed that the employer submitted false payment evidence to the department and demanded kickbacks from the workers while continuing to avoid overtime obligations. According to the DOL's press release, the employer also kept a second set of time records hidden from investigators. *See Executives with Texas-based High Performance Ropes of America sentenced to time served, company ordered to pay employees back wages, penalties,* WHD Press Release, Oct. 7, 2013, http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20131017.xml.

5. Punitive Damages. The FLSA does not provide for punitive damages. Several courts have held that punitive damages are not available under the liquidated damages provision of 29 U.S.C. § 216(b) for an unlawful withholding of overtime compensation. *See, e.g.*, *Gore v. Schlumberger, Ltd.*, 703 P.2d 1165 (Alaska 1985) (interpreting Alaska Wage and Hour Act); *Skrove v. Heiraas*, 303 N.W.2d 526 (N.D. 1981). However, the other "legal relief" provision of the provision prohibiting retaliation, 29 U.S.C. § 215(a)(3), may support an award for punitive damages or emotional distress. *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir. 1990); *but see Snapp v. Unlimited Concepts Inc.*, 208 F.3d 928 (11th Cir. 2000).

C. Action by More Than One Plaintiff. Under 29 U.S.C. § 216(b), a court action may be maintained by an employee or group of employees on behalf of themselves and all other employees similarly situated. Unlike class action lawsuits, however, in a FLSA collective action, no employee is a party plaintiff unless the employee consents in writing to become a party and the consent is filed in the court in which the action is brought. Collective action claims based on alleged FLSA violations are becoming more popular and can be expensive to defend and resolve. Recent settlements of such claims include $5 million by Sears to current and former loss prevention managers who claim they were misclassified as exempt. *See Sears, Kmart Employees Seek Court Nod For $5 Million Settlement of Overtime Claims*, 137 Daily Lab. Rep. (BNA) AA-1 (July 17, 2014). Additionally, Bank of America has proposed paying $5.8 million to review appraisers who claim they were wrongfully classified as exempt. *See $5.8 Million Settlement With Appraisers For BoA Subsidiary Gets Preliminary OK*, 124 Daily Lab. Rep. A-2 (BNA) (June 27, 2014). For more information on collective actions, see the *Class and Collective Actions* Chapter of the SourceBook.

D. Manager of Business as "Employer." An individual member of management who actively participates in running the business may be held to be an "employer" and therefore liable for unpaid wages and subject to court injunctions against violations of the FLSA. *See Donovan v. 75 Truck Stop, Inc.*, 1981 WL 2333 at *9 (M.D. Fla. 1981) ("Common sense compels a finding that [the company president] was an employer within the meaning of the Act. As president, general manager, chairman of the board and owner of 80% of the Company's stock, he actively participated in the overall supervision of the Company as well as in many day to day functions involved in operating the Company. He was frequently on the premises and several employees testified that they received specific instructions from him on how to perform their job duties. There is no question that, as far as the employees were concerned, [the company president] was the 'boss.'").

In *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26 (1st Cir. 2007), the First Circuit affirmed the trial court's determination that the president of the defendant corporation was personally liable for the company's wage and hour violations. The court noted that it has held that not every corporate employee who exercised supervisory control should be held personally liable, but found personal liability appropriate in this case because the president was the "corporate officer principally in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees' wages and schedules. He was thus instrumental in 'causing' the corporation to violate the FLSA." The court also affirmed an award of liquidated damages based on, among other things, evidence that the defendants paid employees "off the books," kept two sets of timekeeping books, failed to keep accurate records of the time worked by its employees, disguised minimum wage and overtime pay violations, and did not record the amounts of cash tips. *See also Irizarry v. Catsimatidis,* 722 F.3d 99 (2d Cir. 2013) (holding that an individual who was the chairman, president and CEO of a grocery chain was personally liable for wages under the FLSA based on his functional control over the enterprise as a whole even though there was no evidence he was responsible for the FLSA violations).

E. Prohibition on the Shipment of "Hot Goods." The FLSA prohibits the shipment in interstate commerce of any goods produced in violation of the Act's minimum wage or overtime provisions. 29 U.S.C. § 215(a)(1). The DOL has the power to bring a lawsuit to enjoin interstate shipments of such "hot goods." However, this injunction power need not be directed solely at the manufacturer who has violated the FLSA. The U.S. Supreme Court has held that the DOL may bring an injunction action against innocent secured creditors or the culpable manufacturer of the goods. *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27 (1987). In such a situation, the secured creditor can ship the "hot goods" only after the manufacturer's employees have been paid the wages they are owed under the FLSA.

VIII. MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. § 1801, *et seq.*, applies to most field workers working in agricultural employment of a seasonal or other temporary nature. The MSPA is a federal law providing certain worker protections to migrant and seasonal agricultural workers in their employment by farm labor contractors, agricultural employers, and agricultural associations. All persons and organizations subject to the MSPA must observe certain rules when recruiting, soliciting, hiring, employing, transporting, or housing workers or when furnishing them to other employers. The MSPA prohibits an agricultural employer from utilizing the services of a farm labor contractor who is not registered with the DOL. In addition to the registration requirements, an agricultural employer must obtain separate authorization to transport workers, drive vehicles transporting workers, and house workers if any of these activities are performed.

Farm Labor Contractors (FLC) must carry proof of registration and show it to any worker or other person with whom they deal in their capacity as a farm labor contractor. An agricultural employer must take reasonable steps to ensure that all FLCs providing workers have certificates of registration that are valid for the specific activities to be performed (transporting, driving, and housing).

There are certain positive actions that an employer subject to the provisions of the MSPA must accomplish to be in full compliance. These are:

- Disclose conditions of employment, in writing, to each migrant worker at the time the migrant is recruited and to each seasonal worker, in writing, upon request;
- Post a poster, at the worksite, setting forth the basic protections of the MSPA;
- Provide each worker with an itemized statement outlining hours worked, gross pay, deductions from pay and basis for deduction, each payday; and
- Pay each worker the wages promised, not less than the federal minimum wage, and pay on the date promised, no less frequently than semi-monthly.

Additionally, if applicable, an employer must:

- Post a poster disclosing the terms and conditions of housing provided;

- Ensure housing meets substantive safety and health standards prior to and during occupancy. A preoccupancy certification that standards are met must be obtained each season; and
- Ensure that workers are transported in safe vehicles, by licensed drivers, and in properly insured vehicles.

Under the MSPA, either an employee or the DOL can bring legal action to correct violations. The DOL has the authority to file for either civil or criminal relief. Criminal convictions carry fines ranging from $1,000 to $10,000, plus up to a three-year prison sentence. In private actions brought by an employee, a court may order up to $500 per worker per violation for statutory damages or an amount equal to the actual damages. A limit of $500,000 is established for any single class action.