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There is no doubt that the filing of cases under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., are on the rise. In the last four years, the number of FLSA cases filed in federal court has increased from approximately 2,898 cases in 2003 to approximately 6,735 cases in 2006.[1] As more practitioners are finding themselves in the wage and hour arena, it is important that we keep apprised of recent developments and changes in the law. This paper is to serve as an update on key substantive issues that relate to, (1) the new white collar regulations; (2) determining compensable work issues; (3) calculating the regular rate; and (4) joint employers. The paper will briefly discuss each of these issues in turn and will attempt to provide useful case law and statutory cites for further reference.

I. The New White Collar Exemptions – What are the Courts Saying?

Introduction

On April 4, 2004, the Department of Labor ("DOL") promulgated revised regulations pertaining to the white collar exemptions. The amended regulations went into effect on August 27, 2004. Although the full impact of these new regulations remains to be determined, courts have begun to interpret these regulations over the past few years. As before the amendments, courts have continued to pay homage to the long established principle that it is the employer's burden to establish the exemption and that exemptions must be construed narrowly. *Hunter v. Sprint Corp.,* 453 F. Supp. 2d 44, 50 (D.D.C 2006); *Casto v. Royal Oak Industries*, 2006 WL 322485 *3 (W.D. Mich. Feb. 10, 2006). *See Aaron v. City of Wichita*, 54 F.3d 652, 657 (10th Cir. 1995); *Baker v. Barnard Constr. Co.*, 146 F.3d 1214, 1217 (10th Cir. 1998); *Clark v. J.M. Benson, Co.*, 789 F.2d 282, 286 (4th Cir. 1986).

The courts' attempts to grapple with the issue of whether to apply the old or the new regulations arise where the plaintiff or the plaintiff class has performed work both prior to and after August 2004. While the new regulations, by their own terms, apply after August 27, 2004, different courts have taken different approaches as to whether they can be used to determine exemption issues for work performed prior to August 2004. For

[1] Legal and Business Publishing Group The Bureau of National Affairs, Inc. conducted a search via the U.S. Case Party Index - (PACER indexes) which classifies Fair Labor Standards cases as item 710. The trend has been steady from 2003 through 2006: 2,898 in 2003; 3,593 in 2004; 4,079 in 2005; and 6,735 in 2006.

example, in *Casto v. Royal Oak Industries*, 2006 WL 322485 (W.D. Mich. Feb. 10, 2006), the court applied the new regulations to work performed prior to August 27, 2004 where the plaintiff was terminated on August 27, 2004 and filed his complaint on Nov. 9, 2004. Similarly in *McDowell v. Cherry Hill Township*, 2005 WL 3132192, the court applied the new regulations to work performed prior to August 27, 2004 where the complaint was filed on March 19, 2004.[2] Other courts have split the analysis and applied the old regulations to work performed pre-August 27, 2004 and new regulations to work periods post-August 27, 2004. *See Elliot v. Flying J. Inc.*, 2006 WL 1308204 (S.D. Ga., May 8, 2006); *Berquist v. Fidelity Information Services, Inc.* 399 F. Supp. 2d 1320 (M.D. Fla. 2005) (analyzing plaintiff's compensation under the salary basis test both before August 23, 2004 and afterward); *Goff v. Bayada Nurses, Inc.*, 424 F. Supp. 2d 816 (E.D. Pa. 2006).

Salary Basis Test

The salary basis test has been retained in the new rules, but with slight modifications from the old salary basis test. In general, an exempt employee's salary may not be docked, but the old rule permitted deductions to be made in certain limited circumstances (e.g., absence from work for one or more full days for personal reasons; offsets for jury duty fees, witness fees, or military pay; or infractions of safety rules of major significance). The new rule adds an additional basis for deduction: full day deductions may be made for disciplinary reasons (e.g., violations of an employer policy prohibiting sexual harassment or workplace violence).

In addition, the new rule changes the "subject to" test of the old rule. The new rule deems exempt status to be lost only when there is an "actual practice" of improper deductions and only for employees in the same class under the same manager responsible

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[2] Other cases where Courts have applied the pre-existing FLSA regulations to employment prior to the new regulations' effective date include, *Palmieri v. Nynex Long Distance Co.*, 2005 U.S. Dist. Lexis 6057, *40 (D. Me. Mar. 28, 2005) (applying pre-August 2004 outside sales exemption where employment was prior to August 2004) (citing *Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124, 1125 n.1 (9th Cir. 2004)); *Clements v. Resource Consultants, Inc*., 2006 U.S. Dist. Lexis 36944, *12 n.1 (D. Utah June 5, 2006) (applying pre-August 2004 outside sales exemption where employment was prior to August 2004); *Miranda-Albino v. Ferrero, Inc.*, 455 F. Supp. 2d 66, 74 n.5 (D.P.R. 2006) (applying pre-August 2004 outside sales exemption where employment was prior to August 2004); *Mutch v. PGA Tour, Inc.*, 2006 U.S. Dist. Lexis 18916, **2-4 (M.D. Fla. Apr. 12, 2006) (highly compensated employee exemption applies only to employment after August 23, 2004); *Kohl v. The Woodlands Fire Dep't*, 440 F. Supp. 2d 626, 633 & n.2 (S.D. Tex. 2006) (applying pre-August 2004 administrative exemption where employment was prior to August 2004).

for the improper docking. Finally, a safe harbor is created for employers who adopt a policy prohibiting improper deductions, inform their employees of that policy, and if complaints of improper deductions are received, reimburse employees and cease making the improper deductions. The Labor Department has created a model safe harbor policy, which is available at http://www.dol.gov/esa/regs/compliance/whd/fairpay/modelPolicy_PF.htm.

A. DOL Opinion Letters

1. FLSA2006-6: Required minimum hours and make-up time under section 13(a)(1)

Facts: the employer wanted to require exempt employees to work 45 or 50 hours per week if they are officers of the company. The employer also wanted to require exempt employees to make up lost work time due to personal absences of less than a day. Although no salary would be docked for failure to make the minimum number of hours, such failure would result in discipline under the proposed policy.

Resolution: because, under the proposed policy, the employer would not dock any exempt employee's salary, the two proposed rules could be implemented without loss of the exemption. The number of hours to be worked by an exempt employee is a matter to be determined between the employer and the employee; indeed, the preamble to the final rule notes that exempt employees may be required to record or track hours or work a specified schedule. However, an employee's failure to work the minimum number of hours or make up lost time is not a violation of a "workplace conduct rule" under 29 C.F.R. § 541.602(b)(5) for purposes of imposing a disciplinary suspension of one or more full days.

2. FLSA2006-7: Deductions from salary for damage or loss of company equipment and section 13(a)(1)

Facts: the employer wanted to compel an exempt employee to pay for the replacement of equipment—laptops and cellular telephones—used in the course of his employment, if the employee damaged that equipment. The employer wanted to deduct the fine from the employee's pay or, if that was not possible, to compel the employee to pay out-of-pocket.

Resolution: such a deduction (or the requirement to pay out of pocket) would result in the loss of the employee's exempt status under the FLSA. To be paid on a salary basis, an employee must be paid "a predetermined amount . . . not subject to reduction because of variations in the quantity or quality of the work performed." 29 C.F.R. § 541.602(a). An employee must also receive "the full salary for any week in which the employee performs any work," subject *only* to the deductions listed in Section 541.602(b). A "fine for damage or loss of company equipment" is not listed as a deduction under Section 541.602(b), and thus is not a permissible deduction from salary. This interpretation is consistent with the Department's interpretations under the old rules (for old Section 541.118(a)).

The employer had also noted that a similar policy was already in place for non-exempt employees, but that enforcement of the policy had never resulted in a non-exempt employee's salary dropping below minimum wage. The Department commented that the employer would violate the FLSA if the employer were to deduct the cost of the equipment from the non-exempt employee's pay, or to compel the employee to purchase new equipment out-of-pocket without reimbursing the employee, if such deduction or failure to reimburse resulted in wages which were below the statutory minimum wage and overtime premium guarantees.

3. FLSA2005-46: Salary docking for weather-related absences and section 13(a)(1).

Facts: a healthcare institution that must remain open even during weather emergencies implemented a policy whereby an exempt employee who did not come to work (and was not otherwise excused) during a weather emergency would be docked a full day of pay; such employee would not be permitted to use a vacation or personal leave day in such a circumstance. An exempt employee arriving late—no matter by how many hours—would not be docked any pay.

Resolution: employers remaining open for business during weather emergencies may make "deductions, for full-day absences only, from the pay of an otherwise-exempt employee who chooses not to report to work for the day(s) because of the adverse weather emergencies." Section 541.602(b) is an exclusive list of the reasons for which an exempt employee's salary, guaranteed in Section 541.602(a), may be docked without

violating the salary basis test. Section 541.602(b) permits a deduction of a full day's pay when an employee does not report to work for the day "for personal reasons." The Department will consider an absence due to weather conditions as an absence "for personal reasons" and thus permit an employer to dock from that employee's salary a full day's pay. If the employee is absent for only a half-day, however, the employer must still pay a full-day's pay. *See* 29 C.F.R. § 541.602(b)(1).

B. Review of case law

Elliott v. Flying J, Inc., 2006 WL 1308204 at *2-*3 (S.D. Ga. May 8, 2006): the plaintiff was paid an annual wage of $28,000 during her employment. The parties disputed, however, whether the plaintiff's salary was subject to reduction based on the number of hours worked. Elliott was not paid her salary on three occasions, one of which was immediately corrected. The other deductions "do not support Elliott's contention that her pay was subject to reduction based on the number of hours she worked." Those two deductions resulted from full day absences while she was recuperating from surgery. These deductions are permissible under the regulations. Moreover, Flying J had already compensated Elliott for the deductions and, under the "window of correction" safe harbor under the new regulations, these two deductions were insufficient to cause Elliott to lose exempt status.

Bergquist v. Fidelity Info. Servs., Inc., 399 F. Supp. 2d 1320, 1330 (M.D. Fla. 2005): the August 23, 2004 regulations did not alter the previous regulatory requirement for what constitutes an employee being paid on a salary basis. The court also reconciled the special hourly computer employee rate of $27.63 per hour with the $455 per week salary basis test. The court found that computer employees can either qualify under the computer employee exemption if paid at the special hourly rate, or as exempt professional employees if paid a salary of at least $455 per week rate.

Chao v. Fossco, Inc., No. 03-3360-CV-S-JCE, 2006 WL 1041353 (W.D. Mo. Apr. 13, 2006): the defendants argued that restaurant managers who were paid $275 per week (and who thus qualified under the old regulations) were nonetheless still exempt under the new $455 requirements after $180 of the employees' tips were counted toward the salary requirement. The Secretary argued, and the court agreed, that tips are the property of the employee and the tip credit provisions do not apply to salaried employees.

The $180 thus could not be counted as salary and the employees were therefore non-exempt.

Goff v. Bayada Nurses, Inc., 424 F. Supp. 2d 816, 820-21 (E.D. Pa. 2006): plaintiff, a staff supervisor for an in-home care provider, was paid an annual salary in an exempt amount, but paid an additional per diem for on-call time. Because employers may provide an exempt employee with additional compensation without it being calculated as overtime pay, this additional pay did not cause the employer to lose the exemption.

Belt v. Emcare, Inc., 444 F.3d 403 (5th Cir. 2006): the court analyzed the exception to the salary basis requirement under old Section 541.3(e), which provides that the salary basis test does not apply to an employee holding a valid certificate or license permitting the practice of law or medicine or any of their branches and actually engaged in the practice thereof. The court determined that physician assistants and nurse practitioners did not fall within the language of the section and thus had to be paid on a salary basis to qualify for the exemption. (The court determined that this exception in the old regulations is not contradicted by the new regulations.)

Baden-Winterwood v. Life Time Fitness, No. 2:06-cv-99, 2007 U.S. Dist LEXIS 49777 (S.D. Ohio July 10, 2007): the company maintained a pay plan whereby its employees were paid a base rate, with a quantum of bonus pay above base if its employees met certain performance targets. However, the company reserved the right to dock the employees' base salary in future periods if the employee's performance dropped so extensively as to make the previous bonus payments over-payments. The court found that, without effecting a change in the language of the "subject to" requirement, the Secretary's new regulations "further refine" what the term means. The Secretary eliminated the portion of the *Auer v. Robbins* test that said a "significant likelihood" of improper deductions "was sufficient to cause an employee to lose his or her exemption." The new regulations specify that only an "actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis." The court noted the preamble to the rule, which noted that "any other approach . . . would provide a windfall to employees who have not even arguably been harmed by a 'policy' that a manager has never applied and may never intend to apply." Despite that the policy

spanned the period of the old and new regulations, with the possibility of differing results, the court concluded that neither under the old "significant likelihood" test nor under the new "actual practice" test would the employer's policies undermine the salary basis test. The mere fact that the company reserved the rights to make deductions did not mean that it was significantly likely that it would do so—there needed to be something more to indicate that the employee is *actually vulnerable* to having his pay reduced—and there was nothing to so indicate on the record. Actual deductions did not occur until 2005, at which point the court considered whether these deductions violated the salary basis test under the new rules. The court found that these deductions did, in fact, violate the salary basis test: they were essentially penalties to recoup earlier payments from plaintiffs when their performance dropped below what was expected from them. The bonus recoupment program thus caused the employees' base salary to decrease based on "variations in the quality or quantity of work," thus violating the salary basis test.

Duties Tests

In addition to changes in the salary basis test, the new regulations simplify and streamline the exempt duties tests, as discussed in greater detail below. Courts have generally focused on the work actually performed by the employee to determine if the exemption applies. The *Casto* court rejected defendant's estoppel argument which asserted that the plaintiff was estopped from claiming he performed non-exempt duties because his resume indicated otherwise. *Casto v. Royal Oak Industries*, 2006 WL 322485 (W.D. Mich. Feb. 10, 2006). The court determined that the actual work performed by employee (not the duties possibly suggested in a resume) are to be determinative of exempt status. *Casto v. Royal Oak Industries*, 2006 WL 322485 at *8.

I. Executive Exemption

Under the old regulations, courts used to apply a "short test" and a "long test" to determine whether an employee falls under the executive exemption depending on the employee's level of compensation. *See* 29 C.F.R. § 541.1. Under the new regulations, the long/short duties test distinction has been eliminated. To qualify for the executive employee exemption under the new regulations, all of the following cumulative tests must be met: (1) the employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week; (2) the employee's primary duty must

be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; (3) the employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and (4) the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. 29 C.F.R. § 541.100.

Even after the effective date of the amended regulations, the "primary duty" test remains critical in determining whether an employee falls within the executive exemption. Courts have focused on the importance of the duties performed by the employee at issue. In *Elliot v. Flying J. Inc.*, 2006 WL 1308204 (S.D. Ga., May 8, 2006) the plaintiff, an assistant manager at a restaurant, claimed that she was entitled to overtime compensation. *Id.* at *1. The plaintiff performed both managerial and non-managerial duties. *Id.* Using the analysis of concurrent duties articulated in the updated DOL regulations, the court explained that an employee does not lose her exempt status merely because she performs both exempt and non-exempt work. *Elliot,* 2006 WL 1308208 at *3 citing 29 C.F.R. § 541.106. However, the court emphasized that management must be the "*primary* duty" in order for the employee to retain the exemption. *Id.* Thus, the court opined that it was not enough that the plaintiff performed managerial duties. Rather, the employer had to show in order to establish that the employee was an exempt executive, that these managerial duties were in fact her primary duties. *See Elliot,* 2006 WL 1308204 *4 (denying employer's summary judgment motion holding that even if employee performed most if not all of the management duties listed in 29 C.F.R. § 541.102, there were still factual questions about her what her primary duty was).

Courts have ruled that the performance of some executive duties by the employee does not necessarily establish that the employee is an exempt executive. Rather, there must be a showing that these managerial duties were the employee's "primary duties," especially if there is evidence that the employee's time is spent on manual labor. *Johnson v. Target Corp*, 2006 WL 572014 (not reported). The plaintiff in *Johnson* was a Executive Team Leader in Logistics. The team replenished merchandise throughout the

store as needed. Although it was undisputed that the plaintiff performed managerial tasks, the significance of these tasks and whether or not these were his primary duties were questions of fact for the jury and, thus, summary judgment for Target was precluded. *Johnson*, 2006 WL 572014 at *6.

Similarly, in *Waugh v. Greenblades of Central Florida, Inc.,* 2007 WL 2071382 (M.D. Fla. July 13, 2007), the court ruled that summary judgment was inappropriate since the importance of the managerial duties in relation to the plaintiff's other duties was in dispute. Plaintiff, a "Project Manager" for a landscaping and irrigation company worked on site at a client location and was responsible for doing some supervisorial work. He testified that, although he performed a number of duties of an executive nature (such as, providing work schedules to the crews, inspecting the work performed, determining what materials were needed to complete work, reviewing for accuracy the time sheets from employees), he spent 75% of his time doing hands-on work on the irrigation equipment. The court determined that summary judgment could not be granted since there was a genuine issue of fact as to whether plaintiffs' primary duty was managerial. *Id.* at 4.

In reaching a different conclusion, the court in *DePew v. ShopKo Stores, Inc.*, 11 WH Cases2d 1353 (D. Idaho May 30, 2006) emphasized that percentages of managerial versus non-managerial work, while instructive, were alone not determinative of an employee's exempt or non-exempt status. The plaintiffs here, assistant managers for a retail store, had once spent the majority of their time performing the managerial duties of selecting, training, motivating, and leading team members. However, after some corporate restructuring, these managers had less discretion and instead did more non-managerial work. In this case, nearly 60% of their work was non-managerial (operating cash registers, collecting carts, and cleaning restrooms). *Id.* at 11. Even with this percentage in mind, the court ruled that the managers' primary duty remained management – that is selecting, training, and motivating employees – and therefore, according to the court they were exempt. *Id.* at 12.

In determining whether employees' duties are primarily managerial, courts seem to be looking at both the relative time and importance of the managerial and production duties. One court though, in addition, has also looked at the employee's resume as part of their determination of an employee's "primary duty." For example, in *Goff v. Bayada*

Nurses, Inc., *supra*, 424 F.Supp.2d 816, 818-819 the court looked to the plaintiff's resume which stated that while she worked for the defendant, she: trained, interviewed, supervised, and evaluated staff; was responsible for scheduling, selecting new hires, maintaining production records, handling employee complaints and grievances and disciplining employees. Thus, the court determined based on the statements on her resume, together with other evidence of her management duties, that the plaintiff's primary duty was in fact management. *Id.* at 822. Note that this case should be compared with *Casto,* wherein the court rejected an employer's estoppel argument with regard to statements the employee made on his resume *prior* to working for defendant. *Casto*, 2006 WL 322485 at *4 (discussed above).

Since the promulgation of the new regulations, courts have had an opportunity to construe the requirement that an exempt employee must "customarily and regularly direct work of other employees." It appears that the courts will strictly construe the "80-hour rule" – that is, an exempt employee must supervise at least 80 hours of subordinate time (2 full-time employees in an average work week), except where a specific industry standard is less than 80 hours, to be considered exempt. *See Perez v. RadioShack Corp.*, 386 F.Supp.2d 979, 2005 WL 2897378 (N.D. Ill. 2005). In *Perez,* the court also held that in adding together supervised hours of a number of employees, a lunch hour could not be considered as part of the 80 hour calculation of subordinate time that an employee must supervise to be considered exempt since the court presumed that an employee is not supervised during lunch breaks. *Id.*

Following the issuance of its new regulations, the Department of Labor has issued opinion letters construing its regulations and finding the following positions to be exempt:

Police lieutenants, police captains, and fire battalion chiefs: Wage and Hour Letter FLSA2005-40 (October 14, 2005). According to the DOL, the salary requirements and supervision requirement were met for these positions. Also, the job description of these employees suggested that their primary duties – supervising other employees, deploying patrols, conducting training courses, disciplining employees – were managerial. The DOL stated that so long as the job description matched what these employees actually do, they would qualify as exempt executives.

Store managers who are not physically supervising employees: Wage and Hour Letter FLSA2006-35 (September 21, 2006). The DOL opined that a store manager who is responsible for store employees (interviewing, selecting, and training employees; setting and adjusting the rate of pay and hours of work; directing work; maintaining sales records; appraising employees' production; disciplining employees, etc.) need not be present in the store to be considered exempt so long as he or she remains responsible for ensuring that the company policies and his or her instructions are carried out by all subordinates. The DOL opined that the store manager could do this by following up on daily tasks assigned, monitoring employee productivity, and ensuring sales goals are met by reviewing sales reports. Thus, according to the DOL, so long as the supervisor still engages in managerial duties, his or her simultaneous physical presence with the other employees he or she supervises is not a requirement for the exemption.

II. Administrative Exemption

Under the new regulations, an employee must meet the following cumulative requirements to be considered an exempt administrator:

1. the employee must receive compensation of not less than $455 per week;
2. the primary duty must be the performance of office or non-manual work directly related to management or general business operations; and,
3. the employee must exercise "discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200.

This new test for the administrative exemption is similar, at least in certain respects, to the old test. The required primary duty—that the administrator's "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" and that this "primary duty includes the exercise of discretion and judgment"—remains similar. That the discretion and independent judgment must be exercised "with respect to matters of significance" is arguably a new addition to the rules, however. Despite suggestions in the preamble that certain provisions do not represent changes to the old regulations, whether that is indeed true has been a point of contention and remains to be seen as the case law develops.

The new rules also specify a number of occupations that may meet the duties requirement provided that they have certain specified job duties. The examples set forth in 29 C.F.R. § 541.203 include insurance claims adjusters, financial services employees, certain team leaders of major projects, and human resource managers who formulate or interpret employment policies. However, section 541.203 does not establish that all persons holding such titles are necessarily exempt administrators. They still must meet the duties requirements, and exercise discretion and independent judgment within the meaning of the regulations. Job titles are insufficient to establish the exempt status of an employee. 29 C.F.R. § 541.2.

The new rules specify that the use of manuals or guidelines does not per se defeat the requirement that the exempt employee exercise discretion and independent judgment, so long as the employee is not simply applying established procedures "within closely prescribed limits." However, the exercise of discretion and independent judgment implies that the employee has authority to make an independent choice free from immediate supervision. The exercise of discretion and independent judgment within the meaning of the regulations is different from merely exhibiting the use of skill and knowledge. *See* 29 C.F.R. § 541.202.

In *Cusumano v. Maquipan International Inc.*, 2005 U.S. Dist. LEXIS 30257 (M.D. Fla. Nov. 30, 2005), the court applied the new regulations and ruled that an employee was not exempt in part based on the application of the administrative production dichotomy. *Cusumano* sold pastries, bread, and baked goods. While the plaintiff was hired as warehouse supervisor or a branch manager, he was trained in other tasks such as baking and displaying products. He visited account customers, trained employees on equipment and products, and demonstrated products to the consumer. He also conducted sales calls, made deliveries, repaired equipment, installed equipment, and dealt with customer complaints. *Id.* at 1217. Plaintiff asserted that he spent 80 % of his time on manual work and 20% of his time on sales duties. The court entered judgment in favor of the plaintiff because the defendant was not able to show that the 20 % of time the plaintiff spent on non-manual work was directly related to the employer's management or general business operations. Rather, the tasks appeared to be related to the employer's day-to-day production of selling products, baked goods, and bread.

Similarly, applying California law, the court in *Eicher v. Advanced Business Integrators, Inc.*, 151 Cal.App.4th 1363 (Cal. Ct. App. 2007), focused on the distinction drawn by California and federal authorities between employees who play an "administrative role" in the business – *i.e.,* doing work that is directly related to the policy-making or general business operations of the employer or its clients – and employees who are engaged in activities that constitute the primary business purpose, or "core day-to-day business," of the employer or its customers. The court determined that an employee who engaged in implementing a software product at customer venues and supporting the product for customers was not employed in a capacity that would affect the general operations or policy making of his employer's business. Thus, the employee was not considered an exempt employee. Rather, the plaintiff's duties were part of his employer's "core day-to-day business" (or its "production work").

In *Goff v. Bayada Nurses, Inc.*, 424 F.Supp.2d 816, a supervisor at an in-home nursing care provider who managed cases and dealt with customers to ensure that standards were being met with regard to patient needs, was found to be an exempt administrative employee. The business involved providing nurses for patients, and the plaintiff matched nurses' skills and abilities to patients, ensuring that company standards were met. *Id.* at 824.

However, a recent DOL opinion letter regarding case managers at a service provider for individuals with disabilities warranted a different result. Wage and Hour Opinion Letter FLSA 2007-7 (February 8, 2007). Here the case managers performed work free of supervision, did not operate on written protocols, and were independently responsible for development of a plan of care for each consumer. The DOL opined that these duties were more related to providing the Company's day-to-day services rather than part of the administrative functions directly related to the management or general business functional areas in 29 C.F.R. § 541.201(b)). Thus, case managers were non-exempt under these circumstances.

There has been a great deal of litigation and a number of repeated cases, as well as Department of Labor opinions, pertaining to insurance claims representatives and claims adjusters. In *In Re Farmers Insurance exchange Claims Representatives Overtime Pay Litigation*, 481 F.3d 1179 (9th Cir. 2007), the Ninth Circuit reversed a judgment of

over $53 million against Farmers for unpaid overtime owing to claims representatives. The Ninth Circuit looked to language in the new regulations found at 29 C.F.R. § 541.203 (notwithstanding that the relevant employment largely pre-dated the effective date of new regulations), reasoning that the preamble to the new regulations states that Section 541.203 "does not represent a change in the law." That is, the Ninth Circuit opinion stated that the new regulation is "consistent with existing section 541.205(c)(5)" which provided that "directly related to management policies or general business operations" is met by "claim agents and adjusters." The Ninth Circuit pointed to Section 541.203 of the new regulations which provides that "insurance claims adjusters generally meet the duties requirements for the administrative exemption" if certain specified duties are performed. The appellate court found that the district court's findings tracked almost word-for-word the description of exempt activities in *new* Section 541.203. The Court of Appeal also relied on an opinion letter issued by the Department of Labor in 2002, which did not address the administrative-production dichotomy. *See also, Cheatham v. et al. v. Allstate Insurance Company*, 465 F.3d 578 (5th Cir. 2006) (ruling that claims adjusters were not entitled to overtime compensation). *But see, Robinson-Smith v. GEICO*, 323 F.Supp.2d 12 (D.D.C. 2004) (auto claims adjuster, but not necessarily other levels of adjusters, did not exercise independent judgment and discretion and, thus, were not exempt.).

The DOL has issued a number of other opinion letters pertaining to insurance claims personnel. In an opinion letter dated August 20, 2006, the DOL found some claims handlers to be non-exempt and some to be exempt depending on the level of discretion they exercised. *See* FLSA 2005-25 (finding Claims Specialists I, who handled bodily injury and workers compensation claims in an office setting to be non-exempt; yet finding Claims Specialist II, who were less closely supervised to be exempt administrators).

Just recently, a California Court of Appeals, interpreting California state labor standards (but also looking to federal case law and DOL regulations), has ruled that claims adjusters are *not* exempt employees. *Harris v. Superior Court*, 154 Cal.App.4th 164 (2007). Here, the focus remained on the administrative/production worker dichotomy. Plaintiffs contended that all class members do work falling squarely on the

production side of the dichotomy. The court embraced this distinction and reasoned, re-affirming *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 105 Cal.Rptr.2d 59, that employees doing exempt administrative work are "engage[d] in 'running the business itself or determining its overall course or policies,' not just in the day-to-day carrying out of the business' affairs." *Id.* at 177 (citing *Bothell v. Phase Metrics, Inc.* 299 F.3d 1120, 1125, (9th Cir.2002) (quoting *Bratt v. County of Los Angeles* 912 F.2d 1066, 1070 (9th Cir.1990))). The court pointed out that while the workers in *Harris* did "investigate and estimate claims, make coverage determinations, set reserves, negotiate settlements, make settlement recommendations for claims beyond their settlement authority, and identify potential fraud", "[n]one of that work is carried on at the level of management policy or general operations." *Id.* at 178. Instead, this work was part of the defendant's day-to-day business operations. Thus, the California court determined that plaintiffs cannot be exempt administrative employees under either California Wage Order 4 or California Wage Order 4-2001. Some believe that there may be a substantial divergence growing between some federal court decisions and California law on the "administrative/production" dichotomy, with the California court calling "misguided" the analysis of some federal courts that had reached an opposite conclusion. *Id.* at 182 n. 9; declining to give deference to the DOL's 2002 letter because it did not find it thorough, persuasive, or well reasoned; and rejecting some federal courts' move away from the production/administrative dichotomy as an "outmoded remnant of a bygone industrial age." *Id.* at 188.

As noted previously, under the executive exemption, courts have refused to permit employers' characterization of their employees, manifested through their job titles, to establish that the employee is exempt under the administrative exemption. *See Casto v. Royal Oak Industries*, 2006 WL 322485 (court denied the employer's motion for summary judgment in a case brought by a "metallurgy expert" who advised defendant and customer on metallurgy issues, where plaintiff presented evidence that he mechanically tested products without exercising any real discretion or judgment).

To qualify for the exemption, an employee must do more than exercise routine discretion or exhibit skill and knowledge. In *Soliz v. Associates in Medicine, P.A.*, 2007 WL 2363304 (S.D. Tex. Aug. 17, 2007), the plaintiff was a collection representative who

relayed information to insurance companies. Plaintiff Soliz testified that she was not allowed to make decisions about what accounts to attempt to collect on and which to write off. She said she created and balanced daily closing sheets following the company's guidelines. The court reasoned that the term "discretion and independent judgment" is frequently misapplied in cases where the level or importance of the matters as to which the employee makes decisions does not rise to the necessary level for the administrative exemption to apply.

The following DOL opinion letters indicate that persons handling the following jobs (based on the hypothetical facts presented to the DOL) are not exempt administrators:

Case managers at service provider for individuals with disabilities: Wage and Hour Opinion Letter FLSA 2007-7 (February 8, 2007). Here the case managers performed work free of supervision, did not operate on written protocols, and were independently responsible for development a plan of care of each consumer. However, the DOL opined that these duties were more related to providing the Company's day-to-day services rather than part of the administrative functions directly related to the management or general business functional areas in 29 C.F.R. § 541.201(b)).

Copy editors at a direct marketing firm that focuses on book sales and promoting sales through book clubs: Wage and Hour Letter FLSA2006-45 (December 21, 2006). Even though the primary duty of copy editors is "office or non-manual work" (i.e. reviewing materials; checking for adherence to copyright and trademark laws), the DOL opined that this work is not directly related to the management or general business operations of the employer or the customers." Rather, the work is related to its *production* and done as part of day-to-day operations. Additionally, the duties of the copy editors involved the use of skill (checking materials for grammar, spelling, clarity, etc) rather than the exercise of "discretion and independent judgment."

Paralegals: Wage and Hour Letter FLSA2005-54 (Dec. 16, 2005). Paralegals do not meet the qualifications for the administrative exemption in part because they do not exercise discretion and independent judgment in their primary job duties and they do not themselves formulate policies, provide expert advice, or plan business objectives.

Moreover, while they exhibit skill and knowledge, they do not exercise discretion and independent judgment within the meaning of the regulation.

According to recent DOL opinion letters looking to assumed facts, the following positions are considered *exempt*:

Film location managers: Wage and Hour Letter FLSA2006-46 (December 21, 2006). The DOL found that the duties of a Location Manager regularly included the exercise of discretion and independent judgment and is an exempt administrator. It was assumed that the Location Manager selected the film's location, negotiated the site rental, oversaw enforcement of rules for locations, and represented the production company in various matters.

Loss prevention managers (LPM): Wage and Hour Letter FLSA2006-30 (September 8, 2006). The primary function of a LPM is implementation of a loss prevention program for the store together with supervising loss prevention associates. Implementation of the program requires analyzing store inventory, identifying paperwork controls, and conducting compliance audits.

School Resources Officers (SROs): Wage and Hour Letter FLSA2007-8 (February 15, 2007). SROs' primary duty is to provide for the safety and security of students, staff, and property within the school by planning to prevent safety and security problems and responding to them immediately. These duties include the exercise of discretion and independent judgment about the use of a discretionary budget, whether to charge a student or party with a violation, and whether to refer a case to the district attorney for prosecution. Moreover, the SROs perform office or non-manual work that consists of training, providing recommendations and advice to faculty and staff on traffic flow, video surveillance, emergency preparedness, and safety. The DOL opined that since the SROs work at public education entities rather than police department or security companies (who primary operations are law enforcement and security), the SROs' work could not be categorized as production.

III. Professional Exemption

The professional exemption under the new rules is similar to the old rules. As before, there are two types of exempt professionals: learned professionals and artistic professionals. Learned professionals must perform work requiring advanced knowledge

(i.e., work that is predominantly intellectual in character including the consistent exercise of discretion and judgment, and not routine mental, manual, mechanical, or physical work), this work must be in a field of science or learning, and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction (for which an academic degree, although not required, is prima facie evidence). The rule recognizes a number of professions that will typically qualify for exemptions, including registered or certified medical technologists, registered nurses, certified public accountants, chefs, and athletic trainers, as well as doctors, lawyers, engineers, and actuaries. Creative professionals will continue to have as their primary duty the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.

A. DOL opinion letters

1. FLSA2007-5: Radiology technologists

Facts: Radiology technologists ("RTs") essentially perform X-Rays and other medical imaging services, including preparing patients for the procedure, administering contrast or other chemicals, set technical factors on the equipment, operate the equipment, and process the film. They also clean and maintain the room and equipment as necessary, without need for supervision. RTs must complete a 2 or 3 year accredited training program, pass an examination, and meet continuing education requirements.

Resolution: RTs are not exempt under the professional exemption. Assuming they receive $455 per week on a salary basis they nonetheless do not have a primary duty requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. That RTs must pass a specialized two to three year training program does not make them a holder of an advanced degree as required by the regulation. The regulations specify exemptions for registered or certified medical technologists who complete three years of pre-professional study plus a fourth year of professional course work in a school of medical technology; an RT's academic requirements are less than that. That is, a mandatory, accredited certification program is not equivalent to specialized academic instruction. In addition, the RT work is not work predominantly intellectual in character, requiring the consistent

exercise of discretion and judgment, but is rather routine mental, manual, mechanical, or physical work under Section 541.301(b) & (d).

2. FLSA2006-26: Respiratory therapists

Facts: Respiratory therapists ("RTs") must be licensed by the state, which requires credentialing by a national organization by passing a certification exam and completing an accredited respiratory therapy educational program. These educational programs are two or four years, and lead to an associates or bachelors degree, respectively, and must include a specific curriculum.

Resolution: RTs may be highly skilled, but their level of intellectual instruction and academic training "does not "qualify the RT occupation as one requiring advanced knowledge 'customarily acquired by a prolonged course of specialized intellectual instruction.'" Only 12% of the accredited programs in the country are at the baccalaureate level; four years of post-secondary education is not a standard prerequisite for entry into the field. The Department also noted that "[o]ur response is applicable under both the new and prior versions of the regulations, as there were no substantive changes in the long-standing educational requirements for the learned professional exemption."

3. FLSA2006-27: Senior legal analyst

Facts: A senior legal analyst has a two-year legal studies degree and eight years of experience in legal research and analysis. Ninety percent of the analyst's responsibilities include "analyzing facts, identifying the legal issues involved, and then providing [an] interpretation of the law in a memorandum format for the attorney's review." Assignments are received from attorneys by e-mail or phone, and deadlines provided. The analyst works within those deadlines and provides responses by e-mail. The analyst does not know what is done with his responses. The other 10% of the analyst's time is spent in miscellaneous legal tasks including reviewing new materials and training other office personnel on legal research.

Resolution: The senior legal analyst position does not qualify for the professional exemption. The analyst is not a learned professional because, under Section 541.301, learned professions are those where specialized academic training, with an appropriate academic degree, is generally a prerequisite for entrance into the profession. The legal

analyst position itself, like other paralegals or legal assistants, does not require a specialized degree. The Department thus determined that, unless the legal analyst possesses an advanced specialized degree in a different field, such degree is a prerequisite for entry into that field, and that knowledge is applied in the performance of the analyst duties, the analyst position does not qualify for the professional exemption.

4. FLSA2005-54: Paralegals

Facts: The employer provided details of the educational background and work activities for several paralegals; except for one instance, these details were largely irrelevant to the Department's ultimate decision.

Resolution: The paralegals are not professional employees. Section 541.301(e)(7) specifically states that paralegals and legal assistants generally do not qualify for the professional exemption because an advanced specialized academic degree is not a prerequisite for entry into the field. A paralegal may qualify as an exempt professional, however, when the individual has acquired an advanced specialized degree (e.g., in engineering) and is hired to provide legal advice within that specialized area (e.g., design defects).

5. FLSA2005-9: Paralegal

Facts: A paralegal has a four-year degree from an accredited university and a paralegal certificate, and has taken continuing legal education courses.

Resolution: The Department, directly applying the new regulations, determined that paralegals are not exempt. Under Section 541.301(e)(7), "[p]aralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field." Paralegals can possess a general four-year degree, but specialized paralegal programs are generally two-year associate degrees. The only way that a paralegal can qualify for the learned professional exemption is if the paralegal is a specialist in another area: i.e., they "possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties." Thus, an engineer hired as a paralegal to provide advice on product liability cases could qualify for the exemption.

6. FLSA2005-50: Social workers and caseworkers

Facts: Social Workers need a master's degree in a specialized field, plus two years of post-masters experience. They make independent decisions about what therapy to provide to the individuals and families with whom they work. They function as therapists and may provide 24-hour crisis services. Caseworkers must have a bachelor's degree in social sciences. Caseworkers provide case management services (e.g., placing children for adoption or adolescents in foster care). They may also provide support groups for those adolescents or prospective caregivers. They also assess client needs and provide therapy and/or counseling.

Resolution: Social workers are exempt learned professionals and caseworkers are not. Social workers must use their advanced knowledge in their work; it thus has the recognized professional status required by the regulation. Caseworkers, however, need possess only a bachelor's degree in the social sciences. This is not the "specialized" academic training necessary to qualify an occupation for the learned professional exemption; under Section 541.301(d), 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 and in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. Because the only prerequisite for Caseworkers is a bachelor's degree in social sciences, Caseworkers do not meet the requirements of the learned professional exemption.

7. FLSA2005-39: Substitute teachers

Facts: A school district employs substitute teachers. Some substitutes have teaching degrees and some do not; some have bachelors' degrees and others have only 60 hours or more of college-level credits. Substitute teachers instruct students in a variety of courses, supervise students during the school day, take attendance, attend faculty meetings, grade work given to students during the day, and prepare lesson plans for the following day.

Resolution: Substitute teachers whose primary duty is teaching qualify for the special teacher exemption under Section 541.303, regardless of whether they hold a teaching certificate. Section 541.303 exempts "any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who

is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed." Thus, so long as the primary duty of the substitute teacher is teaching, as opposed to clerical or administrative tasks, then the teacher is exempt. Having a certificate is one indicator listed under Section 541.303(c) that would qualify a teacher for the exemption, but it is not a necessary one.

8. FLSA2005-38: Beauty school instructors

Facts: A college oversees a beauty school; its instructors have neither degrees nor certificates as teachers.

Resolution: The beauty school instructors are neither exempt teachers nor exempt artistic professionals. The instructors are not exempt teachers because the threshold question—whether they are employed by an "educational institution" cannot be answered. A beauty school is a post-secondary career program; whether this is an educational institutions depends in part on "whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools." As there was no evidence that the beauty school is so licensed or accredited, as indicated by Section 541.204(b), there is no way to determine that the instructors there are teachers. The instructors are similarly not creative professionals because their primary duty is not 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" as there is no indication that the instructors perform such work or that "beauty instruction is a widely recognized field of artistic or creative endeavor."

9. FLSA2005-35: Medical coders

Facts: Medical coders translate medical diagnoses and procedures into codes used for reimbursement from insurance companies in accordance with national coding standards This task requires the analysis of the patient's entire medical record and knowledge of current medical terminology. They must also take courses to maintain their credentials and at least one state board certification. Some coders possess a B.S. in Health Information Management, while others possess a two year associate degree and others possess no degree.

Resolution: Medical coders are not exempt employees, as medical coding is not a profession under Section 541.300. Coding is not generally recognized by colleges and universities as a bona fide academic discipline, and the primary duty of a medical coder does not require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." Specialized academic training must be a standard prerequisite for entry into the profession, as evidenced by an appropriate academic degree. Jobs such as medical coding that only require a general bachelors or associates degree generally do not qualify for the learned professional exemption. Finally, although "[a]ccredited curriculums and certification programs are relevant to determining exempt learned professional status to the extent they provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the occupation as required under section 541.301," the fact of certification is not determinative if it does not require a prolonged course of specialized intellectual instruction.

10. FLSA2005-28: Mechanical or electrical sales engineer

Facts: A company is engaged in producing and distributing DC motors and employs sales engineers, a position that requires a "minimum four-year degree in mechanical or electrical engineering." This position requires both sales and engineering by adapting the company's motors for new applications and then selling these designs. The engineers also provide technical support to customers. This requires the sales engineers to develop close contacts with customers' purchasing and engineering staff. The sales engineer exercises discretion and independent judgment regarding the engineering specifications required for a given product application, based on advanced engineering and product knowledge. The sales engineer also collects data and samples for "next generation" motor development; "verifies industry and market standards or developments; and makes recommendations for clarification or changes in the Company's motor designs, quality or production processes."

Resolution: The sales engineer's primary duty is the performance of exempt engineering activities and not non-exempt sales duties. They perform work that is "predominantly intellectual in character" and includes the use of discretion and judgment, not "routine mental, manual, mechanical or physical work" under 541.301(b). The

engineer has a bachelor's degree in a specialized field and applies that advanced knowledge daily in helping design and develop motor designs—a task predominantly intellectual in character. The engineer exercises discretion in determining the engineering specifications to use on a given topic and to work out the solution to an engineering problem. Second, the engineer has advanced knowledge in a field of science or learning: engineering. Third, this training is a standard prerequisite for entry into the profession: engineers must have either a BSEE or BSME degree, which requires a prolonged course of specialized intellectual instruction under Section 541.301(d). Finally, it must be determined whether the engineering or the sales tasks are predominant under Section 541.700. Here, the engineering duties are of primary importance, and any sales result only from the engineer's ability to design and support the product. Further, well in excess of 50% of the engineer's time is spent engineering rather than selling. The employee is relatively free from direct supervision as the employee travels to and deals with customers personally. Finally, the sales engineers make $20,000 to $40,000 more than sales assistants at the same company, who perform only the non-exempt sales-type work.

11. FLSA2005-26: Original and creative work

Facts: The company designs graphic art wraps. The employees at issue install wraps after on-the-job training. They travel to the site where the wrap will be installed, inspect the site, and wrap the item. These employees must take into account the wrap and the qualities of the site, and then review whether the wrap is well-positioned for advertisement effect.

Resolution: These employees apparently only install the wraps; they are not the graphic designers who create the wraps. Although the "graphic designer or graphic artist performing work that is original and creative could qualify for the creative exemption because the results of their work are dependent primarily upon the invention, imagination or talent of the employee, the ten employees who apply the vinyl wraps do not perform work that meets the requirements to qualify for the section 13(a)(1) exemption." This is because they are not artists themselves, but rather simply skilled at installing the artistic product created by another. Their work requires "diligence and accuracy" not "invention and originality."

B. Review of case law

Wang v. Chinese Daily News, Inc., 435 F. Supp. 2d 1042 (C.D. Cal. 2006): the employer, a Chinese-language newspaper, had classified its reporters as exempt creative professionals. Its reporters successfully challenged this classification. The court held that, although journalists may satisfy the duties requirements for creative professionals, their work would have to depend on "invention, imagination, and talent, as opposed to work which depends primarily on intelligence, diligence, and accuracy." Section 541.302(d) provides that reporters who only collect, organize, and record already-public information (e.g., by rewriting press releases, or gathering facts on routine community events) are non-exempt, while investigative journalists, commentators, editorialists, etc. can be exempt. Here, the newspaper's journalists, at least in the office at issue, wrote only local news pieces, with national stories being covered out of other offices, and did not otherwise perform any duties that would make them exempt creative professionals.

IV. Computer Exemption

While some courts have seen the new regulations as virtually identical to the old regulations, other courts seem to see the new regulations as providing broader exemptions for computer services personnel. In *Bergquist v. Fidelity Information Services, Inc.*, 399 F. Supp.2d 1320, the court granted the employer's motion for summary judgment under the new computer professional exemption as applied to a "computer programmer." The court began its analysis by explaining the evolution of the new computer employee exemptions. The court found that meeting the old test would also mean meeting the new test. The employee was engaged in designing programs, which work was non-routine. The employee would receive a business design from another employee, review the design, and attempt to develop a program to reflect and fulfill the design. The "computer exempt" employee would then assist the other employee with technical details, which involved intensive research to determine what technical steps were necessary and then design and develop the program. The "computer exempt" employee would plan out a project, do the designing and coding and testing, and then perform ongoing program maintenance. Based on these duties and related aspects of the job the court concluded that the employee met the computer exemption.

In *Bobadilla v. MDRC*, 2005 WL 2044938 (S.D.N.Y. August 24, 2005), the court reasoned that the new computer exemption may actually provide broader exemptions and actually may have done away with the "discretion and independent judgment" requirement, any educational requirements, and the requirement that the exemption apply only to "highly-skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly specialized knowledge." The court granted the employer's motion for summary judgment against a "network administrator" who was responsible for the implementation, support, maintenance, analyzing, and testing of networks which constituted a combination of duties described in the computer professional exemption – analysis, design, configuration, modification, and design, development, analysis and modification of computer systems or programs. The court opined that he "made actual, analytical decisions about how [the employer's] computer network should function." *Id.*

Subsequent court decisions have tried to take a more narrow approach the computer professional exemption. For example, in *Lucero v. Southern Micro Systems, Inc.*, 2006 U.S. Dist. Lexis 12653 (M.D. Ala. Mar. 8, 2006), the court determined that summary judgment for an employer with respect to a technician who diagnosed problems and made repairs on computer systems and printers would not be granted since the employee was not necessarily exempt because he engaged in diagnostic work.

The DOL opined that an IT Support Specialist was not considered exempt since his duties – installing, configuring, testing, and troubleshooting computer applications, networks and hardware – did not constitute the types of high-level computer activities required for the computer professional exemption. *See* DOL Wage & Hour Div. Op, FLSA 2006 - 42 (Oct. 26, 2006).

In *Pellerin v. Xspedius Communications LLC*, No. 04-1647, 2005 WL 3311434 (W.D. La. Dec. 5, 2005), the court denied the employer's motion for summary judgment on the old computer professional exemption language. The court acknowledged admissions that the employee had advanced skills and expertise in computer programming, that he utilized these skills in his work, that some of his work required special knowledge of computer science or software development, and that he worked primarily on debugging, maintenance, and some software development. These

admissions convinced the court that at least some aspects of the employee's work met the exemption criteria despite evidence that there was doubt concerning whether he consistently exercised discretion and independent judgment (as the old computer professional exemption required). Although the employee offered testimony that he did not work principally as a software developer, that most of his assignments involved the application of knowledge and skill, that he was closely supervised, that his assignments were routine and did not involve any decisions about how the work was to be accomplished, and that the majority of his work required following specifications provided by management and involved little more than following detailed instructions, and that similar assignments were given to new, inexperienced programmers, the court was not convinced as to the employee's exempt status.

The court in *Hunter v. Sprint Corp*., 453 F. Supp. 2d 22 (D.D.C. 2006), denied the employer's motion for summary judgment on the computer and administrative exemptions. The employee was a computer help-desk employee. According to the court, the exemption is designed to exempt "computer programmers, network designers, and software developers," *Id.* The plaintiffs' job did not involve determining hardware, software or system functional specifications, or the design, development, documentation, analysis, creation, testing, or modification of systems or programs. Moreover, the limited modifications he made – e.g., uploading code provided by vendors – did not relate to operating systems. Basically, the court determined that he was a technically-proficient help-desk employee primarily providing customer service. The court found that although some tasks could be described as "consulting," "analysis" or "testing" relating to computers, that did not mean that the position fell within the ambit of an exemption intended for programmers, network designers and software developers. As for the administrative exemption, there was no evidence his primary duties met the "directly related" test. If he had any administrative duties, they were not his primary duty. Also, the fact that he exercised discretion and independent judgment "unrelated to management or general business operations" did not render him an exempt employee.

In *Sandoval v. Sconet, Inc.*, 2006 U.S. Dist. Lexis 87795 (S.D. Tex. Dec. 5, 2006), under the new computer professional exemption regulations, the court denied the

plaintiff's motion for summary judgment on the computer professional exemption. In the face of dueling declarations, the court found that there was a genuine issue of fact.

V. Outside Sales Exemption

Outside sales employees continue to be exempt under the new rules if their primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. In addition, the employees must be "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." The new rules do, however, eliminate a requirement in the old regulations that the outside salesperson must not devote more than 20 percent of the hours worked in the workweek by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee's own outside sales or solicitations. The Department does not intend this change to be substantive, but rather only to eliminate a rule that it has recently concluded was "extremely difficult to understand."

A. DOL opinion letters

1. FLSA2007-4: Resort timeshare salespeople

Facts: A property management company employs employees whose primary duty is to sell timeshare interests in resorts to prospective owners. The first group of employees, Group One, works from locations some distance (two to five miles) away from the resort sites. Groups Two and Three work primarily at the resorts. Group One employees greet prospects at the sales office and show them an introductory film. After the film, the salesperson drives the prospects to the resort and gives them a tour of the property. If the prospect decides to purchase a timeshare interest, the salesperson returns the prospects to the sales office to handle the closing process. Group two employees do the same thing, except that they meet their customers on the grounds. Group three employees are also the same except that they schedule their own customers.

Resolution: The letter requested a determination only with respect to whether the salespersons are inside or outside salespersons under the rules—i.e., whether the salespeople are "customarily and regularly engaged away from the employer's place of business in performing their primary duty of making sales." The entire resort is the employer's place of business, similar to an agent selling lots at a "condominium"

campground or an on-site apartment rental agent. The agents are not like the sellers of lots of land in a development from the employer's model home, as the employer does not retain an interest in the lots once sold and thus are not part of the employer's place of business. Thus, the time share sales employees selling on-site are not exempt because they are not "engaged away from the employer's place or places of business" under Section 541.500.

2. FLSA2007-2: Home sales employees

Facts: Employees of a builder or developer have a primary duty of selling new homes. These employees work either out of model homes or trailers located in the development. Sales employees usually conduct all of the selling operations out of temporary sales facilities, such as model homes or trailers, which are located in or near the community where the builder is selling homes. The builder usually maintains a separate, permanent office location from which other day-to-day operations are conducted, and to which the sales employees report. Once the sales activity in the new home community is complete, the model home is returned to a residence and sold. Furthermore, these employees do not spend all their time in the model home or trailer, but rather leave one or two hours a day, one or two times a week, to engage in selling or sales-related activities, including explaining to a customer the lot size and location, and where the house will be situated on it.

Resolution: The sales employees qualify for the outside sales exemption to the FLSA. First, the sales employees' primary duty is making sales under section 3(k) of the FLSA because their primary duty is to sell newly-constructed homes; sales employees spend at most one or two hours a week on non-sales activities. All the other work—meeting with prospects, demonstrating model homes, meeting with stakeholders to ensure customer satisfaction, etc.—is either sales or incidental to sales. The same is true for sales-related paperwork, marketing efforts, scheduling appointments, calling realtors, and learning about the homes. Second, the sales employees are "customarily and regularly engaged away from the employer's place or places of business in performing their primary duty of selling newly-constructed homes." As the sales employees must frequently leave the trailer or model home to show customers various home sites, homes under construction, etc., and such activities are essential to the sales work, the sales

persons are "customarily and regularly engaged away from the employer's place . . . of business" and are exempt outside salespersons.

3. FLSA2007-1: Home sales employees

Facts: An employer is a real estate company that employs sales associates to market and sell single-family housing units in developments to the public. "Sales associates are based at the company's offices located within subdivisions that are in the process of being constructed and sold, or in temporary sales trailers outside such subdivisions, sometimes as far as 10 to 20 miles away." Sales begin in sales offices, but thereafter the salesperson takes the prospect on a tour of the community to show the amenities and to preview the units and lots for sale. The sale process then continues from the offices through follow-up calls and appointments to answer buyer questions; this following up with prospects "typically consumes up to a third of a sales associate's workweek." Sales associates close sales in the offices, but then the associate must interact with the buyer on-site as the construction process proceeds. Sales associates must also meet with independent realtors away from the business office to discuss the benefits of the homes and the community they are selling, and to visit local schools, churches, libraries, shopping, entertainment venues, and government facilities serving its communities because knowledge of community services is critical to prospective buyers. "In a typical week, the company's associates spend as much time in these activities away from the sales office or model home as they do in their in-office activities."

Resolution: The sales associates are exempt as outside sales employees. First, the sales associates have their primary duty of making sales under section 3(k) of the FLSA because their principal duty is to sell homes. Other duties are incidental and integral to the sales effort. Second, the sales associates meet the requirement that they be customarily and regularly engaged away from the employer's place or places of business in performing their primary duty of selling homes because they frequently must leave the sales office to tour the community, give tours to prospects, show lots and homes available for sale, etc. These lots and homes are not part of the employer's place of business, but rather part of the products to be sold by the sales associates. These activities away from the home office constitute a significant amount of the sales associates' typical workweek, fulfilling the "customary and regular" requirement under Section 541.500(a)(2).

4. FLSA2006-11: Mortgage loan officers and outside sales

Facts: An employer employs mortgage loan officers, some of whom perform their work in the employer's offices and some of which perform their work outside the offices. The former is excluded from this letter. The latter meet with customers to sell mortgage loan packages. They originate their own sales by contacting prospective clients and by developing and maintaining referral sources; these sales activities take them away from the employer's place of business for substantial lengths of time. While at the home office, they may meet with clients in person to sell mortgage loan packages or contact clients by telephone, mail, and e-mail. They may also obtain credit information and other necessary documentation for the loan application process. They have considerable flexibility to set their working hours and to schedule the tasks they perform during the workday.

Resolution: The loan officers appear to meet the requirements for the outside sales exemption. First, the loan officers fulfill the sales requirement of the exemption, as their principal duty is the sale of mortgage loan packages. Second, whether loan officers are "customarily and regularly engaged away from the employer's place of business" "depends on the extent to which they engage in sales or solicitations, or related activities, outside of the employer's place or places of business." Clients are almost always met at their residence or place of business, outside the employer's offices. Any activities undertaken in the employer's offices are incident to and in support of these outside sales efforts—their goal is to sell more of the employee's quota, not to support the company's sales efforts. That is, activities such as making phone calls, sending e-mails, and meeting with clients in the office are considered exempt if performed incidental to or in conjunction with the loan officer's own outside sales activities. 29 C.F.R. § 541.503. The frequency of loan origination also points to exempt status: these are activities that "normally and recurrently [are] performed every workweek [and are not] isolated or one-time tasks" under 29 C.F.R. § 541.701.

B. Review of case law

Cusumano v. Maquipan Int'l, Inc., 2005 U.S. Dist. LEXIS 30257: on the facts set forth in the administrative exemption above, the court also found that the employee was not an exempt outside salesman. Plaintiff spent only around 20% of his time actually

making sales; the remainder of the time was spent helping customers use existing ovens. Plaintiff was not even permitted to complete sales, but rather had to have his supervisor do so. Plaintiff received a straight salary; he was not paid commissions for any sales that he would have made. Thus, because plaintiff was fundamentally not a salesman, he did not qualify for the outside sales exemption, even though he did most or all of his work out of the office.

Wang v. Chinese Daily News, Inc., 435 F. Supp. 2d 1042 (C.D. Cal. 2006): the employer, discussed above in the creative professional section, also tried to exempt its advertisement salespersons as outside sales personnel. The court noted that the prior regulation's duties test was that the primary duty is making sales, and less than 20% of the employee's hours was spent in other types of work; the new test requires simply that the employee be customarily and regularly engaged away from the employer's place(s) of business in performing the primary duty of selling. The court determined that the employees were not outside salespersons under the old 20% rule, based on when the claim was brought.

In *Billingslea v. Brayson Homes, Inc.*, Civ. No. 1:04-CV-00962-JEC, 2007 U.S. Dist. LEXIS 52566 (N.D. Ga. July 20, 2007): a court had determined that the employer's place of business was the entire subdivision, and thus a salesperson selling out of a model home never left the employer's place of business, and was not an exempt outside salesperson. However, upon a motion for reconsideration based upon FLSA2007-2, discussed above, the court reversed its ruling. It found that the DOL's conclusion that only the model home itself was the employer's place of business, and that each individual lot—where the salesperson would spend a substantial amount of time—was outside that place of business was a reasonable interpretation of the regulations and was thus controlling.

II. Determining Compensable Work

The scope of what constitutes compensable working time has been subject to much litigation including *Dunlop v. City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976), *Dooley v. Liberty Mutual Insurance Company*, 307 F. Supp. 2d 234 (D. Mass. 2004), *Chao v. Akron Insulation & Supply, Inc.*, 2005 U.S. Dist. LEXIS 9331 (N.D. Ohio 2005) and most recently in *IBP, Inc. v. Alvarez,* 546 U.S. 21 (2005). These cases paved the way

for recovery of unpaid wages for the time employees spend performing pre-shift and post-shift duties, travel to and from work sites, cleaning and maintenance duties, and work performed at home when the activities at home are an integral and indispensable part of the employees principal activities.

Employees under the FLSA are entitled to compensation for "work," which is defined by the Supreme Court as an activity involving "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No.* 123, 321 U.S. 590, 598 (1944). Congress modified the FLSA by enacting the Portal-to-Portal Act to limit employer liability for "effortless" preliminary or postliminary activities. 29 U.S.C. § 254(a). However, activities that take place before or after employees commence their regular workday are compensable, "if those activities are an integral and indispensable part of the principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956); *IBP, Inc.*, 541 U.S. at 22; 29 C.F.R. § 790.7(a).

In *Dunlop*, 527 F.2d at 401, the former Fifth Circuit, found that pre-shift activities performed by electricians that involved filling out time sheets, checking job locations, cleaning and loading trucks, picking up electrical plans, checking job locations, removing trash accumulated from trucks accumulated during previous day's work, loading trucks and fueling trucks were "principal activities" primarily benefiting the employer and compensable. *Id*.

In *Dooley*, 307 F.Supp.2d at 239, a Massachusetts federal district court reviewed the compensability of travel time from home to their first assignment for appraisers who alleged they "sometimes" started laptops, opened software, checked voice and email, responded to messages, set a voice mail greeting, reviewed and mapped daily assignments, and loaded supplies into their vehicles before leaving home to drive to their first appraisal site of the day. The appraisers performed similar tasks in the evenings after arriving home, including calling body shops and claimants, completing estimates, time logs, and transmitting them electronically. Comparing their home to an office, the court found this work at home was a principal activity, which was compensable under the FLSA. The court also held that the travel time that followed these activities began and

ended the workday and accordingly, found the commute to and from the first job site compensable. *Id*. at 245.

In February 2005, the Supreme Court heard the consolidated appeal of rulings in two circuit court cases dealing with the compensability of time spent donning and doffing specialized protective gear and its impact on the compensability of related activities during the work day. *IBP Inc.,* 546 U.S. 21. The Court unanimously affirmed the Ninth Circuit's holding in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), in which plaintiffs' donning, doffing, and cleaning activities were held to be compensable as an "integral and indispensable . . . principle activity" for the benefit of the employer. *Id.* The Court did not adopt the First Circuit's holding in *Tum v. Barber*, 331 F.3d 1 (1st Cir. 2003), which found that employees need not be compensated for the time spent walking between their changing area and the production floor after donning and before doffing specialized protective gear. *Id*. at 302. In doing so, the Court rejected the theory that there might be a category of activities deemed "principal" for the purpose of compensation but not sufficiently principal to commence the workday under the Portal to Portal Act. The continuous workday rule requires compensation for activities performed during the time spent between the first and last principal activities of the work day. *Id*. at 304.

In a recent Wage and Hour Advisory Memorandum ("WHAM"),[3] the Department of Labor has stated that the Supreme Court in *Steiner* and again in *IBP, Inc.* have " '*made clear*' that activities integral and indispensable to principal activities are themselves principal activities that start the workday." WHAM, 2006-2, at 1, May 31, 2006 (emphasis added). Moreover, the Department of Labor conveyed that *IBP, Inc.* stands for the proposition, consistent with the continuous workday rule, that if time spent donning, walking, waiting and doffing cumulatively exceeds the *de minimis* standard, it is all compensable time. *Id*. at 3. An open issue, to be resolved by the courts, is the application of the *de minimis* rule to these kinds of situations. Courts have found that three factors must be present for time to be considered *de minimis*: (1) The practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and

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[3] The Department of Labor has changed the terminology for the WHAM and now calls it a Field Advisory Bulletin ("FAB").

(3) whether the claimants performed the work on a regular basis. *Singh v. City of New York,* 418 F.Supp.2d 390 (S.D.N.Y. 2005).

Moreover, courts continue to struggle with the issue of whether certain activities are integral and indispensable. For cases finding that certain activities are integral and indispensable: *see Chao v. Akron Insulation & Supply, Inc.*, 2005 U.S. Dist. LEXIS 9331, *29 (N.D. Ohio 2005) (holding that the workers' shop activities were compensable, as an integral and indispensable part of their principal activities associated with the installation of insulation; that their waiting time was compensable as well, since it was primarily for the benefit of the employer; that the time spent traveling from the shop to the job site and vice versa, constituted principal activities connected with insulation installation and did not qualify as excludable preliminary and postliminary activities under the Portal-to-Portal Act.); *Burton v. Hillsborough County*, 2006 U.S. App. LEXIS 12207, **20-21 (11th Cir. May 18, 2006) (finding travel time to the first work site of the day from a county parking lot where an employee boarded a work vehicle for his/her first assignment and the travel time from the last work site of the day back to the county parking lot was compensable time, because picking-up and dropping-off the work vehicle was integral and indispensable to plaintiffs' principle work activity); *Twaddle v. RKE Trucking Co*., 2006 U.S. Dist. LEXIS 18028, *18 (S.D. Ohio March 29, 2006) (finding plaintiffs' duties of starting the engines of their trucks, performing pre-trip inspections of the trucks and awaiting the receipt of driving assignments are all integral and indispensable to the plaintiffs' principal work activity even if plaintiffs' socialized, drank coffee and drank pop during this time).

In *McLaughlin v. Somnograph,* 2005 WL 3489507 (D. Kan. Dec 21, 2005), the court found sleep technicians' travel time compensable. The court concluded that the equipment transported by the technicians was an integral and indispensable part of their duties and that therefore the travel time from the employer facility to the sleep study site was also an integral and indispensable activity and thus compensable time.

For a contrary holding: *see Singh v. City of New York,* 418 F.Supp.2d 390 (S.D.N.Y. 2005) (finding that travel to and from a remote work site was not compensable time because carrying a briefcase with files, while necessary to plaintiffs' work, without more does not make the activity integral and indispensable).

In this area of the law, one of the inquiries the court will make is whether the employer had knowledge of the work performed. *See Brown v L & P Industries, LLC*, 2005 WL 3503637 (E.D. Ark. Dec. 21, 2005) (FLSA does not allow an employer to refuse payment for hours worked even if the work time was not authorized). However, where the employer is not aware of the activities it may not be liable for the time spent on those activities. *See Bull v. United States,* 68 Fed. Cl. 212 (Fed. Cl. 2005) (finding employer not liable to pay for activities where plaintiff could not show that the employer had actual or constructive knowledge that the activities were being conducted off-duty).

III. <u>Calculating to Regular Rate</u>

The FLSA generally requires that employees be paid at a rate of one and one-half times their "regular rate" for hours worked in excess of 40 in one week. 29 U.S.C. § 207(a)(1). The FLSA, however does not define the term "regular rate". The definition of "regular rate" has been codified in the Department of Labor's regulations at 29 CFR § 778.109 which provides that the regular hourly rate is determined by dividing the total remuneration for employment in any work week by the total number of hours actually worked. *Id.*

A. Salaried Employees

Determining the regular rate can become complicated when dealing with salaried, non-exempt employees. With a salaried employee, the number of hours worked is often different from week to week. As a general rule, the regular rate for a salaried employee is calculated by dividing the salary by the number of hours the salary is intended to cover. *See* 29 U.S.C. § 778.113. This calculation, while straight forward, can create problems in litigation where there is no clear agreement as to the number of hours the salary was intended to cover. *Schneider v. Landvest Corp.* 344 WL 322590 (D. Colo. Feb. 9, 2006).

Salaried employees can be paid pursuant to the fluctuating work week method where the employee is paid a fixed salary for all hours worked in the work week. The employee is then entitled to overtime pay for all hours worked over 40 in a work week at a rate of ½ their regular rate. *See* 29 U.S.C. § 778.114. In this situation, the regular rate is calculated by dividing the salary by all hours worked. *Id.* This method of calculating the regular rate is different than the method used for salaried, non-exempt employees where the regular rate is calculated by dividing the salary by the number of hours the salary is

intended to cover. The requirements for the fluctuating work week to apply include: (1) the employee's hours must fluctuate from week to week; (2) the employee must receive a fixed salary that does not vary with the number of hours worked; (3) the amount of the fixed salary must be sufficient to compensate the employee at a rate not less than the applicable minimum wage for every hour worked; and (4) there must be a clear and mutual understanding of the parties that the fixed salary is compensation for the hours worked each work week, whatever their number *Id. See, Davis v. Friendly Express, Inc.*, 2003 WL 21488682 (11th Cir. 2003); *O'Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003); *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998).

There is a split of authority as to which party has the burden of proof in a case involving the fluctuating work week. The Eleventh and Fifth Circuits hold that because the fluctuating work week is neither a defense nor an exemption to the FLSA, the employee has the burden of proving that the method does not apply. *Sampson v. Apollo Resources, Inc.*, 242 F.3d 629 (5th Cir. 2001); *Hopkins v. Texas Mast Climbers, LLC,* 2005 U.S. Dist. LEXUS 387 21 (S.D. Texas 2005); *Davis v. Friendly Express, Inc.*, 2003 WL 21488682 (11th Cir. 2003).

The Fourth Circuit in *Monahan v. County of Chesterfield, Virginia*, 95 F.3d 1263 (4th Cir. 1996) placed a heightened burden on the employer to demonstrate the clear and mutual understanding element. *See, Mayhew v. Wells*, 125 F.3d 216 (4th Cir. 1997); *Cowan v. Treetop Enterprises, Inc.*, 163 F. Supp.2d 930 (M.D. Tenn. 2001) (finding that the fluctuating work week is an exception to the normal rights of the employee and employer bears the burden of proving all the elements); *Dingwall v. Friedman Fisher Assoc. P.C., 3 F. Supp.2d 215* (N.D.N.Y. 1998) (finding that the employer bears the burden of proving that all the requirements for applying the fluctuating work week are met); *accord, Burgess v. Catawba County*, 808 F. Supp. 341 (W.D. N.C. 1992); *Rainey v. American Forest and Paper Assoc., Inc.*, 26 F. Supp.2d 82 (D.D.C. 1998).

The courts do not require that the employee's hours vary greatly in order to apply the fluctuating work week. In *Mitchell v. Abercrombie,* 428 F. Supp. 724 (S.D. Ohio 2006), the district court rejected plaintiffs' argument that their hours must fluctuate both above and below 40 hours and since they were required to work at least 40 hours a week, their hours did not fluctuate. *See, Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993), *cert.*

denied, 510 U.S. 1110 (1994) (upholding the fluctuating work week method of payment where only the amount of overtime varied); *accord Teblum v. Eckerd Corp.,* 2006 WL 288932 (M.D. Fla. Feb 7, 2006). The district court also rejected plaintiffs' argument that their hours did not fluctuate because the employer had them work a regular schedule. *See, Flood v. New Hanover County,* 125 F.3d 249 (4th Cir. 1997); *Griffin v. Wake County,* 142 F.3d 712 (4th Cir. 1998) (finding that just because the employees' work schedule fluctuated in a predictable manner, rather than in a wholly irregular and unpredictable manner, did not preclude employer from paying employee according to the fluctuating work week plan).

One of the issues litigated under the fluctuating work week is whether there was a clear and mutual understanding between the parties. The parties need not enter into a written agreement and courts have held that it is sufficient that the employees were generally aware that their salary was intended to cover all hours worked. *Bailey v. County of Georgia*, 94 F.3d 152 (4th Cir. 1996); *see Tumulty v. FedEx Ground Package*, 2005 WL 1979104 (W.D. Wash. Aug 16, 2005) (court entered summary judgment for employer where the only relevant evidence as to whether a clear and mutual understanding existed for purposes of fluctuating work week was whether parties agreed that salary would be paid for all hours worked, regardless of number). Courts have held that the existence of the employee's understanding may be "based on the implied terms of one's employment agreement if it is clear from the employee's actions that he or she understood the payment plan in spite of after-the-fact verbal contentions otherwise." *Mayhew v. Wells,* 125 F.3d 216 (4th Cir. 1996); quoting *Monahan v. County of Chesterfield,* 95 F.3d 1263 (4th Cir. 1996) ("An employer can also demonstrate the existence of this clear mutual understanding from employment policies, practices, and procedures."); *Davis v. Friendly Express, Inc.*, 2003 WL 21488682 (11th Cir. 2003) (the explanation provided on weekly pay stubs can provide the necessary understanding); *accord Mitchell v. Abercrombie & Fitch, Co.,* 428 F. Supp. 2d. 725 (S.D. Ohio 2006). *But see, Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F. Supp2d 82 (D.D.C. 1998) (finding that the parties could not have had a clear mutual understanding regarding the fluctuating work week where the employer classified the employee as exempt); *Hopkins v. Texas Mast Climbers, LLC,* 2005 U.S. Dist LEXIS 38721 (S.D. Texas 2005)

(finding no clear understanding where plaintiff testified without contradiction that his supervisor advised him that he would be paid a salary based upon a 40 hour work week).

B. Bonuses

"Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay." 29 C.F.R. § 778.211(c). As explained in 29 C.F.R. § 778.209, the bonus amount must be "apportioned back over the workweeks of the period during which it may be said to have been earned" resulting in adjustment of the regular rate and the payment of additional overtime in accordance with the adjusted regular rate of pay. Similarly, non-discretionary bonuses, pursuant to section 7(e) of the FLSA, in the case of non-exempt employees, must be included when the employer computes the employees' regular rate of pay for purposes of overtime pay.

At least one court has stated that sick leave buy-back payments must be considered part of the regular rate of pay for the purposes of overtime. *See Acton, et al v. City of Columbia, Missouri*, 436 F.3d 969 (8th Cir. 2006). In *Acton*, the employees at issue were given the option to sell back 10 days of unused sick leave so long as they had already accumulated 6 months of leave. In exchange for the sell back, employees received a lump sum payment equal to 75% of their regular hourly pay. In determining the employees' regular rate of pay, the Defendant argued that these lump sums should not be considered in calculating the regular rate because the monies were more akin to discretionary bonuses for perfect attendance. The court however, determined that these payments must be considered in calculating the regular rate of pay since essentially, they were payments to employees for work already done – that is, the work done for a period of several years sufficient to earn the requisite 6 months-leave-reserve to qualify for the sell back option. The Eighth Circuit held that sick leave buy-back payments constituted pay for work and, thus, should be included in calculating the regular rate of pay.

In another case, *Mendez v. Redec Corp.*, 232 F.R.D. 78 (W.D.N.Y. 2005), current and former employees sought damages for among other things, the employer's failure to include bonuses in the regular rate when calculating overtime pay. The plaintiffs sought summary judgment on their claims. The court determined that while defendants admitted that they paid some bonuses and "supplements" to its employees, the defendants

maintained that these were discretionary payments that were not intended to serve as compensation for the employees' services. *Id.* The court denied plaintiffs' motion for summary judgment because defendants presented enough evidence to give rise to a genuine issue of fact concerning the nature of these bonuses and whether they did fall within the exclusion for discretionary bonus payments.

The DOL has opined that an employer who granted consecutive yearly bonuses based in part on employees' pay, could properly exclude the previous year's bonus in calculating the employee's current year bonus. Wage and Hour Letter, FLSA2005-22 (August 25, 2005). The employer computed employee bonuses as a percentage of each employee's straight time and overtime wages earned during the previous calendar year. The employer provided an illustrative example:

> In February 2001, the company paid a 3% bonus based on company and employee performance during calendar year 2000. Assuming the employee earned $40,000 in straight time and $1,000 in overtime wages during calendar year 2000, the employer would pay a bonus totaling 3% of $40,000 ($1200) in straight time, and 3 % of the $1,000 ($30) in overtime earnings. Thus, the employee would receive $1,230 total incentive bonus paid in February 2001 for work done in February 2000.

In the following year, if the employer wanted to pay a bonus based on the same structure, the DOL opined that the incentive bonus of $1230 paid in February 2001 need not be included in the employee's total earnings in 2001 for the purposes of determining how much incentive bonus should be paid in February 2002 for work done in February 2001. According to the DOL, the 2001 bonus may be said to have been "earned" in 2000 even though it was paid in 2001. Thus, such bonus payments need not be recognized as compensation for the year in which they are actually paid.

In another opinion letter, Wage and Hour Letter, FLSA2005-47 (Nov. 4, 2005), the DOL addressed stay bonuses. In that case, employees had three options for the payout of the stay bonus: a) full payment of the stay bonus; b) deferred payment of the stay bonus until a future date, with accruing interest at the rate of 4% per annum; or c) continuous equal monthly payments of the stay bonus until the complete benefit was paid. The DOL opined that under all three options the bonuses would have to be part of the regular rate of pay, and would result in the payment of additional overtime in accordance with the adjusted regular rate of pay. The DOL stated that "[b]onuses which

are announced to employees to induce them to work more steadily or rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay." 29 C.F.R. § 778.211(c). The bonus amounts should result in an adjustment of the regular rate of pay and the payment of additional overtime in accordance with the adjusted rate of pay. *See*, 29 C.F.R. § 778.209. However, the 4% interest on deferred stay bonus payments should not be treated as wages, the DOL opined, when retroactively adjusting overtime. According to the DOL, this payment is more akin to interest on a loan from the employee to the employer or interest on an employee's investment in a savings account operated by the employer and these payments are unrelated to hours worked. Thus, the interest payments are not compensation under the FLSA. *See* § 7(e)(2) of the FLSA and 29 C.F.R. § 778.224.

IV. Joint Employer Issues

A. Joint Employer Regulation

Under 29 C.F.R. § 791.2, "[a] single individual may stand in relation of an employee to two or more employers at the same time" as determined by "all the facts in the particular case." The only regulatory guidance as to whether the employee is jointly employed by both employers is whether the two employers are acting "entirely independently of each other and are completely disassociated" with respect to the employee. If not, then all of the work for all the joint employers must be considered as one employment under the FLSA. The regulations also specify that there are three common joint employment relationship situations: (1) where there is an arrangement to share the employee's services; and (2) where one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) where one employer is controlled by, or under common control with, the other employer.

B. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003)

In *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003), the Second Circuit held that the federal trial court in the Southern District of New York had applied the wrong legal standard in granting summary judgment to a garment manufacturer on the ground that it was *not* a joint employer of twenty-six New York City garment workers who allegedly had not been paid minimum wage or overtime pay for their work. The non-English-speaking plaintiffs all worked in a factory in New York's Chinatown. They

were employed by six different contractors who were doing business at the factory. The plaintiffs' job was to stitch and finish garments, which included sewing buttons and labels into garments, cuffing and hemming the garments, and hanging the garments. They were directly employed by the contractors, who hired them at piece rates and paid them to assemble clothing for numerous manufacturers, including Liberty Apparel Company ("Liberty"). When the contractors failed to pay the workers thousands of dollars in wages, the plaintiffs sued the contractors along with Liberty and its two principals, Albert Nigri and Hagai Laniado (hereinafter referred to as the "Liberty Defendants") under the Fair Labor Standards Act ("FLSA").

In *Zheng*, the district court applied the four factors enunciated by the Second Circuit in *Carter v. Duchess Community College,* 735 F.2d 8 (2d Cir. 1984), adopting factors from *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), to the Liberty Defendants, and concluded that the Liberty Defendants were not joint employers under the FLSA. The district court found that the Liberty Defendants had no power to hire and fire the plaintiffs, did not supervise or control their work schedules, did not determine the plaintiffs' rates of pay or method of payment, and maintained no employment records for the plaintiffs. *Zheng*, 355 F.3d at 66. On that basis, the district court granted the Liberty Defendants motion for summary judgment.

The Second Circuit reversed this decision and held that it had never stated that "the four *Carter* factors alone are relevant, and that other factors bear on the relationship between workers and potential joint employers should not be ignored." *Id.* at 68. The court held that the broad, expansive definition of employee found in the FLSA cannot be reconciled with the "unduly narrow" four-part test used by the district court to determine joint employment status, which concentrated on the formal right to control the physical performance of another's work. That test, said the Second Circuit, "is central to the common-law employment relationship" but cannot be reconciled with the "suffer or permit" language found in the FLSA which, according to the court, reaches beyond traditional agency law. *Id.*

The Second Circuit set forth six factors, which it said were drawn from *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1946), to assist the district court in making the determination whether the Liberty defendants should be deemed to be the

joint employer of the plaintiffs and urged the district court "to consider any other factors it deems relevant to its assessment of the economic realities." The six factors (listed in no particular order said the Second Circuit) are:

> (1) whether Liberty's premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants.

Id. at 72.

The Second Circuit first described why it believed these factors were relevant to the determination of joint employment status. "These particular factors are relevant because, when they weigh in plaintiffs' favor, they indicate that an entity has functional control over workers, even in the absence of the formal control measured by the *Carter* factors." *Id.* at 72. Then, the court described why each of these six factors was important to the joint employment determination.

Whether Liberty's premises and equipment were used for the plaintiffs' work is relevant, said the Second Circuit, because "shared use of premises and equipment may support the inference that a putative joint employer has functional control over the plaintiffs' work." *Id.* Whether the contractor had a business that could or did shift as a unit from one jobber to another is relevant because "a subcontractor that seeks business from a variety of contractors is less likely to be part of a subterfuge arrangement than a subcontractor that serves a single client." *Id.* With respect to the third factor—the extent to which plaintiffs performed a discrete line job that was integral to Liberty's production process—the court noted that: "this factor could be said to be implicated in every subcontracting relationship, because all subcontractors perform a function that a general contractor deems 'integral' to a product or a service." *Id.* at 73. However, the Second Circuit cautioned that it does not interpret this factor, derived from *Rutherford*, quite so broadly. Rather, the Second Circuit construed *Rutherford* to mean that work on a

production line occupies a special status under the FLSA, at least when it lies on "the usual path of an employee." *Id.* (citation omitted).

To determine the weight and degree of importance that integration with the jobber's production process should carry in determining joint employment, the Second Circuit urged the lower court to consult both industry custom and historical practice. *Zheng*, 355 F.3d at 73. Industry custom is relevant, said the court, because to the extent that the practice of using subcontractors to complete a particular task is widespread, it is unlikely to be a mere subterfuge to avoid complying with labor laws. *Id.* Historical practice may also be relevant because if plaintiffs can prove that, as an historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws. *Id.* at 74. The Second Circuit further noted "the mere fact that a manufacturing job is not typically outsourced does not necessarily mean that there is no substantial economic reason to outsource it in a particular case. However, as *Rutherford* indicates, the type of work performed by plaintiffs can bear on the overall determination as to whether a defendant may be held liable for an FLSA violation." *Id.*

Turning to the fourth factor—whether responsibility under the contracts could pass from one subcontractor to another without material changes—the Second Circuit stated that it was derived from the *Rutherford* Court's observation that "responsibility under the boning contracts without material changes passed from one boner to another." *Rutherford*, 331 U.S. at 730. It noted that this factor weighs in favor of a determination of joint employment when employees are tied to an entity such as a slaughterhouse rather than to an ostensible direct employer such as a boning supervisor. "Where on the other hand, employees work for an entity (the purported joint employer) only to the extent that their direct employer is hired by that entity this factor does not in any way support the determination that a joint employment relationship exists." *Zheng*, 355 F.3d at 74.

The court noted that the fifth factor—the degree to which the Liberty Defendants or their agents supervised plaintiffs' work—might be misinterpreted to transform "run-of-the-mill subcontracting relationships" into joint employer relationships. *Id.* It attempted to demonstrate the appropriate application of this factor by contrasting the supervision exercised in *Rutherford* with that exercised in *Moreau v. Air France*, 343 F.3d 1179 (9th

Cir. 2003). In *Moreau*, the Ninth Circuit found that Air France's supervision of workers was not indicative of joint employment because Air France merely gave "specific instructions to a service provider" concerning performance under a service contact. *Id*. at 1188. In *Rutherford*, on the other hand, the slaughterhouse owner's close scrutiny of the boners' work weighed in favor of joint employment because it demonstrated effective control of the terms and conditions of the plaintiff's employment.

Finally, the court emphatically stated that its use of the words "exclusively or predominantly" in the sixth factor—whether plaintiffs worked exclusively or predominately for the Liberty Defendants—was intentional. Thus, the court noted, if a "majority" of the subcontractor's employees' work is performed for a single company (as distinguished from "exclusively or predominately") that alone is not a basis to find joint employment. However, if the contractor's employees are assigned exclusively or predominantly to work for only one "client" of the contractor, the "client" may *de facto* become responsible for the amount workers are paid and for their schedules—traditional indicia of employment.

C. Cases adopting and applying *Zheng*

1. *Ouegraogo v. Durso Assocs., Inc.*, 2005 WL 1423308 (S.D.N.Y. June 16, 2005)

Supermarkets in New York city subcontracted delivery services to an outside contractor which hired plaintiffs to work as delivery personnel. Plaintiffs made deliveries to customers and provided in-store services, as directed by store supervisors. Plaintiffs, characterized as independent contractors, were not paid overtime; they sued alleging that they were employees and that the supermarkets and drug stores were joint employers under the FLSA. The employer sought to dismiss plaintiff's claim that it was a joint employer.

The court determined that the Second Circuit's opinion in *Zheng* dictated that the controlling test whether an employer is a joint employer is a fact-intensive test based on the "circumstances of the whole activity" in light of "economic reality." The plaintiff had alleged that he worked over 40 hours a week without receiving minimum wage or overtime; that his work included bagging and delivering groceries for the supermarket; that the supermarket acted as an employer; that the supermarket was responsible for

hiring and firing the plaintiff; that the supermarket set the terms and conditions of the plaintiff's employment; that the delivery work was integral to the supermarket's operations; and that the supermarket controlled the amount of pay plaintiff received by increasing or limiting its payments to plaintiff's direct employer, the delivery subcontractor. The court determined that these facts, as pled, could support a claim that the supermarket was a joint employer under FLSA and declined to dismiss the case.

2. *Chen v. Street Beat Sportswear, Inc.*, 364 F. Supp. 2d 269 (E.D.N.Y. 2005)

The facts here are similar to those in *Zheng*: plaintiffs, employees of garment sewing companies, claimed that they were jointly employed by the direct sewing company as well as the overall clothing manufacturer—here, Street Beat Sportswear. Plaintiffs alleged that there were as many as 20 such subcontracting companies, performing sewing and cutting work for Street Beat. Street Beat was a "jobber"—a clothing manufacturer which subcontracts the final phases of clothing production—which is a fairly common practice in the garment industry. Plaintiffs acted as thread cutters, garment inspectors, hangars, pressers, button hole-makers, etc.; Street Beat used different subcontractors for different types of garments. Each subcontracting company owned its own premises and equipment. Pricing was set based on speed and quality; the subcontractor took the job at a given price, without consideration as to whether overtime would need to be paid. The contractors then set the pay rate for the plaintiffs; some were paid by the hour and some by the piece.

On these facts, the trial court denied a summary judgment motion by defendant Street Beat, finding that there were disputed issues of fact as to whether the employer was a joint employer. The court very explicitly applied the six *Zheng* factors to arrive at this conclusion.

First, as to "separate premises and equipment," the court determined that the contractors had their own facilities, and that garments were assembled there, and not on Street Beat's premises (except on rare occasions, to correct improper bundling). Even though the plaintiffs used materials provided by Street Beat, those materials were sewn on sewing machines owned by the contractors. This factor thus weighed in favor of Street Beat.

Second, as to "whether the contractors shifted as a unit" from one putative joint employer to another, the court found that the contractors did accept jobs from different manufacturers and that plaintiffs did not work exclusively for Street Beat. However, plaintiffs argued that the contractors were entirely dependent on the relationship with Street Beat in a hyper-competitive sewing market. A question of fact therefore existed on this factor.

Third, as to whether "plaintiffs' work [w]as integral to manufacturing," the court found that plaintiffs performed a discrete line job constituting an essential step in the producer's integrated manufacturing process. The court noted that care must be taken in this area, so as not to inhibit legitimate outsourcing, and that industry practice would be relevant to determine whether the outsourcing was legitimate or for the purpose of subverting the FLSA, and heard expert testimony proffered by both sides. Although the subcontracting practice is common in the garment industry, the court nonetheless found that the integral nature of the work pointed toward joint employment.

Fourth, as to whether "responsibility passes without material change" from one subcontractor to another—i.e., whether the subcontractors were interchangeable—the court found that, although the subcontracting entities came and went, the plaintiffs continued to do the majority of their work for Street Beat, and that plaintiffs were more tied to Street Beat than to their direct employers. This factor thus weighed in favor of joint employment.

Fifth, as to the "degree of supervision," the court determined that there were genuine issues of material fact as to the extent to which Street Beat employees supervised plaintiffs. Although it was conceded that Street Beat managers were not responsible for setting plaintiffs' hours, their wages, or other terms and conditions of employment, the court found that Street Beat at least indirectly exercised control through the quality control process and the specific orders and deadlines given to its subcontractors.

Finally, as to whether "plaintiffs worked exclusively or predominantly for defendants" the court found that evidence was disputed as to the percentage of Street Beat work that plaintiffs did as compared to work for other jobbers. Thus, there were issues of material fact as to this question.

3. *Vega v. Contract Cleaning Maintenance, Inc.*, 2004 WL 2358274 (N.D. Ill. Oct. 18, 2004)

Here, janitors were hired as independent contractors of a janitorial service contractor named Contract Cleaning Maintenance. Contract Cleaning Maintenance provided janitors to work at UPS facilities, and allegedly failed to pay them overtime. The janitors sued both Contract Cleaning Maintenance and UPS, alleging that UPS was a joint employer.

UPS moved to dismiss the plaintiffs' claims against it, arguing that Contract Cleaning Maintenance had control of the terms and conditions of plaintiffs' employment and thus UPS could not, as a matter of law, be a joint employer; the court denied the motion. UPS's arguments were under the four-factor *Bonnette* test rejected in *Zheng*. The court rejected UPS's use of the four factor test as being "unduly narrow" and formalistic. The court adopted the *Rutherford*/*Zheng* factors as the basis of its analysis. Under these factors, the court determined that the plaintiffs had alleged sufficient facts to show a joint employment relationship: that plaintiffs worked regularly on UPS's premises; that UPS set their work hours and assignment; that UPS supervised their work; and that UPS maintained records of hours worked. Although not meeting all the *Rutherford/Zheng* factors, this evidence was sufficient to defeat UPS' motion to dismiss.

4. *Quintanilla v. A&R Demolition, Inc.*, 2005 WL 2095104 (S.D. Tex. Aug. 30, 2005)

Plaintiffs worked for defendant, a subcontractor on several construction sites. The plaintiffs sought to establish that two other defendants—general contractors on the jobs—were joint employers under the FLSA.

The court stated that it would apply the *Zheng* factors to analyze this question, but appeared to apply the four-factor *Bonnette*-type inquiry to determine that the plaintiffs' claim must fail. First, with regard to hiring and firing, although testimony showed that the general contractors had some authority to hire or fire A&R's employees, the court found that such authority is not uncommon in contracting operations of this type: prime contractors can and do address subcontractors' safety violations and contract performance issues. Further, even though the prime contractors could exercise extensive supervision over the subcontractors, such supervision 'weighs in favor of joint employment only if it

demonstrates effective control of the terms and conditions of the plaintiff's employment.'" (Citing *Zheng*, but only with respect to its application of this factor). Finally, the court found that the prime contractors did not have ownership interest in the subcontractors, the prime contractors did not pay the subcontractor's employees or establish the wage rate, did not maintain employment records, did not have general ability to hire and fire, and did not have the general right to control the details of the subcontractor's work.

5. *Godlewska v. HDA*, 2006 WL 1422410 (E.D.N.Y. May 18, 2006)

Plaintiffs, home health providers, sued their employer for unpaid overtime, and later sought leave to add the municipality in which they worked as a joint employer. The municipality argued that leave to amend should be denied as futile.

The court found that it would not be futile to permit amendment of the case, as the municipality could be found to be a joint employer under the FLSA. Applying the "economic reality" test, the court noted the initial *Bonnette* factors as well as *Zheng*'s expansion of that test to not only the new *Zheng* factors but also to "any other factors [the court] deems relevant to its assessment." The court found that plaintiffs had pled an adequate case under either *Bonnette* or *Zheng*. Plaintiffs alleged that municipal defendants retained substantial supervision and control over the employment relationship; that the city set guidelines for training and limits on hourly rates and weekly wages; that the home health provider would be reimbursed for the employees' wages by the municipal defendant; that the municipality could make direct contact with patients and review the provider's records to ensure quality of care; that the municipality provided technical assistance; that the municipality could change assignment of cases to certain employees as well as set management standards and procedures.

6. *Barfield v. N.Y. City Health & Hosps. Corp.*, 432 F. Supp. 2d 390 (S.D.N.Y. 2006)

Plaintiff worked at Bellevue Hospital consistently over a three-year period, but as the employee of three different referral agencies. At times, plaintiff, working through multiple agencies, worked more than 40 hours a week, without receiving overtime pay. The court applied the *Zheng* test to determine, on summary judgment, whether Bellevue could be liable as a joint employer.

The court determined that Bellevue could be found liable. First, defendant undisputedly used Bellevue's premises and equipment for her work. Second, although the referral agencies were nominally free to refer their employees to whatever client they desired, in practice the referral agencies, to preserve continuity of care and productivity, would not shift a unit from one putative joint employer to another; here, plaintiff was, at all times, assigned only to Bellevue. Third, it is clear that plaintiff's work as a nurse was integral to Bellevue's process of "production"—although less relevant in non-assembly-line situations, the court nonetheless weighed the factor. Fourth, it was clear that responsibility under the contracts could pass from one subcontractor to another without material changes because, as plaintiff demonstrated, it was possible to work for Bellevue in the exact same capacity with the exact same responsibilities, through multiple referral agencies. Fifth, Bellevue controls much of the terms and conditions of employment, including providing nurses with tentative schedules (and negotiating scheduling issues with the nurses) and requiring plaintiff to work double shifts. Sixth, it was clear that plaintiff worked exclusively or predominantly for the defendant.

In addition, the court applied its own factors to further its analysis. The court noted that Bellevue exercises control over which agency nurses are permitted to work for the hospital, evaluates their performance, and could "fire" nurses that it believed had committed a major rule violation or had otherwise unsatisfactory performance. In addition to the *Zheng* factors, which all pointed toward joint employment, the court deemed that these additional considerations made it "obvious that no evidentiary dispute remains that is material to the determination" and thus summary judgment was appropriate.

7. *Astudillo v. US News & World Report*, 2004 WL 2075179, 9 WH Cases 2d 1738 (S.D.N.Y. Sept. 17, 2004); reconsideration denied, 2005 WL 23185 (S.D.N.Y. Jan. 6, 2005).

Plaintiff was hired to work as a "personal assistant and house manager" for the Editor-in-Chief of U.S. News; plaintiff was thus essentially employed by both the individual as well as by U.S. News, but the latter paid plaintiff only for her professional functions.

The court found that summary judgment was not appropriate. The court said that it would apply the broad economic realities test used by the Second Circuit in *Zheng*, and noted that, under that test, court are permitted to consider the totality of the circumstances and any factors they deem relevant. However, the court only considered the classic four-factor test to make its determination that there were disputed issues of fact on the joint employer issue: plaintiff was hired and supervised by the Editor, but there existed evidence to show that U.S. News exercised control over her employment and plaintiffs' instructions occasionally came from U.S. News supervisors.

D. Cases applying factors similar to those in *Zheng*

1. *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003)

The facts here are similar to those in *Ouegraogo*, above.

The court first determined that the deliverymen were employees, and not independent contractors, of the delivery service contractors. The court then determined that the plaintiffs were under joint employment with the supermarkets and drug stores.[4] Applying the "economic reality" test, the court found that the delivery workers performed "an integral service for the stores in which they worked," that enabled the defendants to compete effectively with mail order companies. The workers worked from the premises of the drugstores, and assisted other regular employees of those stores in bagging, stocking, security, and inter-store deliveries. Control over the deliverymen was exercised by the drugstores' managers and supervisors: they were told what to take, where to take it, how to record the delivery, and how much in payment to receive. Furthermore, the group worked as individuals, and not as a distinct, cohesive unit moving from store to store, according to needs.

The court also noted that the relationship between the drugstores and the delivery subcontractors was "so extensive and regular as to approach exclusive agency." The subcontractors "acted directly in the interest of [the drugstores] in relation to the delivery workers" and the drugstore used the delivery subcontractors' services almost exclusively, "showing consistent dependence on them."

[4] Although this opinion appears to pre-date the Second Circuit's opinion in *Zheng*, the factors it applies are remarkably similar to those in *Zheng* analysis.

2. *Tumulty v. Fedex Ground Package System, Inc.*, 2005 WL 1979104 (W.D. Wash. Aug. 16, 2005); *Tumulty*, 2:04-cv-01425-MJP (Order granting plaintiff's motion for partial summary judgment) (W.D. Wa. Mar. 3, 2005)

Plaintiffs sought to establish that FedEx Ground was their joint employer under the FLSA; FedEx denied this claim, arguing that plaintiffs were the employees of independent contractors and that no joint employment relationship existed. Evidence established that plaintiffs had contracts, through their direct employer, to pick-up and deliver packages on a specific route.

Finding that the facts were not in controversy, the court applied the controlling 9th Circuit *Bonnette* four-factor test to determine whether, as a matter of "economic reality," FedEx was the joint employer of the plaintiffs. The court also imported an additional eight factors from an agricultural case, *Torres-Lopez v. May*, many of which stem from *Rutherford* and are thus the factors applied in *Zheng*.

First, the court determined that FedEx had the power to hire and fire drivers: each driver had to fill out a FedEx application and receive approval before being hired by the contractor, and FedEx did, in fact, terminate one of the plaintiffs, without consulting the direct employer. Second, the court determined that FedEx controlled employees' work schedules and terms and conditions of employment, as FedEx conducted mandatory meetings, checked drivers' uniforms, and ensured delivery of the packages, as well as assigning extra work or ordering drivers to drive other routes. Third, the court determined that FedEx did *not* maintain a payroll or directly pay the drivers: this was the only factor pointing away from joint employer status. Fourth, the court found that FedEx maintained records regarding whether all the packages were delivered and whether the driver had attracted any employee complaints. Fifth, the court determined that the delivery of packages was one small step in a sequence of the employer's operation, and it was a job without a high level of skill, similar to a job on a production line. Sixth, FedEx used standard form contracts with its contracting delivery companies; and the court found that the use of standardized contracts rather than negotiated, specialized contracts tended to show joint employment. Seventh, although FedEx leased the equipment owned by the delivery contractor, FedEx owned and maintained the customer service department, terminal, and package handling infrastructure, which the plaintiffs used in their work.

Eighth, given their time commitment to FedEx, the drivers were unable to service any other clients; they thus did not have an opportunity to shift from one contracting entity to another. Ninth, the work was similar to piecework in that it did not require substantial initiative, judgment, or foresight—another factor pointing toward joint employer status, said the court. Tenth, the drivers earned a daily wage and could neither profit nor lose wages based on their work efficiency. Eleventh, the drivers worked over the long-term exclusively for FedEx, creating permanence in the working relationship.

3. *Gonzales-Sanchez v. Int'l Paper Co.*, 346 F.3d 1017 (11th Cir. 2003)

Migrant workers sued their direct employers (farm labor contractors, or FLCs) and International Paper ("IP") for alleged violations of the FLSA stemming from IP's hiring of the FLCs to plant tree seedlings in over-cut forests. The workers alleged that IP was their joint employer.

The court applied a multi-factor test specific to that circuit (from *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200 (11th Cir. 2003), but used many of the factors discussed in *Tumulty*, to determine whether IP was a joint employer of the plaintiffs. The court considered a number of factors before concluding that IP was not a joint employer. First, IP's control over the workers was limited to requiring them to wear orange hats and vests (for safety reasons) in certain operations. Plaintiffs claimed that defendants had an instructional video, but could not demonstrate that they were made to watch it nor would it have amounted to a showing of control. Second, the planting of trees is a rote, mechanical task, pointing in the favor of joint employment. Third, tree planting was a very minor part of IP's overall operations, which ranges from forestry to production of paper products and industrial packaging, chemicals production, etc.; indeed, IP's pulp mostly comes from trees purchased from other companies. This pointed against joint employment. Fourth, work was conducted on IP's premises, which pointed in favor of joint employment. Fifth, IP's involvement in setting working conditions or otherwise providing for the employees was limited to leasing portable toilets to the subcontractor. IP did not prepare payroll checks, withhold FICA taxes, provide workers' compensation insurance, housing, transportation, or tools, all of which weighed against a finding of joint employment.

4. *Powell v. Collier Constr. Co.*, 2005 WL 2429245 (W.D. La. 2005)

Collier Construction, a mold remediation specialist, hired a subcontractor to assist with its projects; the subcontractor ("Barbo") in turn hired plaintiffs to assist him. Collier would secure a mold abatement contract from an insurer and then have one of several of its groups, including the group led by Barbo, do the actual work of tearing out moldy drywall, flooring, etc.—essentially, demolition. Collier would pay Barbo per day and would set the number of days that Barbo could work the job; if more were needed, Collier had to get approval from the insurer. Barbo used his own tools, but Collier provided the protective clothing and masks. Plaintiffs were paid $100 per day, by Barbo, until they were terminated.

The court applied a different multi-factor analysis that is usually used to determine independent contractor status to resolve the joint employment question. The Court stated that its goal was to determine whether Barbo and plaintiffs were "in business for themselves or for Collier." To do so, the court used five factors derived from *United States v. Silk*: the degree of control, the relative investments of the worker and alleged employer, the degree of the worker's opportunity for profit and loss, the skill and initiative required in the job, and the permanency of the relationship. The court found that, first, Collier exercised some control by securing contracts, instructing crews where to work, and telling them how many days to spend; plaintiffs testified as to some instances of direct supervision by Collier. Second, the court found that although Barbo purchased some basic demolition equipment, Collier supplied the sophisticated mold remediation equipment necessary for the task; plaintiffs never supplied their own tools. Third, Collier bore all the risk and reward and controlled whether Barbo (and thus plaintiffs) would make a profit or suffer a loss by paying them a flat fee and giving them only a certain number of days to complete demolition. Fourth, Barbo was not an independent contractor of Collier, but rather, based on the skill or initiative test, could best be described as an employee. Barbo was a capable handyman, but mold remediation was essentially demolition plus disinfectant, described as "just not rocket science work." Finally, there was a substantial degree of permanence in the Collier-Barbo relationship, but not in the Collier-plaintiff relationship; plaintiffs had only worked for Collier for a short time. The court ultimately determined that since it found Collier to be the employer

of Barbo, then that made Collier the employer of the plaintiffs as well. However, the court did note that even if Barbo was an independent contractor, there was still joint employment by Collier, based on factors very similar to those analyzed above.

5. *Mattus v. Facility Solutions*, 2005 WL 3132190 (D.N.J. May 18, 2005)

Plaintiffs were hired by Facility Solutions ("FS") to clean floors in Wal-Mart; FS allegedly refused to pay plaintiffs for more than 7 hours of work per day, even though they worked more hours.

In response to Wal-Mart's motion to dismiss the FLSA claims against it, the court used a 6 part test, similar to the test in *Powell*, to find a joint employer relationship: (1) the right to control; (2) the opportunity for profit and loss; (3) the investment in equipment or materials; (4) the requirement of skill; (5) the degree of permanence; and (6) an integral part. The court determined that Plaintiffs had pled facts sufficient to meet factors 1, 5, and 6: that Wal-Mart exercised meaningful control over the work and hiring and firing of plaintiffs; that Wal-Mart controlled the amount paid as wages; that Wal-Mart controlled their hours, working conditions, and tasks (quantity and quality) performed; and that plaintiffs' work was an integral part of Wal-Mart's business. The court also separately weighed "economic reality" and found that this factor might weigh in Plaintiff's favor as well. Wal-Mart's motion to dismiss was thus denied.

6. *Beck v. Boce Group, L.C.*, 391 F. Supp. 2d. 1183 (S.D. Fla. 2005)

Plaintiffs were servers for Boce Group, LC (d/b/a Nexxt Café). As such, they were required to wait tables, bill customers, collect money, and so forth. Plaintiffs brought suit against Boce, alleging they were not paid overtime; plaintiffs also sued Boce's payroll and administrative services provider, Presidion Solutions, Inc., as a putative joint employer.

The court applied an eight-factor test on summary judgment to determine that Presidion was not a joint employer. First, no evidence in the record shows that Presidion exercised any control over the employees. Second, there was little supervision, indirect or direct, of the work. Third, Presidion occupied an administrative role only with respect to hiring and firing, providing only general forms, handbook drafts, and advice to Boce Group. Fourth, Nexxt Café alone had the right to set rates of pay or methods of payment. Nexxt Café might have followed the advice in Presidion's materials, but that alone was

found to be insufficient to establish the power to determine rates or methods of pay. Fifth, Presidion's role in preparing payroll and withholding taxes was considered ministerial because it was performed only after Presidion was provided the funds from Nexxt Café. Sixth, the work occurred in the Café, not in Presidion's facilities. Seventh, the plaintiffs performed a job integral to Nexxt Café's business, not to Presidion. Eighth, Nexxt Café made all the necessary investments in PP&E. These factors firmly pointed away from an administrative services provider such as Presidion being a joint employer.

7. *Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.*, 2006 U.S. Dist. LEXIS 93896 (M.D. Fla. Dec. 29, 2006).

In determining whether a city, a county, and a joint emergency communications center can be considered joint employers for a communications center worker, the court noted both the four-factor common law-type employer test, as well as the six-factor *Zheng* test. The court found that "[t]he four-factor test seems better styled for the circumstances of this case, considering the six-factor test's references to labor contractors, subcontractors, and discrete line-jobs." Applying the more limited four-factor test, the court determined that no joint employer relationship existed. The circumstances alleged by the plaintiff as showing joint employer status essentially showed only a vendor-vendee relationship between the communications center and the city and county. Even though the center was essentially created as a separate entity by the two municipalities, individuals from the municipalities sat on the center's board, and the service received the "bulk" of its operating budget from the municipalities, the center possessed independent corporate existence, and the city and county did not control the terms and conditions of plaintiff's employment. The court thus found that there was no joint employer relationship as a matter of law, and granted summary judgment for defendant.

8. *Schultz v. Capital Int'l Security, Inc.*, 466 F.2d 298 (4th Cir. 2006)

The court applied traditional independent contractor factors to determine that a Saudi Prince; Capital Security, Inc. (CIS), a corporation formed to pay the Prince's personal protection specialists, and CIS's president were all joint employers liable for unpaid overtime. The court suggested in dicta that "in some cases it may be useful for a court to consider factors such as those listed in" *Bonnette* and *Zheng* to determine whether two employers are joint employers within the meaning of the Act.

9. *Miller v. County of Rockingham*, 2007 U.S. Dist. LEXIS 58157 (W.D. Va. Aug. 9, 2007)

The court said that *Schultz* (see above) brought the *Zheng* factors into the Fourth Circuit jurisprudence, but applied the four-factor test to find that the defendant was not the plaintiff's joint employer: the defendant did not have the power to hire, fire, or supervise the other employer's employees and the defendants did not control the employees' work schedules, employment conditions, or rates of pay. Although the defendant cut the payroll checks, this function was deemed administrative in nature only, and the court noted that the defendant was completely reimbursed by the other employer for any wage, health, or retirement benefits.

10. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N.J. 2005)

The court determined that plaintiffs, undocumented employees of a cleaning company contracted to provide janitorial services for Wal-Mart stores, alleged sufficient facts to suggest a joint employment relationship. The court discussed the six *Zheng* factors, noting that it establishes certain circumstances in which an "entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them." In determining that the suit could not be dismissed for failure to state a claim, the court found that plaintiffs had alleged both traditional employment factors, such as the power to hire and fire, as well as the power to control wages, hours, and working conditions. The court also found that the plaintiffs had alleged that they worked only for Wal-Mart, that Wal-Mart's on-site managers supervised the plaintiffs' work, and that such information was sent to Wal-Mart headquarters. All these factors were sufficient to defeat dismissal of the claim.