LITIGATING LAWSUITS UNDER THE FLSA – THE FASTEST GROWING AREA OF EMPLOYMENT LITIGATION

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PRESENTED BY:

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I. INTRODUCTION

The 21st century may prove to be a new beginning for the 62-year-old Fair Labor Standards Act (“FLSA”), the federal statute that governs overtime, minimum wages and child labor in the public and private sectors. With the advent of the “virtual workplace,” telecommuting by employees, and flexible scheduling arrangements, this depression-era statute is starting to show some signs of aging, and many in the employment law community are calling into question its relevance to the modern workforce.

Perhaps the greatest development has been by aggressive plaintiffs joining together in large class actions that have exhibited some new millennium-type numbers. In the last several years, employers have agreed to huge settlements of overtime claims. Although, in the typical case, each individual’s claim for unpaid overtime and/or minimum wages is generally small, when plaintiffs join together in nationwide class actions, the resulting damages (and attorneys’ fees) can be immense. The U.S. Department of Labor announced in December that the $175 million in back wages collected for 263,593 workers in FY 2002 is the largest amount collected by the department in 10 years. See http://www.dol.gov/opa/media/press/esa/ESA2002694.htm.

Such was indeed the case in Bell v. Farmers Insurance Exchange, 87 Cal. App. 4th 805 (2001), in which a California jury awarded $90 million to a class of insurance claims adjusters who alleged they were denied overtime. The jurors awarded $88.7 million to the workers for time-and-a-half pay, and $1.2 million for double time pay. Also in California, VCI Telecom, Inc. recently agreed to pay over $1 million to 227 employees for overtime violations. See Daily Labor Report, BNA, Inc., No. 89, p. A-7, May 8, 2003. Furthermore, Wal-Mart stores around the country are also being faced with class action lawsuits concerning off-the-clock violations. A federal jury recently found Wal-Mart Stores, Inc. guilty of FLSA violations and that back pay was owed to 425 employees. See Daily Labor Report, BNA, Inc., No. 245, p. A-8, December 20, 2002. Many more cases of this nature are pending against Wal-Mart around the country. See, e.g., Freeman v. Wal-Mart Stores, Inc., -- F. Supp. 2d --, No. 02-5161, 2003 WL 1903911 (W.D. Ark. April 15, 2003) (denying class certification in FLSA action).

Meanwhile, Congress and the Department of Labor are wrangling over proposals to amend the FLSA. One such amendment is to increase the federal minimum wage, which is now set at $5.15 an hour, a figure many critics say is out of touch with reality, and an increasing number of state minimum wage laws setting higher hourly rates. For example, Alaska’s minimum wage increased to $7.17 per hour on Jan. 1, 2003, with yearly increases thereafter reflecting changes in the consumer price index for Anchorage. Additionally, Rep. George Miller (D-Calif.) announced, in a letter to fellow House members on January 8, 2003, the reintroduction of legislation to increase the federal minimum wage from $5.15/hour to $6.65/hour. Miller’s proposal is the third of its nature to be proposed by Democrats in Congress since 2000. Each bill called for the federal minimum wage to increase in a number of stages to mitigate the effects on employers. Other proposals include allowing hourly workers to opt for compensatory time off in lieu of overtime pay for extra hours worked.
The Department of Labor is also in the process of revising certain child labor regulations that may provide more job opportunities to youths in the workplace. Tinkering with specifics may not be the only changes to the FLSA. In late 1999, the General Accounting Office called upon the Department of Labor to make possibly wide-ranging revisions to the white-collar exemptions to the law’s overtime requirements. In response to this call for legislative overhaul, the Department of Labor recently proposed an extensive restructuring of the regulations in the Federal Register. The final rule will be issued some time after the notice and comment period ends on June 30, 2003. See the Addendum, infra, for a detailed discussion of the structural and functional differences between the proposed regulations and the existing rules.

Given the dramatic increase in the use of FLSA class actions, the resulting large settlements that are being obtained, and the regulatory and legislative activity, employers must pay close attention to developments in this law.

II. FLSA BASICS

A. WHAT DOES THE FLSA COVER?

The Fair Labor Standards Act establishes minimum wage, overtime pay, record-keeping and child labor standards for full-time and part-time workers in the private and public sectors. Currently the minimum wage is $5.15 per hour. For every hour worked in excess of 40 hours in a workweek, an employer must pay its employee at least one and one-half times her regular rate of pay. And wages required by the FLSA are due on the regular payday for the pay period covered.

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

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

These terms and conditions of employment may be addressed by individual state laws.

III. TO WHOM DOES THE FLSA APPLY?

The overtime and minimum wage requirements of the FLSA apply only to “employees.” 29 U.S.C. §§ 206, 207(a)(1). To determine whether an individual is an employee under the
FLSA, courts usually focus on the economic reality of the relationship. Courts look to whether the individual is "economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself."

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

1) The degree of the alleged employer's right to control the manner in which the work is to be performed;

2) The alleged employee's opportunity for profit or loss depending upon his or her managerial skill;

3) Whether the alleged employee provides the equipment or materials required for his or her task or whether he or she employs helpers;

4) The degree of permanence of the working relationship;

5) Whether the service rendered requires a special skill; and

6) Whether the service rendered is an integral part of the alleged employer's business.

*Rutherford Foods Corp. v. McComb,* 331 U.S. 722, 730 (1947); *Donovan v. DialAmerica Marketing, Inc.**, 757 F.2d 1376 (3d Cir. 1985). As with all issues under the FLSA, the labels given to the relationship by the parties are given little weight.

For example, in *Gustafson v. Bell Atlantic Corp.*, 171 F.Supp.2d 311, (S.D.N.Y. 2001), although a chauffeur for the defendant’s executives technically was an independent contractor for the defendant, because the defendant exercised complete control over his on-the-job activities, he qualified as an employee under the FLSA. The defendant required the plaintiff, as well as all drivers, to form their own corporations, which the plaintiff did. Although he was the sole owner, officer, and employee of the corporation, he drove only for the defendant. The defendant exercised a great deal of control over the plaintiff because it designated who and where he would drive, set his schedule, and supplied and serviced his car.

In contrast, police officers who were employed by the city were found to be independent contractors where they provided security for the city’s housing authority in their off duty hours. The hours accumulated during housing authority patrol were not combined for overtime compensation purposes with those spent performing their ordinary police duties. “For purposes of determining whether such work qualified as "special detail" work exempt from FLSA overtime requirements, evidence was introduced that (1) the housing authority exercised virtually no control over officers who had substantial flexibility with respect to their work for housing authority, including determining when, how often, and how they performed their patrols, (2) officers controlled their own profit or loss by determining how often they worked for housing authority or whether they wanted to work off-duty security for entities other than housing authority, (3) working relationship of parties was not permanent in nature as most officers did
not work for extended time periods for housing authority, (4) officers were highly skilled and trained for work they performed, and (5) work that officers performed was not integral part of housing authority's business.” *Johnson v. Unified Gov’t of Wyandotte County*, 127 F. Supp. 2d 1181 (D. Kan. 2000).

A court applied the economic reality test to determine that a prisoner-laborer was not an employee for the purposes of the FLSA. *Henthorn v. Dep’t of Navy*, 29 F.3d 682 (D.C. Cir. 1994) (prison labor is presumptively not employment unless it is voluntary work where the compensation is set out and paid by a non-prison source).

**IV. THE “WHITE-COLLAR” EXEMPTIONS**

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

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

2) The employee is paid at least $250 per week on a salary basis.

The exemptions for salaried “white collar” employees -- the executive, administrative, and professional exemptions -- are the most common FLSA exemptions. According to a 1999 study by the House Subcommittee on Workforce Protections, Committee on Education and the Workforce, between 20 and 27 percent of all full-time U.S. employees are covered by one of the white-collar exemptions. Despite being common, these exemptions are one of the most frequently misunderstood areas of the FLSA, leading to many unknowing violations by employers.

Employers commonly make two types of mistakes, which lead to employees being improperly classified as exempt. First, not all salaried employees are exempt. Payment of a salary does not mean an employee is exempt if that employee’s duties and responsibilities do not correspond with the tests established by the DOL. Another common violation occurs when employers treat employees as exempt based upon their job titles. Employers frequently attempt to claim an exemption for employees who hold inflated titles but whose duties do not meet the DOL’s tests. The burden falls upon the employer to prove that an employee is exempt. See *Heidtman v. County of El Paso*, 171 F.3d 1038 (5th Cir. 1999). Courts generally narrowly construe exemptions against the employer seeking to assert them. *Auer v. Robbins*, 519 U.S. 452 (1997).
A. THE SALARY TEST

An employee is paid on a “salary basis” where, weekly or less frequently, she receives a predetermined amount, which is not subject to reduction regardless of the quality or quantity of work. 29 C.F.R. § 541.118(a); In re Wal-Mart Stores, Inc., 58 F. Supp. 2d 1219 (D. Colo. 1999) (store lost exemption for pharmacists when it reduced base pay and hours during period of slow business). Further, the employee must receive her full salary for any week that she performs work without regard to the number of hours worked. 29 C.F.R. § 541.118(a). Thus, an exempt employee’s salary may only be subject to deductions in specific situations.

Deductions may be taken when the employee has performed no work in a week, or when the employee is absent for a full day for personal reasons other than illness or an accident. 29 C.F.R. §§ 541.118(a)(1), (2). Deductions may also be made for absences of a day or more where the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary due to sickness, where the employee has not yet become eligible to participate in the plan or has exhausted all accrued leave allowed thereunder. 29 C.F.R. § 541.118(a)(3). Additionally, where an employee has violated a safety rule of major significance, an employer may deduct from the employee’s salary. 29 C.F.R. § 542.118(a)(5). Partial pay deductions may be made for leave taken under the Family and Medical Leave Act without jeopardizing the FLSA exemption. 29 C.F.R. § 825.206. Other than these exceptions, employees paid on a salary basis may not be subject to deductions from salary.

Recently, there has been much litigation over the determination of whether an employee is actually paid on a “salary basis.” Some of these “salary basis” issues include: (1) the effect of policies authorizing impermissible salary deductions; (2) the effect of reductions in accrued leave as opposed to reductions in cash compensation; and, (3) the effect of additional payments, such as straight-time payment of overtime.

1. The Effect Of Policies Authorizing Impermissible Salary Deductions

According to 29 C.F.R. § 541.118(a), an employee will be considered to be paid on a salary basis as long as the amount of pay the employee regularly receives “is not subject to reduction because of variations in the quality or quantity of the work performed.” The Supreme Court has applied a somewhat more liberal interpretation to this regulation, finding that exempt status will be denied where a plaintiff can show either (1) an actual practice of making deductions or (2) an employment policy creating a significant likelihood of improper deductions. Auer v. Robbins, 519 U.S. 452 (1997). Thus, the controlling factor becomes not whether an exempt employee’s salary is subject to impermissible deductions, but rather whether the employer’s practices create a significant likelihood of such deduction.

a. Sick Leave

The FLSA’s regulations allow deductions to be made “when the employee absents himself from work for a day or more occasioned by sickness or disability… if the deductions are...
made in accordance with a bona fide plan, policy or practice of providing compensation for lost salary occasioned by other sickness and disability.” 29 C.F.R. § 541.118(a)(3).

In Sharpe v. MCI Telecommunications Corp., 19 F. Supp. 2d 483 (E.D.N.C. 1998), the plaintiff claimed she was not a salaried worker because her employer did not have a “bona fide plan, policy, or practice” of compensating employees for losses in salary due to sickness. She claimed her employer’s sick leave plan was improper because managers had discretion whether to record sick leave in less than half day increments and whether to require employees to use vacation days when their sick days were used up, because managers could estimate the amount of sick leave used by employees and because managers did not receive training in the maintenance of accurate sick leave records. The court rejected this claim, noting the plaintiff had cited no legal authority supporting her contentions these practices were improper under the FLSA.

b. Other Deductions For Absences

In Baudin v. Courtesy Litho Arts, Inc., 24 F. Supp. 2d 887 (N.D. Ill. 1998), the court refused to find that a pay deduction during an employee’s first week of work resulted in the employee losing his exempt status. The court found that the deduction might have been proper under 29 C.F.R. § 541.118(a)(2), which allows deductions “when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident.” Alternatively, even if the deduction was improper, a “one-time deduction under unusual circumstances” was permissible. Id. (quoting Auer, 519 U.S. 452 (1997)).

In East v. Bullocks Inc., 34 F. Supp. 2d 1176 (D. Ariz. 1998), a managerial employee argued her salary was subject to unauthorized deductions because the employer’s human resources manual provided that pay could be deducted for absences due to jury duty, attendance as a witness, and temporary military leave. The court found the testimony of a human resources employee that the plaintiff’s salary was indeed subject to such deductions insufficient to show a significant likelihood of improper deductions where the manual applied to both exempt and non-exempt employees.

c. FMLA Deductions

Under 29 C.F.R. § 825.206, an employer may deduct from an employee’s salary for partial day absences if such absences constitute intermittent or reduced leave under the FMLA without losing the exempt status of the employee. In Furlong v. Johnson Controls World Services, Inc., 97 F. Supp. 2d 1312 (S.D. Fla. 2000), an employee suffering from a serious medical condition was released to return to work, but was only able to work on an intermittent basis over a two-week period. The employer treated this period as intermittent FMLA leave and deducted salary for the employee’s partial day absences. However, the employee disputed the leave as FMLA-qualifying and sued for overtime, arguing that the deductions rendered him non-exempt. However, the employer submitted a check for the alleged overtime under the window-of-correction provision of 29 C.F.R. § 541.118(a)(6). The court held that the FMLA deduction did not cause a loss of the exemption and that, even if the deductions were impermissible, the
employer properly availed itself of the window-of-correction (discussed below) and therefore did not owe any overtime.

d. Disciplinary Deductions

The Sixth Circuit addressed a classic example of an employer whose disciplinary deduction policy met the test adopted in Auer v. Robbins, 519 U.S. 452 (1997) and provided sufficient evidence in and of itself that warranted a finding that their managers were non-exempt employees. In Takacs v. Hahn Automotive Corp., 246 F.3d 776, 781 (6th Cir. 2001), the court held that not only did the defendant’s policy create a "significant likelihood" of pay deductions from its managers, but the employer actually had a practice of making such deductions. Such evidence precluded any finding that these managers were exempt employees. On October 1, 2001, the U.S. Supreme Court declined to review this decision. 122 S.Ct. 202 (2001).

Despite a written policy subjecting employees to disciplinary pay deductions, the Tenth Circuit found that the plaintiffs were still “salaried” because the City of Tulsa did not have an actual practice of making deductions. Spradling v. City of Tulsa, 198 F.3d 1219 (10th Cir. 2000). The court could not infer a likelihood that the plaintiffs would be subject to such disciplinary deductions where none of the plaintiffs or other employees in the same job position had ever suffered a reduction in pay as a form of discipline.

In McGuire v. City of Portland, 159 F.3d 460 (9th Cir. 1998), battalion chiefs in a city’s fire bureau argued they were not properly classified under the administrative exemption because their salaries were subject to disciplinary deductions under the city code, the city personnel manual and the fire bureau’s policies. The court refused to find a substantial likelihood of unauthorized deductions, despite testimony from supervisors to the effect that the chiefs’ salaries could be subjected to such deductions. The court stated that “the ‘controlling factor is not whether the department head or the employees subjectively believed the employees could be subject to’ disciplinary deductions, but rather whether there was, objectively, a significant likelihood that penalties inconsistent with the salaried status would be made.” Id. at 463 (quoting Stanley v. City of Tracy, 120 F.3d 179 (9th Cir. 1997)).

Where plaintiff police officers were unable to show any evidence that sergeants and lieutenants suffered disciplinary reductions in compensation, the court found that there was no “actual practice” of improper deductions to violate the “salary basis” test. Additionally, the disciplinary policy manual did not create a “significant likelihood” of such deductions because these policies did not clearly communicate that such deductions would be made in specified circumstances. Likewise, plaintiffs’ wages were not “subject to” deductions for temporary military leave or court appearances absent evidence of an “actual practice” or a “significant likelihood” of such deductions in the future. Kelly v. City of Mount Vernon, 162 F.3d 765 (2d Cir. 1998). See also Marden v. Town of Bedford, 159 F.3d 1347 (2d Cir. 1998) (fact that unpaid disciplinary suspension was considered a penalty for police chief’s misconduct was not sufficient to render the chief non-exempt).
The court in *Danesh v. Rite Aid Corp.*, 39 F. Supp. 2d 7 (D.D.C. 1999), held an employer had violated an employee’s exempt status by making three improper deductions for tardiness absent evidence that the deductions were made under unusual circumstances. *See also Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999) (where salaried employees were theoretically subject to impermissible wage reductions, but only one employee had actually sustained a reduction in pay, plaintiffs could not establish that the city lost the exemption with respect to the employees).

**e. Reductions In Pay Due To Business Slowdowns**

The salary basis test is not met where the employer makes deductions from the employees’ predetermined compensation for “absences occasioned by . . . the operating requirements of the business.” 29 C.F.R. § 541.118(a)(1). In *Dingwall v. Friedman Fisher Assoc.*, 3 F. Supp. 2d 215 (N.D.N.Y. 1998), the court rejected the employer’s contention that reduced pay for an employer-imposed reduced workweek was a change in the employee’s “regular” predetermined salary rather than a deduction. The court noted that the employer would have the right to alter the employee’s salary, but could not do so based on a reduction in the number of days worked due to the insufficient amount of work available.

**2. The Effect Of Additional Payments**

Additional compensation, over and above the “predetermined amount,” does not impact the employee’s salaried status, even if that compensation comes in the form of pay at an hourly rate for each hour above the employee’s regular schedule. *See* 29 C.F.R. § 541.118(b); *Fife v. Harmon*, 171 F.3d 1173 (8th Cir. 1999) (hourly overtime payments for four hours worked in excess of 40 in a week does not defeat the employee’s otherwise valid exempt status); *Hood v. Mercy Healthcare Ariz.*, 23 F. Supp. 2d 1125 (D. Ariz. 1997) (exempt status not jeopardized even where minimum guaranteed salary does not bear a reasonable relationship to the amount the employee is paid each week; employer can include paid time off benefits to reach minimum guarantee).

**3. Fee For Service Payments**

The salary basis test includes compensation on a “fee basis.” 29 C.F.R. § 541.313. Accordingly, some employers pay their employees on a set fee per service basis, such as, in the publishing industry, a fixed rate for each article written or photograph taken. Under the regulations, if payment is at a rate that would exceed the statutory minimum if 40 hours were worked, then the employee may qualify for the exemption. However, the employer also must demonstrate that the “fee payment is made for a job . . . which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again.” 29 C.F.R. § 541.313(b).

This regulation was examined in *Fazekas v. Cleveland Clinic Found. Health Care Ventures, Inc.*, 204 F.3d 673 (6th Cir. 2000). In that case, a group of home-care registered nurses who were paid on a fee per visit basis brought suit for overtime compensation, claiming that the
nature of their pay rendered them non-exempt. The nurses’ work involved treating patients in their homes, designing health care protocols for each patient, educating families to help with treatment, supervising the visits of licensed practical nurses and keeping records of all patients under their care. The nurses were required to make at least 25 visits to patients per week and received a fixed fee of $30 per visit. Although the arrangement was apparently designed to result in a 40-hour workweek, the nurses contended that they regularly worked in excess of 50 hours a week. The court rejected the nurses’ claim for overtime finding that, given the unique circumstances involved in each patient’s treatment plan, the fee basis arrangement was not like a repetitive piecework system and thus the nurses qualified as salaried employees.

However, in *Elwell v. Univ. Hosp. Home Care Serv.*, 276 F.3d 832 (6th Cir. 2002), the court upheld denial of the employer’s summary judgment motion. The plaintiff, a home health care nurse, received both per-visit fees and hourly compensation. Her duties consisted of driving to patients’ homes, providing nursing services, and completing documentation. The plaintiff alleged that making 25 visits per week regularly took 60 hours to complete. “Because the undisputed facts show that [the plaintiff]’s compensation arrangement was based at least in part on the number of hours she worked, we conclude that the district court correctly awarded summary judgment to the plaintiff as to the University’s claim that she was an exempt professional.”

4. **Exception For The Public Sector**

An otherwise exempt public sector employee does not lose his or her exempt status because the employer’s pay system requires pay reductions for partial day absences taken for personal reasons or because of an illness when the employee does not use accrued leave. This applies to pay systems where accrued leave is not used because: (1) the employee does not seek permission to use the leave; (2) permission to use the leave is denied; (3) all accrued leave has been exhausted; or (4) the employee elects to use leave without pay. Additionally, deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from satisfying the salary basis test except in the week in which the furlough occurs. 29 C.F.R. § 541.5d.

5. **“Window Of Correction”**

The “salary basis” regulations provide a method for an employer who has made an impermissible deduction to correct that error under certain circumstances and thus preserve the employee’s exempt status. “Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case, the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.” 29 C.F.R. § 541.118(a)(6). *See Auer v. Robbins*, 519 U.S. 452 (1997) (under the regulations, “inadverence” and “reasons other than lack of work” are alternative requirements); *In re Wal-Mart Stores*, 58 F. Supp. 2d 1219 (D. Colo. 1999)
(deductions made to reflect cuts in store hours were deductions for “lack of work” which destroyed exemption).

The DOL filed an amicus brief on behalf of a group of employees in a case before the Ninth Circuit, taking a very restrictive view of the window of correction defense. In Klem v. County of Santa Clara, 208 F.3d 1085 (9th Cir. 2000), a Santa Clara County ordinance authorized the county to discipline its exempt and non-exempt employees with unpaid suspensions of less than a week. During a six-year period, 53 disciplinary suspensions without pay had been imposed. Accordingly, a group of county employees brought suit for unpaid overtime, arguing that the disciplinary suspension policy rendered the otherwise exempt employees non-exempt. The court granted the plaintiffs’ motion for summary judgment, finding that the county’s practice of imposing unpaid disciplinary suspensions on exempt employees rendered them non-exempt. In response, the county eliminated its policy and practice, reimbursed all of the affected employees and then, under the Auer case, moved the court for a reconsideration of its judgment. In opposition to this request to reconsider, the DOL filed an amicus brief on behalf of the employees, interpreting its window of correction regulation to be limited to the situation where the employer has exhibited an “objective intention” to pay its employees on a salaried basis. Id. at 1091. Because, in this case, the employer’s longstanding policy and practice of issuing disciplinary deductions did not reflect such an objective intention, the county’s after-the-fact attempt to cure the problem was unavailing. Indeed, the trend among the circuit courts is to adopt the Secretary of Labor’s view concerning the “window of corrections” regulation. See Yourman v. Giuliani, 229 F.3d 124 (2d Cir. 2000); Takacs v. Hahn Auto Corp., 246 F.3d 776 (6th Cir. 2001); Whetsel v. Network Prop. Servs. L.L.C., 246 F.3d 897 (7th Cir. 2001) (partially overruling DiGiore v. Ryan, 172 F.3d 454 (7th Cir. 1999) to join other circuits in deferring to the Secretary’s interpretation.) See also Belcher v. Shoney's Inc., 30 F. Supp. 2d 1010, 1023-1024 (M.D. Tenn. 1998) (window of correction defense not available to an employer who had engaged in actual practice of making improper deductions because the employer could not thus show an intent to pay employees on a salary basis).

The Fifth Circuit recently declined to adopt this position, finding that the clear language of the regulation does not permit the narrow reading adopted by many circuits. Moore v. Hannon Food Servs., Inc., 317 F.3d 489 (5th Cir. 2003). In Moore, the plaintiffs were KFC restaurant managers who were paid a salary of $300/week and a monthly bonus of 2% of the restaurant’s gross sales for that month. Hannon, the owner of the restaurants, had a policy of deducting recurrent cash register shortages from the supervising manager’s monthly bonus. In November, 1997, Hannon began deducting the shortages from the managers’ salary. Upon informing its legal counsel of this practice, Hannon was advised to discontinue the practice. Hannon promptly reverted to the previous practice of taking the deductions from the bonuses. Its employees filed suit, but before the trial, Hannon tendered plaintiffs the total amount of all improper deductions plus 8% interest from the dates of the deductions to the date trial was set to begin. In finding that Hannon could avail itself to the window of corrections, the Court noted that Auer deference need not be given to the Secretary of Labor’s interpretation of the regulation if that interpretation was contained in an amicus brief. The Court announced that the regulation was clear on its face and allowed employers to correct their mistakes without penalty, even if the deductions were intentional, as long as they were made either “inadvertently” or “for reasons
other than lack of work.” See 29 C.F.R. § 541.118(a)(6).  See also Paresi v. City of Portland, 182 F.3d 665 (9th Cir. 1999) (finding that two improper deductions for disciplinary reasons were insufficient to find a pattern or policy of impermissible deductions and the employer could take advantage of the window of correction); Davis v. City of Hollywood, 120 F.3d 1178 (11th Cir. 1997) (city properly invoked window of correction defense after retroactively compensating employees for four improper disciplinary deductions).

B. THE DUTIES TEST

The “duties test” seeks to identify the “primary duties” of the employee in question to determine whether such employee’s duties are sufficiently complex to justify exempting the employee from the minimum wage and overtime requirements. Each specific exemption has a different duties test.

1. Exemption For Executives

Employees are exempt as executives if their primary duty consists of managing the enterprise in which they are employed, or managing a customarily recognized department or subdivision of the enterprise. 29 C.F.R. § 541.1.

1) “Managing” includes duties such as hiring, firing, directing and evaluating employees, setting rates of pay, determining work techniques, and determining appropriate levels of supplies and merchandise. 29 C.F.R. § 541.102.

2) The rule of thumb for determining a “primary duty” (for all white collar exemptions) is whether the duty occupies more than 50% of an employee’s time. 29 C.F.R. § 541.103.

The employee must also customarily and regularly direct the work of two or more employees. “Two or more employees” means two or more full-time employees or their equivalent, such as one full-time employee and two part-time employees who together work 80 hours per week. 29 C.F.R. § 541.105.

A supervisor in a publishing company’s pre-press department qualified as an exempt executive employee in Baudin v. Courtesy Litho Arts, Inc., 24 F. Supp. 2d 887 (N.D. Ill. 1998). The supervisor’s primary responsibilities were managerial, although the supervisor spent some time working at his light table engaged in film stripping. Some of the employee’s light table work involved checking the work of those who reported to him. He distributed work and scheduled vacation and break times. He developed forms which he required employees to fill out to track the accuracy of their work. He also attended management meetings. The court rejected the employee’s unsupported assertion that he spent 85 to 90% of his time performing the non-exempt work.

A department store manager was properly classified as exempt where the court found her primary duty to be management. East v. Bullock’s Inc., 34 F. Supp. 2d 1176 (D. Ariz. 1998). The employee held three positions at the store: Young Men’s Department Manager, Children’s

Department Manager, and Men’s Polo Manager. In all three positions, she testified that at least 50% of her time was spent supervising and training employees, helping customers, and talking to buyers. She also had authority to discipline employees. The court found these activities satisfied the “management” definition.

In Bates v. United States, 51 Fed. Cl. 460 (Fed. Cl. 2002), the court found that U.S. border patrol agents were exempt where they reviewed applications for vacant positions, planned and oversaw instructional programs for instructors and trainees, recommended disciplinary action, and signed off on paperwork for promotions.

However, nuclear power security employees were found to have been willfully denied overtime pay in Ale v. TVA, 269 F.3d 680 (6th Cir. 2001). The Sixth Circuit found that shift supervisors spent most of their time doing clerical work. Although the supervisors completed performance evaluations for lieutenants, the evaluations were not instrumental in promotion decisions and were frequently changed by their supervisor. Further, although the supervisors engaged in some supervisory duties, they primarily issued orders from higher ranking supervisors. Similarly, the Seventh Circuit recently affirmed a decision finding that a car wash manager was not exempt because all of his decisions had to be reviewed by his superior. Jackson v. Go-Tane Servs., 56 Fed. Appx. 267 (7th Cir. 2003).

There have been a number of cases dealing with the executive exemption in the fast food industry, and the DOL appears to be targeting the use of this exemption in this industry. Oftentimes, such establishments classify employees as managers or assistant managers even though their duties are largely the same as regular line workers. Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982), is the seminal case in this area. In Donovan, the DOL sued Burger King for treating its assistant managers as exempt executive employees, although the employees were paid a salary and they had managerial duties when the managers were not on duty. However, they also spent a portion of their time performing ordinary duties such as order taking and preparing food, and their duties were governed by a detailed operating manual that left them with little discretion in carrying out their duties. In deciding the fate of the employees who had been subjected to the short test, the court held that, despite the employees’ participation in ordinary line duties, and the fact that their duties were extensively controlled by the manual, they were properly deemed exempt executives because management was their primary duty. The court also found occasion to apply the long test, under which several employees were found non-exempt and were awarded damages accordingly.

In Thomas v. Jones Restaurants, Inc., 64 F. Supp. 2d 1205 (M. D. Ala. 1999), a fast food manager was also unsuccessful with her claim that she was non-exempt. The manager was solely in charge of the restaurant, she hired, fired, set schedules, handled employee complaints, apportioned work, and ensured proper paperwork was completed. The manager filed suit after the restaurant changed ownership and she began to work 70 to 100 hours a week. The court found the employee was exempt despite her claims she spent a significant portion of her time performing non-managerial duties and had little supervisory authority. The employee’s testimony showed at least 50% of her time was spent in management and, in fact, the evidence showed her supervisor had specifically told her that she was not to assist in food preparation.
2. **Exemption For Administrators**

Employees are exempt under the administrative exemption if, in addition to meeting the salary basis test, their primary duty consists of office or nonmanual work which (1) is directly related to the employer’s management policies or general business operations and (2) requires the exercise of discretion and independent judgment. 29 C.F.R. § 541.2. The administrative work must not be of a routine or clerical nature but must be of substantial importance to the management or operation of a business. 29 C.F.R. § 541.205. For instance, bookkeepers, secretaries, and clerks are not exempt because they are viewed as “production” workers rather than policy makers. Tax experts, credit managers, account executives, brokers, sales research experts and personnel/human resources directors are typical examples of employees who would be considered exempt. *Id.*

A site manager of federally subsidized housing complexes was held non-exempt in *Jarrett v. ERC Properties*, Inc., 211 F.3d 1078 (8th Cir. 2000). Although the employee had managerial-type duties such as collecting applications from prospective tenants, verifying references, contacting potential applicants regarding apartment availability and preparing reports, the court found that these tasks resembled the work of non-exempt bookkeepers, secretaries and clerks who hold run of the mill positions.

The United States Court of Federal Claims ruled that a security specialist for the Department of Energy whose duties included protecting the Secretary of Energy was entitled to overtime under the FLSA. The Court found that while the plaintiff did undertake a variety of administrative duties such as supervising other security employees, making travel arrangements, and scheduling, these tasks were secondary requirements of the job that did not render it an administratively exempt position. The Court, in arriving at the decision, examined the plaintiff’s day-to-day duties and found that nearly 70% of plaintiff’s time on the job was spent guarding or being near the Secretary. *Statham v. U.S.*, No. 00-699C, 2002 WL 31292278 (Fed. Cl. Sep. 11, 2002).

Salaried insurance claims adjusters are not likely to qualify for overtime under the FLSA, according to a November 19, 2002 opinion letter issued by the Labor Department's Wage and Hour Division. Responding to a request for clarification on whether adjusters who investigate and evaluate insurance claims are due overtime under the FLSA, Tammy D. McCutchen, administrator of the Wage and Hour Division, determined that the statute's exemption for administrative employees applies when the individuals involved perform a number of specific duties, including processing of a claim “from the beginning to end, whether it is easily or quickly resolved or whether it proceeds to litigation.” See Daily Labor Report, BNA, Inc., No. 224, p. E-11, November, 20, 2002.

A recruiter whose responsibility was to oversee placement of nurses to clients with a need for nursing services was an exempt administrative employee. *Hudkins v. Maxim Healthcare Serv’s, Inc.*, 39 F. Supp. 2d 1349 (M.D. Fla. 1998). The recruiter recruited qualified nurses,
approved higher rates of pay, counseled and disciplined poor performers and participated in termination decisions.

An automobile dealership’s office manager was held to be an exempt administrative employee, even though she spent a majority of her time performing bookkeeping and clerical work because her primary duties -- which involved preparing payrolls and financial reports, and the supervision of four employees -- were directly related to both management policies and general business and required an exercise of discretion and independent judgment. *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326 (5th Cir. 2000).

An employee’s exempt administrative duties may be considered the employee’s primary duty even if they take up less than 50% of the employee’s time if they are of “principal importance to the employer.” *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 540 (7th Cir. 1999). In *Piscione*, a manager in an accounting firm claimed he spent the majority of his time performing routine tasks such as valuation and compliance testing. The court disagreed because, even if he did spend more than 50% of his time performing these non-exempt functions, he still was the primary contact for fifteen clients. The manager advised his clients of problems with their accounts and suggested solutions.

3. **Exemption For Professionals**

Employees are exempt professionals if they customarily exercise discretion and independent judgment and their primary duty consists of one of the following:

1) Work requiring advanced knowledge in a field of science or learning customarily acquired by a long course of specialized study. 29 C.F.R. § 541.3(a)(1).
   Occupations such as lawyers, doctors, registered nurses, engineers and certified public accounts meet this “advanced knowledge” requirement. A design engineer who worked for an engineering consulting firm was exempt as a professional employee. *Dingwall v. Friedman Fisher Assoc.*, 3 F. Supp. 2d 215 (N.D.N.Y. 1998). The design engineer had obtained an Associates degree in electrical technology. He was primarily responsible for designing electrical systems for various projects. For a typical project, he would meet with one of the firm’s principals to learn about the project and would produce a rough design of what the project, including lighting and utility service, would require. He would then lay out circuitry after consulting with other engineers and after making calculations according to published power standards. The court stated that a conclusion that the engineer only performed routine or unskilled work would “fly in the face of common sense.” *Id.* at 219.

2) Work that is original and creative in character in a recognized field of artistic endeavor and the result of which depends primarily on the invention, imagination, or talent of the employee. Artistic professionals need not meet the “exercise discretion and independent judgment” prong of the test. 29 C.F.R. §541.3(a)(2).
3) Teaching in a school system, educational establishment, or educational institution. 29 C.F.R. § 541.3(a)(3).

An assistant project manager failed to meet the requirements for the professional exemption. The manager spent most of his time performing the same non-destructive testing of steel he performed prior to his promotion to manager, with the only additional tasks being scheduling and financial responsibilities for his projects. The court first noted that, although the plaintiff had a college degree, a high school diploma plus experience was all that was necessary for the position. Moreover, the skills for the position could be learned through hands-on training without specialized intellectual instruction. Finally, the position did not require consistent exercise of discretion and judgment, as the employee merely compared test results with industry standards and had no authority to deviate from these standards or to accept non-conforming steel. The employee did not interpret data, but merely recorded the test results. Debejian v. Atlantic Testing Labs., Ltd., 64 F. Supp. 2d 85 (N.D.N.Y. 1999).

A court found a licensed funeral director and embalmer qualified as an exempt professional employee in Rutlin v. Prime Succession, Inc., 220 F.3d 737 (6th Cir. 2000). The court based its ruling on the fact that the director possessed advanced-type knowledge acquired by prolonged and specialized study. In order to become licensed, the director had to complete a year of mortuary science school after two years of college, had to take national board tests, pass a state exam, and had to practice as an apprentice for a year. The director exercised discretion and judgment because he counseled grieving families and was often unsupervised in his preparation of bodies. Although the employee argued that he was non-exempt because the majority of his time was spent in run of the mill, non-professional duties such as general maintenance and cleaning of the funeral home, the court found that because the employee’s professional-type duties were of the primary importance to his employer, this controlled over the mere quantity of hours spent in the run of the mill tasks. See also Owsley v. San Antonio Indep. School Dist., 187 F.3d 521 (5th Cir. 1999) (athletic trainers required to have a bachelor’s degree, apprenticeship, and state license exempt as professionals).

C. MISCELLANEOUS EXEMPTIONS

1. Exemption For Computer Professionals

Under 29 C.F.R. §541.3(a)(4), work that involves "theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering" meets the duties test of the special exemption for computer professionals. 29 C.F.R. 541.303 illustrates the types of computer-related professions that qualify for the exemption. Programmers, systems analysts and software engineers are the types of job titles that satisfy the exemption. Specifically, for a computer professional to be exempt from the overtime requirement, his primary duties must include:

(1) the application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system specifications;
(2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) the design, documentation, testing, creation or modification of computer systems or programs related to machine operating systems; or,

(4) a combination of the above-described duties that requires the same level of skill.

29 U.S.C. § 213(a)(17). Additionally, the exemption is limited to those individuals who are proficient in their area. Although most individuals who satisfy the requirements for exemption have a bachelor’s degree or higher, no particular academic degree is required to find exemption. However, the exemption specifically excludes employees involved in the operation of computers or in the manufacture, repair or maintenance of computers, as well as employees whose tasks involve computer use, such as engineers, drafters and even users of CAD/CAM systems. Computer systems analysts, computer programmers, software engineers, and other skilled workers who make at least $27.63 (six and one-half times the minimum wage per 29 C.F.R. § 541.3) per hour are exempt from the salary-basis test.

In Bohn v. Park City Group, Inc., 94 F.3d 1457 (10th Cir. 1996), the court of appeals reversed the lower court's grant of summary judgment for an employer who had argued that one of its employees who worked in its software and training department as a technical documenter was an exempt computer professional. The court held that there was not enough evidence in the record to support a finding that a computer professional was exempt from FLSA. The court noted that even though the plaintiff's salary was in excess of $49,000, because he submitted an affidavit showing that much of his time was spent in routine clerical tasks, the employer failed to meet its burden of proof that the employee was exempt under the computer professional exemption. The court expressed doubt that the employer could ever meet its burden of demonstrating that the plaintiff was exempt because the plaintiff was essentially involved in the use or practical application of computers, but not in theoretical research or development.

In Morgan-Chandler v. Consortium of Md., No. 148147-V, 1996 WL 728158, 3 WH Cases 2d 880 (Md. Cir. Ct. May 29, 1996), a Maryland circuit court ruled that an employee who provided technical writing computer services to a telephone company was exempt from FLSA overtime requirements because her duties, including documentation of complex computer software life cycle programs and functions, were included in exempt duties under DOL regulations, and her hourly rate of pay was between $30.20 and $38.

While employers struggle to comply with the requirements of FLSA, there has been a push in Congress to expand the computer professional exemption to encompass even more computer workers. In August 2000, House Speaker Dennis Hastert (R-Ill.) introduced legislation that would have amended the computer professional overtime exemption to encompass more

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network and database analysts and those training computer professionals. The bill was met with large opposition from Democrats. A similar bill, introduced in April 2001 by Rep. Robert Andrews (D-N.J.), is currently pending in the House Subcommittee on Workforce Protections. H.R. 1545, 107th Cong. (2001), available at http://thomas.loc.gov. The proposed regulations, discussed infra, address the difficulties associated with compliance in this area. The future enactment of a final rule on this issue may render the pending legislation moot.

2. **Exemption For Outside Salespersons**

Employees are exempt as outside salespersons if:

1) They are customarily and regularly engaged away from the employer’s place of business in making sales of goods and services, or in obtaining orders or contracts for services or use of facilities; and

2) The time the salespersons spend engaged in work other than outside sales does not exceed 20% of the hours worked in the workweek by other non-exempt employees who perform the same type of non-exempt work. Work incidental to sales such as writing sales reports or planning an itinerary is considered exempt work for purposes of this exemption. Inside sales and clerical warehouse activities are currently considered non-exempt work. 29 C.F.R. § 541.5.

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

The employer in *Heidtman* also was unsuccessful in claiming the employees were exempt administrative employees. Most of the employees’ actions were mechanical rather than discretionary, such as compiling names, calling prospective clients, and sending them brochures. The employees had no “authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.” *Id.* at 1042. For example, the employees needed to obtain supervisor approval even before taking a prospective client out for a meal.

In *Ackerman v. Coca-Cola Enterprises, Inc.*, 179 F.3d 1260 (10th Cir. 1999), the court found that advance sales representatives/account managers for a soft drink company were exempt as outside salespersons. The employees visited stores and inspected displays, determined the amount of inventory, and set up advertising materials. After performing these tasks, they spoke to sales managers about subsequent deliveries and obtained approval for additional

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2 Employers Must Be Vigilant In Classifying Work of Computer Professionals Under FLSA, Daily Labor REPORT, No. 228, Nov. 27, 2000, at C-1.
shipments. The employees’ merchandising, non-sales tasks exceeded 20% of their work, but the company argued the tasks were “incidental and in conjunction with” their sales. The court held the employees’ merchandising work was incidental because the employees consummated sales at the stores they visited. The promotional work was in furtherance of the employees’ sales efforts.

3. **Small Newspaper Exemption**

Under 29 U.S.C. § 213(a)(8), employees employed in connection with newspapers with a circulation of less than 4,000 are exempt from the minimum wage and overtime laws. In *Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3rd Cir. 1994), the Court held that reporters at 19 small community papers were entitled to overtime under the FLSA. The appeals court, agreeing with the Department of Labor, rejected Gateway Press’ arguments that the small newspaper exemption of the FLSA, 29 U.S.C. § 213(a)(8), applied to its reporters. The court stated that aggregate circulation of 19 community newspapers within a certain geographic area should be considered in determining circulation since Gateway published all the newspapers and engaged in “related activities, under unified operations and control, for a common purpose.” The aggregate circulation exceeded the maximum allowed under the small newspaper exemption, and therefore the exemption did not apply.

4. **Paramedics**

Another subject of litigation with respect to statutory exemptions is whether paramedics and emergency medical technicians are subject to the partial exemption for employees engaged in fire protection or law enforcement duties under 29 U.S.C. § 207(k) and 29 C.F.R. §§ 553.210, 553.215. In *Alex v. City of Chicago*, 29 F.3d 1235 (7th Cir. 1994), the United States Court of Appeals for the Seventh Circuit ruled that fire department paramedics do not fall within the partial exemption for firefighters, and thus are entitled to overtime pay for hours worked in excess of 40 hours a week. The court stated that the issue was whether the paramedics were engaged in “fire protection activities.” The correct test for making this determination is whether the paramedics were required to be trained in the rescue of fire, crime and accident victims and whether they were regularly dispatched to fires. Here, the court found that the rescue activities were specifically reserved for the firefighters, and thus the paramedics were not partially exempt from the FLSA.³

In a 1995 letter ruling, the Wage & Hour Administrator issued an opinion on the issue of whether firefighters who are cross-trained as emergency medical technicians (EMTs) qualify for the Section 207(k) exemption when their primary responsibilities are firefighting duties within the meaning of 29 C.F.R. § 553.210(a) and their EMT activities meet the criteria of 29 C.F.R. § 553.215 for ambulance and rescue workers. The administrator stated that under these circumstances, [t]he time engaged in ambulance and rescue activities would be considered to be work performed as an incident to or in conjunction with the employees' fire protection duties

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³ *See also, Lang v. City of Omaha*, 186 F.3d 1035 (8th Cir. 1999) (court held paramedics within firefighter’s exemption because trained as firefighters and are available as backup firefighters if needed).
within the meaning of 29 C.F.R. § 553.212(a), and would not count in the 20 percent limitation on non-exempt work.

This letter ruling addresses the issue of whether a fully trained fire fighter who has the responsibility to fight fires is covered by the partial overtime exemption set forth under Section 7(k) even though the fire fighter spends more than 20 percent of his or her time responding to medical calls and performing EMT or paramedic duties.

5. **Day Care Centers / Home Health Aides / Domestic Service Employees**

Employees who perform casual baby-sitting or provide companionship services for those unable to care for themselves are exempt from the minimum wage and overtime exemptions of the FLSA under 29 U.S.C. § 213(a)(15). However, the Sixth Circuit has held that a low cost day care center that provides educational enrichment is considered a “preschool” and is subject to the minimum wage requirements of the FLSA. The center in *Reich v. Miss Paula’s Day Care Ctr.*, Inc., 37 F.3d 1191 (6th Cir. 1994), which provided affordable care for sixty low-income children, argued that it should not be considered a pre-school since its primary function was custodial care, and it did not provide the kind of learning experience available at preschools. The court rejected this argument, stating that even if it did not provide any learning, it would still have to comply with the FLSA which applies to purely custodial baby-sitting services by trained professionals or others engaged in baby-sitting as a full time occupation.

In *Salyer v. Ohio Bureau of Workers’ Compensation*, 83 F.3d 784 (6th Cir. 1996), plaintiff’s husband was injured on the job and was deemed permanently and totally disabled. She then quit her job to care for her husband on a full-time basis, for which she received payment of $24 per day under Ohio's workers’ compensation law from an insurance fund that compensates injured workers. The Sixth Circuit denied plaintiff's claim for overtime, holding that even assuming that she could be considered an employee of the workers' compensation bureau, she was exempt under the FLSA's companionship exemption.

Companionship services do not include services which are required to be performed by trained personnel, such as a registered nurse or a licensed practical nurse. 29 C.F.R. § 552.6. Currently, home health aides are not entitled to overtime pay under the FLSA. Home health aides provide companionship services and perform duties which are often performed by nurses, but they do not qualify as “trained personnel” under the companionship services exemption of the FLSA. In *Armani v. Maxim Healthcare Services, Inc.*, 53 F. Supp. 2d 1120 (D. Colo. 1999), the court concluded that in order to qualify as “trained personnel”, and to be entitled to overtime, a person must have training equivalent in quantity and quality to a registered nurse or a licensed practical nurse. The court found that, although the home health aid, a certified nursing assistant, did have some training, it was not equivalent to the training of a registered nurse or a licensed practical nurse. Current DOL regulations define “companionship services” to include fellowship, care and protection provided to a person who, because of advanced age or physical or mental infirmity, could not care for his or her own needs.
The regulations define domestic service employment as “services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.” 29 C.F.R. § 552.3. In *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2000), the employees of an agency providing domestic services in the homes of disabled individuals sued for unpaid overtime, arguing that since they were employed by the agency, and not by the disabled individuals, they were not performing work in the home of the “person by whom [they were] employed” and were thus not exempt. The Court affirmed a judgment for the employees on different grounds, noting that because the Volunteers of America leased and controlled the homes where the individuals resided, the homes were not “private homes” and thus the employees were not exempt.4

The DOL’s Employment Standards Administration has recently withdrawn proposed regulations to narrow the current exemption covering domestic service employees who provide “companionship services.” The proposed regulations were to reflect the significant increase in the number of workers providing in-home care to individuals who are unable to care for themselves. *DOL Proposes Narrowing FLSA Exemption For Providers of “Companionship Services”*, Daily Labor Report, No. 13 at A-1 (Jan. 19, 2001). In assessing these modifications, commentators, including the Small Business Administration and the Department of Health and Human Services, determined that the economic impact of the new regulations was too great to warrant change. *FLSA Exemptions: Proposed Companionship Exemption Withdrawn*, Wage-Hour Compliance Report, Pg. 1 (June 2002).

6. **Volunteers**

Volunteers are specifically exempted from all of the statutory requirements of the FLSA. The Supreme Court has defined a “volunteer” as “an individual who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by another person either for their pleasure or profit.” *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985).

In *Todaro v. Township of Union*, 27 F. Supp. 2d 517 (D.N.J. 1998), the court attempted to apply the traditional economic reality test to individuals who performed uncompensated services as special police officers for a town. The court expressed its frustration with the economic reality test in distinguishing volunteers from employees, since “there are no economic relations to measure.”5 Ultimately, the court refused to grant plaintiffs’ motion for summary judgment due to the need for more useful standards in distinguishing employees from volunteers.

In *Benshoff v. City of Virginia Beach*, 180 F.3d 136 (4th Cir. 1999), the Fourth Circuit considered the claims of city firefighters who also chose to volunteer for private rescue squads.

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4 See also *Gay v. Extended Family Concepts*, 102 F. Supp. 2d 449 (N.D. Ohio 2000) (shared living facility managed by for-profit corporation was not “private home” and thus employees who provided care for residents were not exempt).

5 *Id.* at 534 (quoting *Rodriguez v. Township of Holiday Lakes*, 866 F. Supp. 1012, 1020 (S.D. Tex. 1994)).
The court refused to find the city’s involvement in the provision of the medical services by rescue squads, including regulating and licensing the squad members, coordinating schedules and providing financial assistance, sufficient to render the firefighters’ volunteer service “employment controlled or required” by the city for purposes of the Act. The court also refused to extend the limited exception to the volunteer exclusion in the FLSA, § 203(e)(4)(A), to require payment of the firefighters for their volunteer activities, since they were performing their rescue squad activities for a private entity rather than for the city.

7. Fire Protection And Law Enforcement Personnel

Under 29 U.S.C. § 207(k) and 29 C.F.R. §§ 553.210, 553.215, overtime pay for police officers, firefighters and related employees may be determined on a 28-day work period rather than the 7-day work week applied to other employees. The maximum number of hours that fire protection and law enforcement employees can work in the 28-day period without overtime is 212 and 171, respectively. These amounts are prorated for shorter work periods. Additionally, under 25 U.S.C. § 213(b)(20), small government agencies have a complete overtime exemption with respect to fire protection and law enforcement employees if the agency employs less than five employees in fire protection or law enforcement activities during the workweek.

The Seventh Circuit ruled that fire department paramedics do not fall within the partial exemption for firefighters, and thus are entitled to overtime pay for hours worked in excess of 40 a week. Alex v. City of Chicago, 29 F.3d 1235 (7th Cir. 1994). The court stated that the issue was whether the paramedics were engaged in “fire protection activities.” The correct test for making this determination is whether the paramedics were required to be trained in the rescue of fire, crime and accident victims and whether they were regularly dispatched to fires. Here, the court found that the rescue activities were specifically reserved for the firefighters, and thus the paramedics were not partially exempt from the FLSA. See also Lang v. City of Omaha, 186 F.3d 1035 (8th Cir. 1999) (court held paramedics within firefighter’s exemption because trained as firefighters and are available as backup firefighters if needed); Vela v. City of Houston, 276 F.3d 659 (5th Cir. 2001) (emergency medical technicians and paramedics are not entitled to overtime and did not qualify as “fire protection employees” because they do not regularly respond to fires, crimes, or accidents).

The Fourth Circuit in Adams v. City of Norfolk, 274 F.3d 148 (4th Cir. 2001) ruled that firefighters who are sometimes called upon to perform non-fire related emergency medical services are not entitled to overtime pay. The plaintiffs argued they were entitled to overtime because more than 20 percent of their workweek was spent working as emergency medical personnel. The court, however, found that “so integrated are appellants’ firefighting and emergency medical services duties that appellants are required to have their firefighter tools with them when performing services at nonfire emergencies so that they are ready to fight fires, if called upon to do so.”

In a 1995 letter ruling, the Wage & Hour Administrator issued an opinion on the issue of whether firefighters who are cross-trained as emergency medical technicians (EMT’s) qualify for the Section 207(k) exemption when their primary responsibilities are firefighting duties within
the meaning of 29 C.F.R. § 553.210(a) and their EMT activities meet the criteria of 29 C.F.R. § 553.215 for ambulance and rescue workers. The administrator stated that under these circumstances:

[T]he time engaged in ambulance and rescue activities would be considered to be work performed as an incident to or in conjunction with the employees’ fire protection duties within the meaning of 29 C.F.R. § 553.212(a), and would not count in the 20 percent limitation on non-exempt work.

This letter ruling addresses the issue of whether a fully trained fire fighter who has the responsibility to fight fires is covered by the partial overtime exemption set forth under Section 7(k) even though the fire fighter spends more than 20 percent of his or her time responding to medical calls and performing EMT or paramedic duties.

8. **Trainees**

“Trainees” almost always are employees who must be compensated for their training time. Trainees must be treated as employees unless their employer satisfies each element of the following six-part test:

1) The training is similar to what would be taught in vocational school;
2) The training is for the benefit of the trainees;
3) The trainees do not displace regular employees, but work under their close supervision;
4) The employer derives no immediate advantage from the activities of the trainees;
5) The trainees are not necessarily entitled to a job at the conclusion of the training period; and
6) The employer and the trainees understand they are not entitled to wages for the time spent training.

*Donovan v. American Airlines, Inc.*, 686 F.2d 267, 273 n.7 (5th Cir. 1982).

Former homeless individuals who participated in an employment program were found to be employees rather than trainees of three non-profit entities where the individuals provided productive work, they expected to be paid for that work and the benefits to the employer were greater than the benefits provided to the individuals. *Archie v. Grand Cent. P’ship*, 997 F. Supp. 504 (S.D.N.Y. 1998).
9. Agricultural Exemption

Even though a landscaping company was not actively involved in agriculture, the Eleventh Circuit joined the Second, Fifth, and Ninth Circuits in holding that the agricultural exemption of the FLSA also extends to subsidiary corporations. *Ares v. Manuel Diaz Farms, Inc.*, 318 F.3d 1054 (11th Cir. 2003). The plaintiff was employed by Diaz Landscaping and Nursery Inc., a corporation that leased land and employees to Diaz Farms Inc., which cultivated, harvested, and sold plants and trees. Plaintiff filed FLSA claims against his employer alleging that Diaz Landscaping was requiring its employees to work 50-60 hours a week and was not paying overtime. In affirming the district court’s grant of summary judgment to the employer, the Eleventh Circuit agreed that Diaz Landscaping and Manuel Diaz Farms were two entities “so intertwined as to constitute a single agricultural enterprise” that was exempt from the overtime requirement. The Court explained that The FLSA exempts “any employee employed in agriculture” from overtime requirements. Agriculture, within the meaning of the act, has two distinct branches: ‘(1) a primary meaning which includes farming in all its branches, such as cultivation and tillage of soil, growing and harvesting of crops; and (2) a secondary meaning which includes other farm practices, but only if they are performed by a farmer or on a farm.’”

10. Exemptions Provided By Other Statutes

The Motor Carrier Act, 29 U.S.C. § 213(b) precluded application of the FLSA to three district managers of a local newspaper. Under the Motor Carrier Act, employers do not have to pay overtime to “any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service.” An employee is subject to the Secretary of Transportation if his or her job involves operating a motor vehicle that transports goods in interstate commerce on public roadways. Thus, the court in *Barron v. Lee Enters. Inc.*, 183 F.Supp.2d 1077 (C.D. Ill. 2002) ruled the plaintiffs were not entitled to overtime pay under the FLSA because they delivered newspapers that included preprinted supplements from out-of-state printers. See also *Bilyou v. Dutchess Beer Distribs.*, 300 F.3d 217 (2d. Cir. 2002) (finding that truck drivers transporting goods obtained from out of state were precluded from brining FLSA overtime claims because of Motor Carrier Act preemption).

V. “ON CALL” TIME

The two elements generally considered by the courts in determining whether on-call time is compensable are (1) whether the wait predominantly benefits the employer; and (2) whether employees are able to use the time for their own purposes. As one court described the distinction: for most purposes it is best to ask what the employees can do during on-call periods. Can the time be devoted to the ordinary activities of private life? If so, it is not “work.” *Dinges v. Sacred Heart St. Mary’s Hosp.*, Inc., 164 F.3d 1056 (7th Cir. 1999). “[W]here the conditions placed on the employee’s activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.” *Id.* at 1058; 29 C.F.R. § 785.17; 29 C.F.R. § 553.221(d).

The apparent trend is for courts to find on-call time to be noncompensable. Factors the courts frequently consider in determining whether on-call time is compensable include:
1) Required response time;
2) Use of a pager to ease restrictions;
3) Ability to trade on-call shifts;
4) Excessive geographical limitations;
5) The employees ability to engage in personal activities; and
6) Frequency of calls. *Ingram v. County of Bucks*, 144 F.3d 265 (3rd Cir. 1998); *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994).

For example, emergency medical technicians required to arrive at a hospital in only seven minutes of receiving a page were not entitled to payment for the on-call time. The plaintiffs claimed the 7-minute response time was the “shortest that any appellate court has deemed compatible with ‘effective’ use of time for personal pursuits.” The employees also argued they could not hunt or fish, could not use loud tools which would prevent them from hearing a page, they were forbidden to drink alcohol, and shopping was curtailed because the stores in the area were open fewer hours than those outside the 7-minute radius. The court agreed this might be so, but held response time was not dispositive. The response time was reasonable within the rural setting because the entire city was within the 7-minute radius and traffic jams were rare. Also, there was less than a 50% chance they would be called during the on-call period. *Dinges*, 164 F.3d at 1057-59.

In *Whitten v. City of Easley*, No. 02-1445, 2003 U.S. App. LEXIS 6739 (4th Cir. April 9, 2003), the court held that the firefighters were “waiting to be engaged” during their 48-hour on-call shift. The workers had the freedom to hold part time jobs, travel to other states, and even not respond to second-alarm calls while they were on call. Consequently, the court found that the on-call time was not compensable under the FLSA. Similarly, the Eighth Circuit held that the off-the-premises on-call hours of the nurses at a North Dakota hospital were not compensable because the limitations were minimal and there were few incidents where a nurse was actually called in to work. *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, (8th Cir. 2001).

Patrol officers for a city were not entitled to compensation for their on-call time. *Bartholomew v. City of Burlington*, 5 F. Supp. 2d 1161 (D. Kan. 1998). The officers were given police radios and were generally required to stay within the limits of the city. They were not required to stay on police premises. Officers testified they were able to engage in activities such as attending church and shopping while on-call. They were subject to callbacks, on average, less than once per week. “As soon as possible” was the only requirement for response time and there was no evidence that response time was punitively enforced. Although responding in uniform was encouraged, it was not required. Finally, the officers were able to trade on-call time.
VI. MEAL & REST PERIODS

Rest periods of 5 to 20 minutes are considered hours worked by the DOL and employees are entitled to be paid during such periods. 29 C.F.R. § 785.18. The FLSA does not require a specific number of rest periods or regulate their duration, although state laws may contain such requirements. Meal periods are not considered hours worked as long as the employee is “completely relieved from duty for the purpose of eating regular meals.” 29 C.F.R. § 785.19. Ordinarily, 30 minutes or more is long enough to be considered a bona fide meal period.

In determining whether meal periods are compensable time, courts examine (1) the restrictions placed upon the employee; (2) the extent to which these restrictions benefit the employer; (3) the duties of the employee during the meal period; and (4) frequency of interruption. *Bernard v. IBP, Inc.*, 154 F.3d 259, 266 n.25 (5th Cir. 1998); *Roy v. County of Lexington*, 141 F.3d 533 (4th Cir. 1998). Increasingly, courts are finding meal periods compensable. See, e.g., *Reich v. S. New Eng. Telecomm. Corp.*, 121 F.3d 58 (2d Cir. 1997) (court awards $9 million backpay to telecommunications company employees who were required to eat lunch at the outside work site but did nothing more while eating than monitor the equipment for safety and security reasons).

Frequent interruptions cause meal periods to be compensable. In *Bernard*, the court upheld a jury verdict finding maintenance workers’ meal periods compensable where they were interrupted frequently by supervisors to repair crucial equipment. Moreover, the workers were required to stay on the premises and supervisors often used the meal period as a meeting time to discuss the afternoon work schedule. *Bernard*, 154 F.3d at 263.

In contrast, police officers were unsuccessful in obtaining compensation for meal times. They alleged their meal periods were compensable because they were required to maintain radio contact, remain in uniform, and remain in their assigned team area. They were subject to immediate call-ins to service and most personal errands were prohibited due to these restrictions. The court found insufficient evidence to show the predominant benefit of the lunch was for the city and granted summary judgment. The employees were, for the most part, able to “utilize their lunch periods for the intended purpose of eating a meal.” *Arrington v. City of Macon*, 973 F. Supp. 1467 (M.D. Ga. 1997).

VII. SLEEP TIME

Under the FLSA, for employees who shifts are less than 24 hours long, any time in which an employee is permitted to sleep is compensable. 29 C.F.R. § 785.21. However, if the employees are required to be on duty for more than 24 hours, up to eight hours of sleep time may be excluded from compensation by agreement between an employer and employee if the employee’s sleep time is not interrupted for at least five hours of that period and the employer provides adequate sleeping facilities. 29 C.F.R. § 785.22. In the case of employees who reside on-site, the parties may also agree on additional amounts of private time to be excluded from hours worked. 29 C.F.R. § 785.23. In *Mulligan v. Citrus County, Fla.*, Case No. 93-143-Civ-Oc-10 (M.D. Fla. 1995) the Court ruled that the defendant county improperly deducted 2½ hours
from the plaintiffs' shifts as “sleep time,” finding that the defendant's sleep time policy and agreement did not comply with the controlling regulation. In this case, after coming into compliance with the Act by paying its paramedics and emergency medical technicians overtime for hours worked in excess of 40 per work week, the public employer attempted to reduce its overtime liability by entering into sleep time agreements with its employees pursuant to which 2¼ hours would be deducted from each shift as sleep time. The agreements stated that the sleep time could be deducted provided that the employee had five "substantially uninterrupted" hours available for sleep during the shift.

The defendant's policy further listed various work-related interruptions that would not be considered "substantial" under the policy, such as telephone contact from supervisors, dispatch, or the training division, and face-to-face contact with supervisors, training personnel, or citizens of the community at the substation which do not result in patient care or other emergency medical services.

The court held that this policy violated the Act because the regulations require that the employee receive an uninterrupted sleep period, not a substantially uninterrupted sleep period as provided in the defendant's policy. In addition to awarding the plaintiffs back pay for each shift in which the 2¼ hours were deducted, the court also awarded the plaintiffs liquidated damages on their sleep time claim.

DOL issued a 1995 wage and hour opinion letter which states:
If an employer begins excluding employees’ sleep time after the employees have begun working for the employer, the employees will “not [sic] deemed to have agreed for all time to the exclusions” merely by continuing to work for the employer. The employees can negate the agreement by subsequently protesting the exclusion of their sleep time.

Thus, according to the letter, employees are not forever bound to have sleep time excluded simply because they previously worked under these circumstances.

The plaintiffs in Braziel v. Tobosa Developmental Servs., 166 F.3d 1061 (10th Cir. 1999) worked as residential assistants for developmentally disabled persons. They lived in group homes with the clients and were scheduled to work shifts greater than 24 hours in length. The plaintiffs and the company did not discuss payment for sleep time, but the plaintiffs understood it was company policy not to pay for sleep time except where interruptions occurred. The court ruled an agreement to exempt sleep time from hours worked may be implied and found it clear that the employees understood and acquiesced in the company policy when they were hired.

VIII. PRELIMINARY AND POSTLIMINARY TIME

The Portal to Portal Act generally excludes an employee’s preliminary and postliminary activities from the minimum wage and overtime provisions of the FLSA. 29 U.S.C. § 254. This general exemption does not apply, however, if there is a contractual obligation or custom and practice which provides that employees are paid for this time.
Pre- and post-work activities are compensable if they are an “integral” and “indispensable” part of the employee’s principal activities. Pre- and post-liminary work is not compensable if it falls under the *de minimis* exception. In order to be *de minimis*, activities must be so “insubstantial and insignificant” that they ought not to be included as part of the workweek: “[A] few seconds or minutes of work beyond the scheduled working hours… may be disregarded. Split-second absurdities are not justified… It is only where an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.” *Reich v. Montfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)).

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

1) The practical administrative difficulty of recording the additional time;
2) The size of the claim in the aggregate; and
3) Whether the claimants perform the work on a regular basis.

*Montfort*, 144 F.3d at 1333-34 (citations omitted).

**A. TRAVEL TIME**

Ordinary commuting time between home and work is not considered compensable time, even for employees whose worksites may vary. 29 C.F.R. § 785.35. This time is not compensable even if the employee commutes in the employer’s vehicle, as long as the use of the vehicle is pursuant to an agreement between the employer and the employee and the travel is within the normal commuting area. 29 U.S.C. § 254(a). An employee is entitled to payment for any work that the employer requires the employee to perform during the commute. 29 C.F.R. § 785.41. However, the time spent working on the commute must be more than a *de minimis* amount to be compensable. See, e.g., *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999) (when police officers transporting police dogs with them to work were occasionally required to stop to feed, walk and clean the dogs, such time was compensable except where *de minimus*); *Reich v. New York City Transit Auth.*, 45 F.3d 646 (2d Cir. 1995) (where police officers required to feed, train and walk police dogs during commute, such time is compensable except where *de minimus*).

In *Kavanagh v. Grand Union Co.*, 192 F.3d 269 (2d Cir. 1999), a refrigerator and utility mechanic did not have a fixed work location but instead traveled to more than 50 of the company’s stores in Connecticut and upstate New York. The employee lived on Long Island in New York. He was paid for the time he spent traveling from site to site, but not travel to the first site or travel from the last site. The court stated that “[a]lthough [plaintiff’s] situation strikes us as inequitable, nothing in the pertinent statutes and regulations requires [the company] to compensate [plaintiff] for his travel . . . 29 C.F.R. § 785.35 specifically provides that employers are not required to compensate employees for their ‘normal travel’ between home and work.” *Id.* at 272. The employee was not entitled to compensation “[b]ecause this extensive travel was a
contemplated, normal occurrence under the employment contract entered into between [the plaintiff] and [the company].”  *Id.*  at 273.

On the other hand, employers must compensate employees who have a *fixed work location* and who travel on one-day assignments.  29 U.S.C. § 254(b); 29 C.F.R. § 785.36-785.37.  Overnight travel during the employee’s regular working hours or their weekend equivalent is also compensable.  For instance, an employee must be paid for traveling between 9 a.m. and 5 p.m. on Saturday if that employee works 9 a.m. to 5 p.m. during the week.  29 C.F.R. § 785.39.

Employees on overnight trips who are merely passengers and who are not actually working need not be compensated for the travel time.  On the other hand, an employee who drives or works as a passenger must be paid for this time.  29 C.F.R. § 785.41.

**B. Changing of Clothes**

Regulations under the FLSA provide that hours spent changing clothes are compensable if such activity “is indispensable to the performance of the employee’s work or is required by law or by the rules of the employer.”  29 C.F.R. § 785.26.  The FLSA, however, also contains a provision, at 29 U.S.C. §203(o), which excludes from compensable time all time spent by employees in changing clothes when such time is excluded under “the express terms of or by custom or practice under a bona fide collective bargaining agreement …”

In *Turner v. City of Philadelphia*, 96 F. Supp. 2d 460 (E.D. Pa. 2000), a group of city correctional officers sued for unpaid overtime for time spent changing into and out of their uniforms.  Although the parties’ collective bargaining agreement did not address this issue, because the City had maintained a practice, acquiesced by the Union for over thirty years, of not paying officers for time spent changing into and out of their uniforms, this was a custom or practice under a collective bargaining agreement, and the court held that the employer was not obligated to pay for the time.  *See also Bejil v. Ethicon Inc.*, 269 F.3d 477 (5th Cir. 2001) (“By not incorporating compensation for clothes changing before and after work into the collective bargaining agreement between [the employer] and the union, nonpayment became the ‘custom and practice.’”).

In *Tum v. Barber Foods, Inc.*, No. 00-371-P-C, 2002 WL 89399 (D.Me. January 23, 2002), the court allowed a group of chicken processing plant workers to proceed with their FLSA claim alleging their employer refused to pay them for time spent donning and doffing their sanitary and safety clothing.  The court found, “that the donning and doffing of clothing and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiff’s work for the defendant.”  The judge found that the amount of time spent donning and doffing was in dispute, but because the employees went through the same motions everyday, there should be little variation as to how much time was spent.  The court, however, granted summary judgment to the employer on the employees’ claim for compensation for time spent walking from the plant entrance to a work station.  “The plaintiffs here attempt to combine this
time with time spent waiting to punch in or to obtain necessary clothing or equipment, but time spent waiting in line to punch in or out is also not compensable under the FLSA.”

To comply with FLSA regulations, Honda announced on January 9, 2003, a policy change to allow workers the option of wearing special, required uniforms home from work and to put them on before arriving at the plant if they choose. In offering the choice, Honda avoids being required to pay employees for their donning and doffing time. Honda’s decision came during a still-open investigation initiated by the Department of Labor. Honda has also agreed to pay $1.2 million in back to employees were not compensated under the old policy. Daily Labor Report, BNA, Inc., No. 6, p. A-8, January 9, 2003.

In *Reich v. Montfort*, 144 F.3d 1329 (10th Cir. 1998), the preliminary time spent by approximately 400 meat processing workers was compensable. The workers donned safety and sanitary clothing before and after their shifts. Some were required to walk to a knife room where they had to wait in line to pick up knives and certain employees were required to clean their knives and protective equipment. The court rejected the employer’s *de minimus* argument with respect to this time, which regularly took about 10 minutes per day. The employer argued that the “aggregate” to be examined was the aggregate for each individual. The court first noted that the aggregate time per individual, if looked at over the two or three year statute of limitations period, was substantial. The court also considered the number of employees affected.

In contrast, in *Bridges v. Amoco Polymers, Inc.*, 19 F. Supp. 2d 1375 (S.D. Ga. 1997), an employer paid employees for twenty minutes per day, designed to compensate employees for time they spent changing into uniforms (a jumpsuit or pants and shirt) and for a 10-minute safety and briefing meeting prior to each shift. The plaintiff did not present evidence that she spent more than 5 minutes changing clothes. Consequently, the court concluded the total preliminary time was normally 15 to 20 minutes. “[A]ny slippage to the detriment of the employees would fairly be characterized as *de minimus*, since it occurs with rare frequency—if at all.” *Id.* at 1380.

A split in the courts is developing with regard to the distinction made between meatpacking employees and poultry employees. Two Texas courts have found that there is a distinct difference between the safety equipment worn by meatpacking workers versus poultry workers. This difference precludes a finding that the poultry workers’ time spent donning and doffing is compensable, as that time is *de minimus*. *See Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, (E.D. Tex. 2001); *Pressley v. Sanderson Farms, Inc.*, No. H-00-420, 2001 WL 850017 (S.D. Tex. April 23, 2001). However, an Alabama magistrate's recommendation rejected this argument finding that the donning and doffing of safety equipment does not constitute "changing clothes" or "washing." *Fox v. Tyson Foods, Inc.*, No. 99-CV-1612 (N.D. Ala. February 14, 2001).

The most recent trend, however, appears to be favoring poultry employees. Perdue Farms, Inc. recently agreed to change current and future pay practices at all of its domestic poultry processing facilities, and compensate more than 25,000 current and former employees for time spent donning and doffing work clothing and protective gear. *Perdue Farms Agrees To Change Pay Practices And Pay Millions In Back Wages To 25,000 Poultry Workers*, OPA News
Additionally, on May 9, 2002, the DOL filed a lawsuit in the U.S. District Court for the Northern District of Alabama against Tyson Foods, Inc., seeking to change pay practices and recover back wages for poultry workers who were not paid for time spent donning and doffing work clothing and protective gear. The DOL has recently filed a third lawsuit against Arkansas-based George’s Processing, Inc., another chicken processor for the same FLSA violations found at Tyson and Perdue. See http://www.dol.gov/opa/media/press/opa/OPA20022657.htm.

In a case decided under the Hours of Service Act, the federal railroad safety law, the Supreme Court held that the time workers spend waiting for transportation to their home terminal is not compensable, on-duty time. In *Bhd. of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152 (1996), the unions claimed that time spent waiting by train crews for transportation to their home terminal after the end of their shifts should be counted as part of the 12-consecutive-hour maximum that train crews may spend on-duty under the Hours of Service Act. The Court, in a unanimous opinion, ruled that the waiting time does not count as on-duty time.\(^6\)

**IX. CALCULATING THE WORKWEEK**

Under the FLSA, the maximum number of hours that non-exempt employees may work in a week without receiving overtime compensation is 40. 29 C.F.R. § 778.101. However, there is no limitation on the number of hours that an employee may work in a workweek. 29 C.F.R. § 778.102. The FLSA generally does not require that the employee be paid overtime for hours worked in excess of 8 hours per day, or for work on Saturdays, Sundays, holidays or regular days of rest. 29 C.F.R. § 778.102.

Each single workweek is viewed separately for the purposes of overtime compensation. 29 C.F.R. § 778.104. The workweek is seven consecutive 24-hour periods, and it need not coincide with the calendar week. 29 C.F.R. § 778.105. The beginning of a workweek may be changed only if the change is intended to be permanent. 29 C.F.R. § 778.105. As a general rule, overtime for a particular workweek must be paid on the regular payday for the period where such workweek ends. 29 C.F.R. § 778.106.

The “fluctuating workweek method” is available to employers as an alternative method of calculating pay for non-exempt employees where an employee’s hours vary from week to week. The regulations require that:

1) There is a clear mutual understanding between the parties;

\(^6\) The HSA provides that train employees may not remain on duty for more than 12 consecutive hours, and, having worked for that period, must be given at least 10 consecutive hours off duty. The time spent in transportation by a new crew to a stopped train is on-duty time and counts as part of the 12-hour maximum. Time spent by the old crew in transportation to a terminal, however, is "limbo time" (time not considered on- or off-duty time). Limbo time is not considered part of a crew’s on-duty or off-duty hours, but a crew is paid for limbo time.
2) The employee’s hours fluctuate from week to week;

3) The employee receives the same fixed salary regardless of the number of hours worked during a particular week;

4) The salary is sufficient to provide an average hourly rate of more than the minimum wage; and

5) The employee must receive extra compensation, in addition to such salary, for all overtime hours worked.

29 C.F.R. § 778.114(a).

X. FLSA RETALIATION

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

However, retaliation claims are those where the “employee has filed any complaint or instituted any proceeding … or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.” Id. at 127. In other words, the retaliation generally must be in response to an employee’s participation in a formal proceeding; mere informal complaints are insufficient. See, e.g., Lambert v. Ackerly, 180 F.3d 997 (9th Cir. 1999) (tickets sales agents told they would be fired for continuing to press for overtime were able to sue employer; merely discussing concerns with management about alleged violations, however, is insufficient to be afforded protection); Walker v. Interstate Distr. Co., No. CV-99-1807-ST 2001 WL 1230882 (D.Or. May 24, 2001) (not all amorphous expression of discontent relating to wages and hour will constitute a complaint under §215(a)(3). But see Valerio v. Putnam Assoc., Inc., 173 F.3d 35 (1st Cir. 1999) (finding that the language of Section 215(a)(3), as well as the statute’s remedial purpose, provide the need for a broad interpretation of “filing a complaint”). In short, while the law does no require a formal and detailed complaint, it is clear that the employee must communicate “the substance of his allegations to the employer” prior to the adverse action. Walker v. Interstate Distr. Co., No. CV-99-1807-ST 2001 WL 1230882, *7 (D.Or. May 24, 2001), citing Lambert v. Ackerly, 180 F.3d 997, 1008 (9th Cir. 1999).

Additionally, the violation that the employee complains about need not be an actual violation of the FLSA; the employee’s good faith belief is sufficient. See Cordero v. Turabo Med. Ctr. P’ship, 175 F.Supp.2d 124 (D.P.R. 2001), citing Malone v. Signal Processing Techs., 826 F.Supp. 370 (D.Colo. 1993) (FLSA’s anti-retaliation provision protects conduct based on
good faith, although mistaken belief that employer’s conduct is illegal); *Sapperstein v. Hager*, 188 F.3d 852 (7th Cir. 1999).

In *Kearney v. Town of Wareham*, 316 F.3d 18 (1st Cir. 2002) the Court affirmed the judgment of the lower court: the FLSA does not constrain an employer who, despite harboring animosity toward an FLSA suitor, makes employment decisions on other grounds--and does so with due deliberation and objectivity. The facts of the case recount Kearney’s successful FLSA claims against his employer, the Town of Wareham. Even though the Court acknowledges several instances of retaliatory behavior toward Kearney, it found that the disciplinary proceedings that ultimately led to Kearney’s discharge were replete with due process safeguards such that his retaliation claim could not stand. Specifically, even though it was obvious that the suit plainly left a bad taste in the mouths of Kearney's superiors, “the record is pellucid that the defendants acted only after an evidentiary hearing conducted in such a way as to assure Kearney procedural fairness. The capstone of this process was a recommendation by an independent decision-maker. Kearney has wholly failed either to discredit this process or to show that, but for the defendants' animus toward him, the recommendation would have been rejected.”

### XI. REMEDIES AVAILABLE FOR THOSE WHO SUFFER FLSA RETALIATION

#### A. EQUITABLE RELIEF

A number of remedies are potentially available to employees who have suffered retaliatory effects of an improper discrimination. For example, an employee may request injunctive relief from the court in the form of an order reinstating the employee to his or her former position prior to the adverse action. In addition to injunctive relief, an employee may also request that he or she be given a job promotion that was denied based on the discrimination.

In a recent decision, *Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333 (11th Cir. 2002), the Eleventh Circuit held that the plain language of the FLSA allows plaintiffs to bring retaliation claims to seek preliminary injunctive relief. The plaintiffs, former taxi drivers in Hillsborough County, Florida, were fired shortly after suing Gulf Coast in a collective action for failing to pay them minimum wages. After they were fired, the taxi drivers filed an amended complaint, including a claim for retaliation and for a preliminary injunction to reinstate them to their previous positions.

The lower district court denied the plaintiffs’ claim for injunctive relief based upon a former Eleventh Circuit ruling, *Powell v. Florida*, 132 F.3d 677 (11th Cir. 1998). In *Powell*, the court held that only the secretary of labor could bring an action for injunctive relief for violations of the FLSA. However, in *Bailey*, the court held that *Powell* did not address whether an employee could obtain injunctive relief for violation of the law’s anti-retaliation provision. Rather, the *Powell*, holding only applied to actions for injunctive relief for violations of FLSA’s

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7 For a comprehensive discussion regarding monetary damages, see infra.
wage and hour provisions. As such, the court reviewed the plain language of §216(b) of the FLSA, which provides a private right of action to employees to seek legal or equitable relief for an employer’s violation of the anti-retaliation provision and held that the remedy sought by the plaintiffs, namely reinstatement and no further retaliation, fit squarely within the relief available under §216(b).

XII. OTHER SIGNIFICANT ISSUES

A. STATE IMMUNITY FROM FEDERAL COURT SUITS UNDER FLSA

In June 1999, the Supreme Court ruled that the Eleventh Amendment bars FLSA suits by state employees against states in either federal or state court. *Alden v. Maine*, 527 U.S. 706 (1999). The plaintiffs in *Alden* were state employees who alleged Maine had violated the FLSA with regard to certain overtime payments due them. The Court disagreed, finding that the Eleventh Amendment barred such a federal claim made directly against the state.

The Court’s ruling does not prevent employees of state political subdivisions (such as municipal corporations or school districts) from suing under FLSA. The Court also held that states may enact statutes allowing for suit against them under federal law or may enact parallel statutes which are not affected by the court’s decision. Finally, although the Court ruled that states may not be sued by employees for alleged FLSA violations, they may still be sued on behalf of employees by the Secretary of Labor. Even given these possibilities in the face of state immunity, the Supreme Court of Montana recently found that police officers were not covered by the FLSA and therefore could bring state wage-hour claims. *In re Babinecz*, No. 02-077, 2003 Mont. LEXIS 172 (Mont. April 24, 2003). Specifically, the court found that the Montana laws covered claims not permitted under the FLSA. The court found that because the police officers had no true right of action against the state, the FLSA did not cover them.

B. COMPENSATORY TIME IN LIEU OF OVERTIME

Public sector employers may provide compensatory time off (“comp time”) in lieu of overtime pay as long as the employees agree to do so and the agreement is embodied in a collective bargaining agreement or some other understanding reached between the employer and employee prior to the performance of the work in question. 29 U.S.C. § 207(o). In general public sector employees may accrue up to 240 hours of comp time (480 hours for employees engaged in public safety, emergency response or a seasonal activity). Section 207(o)(5) also provides that employers must honor requests to use comp time within a reasonable period of time following the request, as long as the time off does not unduly disrupt operations. *See, e.g., Houston Police Officers’ Union v. Houston*, -- F.3d --, No. 01-21117, 2003 U.S. App. LEXIS 8096 (5th Cir. April 29, 2003) (public employer need only permit compensatory time within a reasonable period of time after it is requested—it does not have to fit employee’s request exactly); *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999) (public employer’s restrictions on use of comp time were reasonable where the collective bargaining agreement provided that employees had a 30-day period to request comp time off, which period would close when the number of officers
requesting the use of comp time on a given date would bring the City’s staffing levels to the minimum level necessary for efficient operations).

Oftentimes, employees who agree to compensatory time in lieu of overtime accrue more comp time then they are able to use. Accordingly, the law provides that if the employees do not use their accumulated compensatory time, the employer is obligated to pay cash compensation under certain circumstances. The question then arises as to whether an employer can compel employees to use compensatory time rather than to pay them their accrued balance. This was the situation addressed in Christensen v. Harris County, 529 U.S. 576 (2000). In that case, Harris County, Texas had an agreement with its deputy sheriffs permitting them to use comp time in lieu of overtime. Fearing the fiscal consequences of having to pay for accrued compensatory time, Harris County adopted a policy requiring the sheriffs to take comp time off in order to reduce the amount of accrued time they would have to be paid. The sheriffs sued, claiming that the FLSA prohibits such a policy. Specifically, they argued that because § 207(o)(5) requires that an employer reasonably accommodate employee requests to use comp time, it provides the exclusive means of utilizing accrued time in the absence of an agreement or understanding permitting some other method. The Fifth Circuit rejected the claim, finding that, in the absence of an agreement to the contrary, employers can place reasonable restrictions on the use of comp time.

The Supreme Court affirmed. Finding that the statute is silent on this issue, it concluded that the better reading of § 207(o)(5) is that it imposes a restriction upon an employer's efforts to prohibit the use of compensatory time when employees request to do so; however, it says nothing about restricting an employer's efforts to require employees to use comp time. Accordingly, because the FLSA otherwise allows employers to require employees to take time off from work (the FLSA was in part intended to prevent the evils of overwork), and it explicitly permits an employer to cash out accumulated comp time by paying the employee his regular hourly wage for each hour accrued, Harris County was simply combining these two permissible steps into one. In a concurring opinion, Justice Souter noted that although he agreed with the decision, it should not be read to prohibit the Secretary of Labor from issuing regulations prohibiting the forced use of comp time.

The usage of compensatory time may soon be an option for private-sector companies. The labor secretary has argued that changes to the FLSA are necessary to allow employees to have the option of taking compensatory time off in lieu of overtime. In order to further her position, the DOL is planning to conduct a random survey of employees to gauge their opinions on the option of taking comp time rather than being paid overtime. See Daily Labor Report, BNA, Inc., No. 18, p. S-31, January 28, 2003. Moreover, there are currently two bills in Congress proposing to allow private-sector employees access to a compensatory time system. On April 9, 2003, the House version of the bill, known as the Family Time Flexibility Act, was recently ordered to be reported by a vote of 27-22 in the House Committee on Education and the Workforce. The Senate version of the bill, known as the Family Time and Workplace Flexibility Act, was referred to the Senate Committee on Health, Education, Labor, and Pensions on February 5, 2003. Text and status of both bills may be found at http://thomas.loc.gov.
C. **DAMAGES UNDER THE FLSA**

The damages available to employees are potentially huge. Unlike most of the other federal employment laws, the statute imposes fines and criminal penalties (up to $11,000) for willful violations of the statute (although imprisonment is only authorized for second and subsequent convictions). 29 U.S.C. § 216(a). Furthermore, individuals can be held personally liable for civil damages under the FLSA, generally if they act so as to effectively control the employer and/or serve as an alter ego of it. The available civil remedies include all unpaid compensation, mandatory liquidated damages (equal to the amount of the unpaid compensation) equitable relief (such as reinstatement) and attorneys’ fees. 29 U.S.C. § 216(b). However, if the employer acts in a reasonable and good faith belief that its conduct is not in violation of the FLSA, the court may deny an award of liquidated damages. 29 U.S.C. § 260.

Punitive damages are also available for violations of the FLSA’s anti-retaliation provisions set forth at 29 U.S.C. §216(b). Although Section 216(b) limits damage claims for minimum wage and overtime reimbursement claims to unpaid compensation and an additional equal amount as liquidated damages, the damage provision for retaliation claims is open-ended and allows “such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act] …” Given the open-ended nature of this provision, plaintiffs have attempted to seek punitive damages by filing retaliation claims and the courts have been quite receptive. See *Shea v. Galaxie Lumber & Const. Co., Ltd.*, 152 F.3d 729, 736 (7th Cir 1998); *Marrow v. Allstate Sec. & Investigative Servs.*, 167 F. Supp. 2d 838 (E.D.Pa. 2001); *Travis v. Knapp enberger*, No. 00-393-HU, 2000 WL 1853084 at *14 (D. Or. Dec. 13, 2000); *Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1059-60 (N.D. Cal. 1998). In an apparent trend otherwise, two recent decisions have rejected these attempts. In *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000), the court found that, although the statutory language is ambiguous, the “evident purpose” of Section 216(b)’s damages provision is compensatory in nature, not punitive. *Id.* at 934. Similarly, in *Lanza v. Sugarland Run Homeowners Ass’n, Inc.*, 97 F. Supp. 2d 737 (E.D. Va. 2000), the court reached the same result, noting that the punitive portion of the statute is limited to the criminal penalty provisions of Section 216(a). It should be noted that the Seventh Circuit has held that punitive damages are available for retaliation claims. *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir. 1990).

D. **CALCULATING THE REGULAR RATE**

In determining an employee’s “regular rate,” the employer must include the employee’s hourly wages and any bonuses, incentive pay, or commission. Even if the employee will not receive the bonus or commission until later (for example, a quarterly incentive bonus), the payments must be included in the overtime compensation determination, even if this means retroactively adjusting those computations once the amount of the bonus is determined. The commission or bonus is apportioned back over the workweeks of the period in which it was earned, with the employee being paid ½ the increase in the regular rate attributable to the bonus or commission. 29 C.F.R. §§ 778.109, 778.209, 778.117-120. See also *Singer v. City of Waco*, 324 F.3d 813 (5th Cir. 2003)(affirming lower court calculation using overtime hours worked in figuring the regular rate of pay for damages purposes). The only exception is bonuses which are
purely discretionary and are not pursuant to any prior agreement or arrangement, such as a holiday bonus, which is not routinely given. 29 C.F.R. § 778.211-212.

In *Util. Workers Union of America v. S. Cal. Edison Co.*, 83 F.3d 292 (9th Cir. 1996), the court found that Southern Edison’s policy of paying collectively-bargained higher salary levels to disabled employees transferred to lower paid positions did not entitle the company to use the lower base pay rate as the “regular rate” when calculating overtime. The collective bargaining agreement provided that disabled employees unable to perform their jobs would be transferred to lower rated jobs but paid at their former higher rates. In basing overtime pay on the base rate of the lower rated jobs, Southern Edison argued that Section 207(e)(2) of the FLSA excludes from an employee’s regular rate of pay payments made for vacations, holidays, illnesses and “other similar payments to an employee which are not made as compensation for his hours of employment.” The company argued that the supplementary pay for the disabled employees was excluded from the base rate pursuant to Section 207(e)(2). The court rejected this argument, holding that the supplementary payments were compensation for work, and must be included in calculating the employees’ overtime compensation. Additionally, the court held that FLSA rights may not be waived in a collective bargaining agreement, but are independent of such agreements. See also *Albertson’s Inc. v. United Food and Commercial Workers Union*, 157 F.3d 758 (9th Cir. 1998).

The regular rate under the fluctuating hours method is calculated by dividing the employee’s salary by the actual hours worked in a given workweek. The employer need only pay ½ this regular rate multiplied by the hours worked over 40. While this method poses difficulties in administration, it generally results in greater cost savings to the employer. For example, in *Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264 (5th Cir. 2000), the employer paid its employees on a flat, day rate basis, regardless of the number of hours worked per day. Pursuant to 29 C.F.R. § 778.112, the employer calculated the regular rate (for the purposes of overtime) by totaling all weekly compensation paid at the day rate and dividing by the total hours actually worked. This amount was the “regular rate” and was used by the employer to determine overtime compensation. The court affirmed summary judgment, despite the employees’ argument that the greater number of hours they worked, the lower the amount of overtime compensation they would receive. The Court held that the DOL’s interpretation of the law as expressed in 29 C.F.R. § 778.112 was entitled to deference.

The court in *Rainey v. Am. Forest & Paper Ass’n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998), applied a five-factor analysis to find that the employer could not meet the requirements because the plaintiff had not been paid any overtime compensation. The court rejected the employer’s contention that the requirement could be met by the retroactive payment of any overtime due (i.e., as part of the judicially crafted remedy). In the alternative, the court found that the fluctuating workweek would not apply because the mutual understanding requirement had also not been met. The court disagreed with the employer’s claim that it could pay a misclassified employee a ½ rate for overtime even though the employee understood his or her salary covered all hours worked in the workweek. See also *Dingwall v. Friedman Fisher Assoc., P.C.*, 3 F. Supp. 2d 215 (N.D.N.Y. 1998) (employer cannot meet the burden of proving clear, mutual understanding that employee would be paid under the fluctuating workweek plan where
employment manuals described the normal workweek as being a 40-hour week); *Rushing v. Shelby County Gov’t*, 8 F. Supp. 2d 737 (W.D. Tenn. 1997); cf. *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35 (1st Cir. 1999) (employer’s statement to employee who was misclassified as exempt that her salary would cover as many hours as she worked each week was sufficient to form basis of mutual understanding required under fluctuating workweek analysis).

In *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998), the court held that the fluctuating workweek arrangement does not require an employee’s schedule to fluctuate in an irregular unpredictable manner. The court also found that the mutual understanding requirement does not call for the consent of the employees to the method, but merely requires that they understand it.

### E. FLSA AND ARBITRATION

Employees covered by a collective bargaining agreement are nevertheless entitled to bring FLSA lawsuits in federal court without exhausting the grievance procedure. See, e.g., *Albertson’s Inc. v. UFCW*, 157 F.3d 758 (9th Cir. 1998). But cf. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) (finding that arbitration agreement does bar employee from bringing suit under the FLSA). The Court in *Adkins* noted that allowing the employee to circumvent the arbitration agreement would fly in the face of the purpose behind the Federal Arbitration Act.

In *Bailey v. Ameriquest Mortgage Co.*, No. 01-545, 2002 WL 100388, (D.Minn. January 23, 2002), the court ruled that an arbitration agreement between the employer and former account executives was not enforceable because the agreement required the plaintiffs to relinquish their substantive rights under the FLSA. The agreement provided for a one-year limitations period, as opposed to the FLSA’s two-year statute of limitations; included a fee-splitting provision; and required the plaintiffs to litigate their claims in California. Because parties do not forego their substantive rights when they sign an arbitration agreement, “courts must ensure that the agreement in question is in fact merely a change of forum and not a relinquishment of an individual’s substantive statutory rights.”


### F. RELEASES

After a group of construction firm workers brought an action under the FLSA and state wage laws, the employer requested the employees to execute a release of his or her claim in return for monetary payment. In *O’Brien v. Encotech Construction Service Inc.*, 183 F.Supp.2d 1047 (N.D.Ill. 2002), the court found the agreements voided by public policy. “Permitting an employer to violate a minimum wage law, and escape legal consequences by paying an employee something to forget about the violation, undermines the proper functioning of these laws almost as effectively as simply failing to follow them in the first instance.”
G. DEFENSES

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

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


With respect to non-willful wage violations, a plaintiff has two years after the cause of action accrues to file suit. With respect to willful wage violations, the limitations period extends to 3 years after the cause of action accrues.

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

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

There are also many non-statutory defenses that may apply in FLSA actions: laches, estoppel, mootness, res judicata and collateral estoppel, and exhaustion of remedies and

8 FLSA Treatise at 1250-51.
9 Id. at 1248.
Whether derived from statute or common law, the defense must plead the affirmative defenses. Otherwise, the defense will be waived.

H. STATE LAW ISSUES

A California appellate court issued a preemptory writ ordering the trial court to vacate its order granting class certification in a lawsuit brought under California’s wage and hour laws. Sav-On Drug Stores, Inc. v. The Superior Court of Los Angeles County, 118 Cal. Rptr. 2d 792 (Ct. App. 2002), depublished by Sav-On Drug Stores, Inc. v. The Superior Court of Los Angeles County, 125 Cal. Rptr. 2d 439 (Ct. App. 2002) (granting petition for review en banc). In finding that the trial court judge abused his discretion by certifying the class, the appellate court found that there were substantial questions related to each member of the class that predominated over the common questions to be litigated.

Several hundred operating managers (“OM’s”) and assistant managers (“AM’s”) from California’s more than 300 Sav-On Drug Stores had been classified as exempt from California’s wage and hour laws under the state’s equivalent of the FLSA’s administrative duties exemption. Plaintiffs argued that the OM’s and AM’s, who routinely worked more than 40 hours per week, were actually non-exempt because they spent more than 50% of their working hours on tasks other than administrative duties. Additionally, plaintiffs contended that class action was proper simply because the defendant had a policy of treating the OM’s and AM’s as group. Defendant, in addition to arguing that the managers did not spend more than 50% of their working hours on non-administrative tasks, also argued that class action was improper here because each member’s right to recover depended on separate facts applicable only to that member.

The court agreed with the defendant, adopting its reasoning and finding that “the range of activities performed by managers and the amount of time spent in such activities vary significantly from manager to manager based on multiple factors such as store location, size, physical layout, sales volume, hours of operation, management structure and style, experience level of the individual manager, and the number of hourly employees requiring supervision.” The court found it impossible to make any meaningful generalizations regarding the employment circumstances of defendant's managers. Thus, contrary to plaintiffs' position, the evidence demonstrated that the individual and unique factual inquiries required to determine whether defendant's managers have been properly classified as exempt precluded determination of that issue on a class-wide basis. As for plaintiff's argument that a class action was proper because defendant treated all AM's and OM's as exempt, the court disagreed and found that, “the mere fact that defendant has treated its OM’s and AM’s as exempt, based on its reasonable expectation that managers in those positions would be performing primarily managerial duties, is not the equivalent to a finding that the legality of that determination can also be made on a class-wide basis.”

In Muecke v. A-Reliable Auto Parts and Wreckers, Inc., No. 01-C-2361, 2002 WL 1359411 (N.D. Ill. June 21, 2002), a federal judge declined to certify a class for a lawsuit under Illinois wage and hour laws because those same potential class members would have the option to add themselves to the lawsuit under the FLSA. The court reasoned that because all of the
companies’ present and former employees will have the chance to decide whether to join the case under the FLSA opt-in rules, and because those who wish to do so will be before the Court, it makes no real sense to certify a class for the state-law claims that will automatically include all of the employees unless they opt out. The court found that under the circumstances, and because of the relatively modest number of existing present and former employees, there was nothing to favor the proposition that we should impose on the collective FLSA claim an overlay of a Rule 23(b)(3) state-law class.

ADDENDUM -- NEW DOL REGULATIONS

I. Department of Labor Proposes White Collar Exemption Overhaul

A. Background

After several years of internal and external pressure, the Department of Labor has finally unveiled its plan to update the outmoded white collar exemptions. Labor Secretary Chao has described the current white collar exemption regulations as “literally ancient” and “absurdly complex.” The proposed regulations comprise a drastic overhaul of the existing rules, some of which have not been updated since 1949.

29 C.F.R. § 541.6 has been deleted from the proposed rules because it is obsolete. This section provided for a process by which interested persons could petition the Administrator for desired changes to the regulations. Of course, with the passage of the informal rulemaking provisions of the Administrative Procedure Act in 1946, interested parties no longer petition for desired changes. 5 U.S.C. § 553(e). The proposed rules were published in the Federal Register on March 21, 2003. The Department of Labor will be accepting comments on the proposed rules until June 30, 2003. Indeed, throughout the Department’s statement and purpose of the proposed rules, it invited comment on a variety of topics, including the modernization of example occupations to be published with the final rule.

It is important to note that what follows in this addendum is an analysis of the proposed rules. The Department of Labor will undoubtedly alter the text of this proposal after the notice and comment period has passed. None of the proposed regulations has the binding effect of law until after the final rule is published. For these reasons, this analysis will focus mainly on the new requirements of the proposed standard tests and the additional regulations novel to the proposed rule. As the definitions and examples provided in the proposed rule are areas for which the Department of Labor has specifically requested extensive comment, and therefore may be subject to the greatest alteration, they are addressed here in an illustrative fashion only.
B. Why New Rules?

Public concerns, both from employers and employees, regarding the complexity of the current regulations have been voiced for years. In drafting the proposed rule, the Department of Labor relied heavily on a report issued by the General Accounting Office ("GAO") in September, 1999 that outlines these concerns.

According to the GAO report, employers were most concerned with violating the exceedingly complex salary basis test, specifically, in terms of the “no-docking rule.” This oft-litigated area of the current regulations has cost employers millions over the years by way of lost overtime exemptions due to improper deductions from employees otherwise classified as exempt, because it can destroy the “salary basis” for the exemption. Employers raised further concerns over the outdated application of the current duties tests. Employers cite the various requirements imposed by both the long and short duties tests as being confusing, applied inconsistently by Wage and Hour Division investigators, and archaic because of the modernization of the 21st century workforce. Finally, employers sought less subjective requirements to streamline and clarify the complex determinations required by both employers and investigators in Department audits.

Employees and employee representatives, not surprisingly, have been troubled by a very different set of concerns. These groups fear that the current regulations do not effectively preserve the forty-hour workweek and the overtime premium pay mandated by the FLSA. Specifically, the employee lobby views the current exemption tests as having been weakened over the years by judicial rulings, thereby blurring the lines at which employers may properly exempt employees. This “judicial muddying” of the once useful rules has paved the way for employer abuse of the exemptions, thus denying thousands of workers overtime premiums to which they would otherwise be entitled. Moreover, employees cite inflation as reason for the evisceration of the current salary test requirements. Because the dollar values of the salary tests have not been changed since 1975, employees argue that the application of the current regulations is virtually meaningless. Indeed, an employee working forty hours per week at the current minimum wage of $5.15 per hour would gross $206 per week, exceeding the current $155 per week requirement for application of the long duties test. For this reason, the long duties test has not been applied for many years.

The proposed rule addresses most of these concerns by, among other things, streamlining the long and short duties tests into a standard duties test and increasing the minimum salary requirement.

C. What’s New? An Overview

Because this paper explains the existing tests, derived from the current regulations, in detail, there is no need to revisit that material. This addendum will focus on the structural and functional differences between the proposed rules and the existing regulations.

1. Structural Changes
29 CFR Part 541 currently contains two subparts; subpart A includes the regulatory tests described above, and subpart B includes definitions of the terms used in the exemptions. The proposed rule eliminates the division of these subparts, thereby streamlining the requirements for each exemption. As published in the Federal Register, there are five subparts, each one containing the requirements for a particular exemption. The requirements are directly followed by explanations of the various terms used. This new format appears to make referencing and research easier, as there is no need to flip back and forth between the subparts when examining one particular exemption. Furthermore, several examples of different exemptions are provided along with the explanations, further consolidating each category of exemption. Miscellaneous provisions and generally applicable definitions have been relegated to the end of Part 541 in subpart H. Because few changes have been made to the contents of subpart H, it will not be discussed in its own section, but rather novel concepts will be addressed as appropriate throughout this addendum.

2. Functional Changes

Probably the most striking functional change is the elimination of the long duties test. Not only has the long duties test been obsolete for years, but it was, as its name suggests, long. With its length, came complexity and confusion which, in turn, spawned a great deal of litigation. In order to avoid throwing the entire body of FLSA jurisprudence into the paper shredder, the Department instead devised a standard test, based on a combination of the old long and short duties tests. Thus, the step-by-step process through which employers and Wage and Hour Division investigators can determine whether an employee is exempt from overtime pay has not been fundamentally changed. The idea was to make the task much easier and less subjective.

To determine whether an employee qualifies for an exemption, she must first pass the salary basis test. Under the old rules, there were two income ceilings that were connected to either the long or the short duties test. To avoid this protracted analysis and to address the inflation-based concerns of the employee lobby, the proposed rules provide that any employee making less than $425 per week will automatically be non-exempt. Therefore, only employees that earn more than this threshold amount, and otherwise pass the salary basis test, will be subject to the new standard test. Both the salary basis test and the new standard duties tests for each exemption will be discussed in more detail, infra.

3. Subpart A—General Regulations

In contrast to the current regulations, which have general provisions scattered throughout the entire rule, the proposed regulation organizes these introductory items under the heading of Subpart A. Included in the new Subpart A are an introductory statement, explaining the structure and function of the regulation; a terms section that defines Administrator; and an important admonition to employers: “a job title alone is insufficient to establish the exempt status of an employee.” Prop. Reg. § 541.2. This is consistent with FLSA jurisprudence and our comments in the main paper.
4. Subpart B—Executive Employees

As was thoroughly discussed in the body of the main paper, the current executive exemption duties test is very complicated and not clearly understandable by most people. The new rules, however, attempt a comprehensive definition. It provides that an “employee employed in a bona fide executive capacity shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $425 per week … exclusive of board, lodging or other facilities;

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

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

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees will be given particular weight.”

Prop. Reg. § 541.100. Unlike the current regulations, one need only look just beyond this section for the definition of various terms such as “management of the enterprise.” Proposed sections 541.103-541.105 define these terms in ways that will hopefully foster the objective application of the exemption requirements. Each definition is accompanied by several illustrative examples.

a. 20 % Equity Owners

The proposed regulations also would recognize as an exempt executive any employee who owns at least a twenty-percent equity interest in the enterprise in which he is employed. Prop. Reg. § 541.101. It does not matter whether the business is a corporation or other entity. Furthermore, the salary basis test does not have to be met for this particular exemption. The Department reasoned that a partial owner will likely share in the profits of the enterprise and that this profit-sharing is an appropriate indicator of the individual’s exempt status.

b. Sole Charge Executives

Similar to the current regulations, the proposed rule also would include as an exempt executive an employee who is in “sole charge of an independent establishment or a physically separated branch establishment.” Prop. Reg. § 541.102. To qualify for this exemption, the employee must meet the salary basis test, and must also have the “authority to make decisions regarding the day-to-day operations of the establishment and to direct the work of any other employees at the establishment or branch.” While the “sole charge” and “twenty-percent owner” executives are included as exemptions in the current regulations, they appear in the complex and rarely-used long duties test as exceptions to the percentage restrictions on non-exempt work.
c. Working Supervisors; Retail and Fast Food

As discussed in the main body of the paper, confusion often arises in the cases of working supervisors and management level employees in retail or fast food establishments. *See Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982), *supra*. It is often the case that managers in retail and fast food establishments do the same work as regular employees in addition to their other duties. The court in *Donovan* found that the primary duty of assistant managers at Burger King was supervisory in nature, and therefore exempt. This holding is essentially codified in Prop. Reg. § 541.107, which states that “[p]erformance of such non-exempt work by a supervisor in a retail establishment does not disqualify the employee from the exemption if the requirements of § 541.100 are otherwise met. Thus, an assistant manager whose primary duty includes such activities as scheduling employees, assigning work, … [etc.] may be an exempt executive even though the assistant manager spends the majority of the time on non-exempt work.” The opposite is true, however, for working supervisors. Because a working supervisor’s primary function often consists of the same kind of work as his subordinates, he will not be exempt if his supervisory responsibilities are incidental to his primary duty. Prop. Reg. § 541.106. There remains substantial ground for confusion and litigation over this issue.

5. Subpart C—Administrative Employees

Under the current regulations, the administrative exemption has been classified as the most difficult to discern. The GAO report notes specifically that the requirement that the employee exercise “discretion and independent judgment” has generated significant confusion and copious litigation. The proposed rule attempts to reduce the burden of deciphering the old regulations. Specifically, it states that the term “‘employee employed in a bona fide administrative capacity’ … shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $ 425 per week … exclusive of board, lodging or other facilities;

(2) With a primary duty of the performance of office or non-manual work related to the management or general business operations of the employer or the employer’s customers; and

(3) Who holds a position of responsibility with the employer.

Prop. Reg. § 541.200. This concise, three-part test may prove easier to apply than the current tests. Most notably, the “discretion and independent judgment” requirement from the current rules is replaced with the requirement that the employee hold a “position of responsibility” with the employer. Of course, the phrase “position of responsibility” does not sound much less subjective than its predecessor, but the definitions that follow § 541.200 may add enough objectivity to reduce litigation over this exemption.
a. Primary Duty

The primary duty requirement is defined in § 541.201. It emphasizes that performing “work related to the management or general business operations of the employer or the employer’s customers” refers to the work that the employee does. This work must be linked with the running or servicing of the business versus selling a product or working on an assembly line. Several illustrative examples of exempt work are provided, including tasks in tax, finance, accounting, and many other areas. It was also considered important enough to warrant a separate subsection to remind employers that the administrative exemption extends to those employees who perform work related to the management or general business operations of the employer’s customers. Therefore, consultants, tax experts, and the like can qualify for the exemption if they meet the other requirements.

b. Position of Responsibility

To meet the “position of responsibility” requirement, the employee “must either customarily and regularly perform work of substantial importance, or perform work requiring a high level of skill or training. Prop. Reg. § 541.202. This definition, in turn, begs the questions: What is work of substantial importance? and What qualifies as work that requires a high level of skill or training? The “work of substantial importance” concept is present in the current regulations and the proposed rules simplify the definition, but otherwise do not change it significantly. § 541.203, which is devoted entirely to “work of substantial importance”, provides a definition, but one that is illustrated in the subsequent text. To be considered to be of substantial importance, the work must, “by its nature or consequence, affect the employer’s general business operations or finance to a significant degree.” Myriad examples follow, along with occupation-specific hypothetical situations that are designed to address significant cases that litigated the current duties tests for the administrative exemption. For example, insurance claims adjusters have been notoriously difficult to classify under the current rules. § 541.203(b)(2) tackles this issue by stating the claims adjusters generally perform work of substantial importance. If adopted, this would provide some clarity on whether claims adjusters are production workers, or administrative workers. Applying the new rules, claims adjusters would be classified as administrative workers if they met the other requirement of the standard test. As the proposed regulations cannot possibly address all of the litigation spawned from the current rules, the Department has specifically asked for comments relating to this definition.

c. High Level of Skill or Training

As defined in § 541.204, a “high level of skill or training” does not have to be acquired though advanced schooling. Further proposed definitions and examples may help to solve the current problem of denying employees the administrative exemption simply because they rely on a procedures manual to make certain decisions. Where employees must consult such guides to aid them in making difficult or complicated decisions, they may still be considered exempt under the proposed rules. The reasoning behind this stems partly from the vast technological and regulatory advances that have been made since the FLSA’s inception. For example, a tax analyst who needs to consult the tax code to work through a complex issue will not lose her exempt
status under the proposed regulations because she does not use the tax code to simply look up the correct answer. She must apply her own skill and knowledge in combination with other resources in doing her work.

d. Educational Employees

§ 541.205 addresses educational employees. The standard test is very simple for these employees; utilizing the same $425 salary requirement, and also requiring that the employee’s “primary duty consist of performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.” There is an additional section to the salary requirement that will not jeopardize the exemption if the employee makes less than $425, as long as he makes at least the entrance salary for teachers employed in the same educational establishment. This provision, combined with the repeated admonition that secretarial or clerical work is not exempt work, clearly extends to principals, superintendents and other school administrators. Indeed, principals and vice-principals are included as examples in this section, while maintenance workers, dieticians, and school nurses are specifically excluded, because their work does not directly relate to academic instruction or training.

6. Subpart D—Professional Employees

The current regulations for the professional employee exemption are a sea of confusing requirements that vary depending on which category of professional the employee falls into. The result has been litigation. Furthermore, computer professionals and teachers were lumped into this category with their own unique specifications as well. The proposed regulations do much to reduce the sticky morass of rules past. Indeed there is one, streamlined test that initially applies to all professional employees to determine their status. The term “employee employed in a bona fide professional capacity … shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $425 per week … exclusive of board, lodging, or other facilities; and

(2) With a primary duty of performing office or non-manual work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience; or

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

Prop. Reg. § 541.300. This succinct test applies to every category of professional employee included in the current regulations, but eases the method by which employers must determine the
exemption status of its professionals. The subpart is further broken down to address each of the different categories and to provide related definitions and examples.

a. Learned Professionals

Subsection 2(i) above refers to learned professionals. The new rules define “advanced knowledge” as knowledge that is traditionally acquired through a prolonged course of specialized intellectual instruction. This definition does not stray too far from the current one, however, there have been problems with a dichotomy arising from the current narrow definition. Where two engineers do essentially the same work, but one has a degree and the other obtained his skill and knowledge through on-the-job training, the academically certified employee will be exempt, while the other one may not. The proposed rule takes care of this problem by providing that “advanced knowledge” also may be acquired through “alternative means such as an equivalent combination of intellectual instruction and work experience.” It is important to note that the employee’s level of knowledge acquired partially through work experience must equal that of the employee with the academic certification typically required by the profession. However, there is no proposed system to formulate the equivalency of the knowledge of employees who take different routes to the same destination in this way. The Department specifically requests comments on whether or not a test should be devised to help make this decision. The proposed rule goes on to list several occupations that have been predetermined to meet the requirements for learned professionals including: registered nurses, physician assistants, accountants, and some others. Arguably, the new rules will broaden the number of potential “learned professionals,” and this is likely to lead to increased litigation as the boundaries of the definition are tested.

b. Creative Professionals

Subsection 2(ii) is intended to apply to creative professionals. This definition is a simpler version of the current one, but is not intended to alter it substantively. The distinction to be made here is one between employees who must use their creativity to work, and employees who work around creativity or in a creative medium. For example, a journalist who gathers facts, conducts interviews, and combines information into a report, column, or broadcast, would be doing work that requires “invention, imagination, originality, or talent”, and therefore qualify for the exemption if she fulfills the other standard test requirements. On the other hand, an animator for a Disney film may not be exempt, because he has no say in the story line, and must draw characters according to certain specifications, thereby not utilizing his creativity or originality.

c. Teachers

The only change to the current short duties test for teachers is the proposed deletion of the requirement that the employee’s work require the consistent exercise of discretion and judgment. This deletion is proposed for the same reasons that “discretion and judgment” is omitted elsewhere in the proposed rules: because of the historical confusion and subjectivity surrounding this requirement. Consequently, the professional exemption for teachers only contains one other requirement in addition to the standard test mentioned above. The employee
must have 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.” Prop. Reg. § 541.303(a).

Like the learned professionals, teachers who are academically certified are not complicated subjects for the new test. However, not all educational establishments require their teachers to have an elementary or secondary education certificate. The proposed rules address this by specifically noting that a certificate is not required for a teacher to qualify for the exemption.

d. Practice of Law or Medicine

The Department indicates that it intends no substantive changes to law or medicine exemptions, but the structural changes are noteworthy. As with the other exemptions, the definitions have been streamlined and general, definitional provisions have been relegated to Subpart H. The $425 per week salary requirement does not apply to licensed lawyers and medical professionals, probably much to the chagrin of many a medical resident. The proposed regulation succinctly defines the requirements of this specific professional exemption as “(1) any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(2) any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.” Prop. Reg. § 541.304.

7. Subpart E—Computer Professionals

Citing the rapidly changing world of technology, the first paragraph of the proposed regulation reiterates that job titles are not to be used in the determination of this exception. It further states that “to qualify for the computer occupations exemption, the employee must:

(1) Be compensated on a salary or fee basis at a rate of not less than $425 per week … exclusive of board, lodging or other facilities, or on an hourly basis at a rate not less than $27.63 an hour; and

(2) Have a primary duty consisting of:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(ii) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
(iii) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(iv) A combination of the aforementioned duties, the performance of which requires the same level of skills.

Prop. Reg. § 514.400. Because the computer professional exemption was added the most recently, amended as recently as 1996, and partially codified into the FLSA, this condensed definition does not substantively change the current regulations. However the new rules delete the requirement that a computer professional consistently exercise discretion and judgment. This omission is discussed in more detail, supra. While not providing material changes, the proposed rule will hopefully eliminate some of the confusion that has surrounded the current exemption.

8. **Subpart F—Outside Sales Employees**

The term “employee employed in the capacity of outside salesman” shall mean any employee:

(1) With a primary duty of:

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

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

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

Prop. Reg. § 541.500. The $425 per week salary requirement does not apply to outside sales employees. The biggest change this section proposed to make is the elimination of percentage tolerance requirements. Under the current rules, an outside sales employee is allowed to devote up to twenty percent of her workweek to non-exempt work. The percentage requirements have been eliminated across the board because of the difficulty in discerning parts of a day or workweek an employee spends doing different kinds of work. One can imagine that for these requirements to be accurately enforced, the employee in question would spend a great deal of her day keeping a journal or some other record to prove how much of each workday she spent doing certain kinds of work. Additionally, the across-the-board omission of percentage requirements will facilitate the application of this regulation as a whole by providing a consistent approach to each exemption.

To ensure clarity and consistent application, the Department further proposes that when determining the primary duty of an outside sales employee, “work performed incidental to and in conjunction with the employee’s own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee’s sales efforts also shall be regarded as exempt work including, for
example, writing sales reports, updating or revising the employee’s sales or display catalog, planning itineraries and attending sales conferences.” The inclusion of this incidental work further lessens the need for employees to break down their workday into exempt and non-exempt tasks.

The remainder of this subpart replaces the current and somewhat outdated examples with more timely ones. Similarly, these proposed illustrative examples address issues that have been historically confusing under the current scheme.

9. Subpart G—Compensation Requirements

The proposed version of the current salary basis test appears in subpart G. The $425 per week minimum requirement for exemptions has already been discussed throughout this addendum. Consequently, only the remaining sections of subpart G will be discussed below.

a. Highly Compensated Employees

The proposed special rule for highly compensated employees is on paper quite simple. Any employee who is paid more than $65,000 per year and who performs non-manual work will be considered exempt from overtime premiums if he has one identifiable executive, administrative, or professional function as described in the standard duties tests. In other words, if an employee qualifies as a highly compensated employee, she needs only meet one part of the corresponding duties test to qualify for the exemption. To discern whether an employee meets the $65,000 threshold, base salary, commissions, non-discretionary bonuses, and other non-discretionary compensation would be considered. Additionally, as a further protection to employers, if a particular employee’s salary would not otherwise meet the $65,000 threshold by the end of the year, the employer could, to preserve the exemption, make a payment to the employee by the next pay period that would bring that employee’s salary above $65,000.

The reasoning behind this rule is that a high salary is “a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s job duties.” Prop. Reg. § 514.601(c). The Department may be looking to expand upon that reasoning, as it has specifically invited comments about the possibility of a “salary only test.” Seemingly, this test would really be a number. Beyond a certain salary, employees would automatically be exempt automatically no matter what their duties. This idea seems to mirror the $425 per week minimum requirement as any employee below this threshold is automatically non-exempt despite what her duties may be (not including the proposed exceptions to the $425 rule).

b. Salary Basis

The proposed salary basis test is very similar to the current one, with a few notable exceptions. One, of course, is the increased minimum threshold. The other, however, is proposed with the goal of equalizing the treatment of exempt and non-exempt employees. Under the new scheme, employers still would have to pay salaried employees the same weekly rate regardless of the number of hours worked. Additionally, employers are not required to pay a
salaried employee for any week during which no work was performed. But under the old regime, salaried employees could not be docked for time off for disciplinary reasons (except for safety violations). The Department, however, is proposing that employers be able to deduct from pay, in full-day increments, for disciplinary suspensions. Employers still would not be permitted to deduct partial-days from salaried employees, even for disciplinary suspensions.

c. Safe Harbor Provision

The safe harbor provision is a fresh look at the oft-litigated “window of correction” rule. The proposed rule clarifies the circumstances under which an improper deduction would cause an employee or group of employees to become non-exempt. Specifically, the proposed rule provides that “an employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer has a pattern and practice of not paying employees on a salary basis. A pattern and practice of making improper deductions demonstrates that the employer did not intend to pay employees in the job classification on a salary basis. Improper deductions that are isolated or inadvertent, however, will not result in loss of the exemption.” Prop. Reg. § 514.603(a). The rule further suggests factors to consider when determining whether an employer has a pattern or practice of not paying employees on a salary basis. These factors are not meant to be an exhaustive list, and include: “the number of improper deductions; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; the size of the employer; whether the employer has a written policy prohibiting improper deductions; and whether the employer corrected the improper pay deductions.” Id.

Thus, under the new safe harbor provision, if one manager at one facility routinely and improperly docks pay for a class of employees, all employees of that class whose pay could have been docked by that manager are no longer exempt. However, other members of that class of employees located at different facilities do not lose their exemption.