Workers' Compensation Seminar

Mining for Wage & Hour Cases in a Workers' Compensation Practice

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OVERTIME COVERAGE UNDER THE FLSA

This paper is intended to provide lawyers with a very brief and general overview of the federal Fair Labor Standards Act ("FLSA") and which workers are covered by the FLSA's overtime provisions. Of course, what follows does not come close to addressing the many coverage issues arising under the FLSA and similar state statutes. If you are interested in learning more, an especially excellent overview of the substantive law can be found in Betty Southard Murphy and Elliot S. Azoff, Guide to Wage and Hour Regulation, 2d Ed. (BNA 1998). Other generalized information can be found at the website for the Wage & Hour Division of the United States Department of Labor ("www.dol.gov/esa/whd/") and in Robert N. Covington and Kurt H. Decker, Employment Law in a Nutshell (West 2002). More detailed analysis can be found in Les A. Schneider and J. Larry Stein, Wage and Hour Law: Compliance and Practice (West 2000).

I. Why Should I Care About the FLSA and the Overtime Pay Requirement?

The FLSA, codified at 29 U.S.C. § 201, et seq., is the primary source of this Nation's minimum wage, overtime, and child labor protections. With respect to overtime, the FLSA generally prohibits companies from requiring workers to work over forty hours in a workweek unless the worker is compensated for all overtime hours at a rate not less than one-and-one-half times his regular rate of pay. See 29 U.S.C. § 207(a)(1).

Enacted in 1938 by President Franklin D. Roosevelt, the FLSA overtime provision reflects the progressive values underlying so much of the New Deal legislation. The legislative purpose behind the time-and-one-half overtime premium was two-fold. First, the overtime premium was intended "to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of overwork as well as underpay.'" Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728, 739 (1981) (quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt)). Second, "[i]n a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work." Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942). In other words, Congress intended that, by making overtime prohibitively expensive, the FLSA would force companies to hire more workers instead of requiring existing workers to work overtime.

II. Are My Clients Covered?

According to the Department of Labor, over one hundred thirty million American workers are covered by the FLSA. See DOL Wage and Hour Division Fact Sheet No. 14 (available at "www.dol.gov/esa/whd/"). For purposes of coverage, the FLSA interprets the term "employee" in the broadest sense to include "any individual employed by an employer." 29 U.S.C. § 203(e). Covered employees can include, among others, independent contractors, see Johnson v. Unified Govt. Wyandotte Cty., 371 F.3d 723, 729 (10th Cir. 2004) (describing factors to be considered in deciding whether worker is covered employee or independent contractor), and even trainees, see Chelen v. John Pickle Co., 344 F. Supp. 2d 1278, 1291-92 (N.D. Okla. 2004) (describing factors to be considered in determining whether trainee is covered employee).

Workers fall within the FLSA's reach so long as they are engaged in covered activity. Covered activity can be established under either the "individual/traditional coverage" doctrine or the "enterprise coverage" doctrine. Under individual/traditional coverage, workers are covered if, based on their job function, they are engaged in commerce or in the production of goods for commerce. See 29 U.S.C. §§ 206(a)(1) and 207(a)(1). Under enterprise coverage, workers, regardless of their job function, are covered if their company is part of a business enterprise that is engaged in commerce or the production of goods in commerce. See id. at §§ 203(r)-(s). In order to qualify for enterprise coverage, the company generally must do at least $500,000 in annual business, see id. at § 203(s)(1)(A)(ii), but this threshold can be reached by combining the company with other business partners in a "common business purpose", see Chao v. A-One Med. Serv., Inc., 346 F.3d 908, 914-15 (9th Cir 2003) (citing 29 U.S.C. § 203(r)(1)). Also, exceptions are made for volunteers of various non-profit and public entities. See 29 U.S.C. § 203(e)(4)-(5).

Given the extraordinarily broad parameters of the individual/traditional and enterprise coverage doctrines, you generally can assume that most of your clients are covered by the FLSA. Furthermore, in Ohio workers are covered by the Ohio Minimum Fair Wage Standards Act ["the Ohio Wage Act"]codified at Ohio Rev. Code §4111 et seq. The Ohio Wage Act adopts the federal standards as its own by numerous references to the FLSA. The Ohio Wage Act provides more minimum wage protection to employees than the federal regulations but mandating treble damages without the need to show the employer engaged in "willful" conduct.

There are 22 states that provide additional protections beyond the FLSA. The attached table, derived from information in Attorney Barbara Kate Repa's excellent handbook entitled Your Rights in the Workplace 6th Ed. (Nolo 2002), lists states that provide their own statutory overtime protections.

III. Specific Ohio Requirements, different from the FLSA.

Ohio regulates the wages of employees of employers whose gross volume of sales are more than $150,000, but less than $500,000. O.R.C. § 4111.03(D)(2). An employer that falls in this category must pay overtime at a rate of one-and-one-half the employee's hourly rate after 40 working hours in a week.

On November 7, 2006 Ohio passed the Ohio Fair Minimum Wage Amendment. Effective January 1, 2011 the minimum wage in Ohio is $7.40 per hour for employees of employers with gross annual receipts of $250,000 or more. O.R.C. § 4111.02; Ohio Const. Art. II § 34(a). If the employer makes less than $250,000 in gross annual receipts, it can still pay the federal minimum wage of $7.25 an hour. See id. Employers may also pay tipped employees, such as waiters and waitresses, less than the new minimum wage, but no less than half, provided that the tips received by the worker, combined with his wage, add up to at least equal or more than the new minimum wage. Id.

Under Ohio law, employers must pay employees at least two times in a month. Contrary to popular belief, an employer does not have to pay bonuses or give vacation in Ohio.

IV. Are "Salaried" Employees Entitled to Overtime?

One of the myths of the American workplace is that "salaried" workers are not entitled to overtime. Exploiting this myth, some companies promote workers from "hourly" to "salaried" positions with the understanding that, in exchange for the salary, the worker gives up her right to overtime pay. Because these "salaried" job titles often carry an elevated status within the workplace, working without overtime may seem reasonable to the worker.

But the FLSA does *not* exempt all salaried workers from overtime pay. Rather, where a salaried worker is covered by the overtime provision, her salary is usually calculated by dividing her weekly salary by the number of hours the salary is intended to compensate. See 29 C.F.R. § 778.113(a). However, many variations on this general rule exist, see id. at §§ 778.107, et seq., and these variations are too detailed for coverage here.

V. Are "Salaried" Employees Ever Exempt From Overtime?

The FLSA exempts certain executive, administrative, professional, outside sales, and computer employees from the entitlement to time-and-one-half overtime benefits. See 29 U.S.C. §§ 213(a)(1) and 213(a)(17). These exemptions commonly are referred to as the "white collar" exemptions, and they have spawned substantial litigation as some American companies choose to push the envelope in increasingly aggressive efforts to deny overtime pay to workers and their families.

The white-collar exemptions – like all FLSA exemptions – are narrowly construed against the employer. See Arnold v. Ben Kanowski, Inc., 361 U.S. 388, 392 (1960); A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

To utilize a white-collar exemption, a company generally must clear two independent hurdles:

A. The "Salary Basis" Requirement

First, the employee must be paid on a "salary basis" at a salary of at least $455 per week. See 29 C.F.R. § 541.600(a); see generally Auer v. Robbins, 519 U.S. 452 (1997) (discussing "salary basis" concept). "An employee will be considered to be paid on a 'salary basis' . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). Generally, the employee "must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." Id. However, under appropriate circumstances (which are described in the regulation), deductions may be made for full-day absences attributable to, *inter alia*, illness or disciplinary suspensions. See id. at 541.602(b).

Historically, many misclassification cases have been won because companies made improper deductions from a salaried employee's pay. See, e.g., Takacs v. Hahn Automotive Corp., 246 F.3d 776 (6th Cir. 2001) (managers and assistant managers of retail establishment not exempt from overtime entitlement because company subjected them to improper deductions for certain disciplinary infractions); Oral v. Aydin Corp., 2001 U.S. Dist. LEXIS 20625 (E.D. Pa. Oct. 31, 2001) (workers not exempt from overtime entitlement because company subjected them to improper deductions for partial-day sick absences). However, seeking to protect business from large damages awards, the Department of Labor recently expanded regulations allowing companies to escape some liability for "inadvertent" pay deductions that are voluntarily reimbursed by the company. See 29 C.F.R. § 541.603.

Deductions are permissible in certain limited circumstances.

1. An employee is not required to be paid for any week in which she performs no work. See, C.F.R. § 541.118(a).
2. An employee is not required to be paid for a day where she missed a full day for personal reasons. See, C.F.R. § 541.118(a).
3. An employee is not required to be paid for any day occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. See, C.F.R. § 541.118(a) (3).

4. The Family Medical Leave Act of 1993 created some limited exceptions permitting employers to place otherwise exempt, salaried, employee on unpaid leave. See, C.F.R. § 825.206(a).
5. Employees can be docked pay for major safety violations. See, C.F.R. § 541.118(a) (5)

B. The "Job Duties" Requirement

Even if the worker is paid on a "salary basis," an analysis of the worker's job duties must reveal that she actually works as an executive, administrative, professional, outside sales, or computer employee, as those terms are defined under the FLSA. Before turning to each of these exemptions, three preliminary points are in order.

First, in 2004, the Department of Labor expanded the reach of the white-collar exemptions in its business-friendly amendments to the overtime regulations. The amended regulations appear at 29 C.F.R. 541.0, et seq.[1]

Second, even where the revised regulations disadvantage particular employees, advocates should remember that many states have their own overtime laws and regulations and that some state regulations contain language that mirrors the pre-2004 federal regulations. In Ohio, the OMFWSA incorporates the definitions and tests of the FLSA. See, Ohio Rev. Code § 4111.03(D)(3)(d). Importantly, the FLSA does not preempt state laws that offer workers more protection than the FLSA. See 29 C.F.R. § 541.4 ("Employers must comply with any Federal, State, or municipal laws, regulations, or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act"); DeAsencio v. Tyson Foods, Inc., 342 F.3d 301 (3d Cir. 2003) (recognizing that overtime lawsuits may be litigated under both federal and state laws). Also, workers cannot waive their FLSA rights through individual employment contracts or collective bargaining agreements. See 29 C.F.R. § 541.4.

Third, even the new regulations confirm the well-established principle that "[a] job title alone is insufficient to establish the exempt status of an employee." 29 C.F.R. § 541.2; see also Martin v. Indiana Michigan Power Co., 381 F.3d 574, 585-86 (6th Cir. 2004) ("The FLSA requires the employer to make FLSA exemption decisions based on the employee's actual job duties, not the employee's job title."); Barth v. Wolf Creek Nuclear Operating Corp., 125 F. Supp. 2d 437, 439 (D. Kan. 2000) (quoting previous regulatory language for proposition that "[t]itles can be had cheaply and are of no determinative value"). In other words, a company cannot escape its overtime obligations by giving a worker a salary and a glamorous title but requiring her to perform the same work as her non-exempt co-workers.

[1] For a good discussion of how and why these amendments harm American workers, the reader is referred to the Economic Policy Institute's June 26, 2003 Briefing Paper entitled "Eliminating the Right to Overtime Pay" and available at the Institute's web site ("www.epinet.org").

With the above in mind, we turn to the FLSA's various white-collar exemptions.

1. The Executive Employee Exemption

To qualify for the "executive" employee exemption, the following criteria must be established: (i) the worker's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise; (ii) the worker must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and (iii) the worker must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. See 29 C.F.R. § 541.100(a). The concurrent performance of executive and non-executive work does not necessarily disqualify a worker from classification as an executive employee. See id. at § 541.106.

In applying the executive exemption, the devil is in the details. Before deciding whether a worker meets the above criteria, one must carefully study the definitions of applicable terms such as "primary duty," see id. at § 541.700, "customarily" and "regularly," see id. at § 541.701, "management," see id. at § 541.102, "department or subdivision," ," see id. at § 541.103, "two or more other employees," see id. at § 541.104, and "particular weight," see id. at § 541.105. In issuing the 2004 amendments, the Department of Labor generally altered these definitions for the benefit of corporate America. However, there remains ample room to argue that workers do not fall within the revised executive exemption, and, like many regulatory changes, the amended exemption probably is neither as beneficial as business hopes nor as harmful as workers fear. See, e.g., Beauchamp v. Flex-N-Gate, LLC, 2005 U.S. Dist. LEXIS 3108, *10 N. 3 (E.D. Mich. Feb 23, 2005) (suggesting that 2004 regulations did not significantly alter analysis of whether production supervisor was exempt executive employee).

2. The Administrative Employee Exemption

To qualify for the administrative employee exemption, the employee's primary duty (i) must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and (ii) must include the exercise of discretion and independent judgment with respect to matters of significance. See 29 C.F.R. § 541.200(a). The regulations, as amended in 2004, define in great detail key terms, such as "primary duty," see id. at § 541.700, "directly related to management or business operations," see id. at § 541.201, and "discretion and independent judgment," see id. at § 541.202.

Also, the 2004 amendments include various "examples" of positions that "generally" fall within the administrative exemption. See id. Not surprisingly – given the pro-business tenor of the 2004 amendments – these examples read like a "who's who" of

job titles that have been the subject of recent class action lawsuits. However, at least one court has observed that a job title's inclusion in the Department of Labor's list of examples does not preclude the judiciary from finding that, in reality the worker is not exempt from overtime benefits. See Robinson-Smith v. Government Employees Ins. Co., 323 F. Supp. 2d 12, 21-22 (D.D.C. 2004) (insurance claims adjustors not exempt from overtime notwithstanding new regulatory language that "[i]nsurance claims adjustors generally meet the duties requirement for the administrative exemption . . ."). This same court has observed that "[t]he general criteria for employees employed in a bona fide administrative capacity are essentially the same under the August 2004 Regulations as under the current regulations." Id. at 18.

3. The Professional Employee Exemption

Workers are classified as exempt "professional employees" if their "primary duty is the performance of work (i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or (ii) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." 29 C.F.R. § 541.300. Similarly, workers are classified as exempt "learned professionals" if their primary duty is "the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." Id. at § 541.301. Finally, workers are classified as "creative professionals" if their primary duty is "the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work." Id. at § 541.302.

As with the administrative exemption, the 2004 regulations gratuitously suggest that various job titles generally fall within the professional exemptions. These include, among others, certain "medical technologists," 29 C.F.R. § 541.301(e)(1), "registered nurses" (but not "licensed practical nurses"), id. at § 541.301(e)(2) certain "dental hygienists," id. at § 541.301(e)(3), certain "physician assistants," id. at § 541.301(e)(4), most "chefs and sous chefs" (but not "cooks who perform predominantly routine mental, manual, mechanical or physical work"), id. at § 541.301(e)(6), some (but not nearly all) paralegals, id. at § 541.301(e)(7), most teachers, id. at § 541.303(b), and medical interns and residents, 29 C.F.R. § 541.304(c). The current Department of Labor apparently is not concerned with the fact that these examples disrespect the well-established principles that a worker's job title is not determinative of his coverage status under the FLSA and that coverage should be determined on a case-by-case basis depending on the worker's *actual* job duties. See, e.g., 29 C.F.R. § 541.2 ("A job title alone is insufficient to establish the exempt status of an employee."). One is left with the distinct impression that the Department's expansive regulations are intended to usurp the judicial function of interpreting the FLSA's meaning.

4. Computer Employees, Outside Salesmen, and Highly Compensated Employees

The regulations also exempt "[c]omputer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field," 29 U.S.C. § 541.400(a), as well as most "outside salesmen," see id. at § 541.500, et seq., and most employees with a total annual compensation in excess of $100,000, id. at 541.601. Because such individuals probably do not make up a substantial portion of your client base, these exemptions are not discussed further.

5. "Blue Collar" Workers and Public Safety Employees

Even though there never was much doubt about the non-exempt status of "blue collar" workers, the 2004 regulations explicitly state that the exemptions do *not* apply to "manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy." 29 C.F.R. § 541.3(a). More significantly, the new regulations assert that the following public safety providers generally are *not* exempt from receiving overtime: "police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work." Id. at § 541(b)(1).

Apparently, local governments could not match big business' success in impacting the regulatory drafting process. But the outcome is one of the only bright spots in the 2004 regulations, and you should carefully review your client base to ensure that your law enforcement and other public safety clients are receiving full overtime benefits. If these workers are unionized, be especially mindful that FLSA rights cannot be waived by collective bargaining agreements that provide less generous overtime benefits. See 29 C.F.R. § 541.4.

VI. Are any Other Employees Exempt From Overtime Under the FLSA?

In addition to the white-collar exemptions discussed above, the FLSA contains various statutory exemptions for other types of workers. These exemptions, some of which are quite broad, include, *inter alia*:

1. Workers (such as truck drivers) employed by common carriers and whose qualifications and maximum hours are dictated by the federal Motor Carrier Act;

2. Most newspaper delivery drivers;

3. Many chartered bus drivers;

4. Taxicab drivers;

5. Most railroad and airline employees

6. Workers employed in certain "amusement or recreational establishment[s], organized camp[s], or religious or non-profit educational conference center[s];"

7. "Seamen" and certain workers employed in the fishing and seafood industry;

8. Most agricultural workers;

9. Most workers employed by small-market news publications; and

10. Babysitters and certain domestic service workers "employed on a casual basis."

See generally 29 U.S.C. § 213.

In Ohio;

1. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;

2. A member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state;

3. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a nonprofit organization or group of organizations described in Section 501(c)(3) of the "Internal Revenue Code of 1954," and exempt from income tax under Section 501(a) of that code;

4. Any individual employed directly by the House of Representatives or directly by the senate.

See generally Ohio Rev. Code §4111.03.

VII. Some Specific Examples of Jobs.[2]

1. **Mortgage Loan Officers:** Some mortgage companies illegally classify their loan officers as ineligible for overtime pay, even though these workers routinely work over 40 hours per workweek. In fact, most mortgage loan officers who spend the majority of their time working inside the mortgage company's facility are entitled to overtime.

2. **Call Center Workers:** Many call center workers are required to perform duties before and after the beginning of their paid shift. For example, some companies require call center workers to prepare and submit reports at the conclusion of their workday. These kinds of company-mandated activities generally are compensable work.

3. **Independent Contractors:** Some companies refuse to pay workers overtime by calling them "independent contractors" instead of "employees." But whether a worker truly is an independent contractor depends on the specific, real-life circumstances of his employment. A worker is not an independent contractor just because the company says so.

4. **Outside Sales:** If you are employed in the capacity of an outside sales person and your primary duties include; making sales or obtaining orders or contracts for services or the use of facilities that a customers pays for and you are regularly away from your employer's place of business; you are not entitled to receive overtime. However, you must have personal contact with the customer away from your employer's place of business. Outside sales do not include sales by mail, telephone or the internet if you never meet the customer in person.

5. **Social Workers/Caseworkers:** Social workers who have Master's degrees who work in the area of their advanced degree generally meet the learned professional exemption and are not entitled to overtime.

[2] For more information on these examples please visit the Department of Labor website at "www.dol.gov/whd/fact-sheets-index.htm"

However, Caseworkers will generally not qualify for the learned professional exemption and are due overtime.

6. **Substitute Teachers:** Do not automatically meet the teacher exemption from overtime. The courts have held that substitute teachers must be evaluated on a "case-by-case" basis. Much of the review will focus on the primary duties. If the primary duty is teaching then they are not eligible for overtime. On the other hand, if the duties perform were solely clerical or administrative then they could qualify for overtime.

7. **Insurance Claim Adjusters**: Adjusters that have actual claims handling duties meet the administrative exemption and are not eligible for overtime. The duties would include but is not limited to interviewing the insured, witnesses and physicians, inspecting property damage, reviewing factual information, evaluating and recommending coverage of claims, negotiating settlements and making recommendations as to litigation the exemption would apply. However, the "insurance claims adjuster" title is insufficient if the duties are not administrative in nature.

8. **Tipped employees**: Employees who customarily and regularly receive tips must make at least the federal minimum wage per hour through a combination of wages and tips. Employers may take a "tip credit" towards their obligation to pay the employee, but only if the employer informs the employee of his/her intent to do so. Remember, tips are the sole property of the employee regardless of whether the employer takes a "tip credit". For example, even where a tipped employee receives at least $7.25 per hour in wages directly from the employer, the employee may not be required to turn over his or her tips to the employer.

9. **First Responders:** Police officers, firefighters, ambulance personnel, and other first responders are not exempt under 29 U.S.C. § 213(a)(1) and thus, are protected by the overtime and minimum wage provisions of the FLSA. Overtime violations sometimes arise with these types of employees, because firefighters, ambulance personnel and other first-responders work unusual or 24 hour shifts. First responders should be distinguished from fire protection employees who are sometimes exempt to the extent defined in 29 U.S.C. §§ 203(y) & 213(b)(20).

10. **Financial Service Industry employees:** Employees in the financial services industry generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay as long as their duties include work that involves financial planning. However,

an employee whose primary duty is *selling* financial products does not qualify for the administrative exemption. The difference in duties is sometimes a fine line that causes problems for these types of employees.

11. **Nurses:** Registered Nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least $455 per week, may be classified as exempt. As discussed above, this generally does not include LPN's.

12. **Technicians:** Ultra-sound Technicians, Veterinary Technicians, and similar professions are not exempt, and therefore subject to the overtime and minimum wage protections of the FLSA. These professions generally do not meet the requirements for the learned professional exemption. The type of academic degree the technician holds is relevant in determining their status.

13. **Restaurant and Fast Food Workers:** These employees should be distinguished from tipped employees. To be a tipped employee he/she must make at least $30 per month in tips. Employers of non-tipped restaurant and fast food employees may take a food credit for food provided to the employee at no cost. Additionally, the employer may not require the employee to bear the cost of a uniform if such cost will reduce the employee's wages below minimum wage.

14. **Security Guards:** Security guards cannot bear the cost of purchasing their industry required tools if by purchasing them he/she receives less than minimum wage. Additionally, hours worked at more than one post in the same week must be counted together for overtime purposes. Remember, all travel time between worksites must be treated as hours worked.

15. **Real Estate Agents:** Sometimes employers miscompute their agents' gross business volume when determining agents' commission or pay. With respect to the sale of any property or commodity (such as insurance) or the rental of property owned by the employer, gross receipts are counted in determining business volume. In the rental of property owned by someone else, only the commission paid is counted in the gross business volume.

16. **Retail employees:** Typical problems include miscalculating hours worked and taking illegal deductions from the employees' pay. A retail employee must be paid for all hours controlled by the employer

including time spent "engaged to wait." Additionally, pay deductions taken for cash or merchandise shortages are illegal to the extent that they reduce the employee's wage below the minimum wage.

17. **Warehouse employees:** Clerical workers, Inside salespeople, and Foremen are commonly misclassified as exempt under the Administrative or Executive exemptions. Additionally, employers sometimes attempt to classify these types of workers as "contract labor." It is important to review all of the facts surrounding the job duties of a warehouse employee in order to determine whether there is a violation.

18. **Drivers:** 29 U.S.C. § 213(b)(1) is the motor carrier exemption. This section exempts any employee who is subject to the authority of the Secretary of Transportation. To fit into the motor carrier exemption, the employee must be engaged in "safety affecting activities." This usually includes drivers, mechanics, or loaders of vehicles that carry passengers or property through interstate commerce.

19. **Commissioned employees:** Certain employees paid by commission at retail establishments are exempt under the FLSA. This is a complicated exemption where four conditions must be met in order for the employee to qualify. Problems sometimes arise where an employer is not keeping adequate records of the employee's earnings.

20. **Home Health Aides:** Depending on what the Aide does, he/she may or may not be exempt. An employee who provides "companionship services" for an individual because of age or infirmity in a private home is exempt. "Companionship services" means meal preparation, bed making, clothes washing, etc. If the Aide performs more medically related services for the individual they may or may not fit into the nursing exemption.

21. **Hotel/Motel employees:** These employees are generally not exempt, and thus subject to the minimum wage and overtime protections of the FLSA. Typical problems include employers attempting to pay the employee a salary and classify them as exempt without regard to the duties actually performed. Additionally, if these employees are considered "tipped employees" they must be paid in compliance with 29 U.S.C. § 203(m).

22. **Daycare employees:** Unless, these employees are bona fide teachers, classroom aides and other daycare workers are generally not exempt under the FLSA. As such, employers must comply with minimum

wage and overtime requirements, as well as other wage requirements such as paid rest and meal periods and paid training and meetings.

VIII. What is work under the FLSA?

As discussed in the accompanying paper, the Fair Labor Standards Act ("FLSA") generally prohibits companies from requiring workers to work over forty hours in a workweek unless the worker is compensated for all overtime hours at a rate not less than one-and-one-half times his regular rate of pay. See 29 U.S.C. § 207(a)(1). The FLSA also requires that covered employees be compensated for every hour worked in a workweek. See 29 U.S.C. § 206(b).

A. What is "Work"?

In view of the above, it is surprising that "work" is not defined in the FLSA. Congress left that job to the courts, and – fortunately for workers – the New Deal Supreme Court wasted little time in laying down worker-friendly precedent and establishing that "work" under the FLSA should be liberally construed in furtherance of the statute's "remedial and humanitarian" purposes. See, e.g., Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

An activity constitutes work under the FLSA if it (i) is controlled or required by the employer and (ii) is pursued necessarily and primarily for the benefit of the employer and its business. See Tennessee Coal, 321 U.S. at 598. The United States Department of Labor puts it this way:

> The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place. "Workday", in general, means the period between the time on any particular day when such employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

DOL Fact Sheet #22, entitled "Hours Worked Under the FLSA" (available at "www.dol.gov").

B. Measuring Work

Based on the above, the time clock is not always an accurate measure of a worker's compensable work time. In fact, the Supreme Court has

> generally recognized that time clocks do not necessarily record the actual time worked by employees. Where the employee is required to be on the premises or on duty at a different time, or where the payroll records or other facts indicate that work starts at an earlier or later period, the time clock records are not controlling. Only when they accurately reflect the period worked can they be used as an appropriate measurement of the hours worked.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690 (1946).

Moreover, because *the company* – not the worker – is obligated to maintain accurate records reflecting work hours, the lack of reliable data or recordkeeping benefits the worker's in litigation. See Anderson, 328 U.S. at 688 ("The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [Act's] requirements.") As stated by the Supreme Court:

> where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687-88.

C. Common Violations

The Department of Labor gives the following examples of common instances in which workers might be shortchanged under the above-described principles:

Waiting Time: Whether waiting time is time worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

On-Call Time: An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Rest and Meal Periods: Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

Sleeping Time and Certain Other Activities: An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

Lectures, Meetings and Training Programs: Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

Travel Time: The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

Home To Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

DOL Fact Sheet #22, entitled "Hours Worked Under the FLSA" (available at "www.dol.gov").

D. <u>"Donning and Doffing" and the Supreme Court's Recent Decision in IBP, Inc. v. Alvarez</u>

Under Supreme Court cases, activities "such as the donning and doffing of specialized protective gear, that are 'performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." IBP, Inc. v. Alvarez, 546 U.S.21, 30 (2005) (quoting Steiner v. Mitchell, 350 U.S. 247, 256 (1956)).

In 2010, two cases, including one in the 6th circuit, interpreted whether the donning and doffing of food safety equipment was an integral and indispensable part of employees' principal activities. In Franklin v. Kellogg, the court held that the donning and doffing of mandatory food safety equipment in the beef processing industry constituted an integral and indispensable part of the employees' principal activities because the equipment was required by the employer and primarily for the benefit of the employer. 619 F. 3d 604, 619 (6th Cir. 2010). As such, the employees' post-donning and pre-donning walking time, from the changing area to the employees' positions on the production line, was compensable. Id. at 620.

Similarly, in In Re Tyson Foods, Inc., the court concluded that post-donning/pre-doffing time may be compensable even if the actual donning and doffing time is not. 694 F.Supp.2d 1358, 1371 (M.D. Ga. 2010). Further the court rejected the viewpoint that donning and doffing could not be considered a principal activity. Id.

V. Conclusion

Enforcement of our Nation's wage and hour laws is a noble undertaking that may be rewarding and profitable for plaintiffs' attorneys. As discussed above, many of your existing clients may be entitled to overtime, and, as more companies violate the overtime laws, it becomes increasingly likely that your clients will have legitimate overtime claims.

Overtime lawsuits often are commenced and resolved as class action lawsuits. The next "big" overtime case might be right under your nose, but you will never know if you do not ask.

APPENDIX

LISTING OF STATE OVERTIME LAWS[3]

Alaska – Alaska Stat.§§ 23.10.055; 23.10.060; 23.10.410. Applicable to employers of 4 or more employees.

Arkansas – Ark. Code Ann. §§ 11-4-211; 11-4-203. Applicable to employers of 4 or more employees, but excludes employment that is subject to the FLSA

California – Cal. Lab. Code §§510, 511 and Orders of the Industrial Welfare Commission, 8 Cal. Admin. Code § 11010, *et seq.* Overtime generally is due after 8 hours per day or 40 hours per week. 10 hours was established prior to 7/1/99.

Colorado – Colo. Rev. Stat. § 8-12-101, *et seq.*

Connecticut – Conn. Gen. Stat. Ann. §§ 31-58, *et seq*.; Conn. Admin. Code §§ 31-60-1, *et seq*.

District of Columbia – D.C. Code Ann. § 32-1003

Hawaii – Haw. Rev. Stat. § 387-3.

Illinois – 820 Ill. Comp. Stat. §105/4a. Applicable to employers of 4 or more employees.

Indiana – Ind. Code Ann. § 22-2-2-4(j). Applicable to employers of 2 or more employees, but excludes employment that is subject to the FLSA.

Kansas – Kan. Stat. Ann. § 44-1204. Not applicable to employment that is subject to the FLSA.

Kentucky – Ky. Rev. Stat. Ann. §§ 337.050; 337-285.

Maine – Me. Rev. Stat. Ann. Tit. 26, § 664.

Maryland – Md. Code Ann., [Lab. & Empl.] § 3-420.

Massachusetts – Mass. Gen. Laws ch. 151, § 1A.

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[3] The information herein is derived from a very useful table contained in Barbara Kate Repa, Your Rights in the Workplace 6th Ed. (Nolo 2002). More information can be found on the Department of Labor's website, http://www.dol.gov/whd/minwage/america.htm.

Michigan – Mich. Comp. Laws § 408.384a. Applicable to employers of 2 or more employees, but may exclude employment that is subject to the FLSA.

Minnesota – Minn. Stat. Ann. § 177.25.

Missouri – Mo. Rev. Stat. §§290.500 and following. Not applicable to employment that is subject to the FLSA.

Montana – Mont. Code Ann. § 39-3-405.

Nevada – Nev. Rev. Stat. Ann. § 608.018.

New Hampshire – N.H. Rev. Stat. Ann. § 279:21. Does not apply to employees covered by the FLSA.

New Jersey – N.J. Stat. Ann. § 34:11-56a4.

New Mexico – N.M. Stat. Ann. § 50-4-22.

New York – N.Y. Lab. Law § 651.

North Carolina – N.C. Gen. Stat. § 95-25.4.

North Dakota – N.D. Admin. Code 46-02-07-02

Ohio – Ohio Rev. Code Ann. § 4111.03

Oregon – Or. Rev. Stat. §§ 653.261, 653.265.

Pennsylvania – 43 Pa. Cons. Stat. Ann. § 333.104(c).

Rhode Island – R.I. Gen. Laws §§ 28-12-4; 5-23-2.

Vermont – Vt. Stat. Ann. Tit. 21, § 384.

Washington – Wash. Rev. Code Ann. § 49.46.130.

West Virginia – W.Va. Code § 21-5c-3. Applicable to employers of 6 or more employees at one location, but excludes employment that is subject to the FLSA.

Wisconsin – Wis. Stat. Ann. § 104.02.