HOT TOPICS IN WAGE AND HOUR LAW

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by

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I. PROPOSED DOL RULEMAKING TO UPDATE THE REGULATIONS DEFINING THE WHITE COLLAR EXEMPTIONS

Almost a year ago, on July 6, 2015, the United States Department of Labor (DOL) published its Notice of Proposed Rulemaking (NPRM) in the Federal Register (80 FR 38516) addressing changes to the White Collar Exemptions to overtime pay requested earlier (March 2014) by President Barack Obama. Pursuant to the Administrative Procedure Act, the time period for comments was open through September 4, 2015. The DOL at that time anticipated that the new rule, authorized by 29 U.S.C. 213(a)(1) of the FLSA, would be final as of July 2016. While nothing is certain at this point, it appears that the final rule should become effective this year (before the end of the Obama Administration). The DOL sent its final version of the rule, as required, to the Office of Management and Budget (OMB) on March 15, 2016. Already, Congressional Republicans have introduced a bill ("Protecting Workplace Advancement and Opportunity Act") to prevent the finalization of the rule. Once the rule is issued as a final rule, Congress may still reject the rule within 60 days under the Congressional Review Act (but this could be vetoed by President Obama). While the timeline is fraught with peril, and the final terms of the rule remain obscure (see below), the odds still favor implementation of the new rule before year end.

The DOL retains the ability to alter the rule, in response to the approximately 300,000 comments it received, from what was outlined in the NPRM. These changes could go to the salary levels that were proposed or could go to modifying the duties tests as the DOL did not propose specific regulatory changes as to this but did solicit comments on whether to adopt a quantitative (California model) test for the exemptions, as opposed to the current qualitative "primary duty" test. NELA submitted detailed (22 pages single spaced) comments on September 2, 2015, mostly in support of the proposed new salary levels for the exemptions (but also suggesting higher salary levels than proposed and responding to the additional questions posed in the NPRM regarding the duties tests).

NELA members may recall that the White Collar Exemptions were last modified in 2004 under the Bush Administration. The absurdly low salary levels for the then existing "long test" and "short test" for the Administrative, Executive, and Professional exemptions were collapsed into a single "standard salary level" set at the still too low level of $455 per week ($23,660 annually). The NPRM proposed setting the new standard salary level at the 40th percentile of weekly earnings for full-time salaried workers or $921 per week ($47,892 annually), and establishing a method for indexing automatic increases based on inflation. Under the formula, the new level would rise to $970 per week or $50,440 annually in 2016, and increase thereafter. The NPRM also proposed setting the salary level required for the Highly Compensated Employees exemption at the 90% percentile of weekly earnings for full-time salaried workers ($122,148 annually).

In sum, at this point, it is not clear what the final rule will require either in terms of salary levels or any changes in the duties tests. It is anticipated that the rule will issue – possibly before the Convention convenes – and that there will be a political donnybrook immediately following. When all is said and done however, we can expect that the new salary level will be effective at or around year end, will be at or about the proposed levels, and will be indexed so that workers will not see their FLSA protections eroded as in the past.

II. DEPARTMENT OF LABOR'S COMPANIONSHIP EXEMPTION REGULATIONS CHANGES

The US DOL's October 2013 home care rule extended FLSA coverage to almost all of the nation's more than 2 million home care workers, virtually all of whom were previously exempt:

- all third-party home care employers are now categorically covered by FLSA, and
- all workers employed solely or jointly by a third-party employer are protected by FLSA's minimum wage and overtime rules.
- In addition, most home care workers employed solely by an individual or private household have gained coverage because their work duties do not fall within the new definition of exempt "companionship" services;

Thus, only a small group of workers who both (1) are solely employed by a private household and (2) primarily provide fellowship and protection remain exempt.

The rule's effective date is January 1, 2015; the rules were upheld by a unanimous panel of the D.C. Circuit Court of Appeals *Home Care Assn. of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015) on August 21, 2015. The DOL delayed its own enforcement of the Rules until January 2016, but the Rules went into effect after the U.S. Supreme Court declined a request to stay the rules and the appellate court's mandate issued on October 13, 2015. A cert petition filed by the industry association litigants to the Supreme Court is still pending.

The Rules contain two major changes. First, they clarify and narrow what constitutes FLSA-exempt "companionship services." Second, they exclude third-party employers, such as home care agencies that solely or jointly employ home care workers, from claiming the companionship exemption and another exemption for live-in domestic workers.

A. The Impact of the Rules' Implementation.

The Rules will correct outdated interpretations by DOL that have fueled poverty-level wages and destabilized the increasingly-crucial home care industry. Investing in this workforce is paramount to improving the quality of care and access to services.

Home care workers are one of our country's fastest-growing occupations and provide crucial in-home care and support for elderly and people with disabilities. The need for services is increasing at a rapid pace. Every 8 seconds a person in this country turns 65. And people with disabilities need support to live independently in their communities. Combined, this growth is expected to result in over a million new jobs in home care over the coming decade. And yet these workers have struggled to support their own families. Average annual earnings are just over $17,000, and the median hourly wage for home care aides is just $9.38 -- levels low enough to qualify home care workers for public assistance in 34 states. One in four home care workers lives in households below the federal poverty line. Ninety-one percent of home care aides are women, and more than half are women of color. Immigrant workers make up 25 percent of the

workforce, and one in five home care workers is a single mother.[1]

The home care industry is highly profitable: for-profit home care chains, which drove much of the opposition to the reforms, are a $90 billion industry. Federal oversight and the DOL's minimum requirements that have been lacking in the industry can lay important groundwork for ensuring that these jobs can lift workers out of poverty and support the occupation as our country's need for in-home care increases.

While DOL has conducted extensive outreach to state policymakers and released comprehensive regulatory guidance, advocates have a crucial role to play in ensuring the reforms take hold in the states and translate into real and lasting improvements for both home care workers and consumers. How states revise their Medicaid programs to take the new rules into account, provide for an exceptions mechanism, and whether they budget for any new overtime and travel time expenses, will be key determinants in whether workers, consumers and states achieve the intended benefits. State-level advocates for low-income people and for elders and people with disabilities will need support and technical assistance in order to engage in successful advocacy around implementation of the home care rules. The programs that fund and administer these services are enormously complex, and have been built on the expectation of low wages and absence of worker labor protections from the outset.

B. Compliance Challenges and Legal Questions Remaining.

Employers in this industry have operated under the radar for decades, even in states where there have been home care worker protections under state laws, due to worker isolation and lack of enforcement. For these reasons, wage and hour violations are common. In particular: commonly, companies do not pay for a worker's time spent traveling from one household to another during a workday; and, in cases where the worker is on an overnight shift, employers routinely fail to pay for all hours worked, claiming that the worker is a "live-in" domestic worker. These unpaid hours can add up in many instances, and push weekly hours over 40.

Attorneys should be aware of questions around employee and employer status as well in these cases. A disturbing number of companies call their employees "independent contractors," claiming they are not covered by basic labor and employment protections. And, many state programs have multiple levels of intermediaries and private agencies between the worker and the funding sources, creating opportunities for claims against multiple joint employers.

In addition, questions have arisen around the effective date of the Rules, given the legal challenges to the regulations, with some employers arguing that the effective date should be the date of the Circuit court's mandate (October 16, 2015) rather than the DOL effective date of January 1, 2015. At least two cases have raised the issue so far: See *Beltran v. Interexchange, Inc.*, 2016 WL 695967 at * 12 (D. Colo. Feb. 22, 2016)(court refuses to dismiss FLSA overtime claim based in part on companionship regulations); *Kinkead v. Humana*, No. 3:15-cv-01637 (D. CT)(pending motion to dismiss FLSA claims). The law appears to be on the side of the January 1, 2015 effective date, for a couple of reasons. First, the DC Circuit court reversed the trial court's judgment, negating any temporary effect it had on the regulations' validity. *See, e.g.,*

[1] PHI 2014 fact sheet: http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf.

United States v. Indus. Bank, 459 U.S. 70, 79 (1982); C.J.S. *Appeal and Error* §1106 (2007). Second, the trade association challengers to the USDOL regulations – Home Care Association of America and the International Franchise Association – did not file their case as a class action nor list out the names of the organizations or companies represented as parties, and so most defendants in home care litigation will not be able to claim they were parties to the regulations' challenge. While employers are free to challenge the regulations in other jurisdictions, they cannot at the same time claim they are beneficiaries of any holding that suits them. *See,* Samuel Estreicher and Richard Revesz, *Nonacquiescence by Federal Administrative Agencies in U.S. Court of Appeals Precedents,* 18 Colum. J.L.& Soc. Probs. 463, 490-501 (1985).

C. Resources and Ongoing Enforcement Monitoring.

The USDOL has a fairly extensive set of resources at its homepage on the rules, found at http://www.dol.gov/whd/homecare/, including several subject-specific fact sheets. NELP has been active in promoting the rules change and with a broad-based working group, has provided ongoing policy and legal analysis of the rules by state, implementation assistance and information, and legal advice to campaigns and direct litigation. NELP's resources are collected in a webpage, at http://www.nelp.org/campaign/implementing-home-care-reforms/. Resources there and behind a password-protected folder at www.just-pay.org include a co-authored September 2015 Fact Sheet with resources listed from allied organizations, and a webinar training module with model pleadings and research.

III. REGULAR RATE ISSUES

A. The FLSA's Regular Rate.

Calculation of an employee's "regular rate" is the "linchpin" of every Fair Labor Standards Act overtime case. *O'Brien v. Town of Agawam*, 350 F.3d 279, 294 (1st Cir. 2003). This is because the FLSA requires employers to pay non-exempt employees at least one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek. 29 U.S.C. § 207(a). The requirement that employers pay overtime based on the applicable regular rate covers to all non-exempt employees, including workers paid by salary, the day, the hour, on commission, etc. Further, the employee's regular rate includes most forms of compensation (such as bonuses, employer provided meals and lodging, commissions, shift differentials, guaranteed longevity pay, incentive pay, retroactive raises, and good attendance bonuses).

Errors in the calculation of regular rates are "common." Michael R. Triplett, *Wal-Mart to Pay More Than $33 Million in Settlement with DOL Involving Overtime*, DAILY LAB. REP. (Jan. 26, 2007). In fact, the largest Department of Labor settlement in history resulted from Wal-Mart's failure to calculate its employee's "regular rates" accurately. *Id*.; Michael R. Triplett, *Wal-Mart/DOL Pact May Prompt More Claims Involving Overtime Calculation, Attorneys Say*, DAILY LAB. REP. (Feb. 8, 2007). Therefore, the regular rate must be examined in every FLSA overtime case.

B. The General Rule: What is Included in the Regular Rate?

The regular rate is a rate per hour. 29 C.F.R. § 778.109. "If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his 'regular rate.'" 29 C.F.R. §

778.110. However, the FLSA does not require an employer to pay its employees by the hour. *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 673 (7th Cir. 2010). An employer can pay its workers under a variety of systems (such as on a salary, by commission, or on a day rate basis), as long as the employer computes and pay overtime based on the hourly rate that results from the chosen pay plan. *Id.* "Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived, as previously explained, by dividing the *total compensation* (except statutory exclusions) by the total hours of work *for which the payment is made*." 29 C.F.R. § 778.209 (emphasis added).

In other words, unless the employee's sole means of compensation is "a single hourly rate," the employee's regular rate includes more than simply his hourly wage or salary. Rather, the employee's regular rate generally includes "all remuneration for employment paid to, or on behalf of, the employee[.]" 29 U.S.C. § 207(e); *cf. Bay Ridge Operating Co. v. Aaron*, , 461 (1948) ("The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments.").[2] Even "payments" such as an employer's provision of meals or lodging (*i.e.,* non-cash compensation) must be considered. 29 C.F.R. § 778.116. In short, with few statutory exceptions, everything of value the employer provides to the employee must be included in the "regular rate" for overtime purposes.

C. The Limited Exceptions: What's Excluded from the Regular Rate?

The FLSA contains a relatively few exceptions to the rule that the regular rate includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e)(1)-(8). In particular, the calculation of an employee's regular rate excludes:

> (1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
>
> (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;
>
> (3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined

[2] This case predates Congress' statutory definition of the term "regular rate."

without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day of workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; *and*

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work;

or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract. *Id.*

The "list of exceptions is exhaustive[.]" *O'Brien*, 350 F.3d at 295.

Simply designating compensation as a "gift" or "reimbursement for expenses" does not mean the item will not be included in the regular rate. *Gagnon v. United Technisource, Inc*. 607 F.3d 1036, 1041 (5th Cir. 2010) (finding the employer "tried to avoid paying … a higher "regular rate" by artificially designating a portion of [the employee's] wages as "straight time" and a portion as "per diem."). Further, the employer bears the burden of establishing that a payment should be excluded from an employee's regular rate. *O'Brien*, 350 F.3d at 295.[3] Compensation that does not fall within one of the statutory exclusions must be included in the calculation of an employee's regular rate. *Id*.; 29 C.F.R. § 778.200(c).

D. Application of Regular Rate Principles.

1. Hourly Workers Who Earn Bonuses.

As noted above, if "the employee is employed solely on the basis of a single hourly rate, the hourly rate is his 'regular rate.'" 29 C.F.R. § 778.110(a). However, if the employee receives, for example, a production bonus in addition to his hourly rate, the bonus must be included in his regular rate for overtime purposes. *Id.* at 778.110(b). For example, if an employee whose hourly rate is $10 an hour receives a $50 production bonus in a week in which he works 50 hours, his regular rate is $11. The regular rate is calculated as follows:

50 hours at $10 an hour	=	$500
Production bonus	=	$50
Total weekly "straight time" earnings	=	$500
Total "straight time" earnings ($550) divided by hours worked (50)	=	$11 an hour "regular rate"

[3] *See also, Local 246 Util. Workers Union v. Southern Cal. Edison Co*., 83 F.3d 292, 296 (9th Cir. 1996); *Minizza v. Stone Container Corp. Corrugated Container Div. E. Plant*, 842 F.2d 1456, 1459 (3d Cir.1988).

This employee is then entitled to $55 in overtime premiums ($11 an hour divided by 2 times 10 overtime hours).

2. Piece-Rate Workers.

"When an employee is employed on a piece-rate basis, his regular hourly rate of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions)." 29 C.F.R. § 778.111(a). Once this sum is divided by the number of hours worked in the week for which such compensation was paid, the result is the piece-rate worker's "regular rate" for that week." *Id.* The piece-rate worker is entitled to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week (in addition to his regular earnings).

Alternatively, if the employer and employee come to an agreement prior to the performance of the work, the employer can simply pay one and one-half times the piece for time worked in excess of forty hours in a workweek. For example, if the employee is normally paid $1 per "widget" made during non-overtime hours, the employer could pay the employee $1.50 for each widget made during overtime hours. 29 U.S.C. § 207(g)(1); 29 C.F.R. § 778.418.[4]

If the piece-rate worker is guaranteed a minimum hourly rate, overtime must be calculated based on the minimum hourly rate in workweeks were the employee's piece-rate earnings fall short *provided* the guaranteed hourly rate is actually paid. 29 C.F.R. § 778.111(b); DOL Field Op. Handbook § 32b02.

3. Day Rates.

The overtime requirements apply to employees paid on a day rate basis. 29 C.F.R. § 778.112; *see also, Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 267-68 (5th Cir. 2000). The regular rate is calculated by "totaling all sums received at such day rates … in the workweek and dividing by the total hours actually worked." *Id.* The employee is then entitled to one-half this amount for every hour worked in excess of forty in a workweek. *Id.*

The more hours an employee works, the less his regular rate of pay becomes. The supposed "trade-off" is that the employee receives a full day's pay even if the employee works less than a full day. 29 C.F.R. § 778.112 (day rate must be paid regardless of the number of hours worked). If the employee's pay is docked for working less than a full day, the employer does not have a "valid day-rate plan." *Solis v. Hooglands Nursery, L.L.C.*, 372 Fed. App'x 528, 529-30 (5th Cir. April 7, 2010). As a result, the employer may be liable for overtime based on the rate at which the employee is docked. *Id.*

4. Salaried Employees.

Where an employee is compensated on a salary basis, her regular rate is computed by

[4] Of course, the employee's regular rate cannot be less than the minimum wage.

dividing her weekly salary[5] by the "by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113; *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259. 1268-69 (11th Cir. 2008) (the factual question of how many hours the salary was intended to cover must be answered prior to calculating damages). For example, if the employee is hired at a salary of $450 a week with the understanding that this salary is compensation for a regular workweek of 45 hours, the employee's regular rate is $450 divided by 45 hours, or $10 an hour. If the employee works 50 hours in a particular week, the employer owes the employee "*one-half* times their regular rate for the other five hours a week for which the straight time was already compensated" but owes "*one-and-a-half times* their regular rate for all hours worked over 45[.]" *Johnson v. Big Lots Stores, Inc.*, 604 F.Supp.2d 903, 930 (E.D. La. 2009).

The calculation is different where the employer and the employee agree that the salary is intended "as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many." 29 C.F.R. § 778.114(a). This payment plan, known as the fluctuating work week (or FWW) plan, is subject to a number of important limitations. *Urnikis-Negro*, -- F.3d --, 2010 WL 3024880, at *11-13. However, *assuming all the required conditions are met*, the regular rate for an employee covered by a FWW plan is calculated by dividing the salary by the total number of hours worked in the workweek. *Id*. The employee is then entitled to an additional ½ of the regular rate for each hour worked in excess of forty. *Id.*

5. Regular Rate for Commissioned Employees

Commissions are "payments for hours worked and must be included in the [employee's] regular rate." 29 C.F.R. 778.117. "This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary." *Lalli v. Gen. Nutrition Centers, Inc.*, 814 F.3d 1, 4 (1st Cir. 2016). If the employee is paid purely on a commission basis, the commissions form the total "straight-time" earnings for the employee. 29 C.F.R. 778.117. However, if the employee receives commissions in addition to some other form of payment (salary, hourly rate, day rate, etc.), the commissions must be included with other forms of pay for hours worked in order to calculate the total straight time pay. *Id.* In either instance, the total straight time pay is then divided by the hours worked during a workweek in order to arrive at the regular rate for that workweek. *Id.*

This basic method applies whether the commissions are paid on a weekly basis or on some other, less frequent basis. Since commission payments often vary from week to week, it is very common for employees paid on a commission basis to have a regular rate that likewise varies from week to week. 29 C.F.R. 778.117 explains the general issues in computing the regular rate for commission-pay employees.

a. Commissions Paid on a Workweek Basis.

[5] "Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent." 29 C.F.R. § 778.113(b). For example, a month salary should be multiplied by 12 (to equal a yearly salary) then divided by 52 (the number of weeks in a year) to yield the "weekly" salary. *Id.*

If commissions are paid weekly, add the commission payment to any other forms of pay for that week and divide the total amount by the number of hours worked that week. Since the commission payment (and any other forms of pay) represent the straight-time earnings for that week, any overtime would be compensated by paying half of the regular rate times the number of overtime hours. 29 C.F.R. 778.118. Of course, this payment is in addition to the employee's straight-time earnings, bringing the employee up to time and a half. *Id.*

b. Deferred Commissions.

An employer is not required to pay commissions on a weekly basis. Until the commission is actually paid, the employer can simply pay overtime based on the regular rate calculated *exclusive* of the commission payment. 29 C.F.R. § 778.119. However, once the commission can be computed and paid, the employer must calculate any additional overtime owed by apportioning it across the workweeks of the period during which it was earned. *Id.*

For example, if the commissions can be tied to particular workweeks, the commissions are added to the other earnings for those particular workweeks. 29 C.F.R. § 778.119. The employer must then calculate the regular rate, and pay the "back" overtime pay, in the same manner as commissions paid on a workweek basis. For example, assume the employee earned $600 in commissions tied to two workweeks, *i.e.,* the employee earned an additional $300 a week in commissions. In the first of two workweeks, the employee worked 50 hours. In the second, the employee worked 60. Assuming the employer paid overtime has already paid the overtime owed on the employee's non-commission pay, the employer can simply use the commission and hours to calculate the unpaid overtime as follows:

For Week 1:

$300 divided by 50 hours	=	$6 "additional" regular rate.
$6 regular rate times ½	=	$3 additional overtime premium owed
$3 times 10 overtime hours	=	$30 overtime due
For Week 2:		
$300 divided by 60 hours	=	$5 "additional" regular rate.
$5 regular rate times ½	=	$2.5 additional overtime premium owed
$2.5 times 20 overtime hours	=	$50 overtime due

Thus, even though the amount allocated for each workweek is the same, the employee's regular rate will depend on the number of hours worked in a particular workweek. 29 C.F.R. § 778.119.

If the commission cannot be tied to specific workweeks, the commission must be allocated pro-rata to each workweek in the period covered by the commission payment. 29 C.F.R. 778.120(a). If the employee worked overtime in the covered workweeks, the regular rate would be recalculated as set forth above. *Id.* However, the employee's work hours vary significantly from week to week such that it is unrealistic to allocate equal portions of the commission to each workweek, commissions may be allocated to hours worked during the covered period. 29 C.F.R. 778.120(b). The commission is divided by the total number of hours worked during the computation period. *Id.* Overtime is then calculated by multiplying one-half of that figure (representing the increase in the regular rate attributable to the commission) by the

number of overtime hours worked in each workweek during that period. See 29 C.F.R. 778.119 and 778.120 for examples of the above calculations. *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 575-76 (7th Cir.1995) (explaining how to incorporate an annual lump-sum payment into an employee's regular rate).

c. Basic Rate.

The FLSA provides for overtime calculations based on a "basic rate" an alternative to the methods listed above. 29 C.F.R. § 778.122. The Department of Labor's regulations provide several means for calculating a basic rate. *Id.* These methods generally amount to an average of the employees' earnings (except overtime premiums) over the course of a specified period of time. *See, e.g.,* 29 C.F.R. § 548.3. Several conditions must be satisfied in order for the employer to take advantage of paying overtime pay based on a "basic rate." For example, the rate must be agreed upon (in an individual or collective bargaining agreement) before the performance of the work. 29 C.F.R. § 548.2(a).

6. Regular Rate for Tipped Employees.

Provided certain conditions are met, the FLSA permits employers to pay a sub-minimum wage ($2.13 per hour) to certain "tipped employees" (provided certain conditions are met). 29 U.S.C. § 203(m). However, employers must still pay tipped employees overtime based on the full minimum wage. *See, e.g.*, 29 C.F.R. § 531.60; *Perez v. Palermo Seafood, Inc*., 548 F.Supp.2d 1340, 1349 (S.D. Fla. 2008) *aff'd* 2008 WL 5207047 (11th Cir. Dec. 12, 2008). Thus, even where an employer is properly paying a "tipped employee" a cash wage of $2.13 per hour (because the employer qualifies for a "tip credit") for straight time hours, overtime *cannot* be paid at $3.195 an hour ($2.13 times 1.5). Instead, the employer cannot pay must pay the employee $2.13 *plus* an additional ½ times the minimum wage for each overtime hour worked. *See* National Restaurant Association Legal Problem Solver for Restaurant Operators, *Overtime: How to Compute It* (April 15, 2010).[6]

E. Some Recent Applications of the Regular Rate Rules.

1. Contributions to the Union Funds.

In one recent case, the plaintiffs argued that "CBA-mandated benefit contributions [the employer made] towards the Union's health, pension, prepaid legal, and training and scholarship funds" should have been included in the regular rate. *Diaz v. Amedeo Hotels Ltd. P'ship*, No. 12-CV-4418 (JMA), 2016 WL 1254243, at *3 (E.D.N.Y. Mar. 29, 2016). In dismissing the case on summary judgment, the court applied "29 U.S.C. § 207(e)(4) [which] excludes from an employee's 'regular rate' 'contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.'" *Id.* (quoting the statute).

2. Cash in Lieu of Medical Benefits

[6] Available at: www.restaurant.org/pdfs/legal/lps/employees_overtime.pdf.

A number of recent cases have questioned whether "cash … received for reimbursement for opting-out of the health benefit plan is remuneration and should be included in the regular rate of pay." *See, e.g., Callahan v. City of Sanger*, No. 14-CV-600-BAM, 2015 WL 2455419, at *5 (E.D. Cal. May 22, 2015).[7] In the *Callahan* case, "the City contribute[d] a fixed sum of money per year toward employees' medical benefits in which employees ha[d] the option to receive an unused portion of their monthly benefit allowance as income in their paycheck." *Id.* The court noted "the benefit is tied to [the workers'] compensation for hours of employment because the employee must be working to qualify for the health benefits and any reimbursement." *Id.* In addition, "the payments [we]re subject to federal and state withholding taxes, Medicare taxes, and garnishment[,]" indicating "the cash payments [we]re remuneration for work performed and must be included in the regular rate of pay used in calculating overtime." *Id.*

3. Lump Sum Bonuses

In *Gilbertson v. City of Sheboygan*, No. CV 15-C-139, 2016 WL 1179246 (E.D. Wis. Feb. 5, 2016), the employer adopted a pay plan that provided a lump sum bonus to employees who had reached the pay cap for their position.[8] "To whatever extent an increase would cause the employee's rate of pay to exceed the maximum for his or her job classification, that excess amount would be paid as a lump sum." *Id.* at *1. "For example, if an employee making $10.00 in a job with a maximum classification of $10.10 per hour received a $0.25/hour raise, his new pay rate would be $10.10 per hour and he would receive the remaining $0.15/hour in a lump sum." *Id.*

The compensation plan provided that merit increases "*are not automatic,* nor does an employee acquire any right to an increase because of length of service or time in a job." *Id.* at *5. It further stated that once "the budget has been approved, it is up to each supervisor and/or department head to approve the amounted [sic] granted to the employee." *Id.* While the court noted "the City retains the discretion to grant or deny a bonus," and "there is a subjective component to the City's evaluation process[,] … the applicable regulation provides that bonuses 'which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay.'" *Id.* (quoting 29 C.F.R. § 778.211(c)). Because the "City's bonus plan falls directly into this category[,]" it had to be included in the workers' regular rates. *Id.*

4. Longevity Pay & Sick Leave Buyout

Most courts addressing whether longevity pay must be included in the regular rate for overtime purposes have answered in the affirmative. *See* O'Brien, 350 F.3d at 296; *see also,*

[7] This case also involved an allegation that the employer failed to consider the value of employer-provided meals when calculating the regular rate. However, the plaintiff failed to produce evidence that employees actually received such meals. Thus, the claim failed for a lack of proof.

[8] The City's plan also included medical expense reimbursement. As in *Callahan,* the employees were granted summary judgment on this claim.

Wheeler v. Hampton Twp., 399 F.3d 238, 248 n.12 (3d Cir. 2005); *Featsent v. City of Youngstown*, 70 F.3d 900, 905 (6th Cir. 1995) (holding that longevity payments were includible in employees' regular rate calculation because they "compensate the ... [employees] for their service to the City"); *Theisen v. City of Maple Grove*, 41 F. Supp. 2d 932, 938 (D. Minn. 1999) (holding that longevity payments provided for in a collective bargaining agreement must be included in the employee's regular rate calculation because they were nondiscretionary); *but see Moreau v. Klevenhagen*, 956 F.2d 516, 520-21 (5th Cir. 1992) (longevity payments constituted "gifts" to employees and need not be included in the regular rate since they were not required under a city ordinance or collective bargaining agreement). The Court in *Gilbertson v. City of Sheboygan*, No. CV 15-C-139, 2016 WL 1179246, at *5 (E.D. Wis. Feb. 5, 2016) applied the majority rule with respect to longevity pay

The Court also held that "sick leave payout or buyback programs must be included in the regular rate calculation." *Id.* at *14. Quoting Eight Circuit precedent, the court held: "The primary effect of the sick leave buy-back program is to encourage employees to come to work regularly over a significant period of their employment tenure." *Id.* Because "consistent workplace attendance" is "a general duty of employment[,] … sick leave buy-back monies constitute remuneration for employment." *Id.* Thus, the payment had to be included in the regular rate.

5. Meal Reimbursement.

The value of meals provided by the employer must often be included in the regular rate. *See, e.g.,* 29 C.F.R. § 778.217(d) (expenses personal to the employee which are paid by the employer constitute compensation for employment and belong in the regular rate); Department of Labor Field Operations Handbook § 30c03(a)(1) (meals are typically considered expenses personal to the employee). However, there is an exception for meal expenses incurred while the employee is "traveling away from home on the employer's business." However, even then, the reimbursement must be a reasonable approximation the employee's expenses.

In one recent case, the parties agreed the meal payment was a "reasonable approximation of meal expenses incurred by employees while working at the remote work site." *Sharp v. CGG Land (U.S.) Inc*., No. 14-CV-0614-CVE-TLW, 2015 WL 6142897, at *3 (N.D. Okla. Oct. 19, 2015). However, the parties disagreed with respect to "whether this amount constituted a 'travel expense' that was 'incurred by an employee in furtherance of the employer's interests,' that is, whether the plaintiffs were 'required to expend sums solely by reason of action taken for the convenience of [their] employer.'" *Id.*

The plaintiffs argued the payments could not "be excluded under § 207(e)(2) because plaintiffs did not incur these expenses while actually in transit." *Id.* at *3. In rejecting this argument, the court cited "[a]mple authority, including federal regulations, case law, and Department of Labor (DOL) guidance, support[ing] the interpretation that 'traveling' is not limited to the moments actually in transit, but include time spent 'away from home' on an employer's business." *Id.* Finding the workers were away from home for the employer's benefit, it held the "[m]eal expenses plaintiffs incurred were therefore for the benefit of defendant and in furtherance of defendant's interests." *Id.* at *4. The payments were therefore found not to be includable in the workers' regular rates.

In a case reaching the opposite result, employees "working at least 8 hours were paid a $7.00 meal allowance, plus an extra $7.00 for each additional 4 hours, up to a cap of $21.00 per day." *Hanson v. Camin Cargo Control, Inc*., No. CIV.A. H-13-0027, 2015 WL 1737394, at *5 (S.D. Tex. Apr. 16, 2015). The employer presented "no evidence that the meal allowance approximated inspectors' actual expenses." *Id.* Thus, the found the meal allowance had to be included in the employees' regular rates.

IV. DOES THE TIP CREDIT APPLY TO EMPLOYEES PAID AT, OR ABOVE, THE MINIMUM WAGE?

A. The History of FLSA' Treatment of Tips.

Congress did not address the question of whether tips counted as wages in the original version of the FLSA. *See* Public-No. 718, 52 Stat. 1060 (June 25, 1938). The Supreme Court interpreted this silence to permit employers and employees to reach an "agreement" whereby tips would be counted against the minimum wage. *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). However, the Supreme Court recognized Congress could change the answer to this question. *Id.*, at 388-89.

In 1966, Congress amended the FLSA in an effort to limit employers' ability to claim credit against the minimum wage for tips received by their employees. *See* Public Law 89-601, 80 Stat. 830 (Sept. 23, 1966). Congress sought to strike a balance between "diametrically opposite views" with respect to whether tips should count as "wages" under the FLSA. *See* 112 Cong. Rec. 11363 (May 25, 1966) (statement of Cong. Dent). To do so, the 1966 Amendments included a tip credit provision allowing employers a credit for tips equal to 50% (or less) of the applicable minimum wage. *See* Public Law 89-601, 80 Stat. 830 (Sept. 23, 1966).

Unfortunately, the Department of Labor promptly issued regulations suggesting employers could still require employees to "agree" to turn over their tips. 29 C.F.R. § 531.52 (1967); *see also,* Wage & Hour Opinion Letter WH-251, 1973 WL 36857 (Dec. 26, 1973). Under this interpretation, an employer could simply pay the minimum wage and take *all* its employees' tips – even if the tips greatly exceeded the minimum wage. Thus, the Department's regulation suggested employers could obtain a tip credit far in excess of the tip credit permitted by Congress.

In 1974, Congress again amended Section 203(m) "to make clear the original Congressional intent that an employer could not use the tips of a 'tipped employee' to satisfy more than 50 percent of the Act's applicable minimum wage." *See* Senate Report 93-690, at p. 43. In other words, all tips received by tipped employees were to "be paid out to tipped employees." *Id.*, at p. 42. "Since the passage of the 1974 Amendments to the FLSA [therefore], it has been clear that tips are the property of the employee[.]" *See* Wage & Hour Opinion Letter, 2001 WL 1558958 (April 19, 2001). So, since at least 1974, the Department of Labor has recognized that the FLSA mandated that employees keep the tips they receive *regardless* of whether the employer takes a tip credit. *See* FLSA Wage & Hour Opinion Letter, 2001 WL 1558958 (April 19, 2001); Wage & Hour Opinion Letter WH-536, 1989 WL 610348 (Oct. 26,

1989); Wage & Hour Opinion Letter WH-489, 1978 WL 51435 (Nov. 22, 1978).[9]

However, because the regulations themselves had not changed, some courts permitted employers to confiscate employee tips where the employees were paid at (or slightly above) the minimum wage. *See, e.g., Cumbie v. Woody Woo, Inc.*, 2008 WL 2884484 (D. Or. July 25, 2008); *Cooper v. Thomason*, 2007 WL 306311 (D. Or. Jan. 26, 2007) (same). On other words, despite clear Congressional intent to limit the ability of employer's tips, employers could obtain an unlimited tip credit by simply paying at least the minimum wage, then taking *all* the workers' tips.

B. *Cumbie v. Woody Woo*.

Things got even worse when one of these cases, *Cumbie v. Woody Woo, Inc.*, reached the Ninth Circuit. *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010). The Ninth Circuit held – over the Department of Labor's objection – that "*Williams* [*v. Jacksonville Terminal*] establishes the default rule that an arrangement to turn over or to redistribute tips is presumptively valid." *Id.* at 579. Thus, this panel believed its task to be "to determine whether the FLSA imposes any 'statutory interference' that would invalidate Woo's tip-pooling arrangement." *Id.* On other words, the panel believed "whether a server owns her tips depends on whether there existed an agreement to redistribute her tips that was not barred by the FLSA." *Id.* at 582. Continuing, Judge O'Scannlain wrote: "The FLSA does not restrict tip pooling when no tip credit is taken. Therefore, only the tips redistributed to Cumbie from the pool ever belonged to her, and her contributions to the pool did not, and could not, reduce her wages below the statutory minimum." *Id.*

C. *A New Hope* - The Department of Labor Steps In.

At the time *Woody Woo* was being decided, the Department of Labor was in the process of considering amendments to the tip credit regulations. *See* Updating Regulations Issued Under the Fair Labor Standards Act, 76 FR 18832-01. A "variety of commenters" including "NELA, AFL-CIO, Bruckner Burch PLLC, and NELP" directly addressed both the ownership of employee tips and the application of 29 U.S.C. § 203(m) to employees whose "direct wage" exceeded the minimum wage. *Id.* at 18840. These commenters provided a detailed analysis of "the legislative history of the tip credit provisions[, …] Wage and Hour opinion letters, the FOH and Fact Sheet #15[.]" They urged the Department to adopt regulations recognizing that tips were the property of the employee and, as a consequence, could not be confiscated by an employer even if no tip credit was claimed. Although the *Woody Woo* decision had been issued in the interim, the Department "agree[d] with the analysis in the comments that tips are the property of the employee, and that Congress deliberately amended the FLSA's tip credit provisions in 1974 to clarify that section 3(m) provides the only permitted uses of an employee's tips—through a tip credit or a valid tip pool among only those employees who customarily and regularly receive tips." *Id.* at 18841.

The Department noted the Ninth Circuit's decision, but "respectfully [found] Woody Woo was incorrectly decided." *Id.* at 18841. Relying on many of the same authorities provided

[9] In addition, many state laws prohibit employers from taking employee tips.

by "NELA, AFL-CIO, Bruckner Burch PLLC, and NELP[,]" the Department found the 1974 amendments to the FLSA had, in fact, altered the what the Ninth Circuit "characterized as Jacksonville Terminal's default rule." *Id.* at 18842.[10] It noted that even if 29 U.S.C. § 203(m) did "not expressly address the use of an employee's tips when a tip credit is not taken[,]" this is a statutory "gap … which the Department has reasonably filled through its longstanding interpretation of section 3(m). *Id.* The Department further explained: "[I]f tips were not the property of the employee, Congress would not have needed to specify that an employer is only permitted to use its employees' tips as a partial credit against its minimum wage obligations in certain prescribed circumstances because an employer would have been able to use all of its employees' tips for any reason it saw fit." *Id.* at 18843. Thus, the regulations ultimately issued (the "2011 regulations" or "new regulations") rejected *Woody Woo* and confirmed that tips are the property of the employees who receive them (regardless of whether the employer claims a tip credit).

The Department then took steps "to advise staff that the … new regulations addressing ownership of employee tips … should be enforced uniformly across the country, including in states covered by the Ninth Circuit." *See* DOL Field Assistance Bulletin No. 2012-2 (February 29, 2012).[11]

This specific guidance was, of course, necessary because before "the publication of the 2011 tip regulations," the Ninth Circuit had "held that section 3(m)'s limitations on an employer's use of its employees' tips do not apply when the employer does not take a tip credit." *Id.* However, "because that decision was issued before the Department promulgated its new tip credit regulations," the Department of Labor believed it did "not preclude Wage and Hour from enforcing these regulations in those states covered by the Ninth Circuit." *Id.*

D. The [Restaurant] Empire Strikes Back.

In an effort at de-regulation through litigation, the restaurant industry filed a lawsuit (in the same district court that spawned the *Woody Woo* decision) arguing the regulations were invalid and should be enjoined under the *Woody Woo* decision. *See Oregon Rest. & Lodging v. Solis*, 948 F. Supp. 2d 1217 (D. Or. 2013). The district court determined the primary question was whether the new regulations were entitled to *Chevron* deference.[12] The district court noted "that the Ninth Circuit has previously interpreted Section 3(m) does not end [the] inquiry," because a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 1224. Thus, the district court found required a three-step analysis: (1) "whether the [Department of Labor] was authorized to issue the challenged regulations;" (2) "whether

[10] And remember, the Supreme Court expressly recognized Congress could make this change. *Jacksonville Terminal Co.*, 315 U.S. at 388-89.

[11] Available at: http://www.dol.gov/whd/FieldBulletins/fab2012_2.htm

[12] Under *Chevron*, a court "must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." *Christensen v. Harris Cty.*, 529 U.S. 576, 586-87 (2000).

Congress has directly spoken to the precise question at issue;" and, if not, (3) "whether the [Department of Labor]'s answer is based on a permissible construction of the FLSA." *Id.* at 1222.

The district court found the Department clearly had the authority to issue the regulations. "In 1974, Congress granted the Secretary of Labor the authority 'to prescribe necessary rules, regulations, and orders with regard to the [1974] amendments,' which included an amendment to Section 3(m)." *Id.* at 1223 (quoting Pub. L. No. 93–259, § 29(b), 88 Stat. 55, 76). Noting this type of general rule-making authority is consistently upheld, the court found the Department of Labor had "exercised a general conferral of rulemaking authority within its substantive field." *Id.* Thus, the familiar *Chevron* deference standard applied. *Id.* However, the district court then found that *Woody Woo* had determined "based on the clear and unambiguous text of the statute, … that Congress intended *only* to limit the use of tips by employers when a tip credit is taken." *Id.* at 1224. Thus, finding "that *Woody Woo* leaves no room for agency discretion[,]" the district court declined to defer to the 2011 regulations.

E. Return of the [Regulation].

The Department of Labor appealed to the Ninth Circuit, where it was combined for oral argument and disposition with a case[13] involving private plaintiffs. The Ninth Circuit agreed that the question of *Chevron* deference was paramount. *Oregon Rest. & Lodging Ass'n v. Perez*, No. 13-35765, 2016 WL 706678, at *4 (9th Cir. Feb. 23, 2016). However, the Circuit Court quickly parted company with the district court in applying the *Chevron* standard. In a 2-1 opinion, it noted: "The precise question before this court is whether the [Department of Labor] may regulate the tip pooling practices of employers who do not take a tip credit. The restaurants and casinos argue that we answered this question in *Cumbie.* We did not." *Id.* at *5.

The Ninth Circuit also found the statute did *not* directly address the precise issue in question, but rather was *silent* with respect to it. *Oregon Rest. & Lodging Ass'n*, at *5-6. So having concluded "that step one of the *Chevron* analysis is satisfied because the FLSA is silent regarding the tip pooling practices of employers who do not take a tip credit[,]" the Court went on to "determine if the DOL's interpretation is reasonable." *Id.* at *7. It noted the Department had considered comments from the "AFL–CIO, National Employment Lawyers Association, and the Chamber of Commerce[,]" all of whom "commented that section 203(m) was either 'confusing' or 'misleading' with respect to the ow The AFL–CIO, National Employment Lawyers Association, and the Chamber of Commerce all commented that section 203(m) was either "confusing" or "misleading" with respect to the ownership of tips. Thus, it "was certainly reasonable to conclude that clarification by the [Department of Labor] was needed" and the 2011 regulations were "a reasonable response to these comments and relevant case law." *Id.* The Court therefore reversed the district court.

F. Current Status.

In the *Cesarz* case involving private parties, the Ninth Circuit has denied rehearing and

[13] *Cesarz v. Wynn Las Vegas, LLC,* No. 2:13–cv–00109–RCJ–CWH, 2014 WL 117579, at *3 (D. Nev. Jan. 10, 2014).

en banc consideration. However, in the *Oregon Rest. & Lodging Ass'n* case itself, the Ninth Circuit directed the Department of Labor to respond to the requests for rehearing. One district court outside the Ninth Circuit has found the "reading and application of *Crumbie*" contained in *Oregon Rest. & Lodging Ass'n* to be unpersuasive (or, at least not enough to sustain a motion for reconsideration), "as it ignores the plain language of section 203(m) and of *Crumbie*." *Brueningsen v. Resort Express Inc.*, No. 2:12-CV-843-DN, 2016 WL 1181683, at *3 (D. Utah Mar. 25, 2016) (denying a motion to reconsider a pre-*Oregon Rest.* decision by the Court). So the battle for employee tips continues. *Cf.* Courtney Kenny*, Jhering on Trinkgeld and Tips,* 32 L.Q.Rev. 306, 313 (1916) (noting that once employers discovered "a stream of money th[at] flowed with mechanical regularity into the pockets of their servants, they sought means of diverting it into their own tills.").

Note: It has been suggested by some defendants that the Fourth Circuit has adopted *Woody Woo* and rejected the new regulations regarding tips. Not so. To the contrary, and as the concurring opinion notes, "the majority carefully clarifie[d] that we have no occasion to opine on the regulation today[.]" *Trejo v. Ryman Hosp. Properties, Inc.*, 795 F.3d 442, 452 (4th Cir. 2015). And in the case, the plaintiffs specifically admitted they were "not seeking damages for unpaid minimum wages." *Id.* at 446. "Instead, … the Plaintiffs argue[d] that § 203(m), commonly called the tip credit provision, create[d] a free-standing right to bring a claim for lost 'tip' wages." *Id.* at 447. But even the Department of Labor – who was contesting *Oregon Rest. & Lodging Ass'n* at the time – rejected that argument. *Id.* at 450. Thus, the Ninth Circuit is still the only circuit court to address the viability of the new regulations (on the tip ownership and credit issues).

V. EXEMPTION CASE UPDATES

A. More Executive Exemption Cases May Now Be Viable

If the NELA lawyer interested in wage/hour reads one case following the Convention it should be *Marzuq v. Cadete Enterprises, Inc.*, 807 F.3d 431 (1st Cir. 2015). It remains to be seen how seismic an event this case turns out to be and it may be an over-statement to declare that "Burger King is dead." However, maybe not. It remains for NELA lawyers to evaluate their intakes from managers and assistant managers at chain store or chain restaurant employers and determine if a case can be made for non-exempt status as opposed to assuming that these relatively low paid "managers" are exempt under the executive employee exemption. Up until the new salary level regulations become effective, there are likely thousands of these purported managers out there in the labor force, being paid roughly $23,660 annually ($455 per week), and working side by side their non-exempt workers doing the same exact non-exempt work for 90% of their workweek. Once the new salary regulations come into effect, employers will either have to reclassify these employees as non-exempt going forward or raise their salaries to something like $50,000 annually (at which point it seems unlikely that they will still be mopping the bathrooms and flipping hamburgers). However, even once reclassified or given adequate wage increases, these workers may have back overtime liability going back at least two years (the FLSA statute of limitations for non-willful violations).

For the past decades, NELA lawyers handling executive exemption cases have been confronted with the Burger King Rule derived from *Donovan v. Burger King Corp.*, 672 F.2d

221 (1st Cir. 1982). In Burger King, the First Circuit reversed the trial court's decision (after a bench trial) holding that the fast food franchise's assistant managers were exempt as executive employees. The Burger King Rule holds that where fast food assistant managers are "in charge" of their stores, even if they perform non-exempt work for much of the time, their primary duty is management. Thus, at the trial court in the *Marzuq* case, the plaintiffs (Dunkin Donut store managers) lost on summary judgment on the basis of Burger King, even though the evidence indicated that they spent 90% of their work time "serving customers like normal hourly employees." The district court relied on Burger King, and on 29 CFR Sec. 541.106(a) ("employees who perform exempt and non-exempt work concurrently are not disqualified from the executive exemption").

In reversing the summary judgment for the employer in *Marzuq*, the First Circuit generalized the facts as follows:

> In sum, the record depicts a dynamic that, at least in broad strokes, appears typical for a fast-food franchise manager: limited decision making authority, particularly when a matter involves spending money; close monitoring by an off-site superior to ensure compliance with the company's policies, practices, and expectations; and everyday responsibility for the smooth operation of a clean, adequately staffed restaurant.

Marzuq, 807 F.3d at 444.

In fact, the same could be said in the context of retail chain stores or convenience stores (two other contexts in which these cases arise). In *Marzuq*, the Dunkin Donut managers claimed to be working 66-70 hours per week and spending a small fraction of that time on management duties. The First Circuit rejected a bright line "in charge" test, and criticized the district court for its failure to perform a close analysis of the four factors required by Section 541.700:

- The relative importance of the exempt duties as compared with the other types of duties;
- The amount of time spent performing exempt work;
- The employee's relative freedom from supervision; and
- The relationship between the employee's salary and the wages paid to non-exempt employees.

The First Circuit found some of these factors not to favor one side or the other and some to favor non-exempt status as follows. It found the non-exempt duties to be critical to the success of the restaurant, and therefore the "relative importance" factor was inconclusive. It found that the amount of time factor was inconclusive as well given that it was difficult to account for all the time the managers worked on and off-site, and the testimony that their management role was "overwhelmed" by their non-exempt duties. In this ruling, the First Circuit followed the road previously plowed by *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1272 (11th Cir. 2008). It is significant that in *Family Dollar*, as in *Marzuq*, the amount of non-exempt time reached 90% as opposed to the 40% underlying the original Burger King Rule. The First Circuit also found the "relative freedom" factor to be inconclusive, although there was a good record showing the unit managers were closely supervised by off-site higher managers and that they had

a "confined level of authority." *Marzuq*, 807 F.3d at 444. Finally, the panel found that the "relative pay" factor strongly favored non-exempt status when it divided the manager's $600/week salary by 66 hours per week and accounted for tip income earned exclusively by the non-exempt employees and the overtime pay earned only by the non-exempt employees. While the amount of time factor was not determinative, the panel concluded that a jury could find that the managers effectively had two jobs: a part-time exempt job and a full-time non-exempt job. As such, it was difficult to conclude that management was the "primary duty."

It is recommended that NELA members give *Marzuq* a close reading and re-evaluate any executive exemption cases they encounter using the approach suggested by the First Circuit, as the Burger King Rule may be dead (or at least no longer is nearly as potent as it has been in the past).[14]

B. Recent Developments Regarding The Administrative Exemption

The first case reported here portends good news with regard to the category of workers who can be characterized as Investigators. Employers will argue that investigators are like claims adjusters and are exempt as administrative employees. Employers will also argue that regulatory guidance and older cases finding investigators to be non-exempt are limited to public sector employment. Employers will also point to fairly recent bad precedents like *Foster v. Nationwide Mutual Insurance Co.*, 710 F.3d 640 (6th Cir. 2013)(holding that insurance investigators were exempt under administrative exemption). However, NELA members can now rely on *Calderon v. GEICO General Insurance Co.*, 809 F.3d 111 (4th Cir. 2015) for the proposition that security investigators' primary duty, conducting investigations into suspected fraudulent insurance claims and reporting the results to claims adjusters or supervisors, does not fall within the administrative exemption. In *Calderson*, the district court granted partial summary judgment on this issue for the plaintiff, and the Fourth Circuit affirmed (also reversing the district court and awarding prejudgment interest). More generally, the case stands for the proposition that conducting factual investigations and reporting results are not exempt duties. Be on the lookout for the tipping point where exempt duties like negotiating claims, resolving or settling cases, or making recommendations may be in evidence.

Another disputed job function is the dispatcher role, often in trucking or maintenance companies. In *Grage v. Northern States Power Co.*, 813 F.3d 1051 (8th Cir. 2015), the Eighth Circuit reversed summary judgment for the plaintiff, a Supervisor I who claimed her main job was to schedule power company work crews to do installations, maintenance, and repairs. The employer argued that she supervised the crew and did short and long term planning of installations/repairs. Similarly, in *Gordon v. Rush Trucking Corp.*, 2016 WL 1047084 (S.D. W. Va., March 10, 2016), the district court denied cross motions for summary judgment as to a "Driver Manager". She claimed that her job consisted almost entirely of taking drivers' phone calls, scheduling, and record keeping. The documentary evidence (job description and evaluations) highlighted managerial duties. The court decided to leave the decision of whether

[14] For example, see *Tyler v. Taco Bell Corp.*, 2016 WL 889034 (W.D. Tenn., March 8, 2016)(relying on *Marzuq* rather than Burger King to deny employer's summary judgment motion as to Taco Bell Assistant General Managers earning $39,000/year who spent "roughly 90% of her workday on manual non-exempt tasks").

she was a non-exempt secretary or an exempt supervisor for trial.

Finally, *Lutz v. Huntington Bancshares, Inc.*, __ F.3d __, 2016 WL 813535 (6th Cir., March 2, 2016), undermines NELA members' ability to rely on *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009)(underwriters not exempt under the administrative exemption because they are production employees pursuant to the dichotomy analysis). *Lutz* sidesteps *Davis* as inconsistent with Sixth Circuit precedent. The Sixth Circuit affirmed class summary judgment for the employer, finding that the underwriters were more like exempt claims adjusters or financial service employees. The key focus was on the underwriters' "making decisions about when Huntington should take on certain kinds of credit risk…"

C. Are Attorneys Exempt As Professional Employees When Working As Contract Lawyers Doing Document Review?

Another potential boomlet in wage/hour litigation surfaced in the form of putative class actions brought on behalf of contract lawyers employed by big corporate law firms on massive document review projects. The argument was that these attorneys were not practicing law, as required for the exemption, when doing rote document review work in which they followed strict instructions and exercised no independent judgment or discretion. This appears to be heading nowhere at this time. Courts have ruled that the FLSA requires an inquiry into state law in each case to determine the applicable rule governing the definition of the practice of law. Thus, there will be no federal rule on this point and NELA members reviewing any such cases in the future are directed to the applicable state law rules which govern the practice of law in their jurisdiction. For example, in the leading case, *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 Fed. App'x 37 (2d Cir. 2015), the appellate court applied North Carolina law to the claims of a member of the state bar of North Carolina as to document review work performed in North Carolina. The Second Circuit reversed the order dismissing the case and remanded the case since the complaint alleged that the attorney in question exercised no independent judgment (if work can be performed by machine then not the practice of law). The case subsequently settled. More instructively, in *Henig v. Quinn Emmanuel Urqhart & Sullivan LLP*, 2015 WL 9581780 (S.D.N.Y. 2015), the district court granted an employer motion for summary judgment on similar facts where New York state law applied. It determined that the plaintiff was practicing law as he was required to exercise legal judgment in tagging/untagging key documents, making confidentiality determinations, and asserting privileges.

D. The Next FLSA Issue at the SCOTUS: Service Advisors

Last year, the Ninth Circuit declined to follow prior courts that had held that automobile dealer Service Advisors were exempt under 29 USC 213(b)(10)(A) as interpreted by the DOL's regulations at 29 CFR 779.372(c) (April 5, 2011). *Navarro v. Encino Motors, LLC*, 780 F.3d 1267 (2015). The Supreme Court granted cert on January 15, 2016 (136 S. Ct. 890) and the matter is being briefed. Under the statute and the regulations, it is clear that car salesmen and car mechanics are exempt. But it is not entirely clear whether the statute applies to Service Advisors, those ubiquitous agents at car dealer service departments everywhere who welcome you into the shop, pull up your information in the computer, and write up your service order. Under the most recent DOL iteration, it appears that the regulation would exclude these workers from the scope of the exemption. However, the Ninth Circuit's decision conflicts with contrary

rulings. *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, Inc., 475 F.2d 1095 (5th Cir. 1973). The SCOTUS will resolve the circuit split and the result may depend on whether the Court applies Chevron Deference to the DOL's current interpretation of the statute. This case will then determine the exempt or non-exempt status of this narrow class of employees across the nation.

VI. UNPAID INTERNS AND THE FUTURE OF FREE LABOR.

In *Glatt v. Fox Searchlight Pictures, Inc*., 811 F.3d 528 (2d Cir. 2016) the Second Circuit became the first federal circuit court to rule in an unpaid interns FLSA case. It rejected the plaintiffs' and the U.S. Department of Labor's proposed tests for determining whether an intern should be covered as an "employee" subject to the Fair Labor Standards Act, and instead accepted the employer's narrower "primary beneficiary" test, outlining the following factors to be considered:

- Whether there is any expectation of compensation;
- Whether the internship provides training like that provided in an educational setting;
- Whether the internship is tied to a formal educational program or academic credit;
- Whether the internship corresponds to the academic calendar;
- Whether the internship is limited in duration to the benefit to the intern;
- Whether the work displaces the work of paid employees;
- Whether there is an understanding that the internship entitles the intern to a job at the conclusion of the internship.

The USDOL's proposed test, described in its fact sheet on unpaid interns, proposes a rather narrow six-factor test taken from the U.S. Supreme Court's decision in *Walling v. Portland Terminal*, 330 U.S. 148 (1947).

Cases for and on behalf of unpaid interns continue to make their way through the courts against high-profile employers like Conde Nast, CBS News, Calvin Klein, and Lions Gate Entertainment, among others, and the test(s) to be used in Circuits around the country are still up for grabs.

Because unpaid labor (called an "internship" or not) remains a persistent problem in our economy, plaintiffs should seek to broaden the test used by courts beyond the USDOL 6-factor and certainly beyond the Second Circuit's unprecedented narrow considerations.

A. FLSA Coverage Is Broad And Should Cover Unpaid Interns' Work In The Private Sector.

The Fair Labor Standards Act ("FLSA" or "the Act") was enacted to create baseline

minimal wage and hour standards and was meant to cover most workers.[15] To reach this result, Congress enacted sweeping definitions of employment in the FLSA, which went far beyond the common-law definition. To "employ" a person under the Act "includes to suffer or permit [the person] to work." 29 U.S.C. § 203(g). In light of the FLSA's remedial purpose, Congress adopted an exceptionally broad definition of "employ" to include "to suffer or permit to work,"[16] which "stretches the meaning of 'employee'"[17] to include work relationships that were not within the traditional common-law definition of "employee."[18] It is "the broadest definition [of employ] that has ever been included in any one act."[19]

Employers' use of labels like "intern" that take workers outside the protections of the Act is on the rise and undercuts the broad remedial nature of the FLSA. The label "intern" does not change what otherwise would be considered entry-level paid employment into legitimately unpaid work; it is the relationship between the worker and the company that matters.[20] If workers are suffered or permitted to work, their employer must pay them.[21] This is true even if workers do not think they are covered employees. In *Tony and Susan Alamo Foundation v. Secretary of Labor*, the U.S. Supreme Court highlighted the danger of extending exceptions under the FLSA to workers who say they work "voluntarily."[22] "Employers could use superior bargaining power to coerce employees to claim they were volunteering, or to waive their protections under the Act. Such exceptions to coverage affect many more than those workers directly at issue in this case and exert a general downward pressure on wages in competing businesses."[23]

Unpaid internships are part of a broader trend to skirt the broad definitions of employment in the FLSA. A growing number of employers mischaracterize their workers as non-employees, hurting some of the most vulnerable workers, law abiding employers, and the overall economy. For example, employers (1) misclassify their employees as independent contractors, franchisees, and trainees to place them outside of the protections of labor and

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[15] 29 U.S.C. §§ 201 *et seq*.

[16] 29 U.S.C. § 203(g).

[17] *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326 (1992).

[18] *Rutherford*, 331 U.S. at 729.

[19] *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting the FLSA's principal sponsor, Senator Hugo Black, 81 Cong. Rec. 7657 (1937)).

[20] *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (explaining that "'economic reality' rather than `technical concepts' is . . . the test of employment" under the statute); *see also Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 139 (2d Cir.1999) ("[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question.").

[21] 29 U.S.C. § 203(g).

[22] 471 U.S. 290, 302 (1985).

[23] *Id.* (internal citations omitted).

employment laws[24], and (2) engage contingent workers, including temporary and subcontracted workers, sometimes creating confusion as to who is the responsible employer.[25]

For any contingent or free labor, worker advocates should urge the broad application of the FLSA's broad statutory and remedial coverage.

B. Unpaid Internships Are On The Rise, And Hurt Law-Abiding Companies, Workers And Society.

Although young workers face pressures to take unpaid internships, these positions provide scant leverage for job prospects and earning capacity. Unpaid internships provide no advantage in terms of full-time job offer rates or starting salary, while paid internships provided a substantial advantage. Unpaid internships also disproportionately and adversely impact students who often pay for academic credits in order to work as unpaid interns. And unpaid internships not only harm the workers who are not paid, but also competing employers who pay their employees, and the economy overall.

Internships as a whole are on the rise in the United States. Though precise figures are unavailable, conservative estimates show that between 1 to 2 million workers participate in internships each year in the U.S.[26] Between 1981 and 1991, the proportion of college graduates who engaged in paid and unpaid internships increased from one in thirty-six to one in three.[27] Today, there are estimates that half of graduating college students have interned,[28] and more than half of those were not paid for their internship work.[29] Other sources estimate that upwards of

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[24] *See e.g.* Mitchell Rubinstein, "Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship, 14 U. Pa. J. of Bus. L. 605 (2012); *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010).

[25] *Id. See also Carrillo v. Schneider Logistics, Inc.*, 823 F.Supp.2d 1040 (C.D. Cal. 2011), aff'd, 2012 WL 6734672 (9th Cir. 2012 Mem. Disp.); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 407 (7th Cir. 2007).

[26] ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY, 27 (Verso ed., 1st ed. 2011).

[27] Dawn Gilbertson, *EARNING IT; Glamorous Internships With a Catch: There's No Pay*, N.Y. TIMES, Oct. 19, 1997, *available at* http://www.nytimes.com/1997/10/19/business/earning-it-glamorous-internships-with-a-catch-there-s-no-pay.html?emc=eta1.

[28] Steven Greenhouse, *Looking for Experience, Providing Free Labor*, N.Y. TIMES, Apr. 2, 2010, *available at* http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all.

[29] INTERN BRIDGE, 2012 NATIONAL INTERNSHIP SALARY SURVEY RESULTS TO BE RELEASED, Feb. 07, 2013 *available at* http://www.prweb.com/releases/internbridge/02/prweb10400332.htm (finding that 51.3 % of students are not paid for their internship); *see* Gilbertson *supra* ("Internship experts estimate that 50 to 60 percent of all student internships are unpaid.").

500,000 college students are working without pay at any given time.[30] These positions are often outside of FLSA coverage, leaving millions of workers without workplace protections.

As a result, employers have cut the number of paid opportunities and have increasingly hired unpaid interns.[31] Many employers view unpaid internships as a means to reduce labor costs, if not avoid them altogether.[32] This upsurge in unpaid internships in for-profit firms is not limited to the entertainment and communications industry; similar patterns have been noted in a variety of sectors. According to a 2010 report by Intern Bridge, a national college recruiting research firm, compensated internships in some industries were in danger of disappearing altogether: only 11 percent of game design interns were paid; less than 16 percent of interns in law enforcement and security were paid, and only 28 percent of interns in healthcare consulting were paid.[33]

As our economy faces chronic long-term and record-high youth unemployment, employers since the economic downturn in 2008 have continued to eliminate staff and replace them with unpaid labor.[34] Employers feel emboldened to hire free 'interns' instead of hiring entry-level employees or paid temporary workers because young workers believe, incorrectly in many cases, that internships will help them enter the highly-competitive labor market. Paid workers are thereby being replaced or simply not hired.[35]

There is little economic disincentive for employers to stop unpaid intern programs. Companies save some $2 billion annually by not paying interns the minimum wage to which they are entitled.[36] Employers, particularly in highly competitive, labor-intensive sectors, may conclude that it pays to violate the FLSA because they gain a competitive advantage over law-abiding employers that pay minimum wage, overtime, unemployment insurance, workers' compensation, and payroll taxes. Employers that hire unpaid interns shift the cost of labor onto

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[30] Ross Eisenbrey, *Hillary Clinton Speaks Out for Young Workers*, THE ECONOMIC POLICY INSTITUTE, March 7, 2014, *available at* http://www.epi.org/blog/hillary-clinton-speaks-young-workers/.

[31] PERLIN, *supra*, at 28.

[32] *See* Joan E. Rigdon, *Workplace: For Companies Facing Rough Sailing, Students Interns Provide Cheap Labor*, WALL ST. J., Apr. 25, 1991, at B1.

[33] INTERN BRIDGE, 2010 INTERNSHIP SALARY REPORT 12–13 (2010), *available at http://utsa.edu/careercenter/pdfs/2010%20salary%20report.pdf*.

[34] Heidi Shierholz, *Six Years From Its Beginning, the Great Recession's Shadow Looms Over the Labor Market*, THE ECONOMIC POLICY INSTITUTE, Jan. 9, 2014, *available at* http://www.epi.org/publication/years-beginning-great-recessions-shadow/; U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL-14-0354, The Employment Situation — February 2014 2 (2014) (reporting that the number of long-term unemployed grew by over 200,000 in February 2014, accounting for 37 percent of the unemployed), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf.

[35] Kathryn Ann Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection—Reforming the Regulation of Student Internships*, THE ECONOMIC POLICY INSTITUTE, Apr. 9, 2010, *available at* http://www.epi.org/publication/pm160/.

[36] PERLIN, supra, at 124.

workers, their families, and state and federal governments. Unpaid interns and their families take the immediate burden, at times needing to take out additional loans, burning through savings, and seeking family support.[37] State and federal governments collect no taxes on uncompensated labor, losing millions of dollars in potential revenue.[38]

VII. SETTLEMENTS & SCOPE OF RELEASES

It had been axiomatic, at least since *Lynn's Food Stores, Inc. v. United States Dep't of Labor*, 679 F.2d 1350 (11th Cir. 1982), that the settlement of an employee's FLSA claims required court or DOL approval in order to establish an effective release of such claims. The water was somewhat muddied by *Martin v. Spring Break #83 Prods., LLC*, 688 F.3d 247 (5th Cir. 2012), which appeared to establish a new rule that unions could effectively release FLSA claims without court or DOL approval. However, the recent case of *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), provides an effective rejoinder to those seeking to avoid the *Lynn's Food* court/agency approval requirement. Looking to FRCP 41 and the protective scheme constructed by the FLSA, *Cheeks* held that "stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the DOL to take effect." Nevertheless, there may be further disputes in other Circuits on this issue, ultimately requiring SCOTUS resolution.

It is outside the scope of this report, but there remain a whole panoply of settlement approval issues that vex the courts and practitioners. Most courts will apply a fair adequate and reasonable standard to evaluate a proposed settlement before approval. Many courts are hostile to parties who attempt to present confidential settlements that do not disclose the consideration being paid for the release of the FLSA claims nor the purported value of the settled claims. In the context of Rule 23 or Section 216(b) settlements, courts have been looking carefully at the settlement terms, often scrutinizing any incentive payments, attorney fee allocations, or impediments to distribution of settlement funds (unnecessary claims procedures) with a jaundiced eye. See for example, *Deatrick v. Securitas Security Servs. USA, Inc.*, 2016 WL 729622 (N.D. Cal. Feb. 24, 2016).

VIII. *TYSON FOODS V. BOUAPHAKEO* – REPRESENTATIVE TESTIMONY IN THE ABSENCE OF EMPLOYER RECORDS

Once again, the U.S. Supreme Court was called upon last year to rule on the compensability of time spent donning and doffing protective equipment in a meat-packing plant. And once again, the defendant was Tyson Foods, the perennial and persistent violator of workplace rights.[39] In *Tyson Foods, Inc. v. Bouaphakeo et al*, 577 U.S. __ , 136 S. Ct. 1036

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[37] *Id.* at 127.

[38] *Id.* at 27 (Conservative estimates show that 1–2 million individuals engage in unpaid internships each year, which depending on the amount of hours worked, may account for tens of millions dollars of lost payroll taxes, workers' compensation premiums, and unemployment insurance to states and the federal government).

[39] For a comprehensive if not depressing catalogue of Tyson's previous wage and hour lawsuits and compliance actions, including actions at the same plant subject to the litigation

(March 22, 2016), the Supreme Court found, in a 6-2 decision, that the plaintiff-workers bringing Rule 23 state wage and hour class and § 216(b) FLSA claims could use representative evidence by an expert to prove individual hours worked "to fill an evidentiary gap created by the employer's failure to keep adequate records." *Id.* at 1039. Importantly, the Court rejected Tyson's argument that its decision in *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011) prohibited the representative testimony evidence, finding that any one employee proceeding in an individual lawsuit could have used the expert's testimony to prove his own case, as the workers were similarly situated and were paid under the same employer policy. The court did not decide whether a class may be maintained if the class includes uninjured class members.

Justice Roberts issued a separate concurrence agreeing with the court's holdings on the statistical evidence issue and on the determination that the district court could decide how to distribute the settlement monies so that workers who suffered no injury would not recover. However, he expressed skepticism that the district court could screen out undamaged class members, and Justice Alito joined in this portion of the Roberts' concurring opinion. Justices Thomas and Alito dissented.

The plaintiff's expert videotaped scores of workers in the course of their pre-shift and post-shift routine, and analyzed the time spent donning and doffing protective gear necessary to perform different functions in the defendant's meat processing facility. There were variations across departments and between individuals. The plaintiffs used the expert's statistical analysis to prove liability and damages. Tyson did not raise a *Daubert* admissibility challenge below, but attacked the use of representative evidence to prove liability at trial, calling it a "trial by formula." The Supreme Court's decision rejected Tyson and its amici's wholesale attack on the use of representative evidence in class and collective actions.

Despite rafts of amici on both sides, the decision failed to parse the difference between proof in a Rule 23 class and a 216(b) collective action, implicitly suggesting that FLSA collective actions are held to the same standard as Rule 23 class actions, but time will tell as to whether that view holds up.[40]

The case is important practically for limiting the sweep of *Dukes* and for reaffirming the importance of burden-shifting in the face of nonexistent employer records in the seventy-year old *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946). *Mt. Clemens* has governed wage

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before the Supreme Court, *see* the amicus brief submitted by the United Food and Commercial Workers Union, at http://www.scotusblog.com/wp-content/uploads/2015/10/14-1146-bsac-United-Food-Commercial-Workers-Int_l-Union.pdf

[40] The Court stated "The parties do not dispute that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure." *Id.* at 1045. Indeed, many plaintiffs would have said that the standard is less stringent in § 216(b) cases than under Rule 23. However, expect to see defendants using this language to argue, *a la Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013), that the standards are identical, despite long-standing rulings in other circuits the contrary. *See, e.g., Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 & n.12 (11th Cir. 1996).

and hour litigation across the country for the last seven decades, and while its application has not always been properly upheld in the courts, for low-wage workers in particular whose employers fail or refuse to keep records, *Tyson* is an important bulwark.

The core holding in *Mt. Clemens* is its recognition that often employees will not have the ability to prove through direct evidence that they were underpaid due to their employer's failure to keep records of hours worked, and for that reason they may prove their case through imperfect evidence that raises a "just and reasonable inference" of the violation. "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 requirements of [the FLSA]." 328 U.S. at 688. To not permit cases to proceed with inexact damages "would place a premium on an employer's failure to keep proper records in conformity with his statutory duty." *Id.*[41]

The problems cannot be overlooked in the face of the overwhelming and persistent wage theft that continues to plague worksites around the country. In too many low-wage workplaces (like the pork processing plant in this case) employees work off the clock, their employers are rewarded for a failure to keep records of the hours worked, and the workers cannot proceed collectively to seek their fair pay.[42]

A. *Mt. Clemens* and Its Progeny Permit Representative Proof When the Employer Fails to Keep Records.

The vast majority of wage and hour litigation presents situations where the employer did not keep records of the overtime allegedly worked.[43] In Section 11(c) of the Act Congress

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[41] *Tyson* also helpfully confirms that representative or statistical evidence can be used to establish liability, not only damages. *Id.* at 1046. Some cases had suggested that such evidence could *only* be used to establish the extent of damages, and not the existence of liability. *See, e.g., In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 268 F.R.D. 604, 612 (N.D. Cal. 2010). *Tyson* should put an end to that drift away from the meaning of *Mt. Clemens*.

[42] A seminal 2009 study of 4,307 low-wage workers found that: more than two-thirds experienced at least one pay-related violation in their previous work week, including a quarter of workers who were paid less than minimum wage; three quarters of those surveyed were not paid proper overtime wages; 57% did not receive pay stubs in violation of state laws requiring employer to provide workers with written documentation of wages, rates of pay, and hours worked. *Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (New York: Center for Urban Economic Development at UIC, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2009), available at* www.nelp.org/page/-brokenlaws/BrokenLawsReport2009pdf. For a summary of these and other surveys and research from across the country, see NELP's Summary of Research on Wage and Hour Violations in the United States, available at: http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf.

[43] Most wage and hour claims brought as collective actions under 29 U.S.C. § 216(b) fall into two categories: (1) claims for off-the-clock work (the claims at issue in the present case); (2)

mandated that employers "shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him…." 29 U.S.C. § 211(c); *accord* 29 C.F.R. § 516.2. *Anderson v. Mt. Clemens Pottery* addresses the failure of an employer to comply with that provision, and the manner in which the Court handled it has governed wage and hour litigation since.

The issue the Court set out in *Mt Clemens* was how to address the fact that:

> Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

328 U.S. at 687.

The Court recognized that the solution cannot be "to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work" because "[s]uch 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." *Id*.

To prevent workers from being penalized by the employer's failure to keep adequate records, the Court provided that plaintiffs could meet their burden of proof so long as they "prove[] that [they have] in fact performed work for which [they were] improperly compensated" and "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687.

In the second half of the *Mt. Clemens*' decision, the Court concluded that the employees had proven the liability aspects of their case through what is now termed representative testimony – having a subset of the group of affected employees testify at trial. This Court wrote that "we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute" and "the damage is therefore certain," 328 U.S. at 688, then liability was established based on the testimony of 8 out of 300 employees and the company's proffered testimony of its supervisors. *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461-62 (6th Cir. Mich. 1945). The Court concluded, as to liability, both that "the employees did prove, however, that it was necessary for them [*i.e.*, all the employees] to be on the premises for some time prior and subsequent to the scheduled working hours," 328 U.S. at

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claims where employees allege they were misclassified as overtime-exempt (and, hence, were improperly not paid any overtime at all). In both, the number of hours worked and what was done during those hours are the critical issues. The third category of FLSA claims are those asserting that the overtime paid was improperly determined. (*e.g.*, when an employer improperly docks vacation pay). *See generally* 2 *The Fair Labor Standards Act* § 19.IV.D, pp. 19-55 – 19-72 (Ellen C. Kearns ed., 2d ed. 2010).

690, and that "[t]he employees proved, in addition, that they pursued certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* at 692-93.

B. *Tyson* and Beyond.

Employer-side attorneys argue that *Tyson* is narrow and will not have broad applicability, while plaintiffs' counsel argue that its reach is potentially wide-ranging.

Plaintiffs in the high-profile minor league baseball wage and hour class case recently invoked the *Tyson* decision to argue that the court should allow survey evidence of hours worked in their motion for class certification. The baseball plaintiffs explicitly described their representative survey data as sufficient and necessary to fill informational gaps in defendants' employment records. *Senne et al. v. Office of the Commissioner of Baseball et al*., No. 3:14-cv-00608, (N.D. CA).

In finding that the use of a sample was an appropriate method of proving classwide liability, the Supreme Court noted that "one way" to establish the sample was permissible was "by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id.* at 1046-47. It will be interesting to see if lower courts acknowledge that if this is "one way" that there are other ways as well.[44]

While firmly ensconcing *Mt. Clemens*, *Tyson* may well lead to increased scrutiny of the quality of the statistical evidence, or evidence that a sample is adequately representative. The Court noted that:

> Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondents' experts' methodology under *Daubert*.

Id. at 1048-49. Ultimately, the Court concluded:

> Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the Court so long as the study is otherwise admissible. *Mt. Clemens*, *supra*, at 687, 66 S. Ct. 1187; see

[44] See *Villalpando v. Exel Direct Inc.*, No. 12-CV-04137-JCS, 2016 WL 1598663, at *20 (N.D. Cal. Apr. 21, 2016) (applying *Tyson* to state wage and hour claims, and finding expert testimony which used certain assumptions and averages to fill in gaps in the employer's data regarding days and hours worked by class members constituted reasonable inferences under *Mt. Clemens*, and an appropriate use of representative data under *Tyson*, without specifically finding that each individual class member could have relied upon those averages).

also Fed. Rules Evid. 402 and 702. The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases.

Id. at 1049.

IX. OFF THE CLOCK CASES: CONSTRUCTIVE KNOWLEDGE OF HOURS WORKED VS. THE DEFENSE DU JOUR OF "UNCLEAN HANDS"

The defense bar has made a concerted effort to establish that whenever employees fail to report all hours worked, they are foreclosed from pursuing an FLSA claim for such unreported hours. Some have gone so far as to raise an affirmative defense of "unclean hands" against employees who fail to report, at least where the employer nominally has a policy requiring such reports. While rarely, if ever, finding that such defenses as "unclean hands" or "in pari delicto" are appropriate characterizations, some courts have been unduly sympathetic to employers claims to have been unaware of the overtime hours worked. While it is uniformly agreed that a plaintiff must establish that an employer "knew or should have known" of the hours at issue, the standards for what an employer "should" have known vary widely. In a highly unusual turn of events, the Eleventh Circuit has the most worker-friendly standard.

Overall the most helpful language is found in *Reich v. Dep't of Conservation & Natural Res., State of Ala.,* 28 F.3d 1076, 1082 (11th Cir. 1994) ("The cases must be rare where prohibited work can be done and knowledge or the consequences of knowledge avoided.") and *Bailey v. TitleMax of Georgia, Inc.*, 776 F.3d 797, 801 (11th Cir. 2015) (employee failure to report all hours does not provide an equitable defense, as that would undermine FLSA intent to make up for employer's superior bargaining power), while the worst may be in *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 964 (5th Cir. 2016) (employee cannot prevail if he or she fails to notify the employer of the hours worked) and *Brumbelow v. Quality Mills, Inc.,* 462 F.2d 1324, 1327 (5th Cir. 1972) (finding employee "committed an intentional fraud upon his employer by intentionally falsifying his overtime records." though also acknowledging its ruling was limited to "the narrow facts of this case").

Factors that make it more or less likely that an employer will be deemed to have knowledge of the hours worked:

A. Actual Knowledge

Actual knowledge is obviously the most persuasive evidence. *Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997) (actual knowledge of hours worked); *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287-88 (2d Cir. 2008) (actual knowledge from timesheets submitted).[45]

However, even actual time records has not always been sufficient to establish actual knowledge. In *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177-78 (7th Cir. 2011), the court

[45] *Chao* does cite approvingly to favorable language from *Reich v. Dep't of Conservation & Natural Res., State of Ala., supra*, and rejects the employer's argument that a rule prohibiting overtime without prior approval provided any defense.

found that employees routinely punched in early for their shifts and then socialized prior to arrival of management. Thus, the one employee who punched in early and actually completed work could not establish that the employer knew or should have known of such work from her timecard alone.

B. Formal Requirement to Report All Hours Worked Helps Employers, But Is Not Conclusive

Even if an employer has a formal policy requiring reporting all hours worked, employees can nonetheless prevail by establishing the employer knew or should have known that employees were working additional, unrecorded hours. *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 876 (6th Cir. 2012); *Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 781-82 (8th Cir. 2009); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995); *Forester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981). Where employers nominally required employees to accurately report their hours, but actually discouraged it, liability is found. See *Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1314, 1318 (11th Cir. 2007); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 827-8 (5th Cir. 1973).

C. Evidence Supervisors Discouraged Accurate Reporting of Hours Worked Helps Show Employer "Should Have Known"

Discouraging full reporting or encouraging artificially low reports of hours worked is frequently cited to establish that the employer knew or should have known of the unpaid overtime, even when it is lower level supervisors who discourage accurate reporting. *Brennan v. Gen. Motors Acceptance Corp.,* 482 F.2d 825, 828 (5th Cir. 1973) ("The company cannot disclaim knowledge when certain segments of its management squelched truthful responses."); *Bailey v. TitleMax of Georgia, Inc.*, 776 F.3d 797, 801 (11th Cir. 2015).

D. Evidence that Employer Paid Overtime When Reported

Employers who establish a system which does compensate plaintiffs for overtime hours when they are reported certainly have an advantage. *See White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 876-77 (6th Cir. 2012) ("Each time [plaintiff] followed [defendant's] procedures for being compensated for interrupted meal breaks or for payroll errors she was compensated."); *Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 779 (8th Cir. 2009) (same); *Forester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (same); *Wood v. Mid-Am. Mgmt. Corp.*, 192 F. App'x 378, 380-81 (6th Cir. 2006) (same, and when plaintiff once told supervisor he had not reported all hours, he was instructed to report them so he would be paid). This should assist workers incorrectly classified as exempt from being penalized for not reporting all hours worked, as they would not have been paid overtime even if such hours were reported.

E. Should Have vs. Could Have Known

As noted above, the most worker-friendly case is *Reich v. Dep't of Conservation & Natural Res., State of Ala.*, 28 F.3d 1076 (11th Cir. 1994), where the court found that inconsistencies between arrest records and time reports placed the employer on notice of employees working more than 40 hours, even though only 35 out of 19,000 reports showed such

inconsistencies, and even though the employees worked independently, not under the direct observation of the captains. *Id.* at 1078-79, 1081 n.11.

In contrast, other courts have found similar facts established only that an employer *could* have known, not than an employer *should* have known. *Hertz v. Woodbury Cty., Iowa*, 566 F.3d 775, 781-82 (8th Cir. 2009) (access to records that served as daily report of officer activity and not used for payroll deemed insufficient to establish employer should have known, because it was not reasonable to require the employer weed through non-payroll records to determine if employees were working beyond scheduled hours); *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 965 (5th Cir. 2016) (employer "could have potentially discovered" that plaintiff worked overtime "based on the usage reports," but that did not establish the employer *should* have known).

F. Knowledge of Isolated Instances May Not Be Sufficient to Establish Knowledge of Broader Pattern

The Fourth Circuit has been particularly strict in distinguishing between the level of violation the employer was aware of, and that which plaintiff pursues. At least twice the Fourth Circuit has held that "It is not enough for a plaintiff to establish his employer's knowledge of a few incidents of off-the-clock work, and upon this claim of knowledge, submit a record of his three years of alleged off-the-clock work." *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 109 (4th Cir. 1988). Instead the employee must show the employer "suffered" a pattern or practice of off the clock work to support a comparable claim for unpaid hours. *See also Bailey v. Cty. of Georgetown*, 94 F.3d 152, 157 (4th Cir. 1996) ("The district court held that those apparently isolated incidents were not sufficient to put the County on notice that, over the three-year period in question, deputies routinely did not report all of the hours they worked. We agree.")