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Defending Against Damages in Wage and Hour Litigation: Preventive and Trial Techniques

Strategies to Mitigate Liquidated Damages, Overtime and Back-Wage Calculations, and Attorney Fees

WEDNESDAY, NOVEMBER 12, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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DEFENDING AGAINST DAMAGES IN WAGE AND HOUR LITIGATION: PREVENTIVE AND TRIAL TECHNIQUES

A Live CLE Webinar

November 12, 2014

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Note: These materials are designed to assist in issue-spotting and to highlight major differences between federal and California law. It does not identify or discuss every difference between these laws. Please consult an attorney if you have specific issues.

The Department of Labor ("DOL") has revamped its approach to use its enforcement resources even more strategically than before. In addition to responding to complaints, it is engaging in directed investigations where it knows through enforcement experience and other evidence that workers are most at risk for violations of the FLSA. It is also ramping up its outreach to educate employers about their responsibilities and to inform workers about their rights. They are increasingly cooperating with state partners and increasing outreach and education. They are also starting to use social media to help workers, employers, and the public at large.

Among other things, it is increasing the cost of non-compliance by using all enforcement tools possible, including civil money penalties, liquidated damages, and debarment. It is identifying the contracting stream (supply chains) so that those at the top of the chain will evaluate the compliance practices of those below them and consider whether it is worth their own good name and possibly their own bottom line to utilize the services of subcontractors or suppliers who violate the law. When they conclude significant cases, they publicize the results through traditional and digital media to educate other employers about their responsibilities and encourage compliance.

In Fiscal Year 2013, it recovered more than $83 million for some 108,000 in low wage industries.

According to one report, litigants filed a total of 8,119 FLSA cases between May 1, 2013 and April 30, 2014. In comparison, From May 1, 2012 to April 2013, they filed 7,388 FLSA cases. This is an increase of 10%. These numbers do not even include wage and hour lawsuits based on state law that might include FLSA claims.

FLSA violations continue to attract congressional attention as well. During the past two years, Congress considered measures that would impose additional fines on a contractor that violates the FLSA, and that would prohibit the Department of Defense from using contractors with FLSA violations within the past five years (with "violation" defined not only as finding of fault and liability in civil, criminal, or administrative proceedings, but also entering into wage and hour conciliation agreements or consent decrees that include a "finding of fault"). While neither of these provisions has yet become law, the increased attention suggests that some type of additional penalties will be enacted in the future. The Fiscal Year 2015 Defense Appropriations Act is currently wending its way through Congress. (H.R 4870)

The old adage "the best defense is a good offense" has been applied to many areas, including FLSA litigation. That's what we will try to give you today: good offensive actions you can take now to set up your damages defenses if you face a wage and hour case.

Knowing the main trigger points and aggressively setting the employer up to defend against them is critical.

KEY BASES OF WAGE AND HOUR SUITS AND HOW TO PREVENT THEM

A. Independent Contractor Misclassification

This issue is not a new one, but it continues to be troublesome for employers. This is particularly true in light of the stepped-up enforcement actions at the federal and many state levels, and increased penalties.

Federal contractors and subcontractors that are covered by the Executive Order on Fair Pay and Safe Workplaces are already required to give an individual who is performing work under a contract or subcontract subject to the Executive Order as an independent contractor (not an employee) a document informing the individual of this status.

The Payroll Fraud Prevent Act of 2014 (H.R. 4611) was introduced on May 8, 2014. If enacted, it would expand the FLSA to cover misclassification of employees as independent contractors. It would also create a new definition of workers called "non-employees," impose upon businesses the obligation to provide a classification notice for both "employees" and "non-employees," would make misclassification of "employees" as "non-employees" a new labor law offense, and would expose businesses to fines of up to $5,000 per worker for each violation of the law. It would also impose recordkeeping requirements on businesses. If the business failed to provide the worker with the prescribed notice or does so in an untimely fashion, a presumption is created that a "non-employee" is an "employee." The presumption of employment would only be rebutted by "clear and convincing evidence." It would also "pierce the corporate veil" by including in the definition of "non-employees" those who provide services through a corporation or LLC, if they are required to create or maintain such entities as a "condition for the provision of such labor or services," and impose triple damages for willful violations of the minimum wage or overtime laws where the employer misclassified the worker.

In the context of wage and hour cases, an independent contractor is unlikely to have been required to log time worked accurately, and is probably paid on a per-job or hourly rate without overtime. Both of these are problematic if the worker is later found to be an hourly employee. In this regard, it would be rare for the worker to be found to be an exempt employee, since exempt status requires the payment of a salary which is generally not part of the independent contractor arrangement.

The US Department of Labor ("DOL") has information regarding independent contractors on its website at www.dol.gov. In general, the DOL accurately states that the U.S. Supreme Court has said there is no definition that solves all problems relating to classification under the FLSA, nor is there an isolated set of factors or single characteristic that will govern the determination. Instead, it depends upon the circumstances of the whole activity with the goal of the analysis being the determination of the underlying economic reality of the situation and whether the individual is economically dependent on the supposed employer. In general, an employee, as distinguished from an independent contractor who is engaged in a business of his own, is one who "follows the usual path of an employee" and is dependent on the employer for whom he works. Although no single factor is controlling, the factors that the Supreme Court, and the DOL, consider significant are:

(1) the extent to which the worker's services are an integral part of the employer's business (examples: Does the worker play an integral role in the business by performing the primary type of work that the employer performs for his customers or clients? Does the worker perform a discrete job that is one part of the business' overall process of production? Does the worker supervise any of the company's employees?);

(2) the permanency of the relationship (example: How long has the worker worked for the same company?);

(3) the amount of the worker's investment in facilities and equipment (examples: Is the worker reimbursed for any purchases or materials, supplies, etc.? Does the worker use his or her own tools or equipment?);

(4) the nature and degree of control by the principal (examples: Who decides on what hours to be worked? Who is responsible for quality control? Does the worker work for any other company(s)? Who sets the pay rate?);

(5) the worker's opportunities for profit and loss (examples: Did the worker make any investments such as insurance or bonding? Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?); and

(6) the level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise (examples: Does the worker perform routine tasks requiring little training? Does the worker advertise independently via yellow pages, business cards, etc.? Does the worker have a separate business site?).

In September 2011, the DOL signed a Memorandum of Understanding ("MOU") between the DOL and the IRS. Under this agreement the agencies agreed to work together and share information to reduce the incidence of misclassification of employees. In addition, the

DOL entered into similar MOUs with the states of California, Washington, Montana, Utah, Colorado, Minnesota, Iowa, Missouri, Illinois, Louisiana, Alabama, New York, Massachusetts, Connecticut, and Maryland.

In 2010, the DOL alone collected nearly $4 million in back wages for minimum wage and overtime violations under the FLSA that resulted from employees being misclassified as independent contractors or otherwise not treated as employees. In Fiscal Year 2013, the DOL alone collected more than $83,051,159 in back wages for more that 108,050 workers in industries such as the janitorial, construction, day care, hospitality, and garment industries. It reported that it regularly finds large concentrations of misclassified workers in low-wage industries.

The IRS views independent contractors under a "right to control" test which includes 20 different factors, to a more simplified test that considers three characteristics to determine the relationship, i.e., the employer's behavior, financial control over the worker, and the relationship between the parties.

The IRS also launched a "Questionable Employment Tax Practice" initiative and has entered into MOUs with 37 state agencies to share the results of employment tax audits. Under this program, states have found over 7,000 workers incorrectly classified as independent contractors, reclassified more than $1.3 billion in wages, and assessed almost $21 million in penalties through the use of information obtained from federal tax audits through mid-2011. The IRS has also assessed almost $23 million in taxes on employers based on state referrals under this initiative.

While these amounts are staggering, they do not even include the penalties imposed, nor the amounts collected in FLSA collective actions filed by the plaintiffs' bar. Since it is almost always the case that a misclassified worker has not been paid minimum wage or overtime as required by the FLSA, and the fact that a successful case means the employer also has to pay the plaintiff's attorney's fees, misclassification cases are particularly attractive to plaintiffs' attorneys. Lastly, although beyond the scope of this presentation, unions seize on misclassifications to promote their organizational efforts.

A "willful" misclassification of a worker as an independent contractor is defined in 29 U.S.C. § 255, and can be the basis of an employee's double recovery as liquidated damages. It can also result in fines of up to $10,000. Further, misclassifying employees may even subject repeat offenders to criminal penalties and up to 6 months of imprisonment.

The employer bears the burden of proof when an employee or DOL challenges classification as an independent contractor, regardless of whether that misclassification is the result of lack of knowledge, a mistake, or "willful."

While outside the scope of this presentation, other laws also impose liability. For example, if an "independent contractor" who is hurt while performing job duties successfully challenges that status in the context of a workers' compensation claim, the company – which likely has not provided coverage to that worker – is on the hook for medical bills, lost wages, etc. Similarly, while Title VII does not apply to independent contractors, the EEOC or the worker may be able to successfully challenge that classification. More recently, the Patient Protection and Affordable Care Act ("ACA") also expanded the liability for misclassification because key provisions are based on the number of "employees" that a business has. If a worker is misclassified as an independent contractor and therefore not counted towards coverage or not provided with required benefits, the liability expands beyond the FLSA.

Preventive Steps:

(1) Execute and abide by an independent contractor agreement. While this is not going to be determinative, it helps define the relationship between the parties. Use the factors above as a guideline for drafting and/or reviewing the contract. Remember: it should use terms appropriate to an independent contractor relationship, not terms such as "employee," "hire," or "fire" and be between your business and the independent contractor's business. Additionally, it should generally require notice prior to ending the contract, unless the contract is for a specified period of time.

(2) Require independent contractors to incorporate or have business cards. Keep a record. As a business, the independent contractor should have the right to employ its own employees and establish the terms and conditions of employment. Thus, it should be required to show proof of insurance and workers' compensation upon request. The contractor should also have sole control of, and responsibility for, the rate or method of payment to its own workers. Remember: the contract is between your business and its business. You should never pay its workers.

(3) Require the independent contractor to invoice its work. This should be done on a form submitted under the independent contractor's letterhead. It should be treated as any other accounts payable, and may include penalties for late payment or discounts for prompt payment, just as any other business-to-business contract might. Obviously, it should not be paid out of a payroll account!

(4) Make sure that the independent contractor has the opportunity for profit or loss from the contract. This might include requiring the independent contractor to provide its own equipment, supplies, etc.

(5) The workers that are contracted as independent contractors should not be used to perform an integral function of the business. Thus, converting “retirees” to “independent contractors” is very dangerous since they will almost always continue to perform their pre-retirement employee duties with little change.

(6) Wherever possible, have the independent contractor work off-premises and set their own hours. If absolutely necessary for the independent contractor to have an office on your premises, enter into a rental agreement and treat the independent contractor as you would any other business that is temporarily renting space from you. For example, you should not invite them to employee events.

(7) Relinquish control! By using an independent contractor, you should be interested in the end result of their work rather than how they reach that result. Think plumber: you want your sink fixed but you really don’t care how the plumber actually fixes it as long as it works when he/she is done.

(8) Do not maintain employment records for independent contractors. You should have a business contract file, just as other business-to-business contracts that you have.

(9) The independent contractor relationship should not be a permanent or long-term relationship.

(10) The independent contractor should already have the required training and qualifications for the job. Don’t train the independent contractor in job functions.

B. Exempt Status

Another issue that has been around for decades but still causes problems for employers is the correct classification of positions as exempt or non-exempt. This is important because non-exempt employees are entitled to be paid minimum wage and overtime under the FLSA.

There are five exemptions under the FLSA. Each exemption, except the outside sales exemption, requires that the employee be paid on a salary basis at not less than $455 per week.

To quality for exemption, employees generally must be paid at not less than $455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least $455 on a salary basis or on an hourly basis at a rate not less than $27.63 an hour.

Being paid on a “salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

The employer will lose the exemption if it has an “actual practice” of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions: the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Administrative, professional and computer employees may be paid on a “fee basis"' rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a "fee basis." A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours. For example, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield $500 if 40 hours were worked.

In addition, the employee’s job duties must meet the requirements of the exemption. Job titles do not determine exempt status; instead, the duties of each position must qualify for the exemption.

Highly compensated employees performing office or non-manual work and paid a total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee identified in the standard exemptions below. Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even if the employee does not meet all of the other requirements in the standard executive exemption. The required total annual compensation of $100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but noes not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits. There are special rules for prorating the annual compensation if the employee works only part of the year, and which allow payment of a single lump-sum, make-up amount to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

The exemptions only apply to “white collar” employees who meet the requirements of the exemption. The exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skills and energy. FLSA-covered non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are not exempt no matter how highly paid they might be.

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation workers, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers, and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

"Primary duty" is a term used in several of the exemptions. (This means the principal, main, major or most important duty that the employee performs.) Determination of the primary duty must be based on all the facts in a particular case, with the main emphasis on the character of the employee's job as a whole.

The term "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

Several of the exemptions also require the use of discretion and independent judgment. In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of action and acting or making a decision after the various possibilities have been considered. The term must be applied in light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operation of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, as well as other facts set forth in the regulations. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

1. **Executive Exemption (minimum wage and overtime exemption)**

To be exempt as an executive, the employee must be paid on a salary or fee basis that meets the FLSA requirements; the employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; the employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Factors considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. A department with five full-time non-exempt workers may have up to two exempt supervisors if each supervisor directors the work of two of those workers.

There is a special rule for business owners. An employee who owns at least a bona fide 20% equity interest in the enterprise in which he/she is employed, regardless of the type of business organization (corporation, partnership, or other) and who is actively engaged in its management, is considered a bona fide exempt executive.

2. **Administrative Exemption (minimum wage and overtime exemption)**

To be exempt as an administrator, the employee must be paid on a salary or fee basis that meets the FLSA requirements; the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with running or servicing the business – not, for example, working on a manufacturing production line or selling a product in a retail or service establishment.

Work "directly related to management or general business operations" includes, but is not limited to work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, legal and regulatory compliance, and similar activities.

An employee may qualify for this exemption if the employee's primary duty is performing work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisors or consultants to their employer's clients or customers (e.g., tax experts or financial consultants), may be exempt.

"Matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial harm to the employer.

There is a special application of this exemption to educational establishments. The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than $455 a week, or on a salary has is which is at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities. Having a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment includes, by its very nature, exercising discretion and independent judgment with respect to matters of significance.

Whether they work for an insurance company or other type of company, insurance claims adjusters generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

3. Professional Exemption (minimum wage and overtime exemption)

There are two kinds of professionals, learned professionals and creative professionals.

To be exempt as a learned professional, the employee must be paid on a salary or fee basis that meets the FLSA requirements; and the employee's primary duty must be the performance of work requiring advanced knowledge (defined as work which is predominantly intellectual in character) and which includes work requiring the consistent exercise of discretion and judgment; the advanced knowledge must be in a field of science or learning; and the advanced knowledge must be customarily acquired by a prolonged course of specialized instruction.

The term "requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Veterans are not exempt under the white collar exemptions based upon their status as veterans. No amount of military training will satisfy the requirements of the learned professional exemption because the exemption applies only to employees who are occupations that have attained recognized professional status, which requires that an advanced specialized academic degree is a standard prerequisite for entrance into the profession. No amount of military training can turn a “blue collar” occupation or a technical field into a profession. For example, a veteran who has received substantial military training as a veteran but works on a manufacturing production line or as an engineering technician is not exempt.

Registered nurses who are paid on an hourly basis are not exempt. However, registered nurses who are registered by the appropriate State examining board generally meet the duties requirement and may be exempt if they also meet the salary requirement. Licensed practical nurses and other similar healthcare employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

Technologists and technicians, such as engineering technicians, ultrasound technologists, licensed veterinary technicians, avionics technicians and other similar employees are not generally exempt under the learned professional exemption because they do not work in occupations that have attained recognized professional status, which requires than an advanced specialized academic degree is a standard prerequisite for entrance into the profession.

To be exempt as a creative professional, the employee must be paid on a salary or fee basis that meets the FLSA requirements; and the employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (e.g., music, writing, acting and the graphic arts).

The requirement that the work involve invention, imagination, originality or talent distinguishes the creative profession from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. For example, reporters who rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters whose work products are subject to substantial control by their employer also do not qualify as exempt creative professionals. However, employees may be exempt creative professionals if their primary duty is to perform on the air in radio, television or other electronic media; to conduct investigative interviews; to analyze or interpret public events; to write editorial opinion columns or other commentary; or to act as a narrator or commentator. Thus, journalists' duties vary along a spectrum from the nonexempt to the exempt. The less creativity and originality involved in their efforts, and the more control exercised by the employer, the less likely journalists are to be considered exempt. There is no "across the board" exemption for journalists; nor has there ever been. Rather, each determination must be made on a case-by-case basis, as is the case with all job classifications. The majority of journalists, who simply collect and organize public information, or do not contribute a unique or creative interpretation or analysis, are not likely to be exempt.

4. **Computer Employee (minimum wage and overtime exemption)**

To be exempt as a computer employee, the employee must be compensated on either a salary or fee basis (as defined in the regulations) at a rate of not less than $455 per week, or, if compensated on an hourly basis, at a rate not less than $27.63 an hour; the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; the employee's primary duty must consist of: 1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; 3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others who are skilled in computer-aided design software) but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test are not exempt under this exemption.

5. **Outside Sales (minimum wage and overtime exemption)**

To be exempt as an outside sales employee, the employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client/customer; and the employee must be customarily and regularly engaged away from the employer's place(s) of business. Note: the salary requirements do not apply to the outside sales exemption.

"Sales" includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences or intangible property.

Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word "services" extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

An outside sales employee makes sales at the customer's place of business, or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements, and other factors set forth in the regulation.

Preventive steps re misclassification as exempt:

(1) Understand the law.

(2) Know policies and classify employees properly. Carefully review existing policies for compliance and look for differences between the policy and what actually happens. Update policies as needed.

(3) Consider maintaining time records for all employees. Documents should be maintained in a secure manner.

(4) Be cautious about classifying an employee as "exempt."

(5) Conduct periodic audits.

(6) Train managers.

(7) Do not assume that based on terms such as "salaried" or "manager" that an employee is actually exempt.

6. Motor Carrier Act Exemption (overtime exemption)

An employee is exempt from the FLSA overtime requirements if the employee is:

(1) employed by a motor carrier subject to the Secretary of Transportation's jurisdiction;

(2) engaged in activities directly affecting the operational safety of motor vehicles (driver, driver's helper, loader, or mechanic); and

(3) engaged in an activity that affects the safe operation of motor vehicles in the transportation of passengers in interstate commerce.

Employees who are subject to the Secretary of Transportation's jurisdiction under 49 U.S.C. § 31502(b) are exempt from the FLSA's overtime compensation requirement under this exemption regardless of whether the Secretary of Transportation actually exercises jurisdiction. *Levinson v. Spector Motor Service,* 330 U.S. 649, 661-662, 678 (1947); *Klitzke v. Steiner Corp.,* 110 F.3d 1465, 1468 (9th Cir. 1997).

As with other exemptions to the FSLA, the Motor Carrier Act exemption is "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392 (1960).

Intrastate deliveries of goods are considered to be part of interstate commerce if the deliveries are merely a continuation of an interstate journey. (*Walling v. Jacksonville Paper Co.* (1943) 317 U.S. 564, 568 [63 S.Ct. 332]; *Bilyou v. Dutchess Beer Distributors, Inc.* (2d Cir. 2002) 300 F.3d 217, 223.) Goods arriving from out of state that are unloaded and held in a warehouse before being loaded onto trucks and delivered to customers do not terminate their interstate journey if "there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." (*Walling*, *supra*, at p. 568.) Courts determining whether intrastate deliveries are part of interstate commerce consider the shipper's intended final destination of the goods upon the commencement of the interstate journey. (*Bilyou*, *supra*, at pp. 223-225; *Klitzke v. Steiner Corp.*, *supra*, 110 F.3d at pp. 1469-1470.)

Even drivers who do not transport goods in interstate commerce are subject to the jurisdiction of the Secretary of Transportation if, as part of their regular duties, they reasonably could be expected to be called on to make interstate runs. *Morris v. McComb,* 332 U.S. 422, 433-434 (1947); *Walters v. American Coach Lines of Miami, Inc.,* 569 F.Supp.2d 1270, 1292 (S.D. Fla. 2008), affd. (11th Cir. 2009) 575 F.3d 1221; *Garcia v. Pace Suburban Bus Service, a Div. of Regional Transp.,* 955 F.Supp. 75, 77 (N.D. Ill. 1996). The United States Supreme Court in *Morris* held that, although interstate hauls constituted only 3.65 percent of the carrier's trips and many of its drivers performed no interstate hauls, the motor carrier exemption applied to all of the carrier's drivers. *Morris*, *supra*, 332 U.S. at pp. 433-434. *Morris* stated that the interstate hauls were "shared indiscriminately by the drivers" and mingled with intrastate work, and "were thus a natural, integral and apparently inseparable part of the common carrier service of the petitioner and of his drivers." *Id.* at p. 433. Recognizing the desire to regulate employees whose work may affect the safety of operation of vehicles in interstate commerce, *Morris* held that the Interstate Commerce Commission had the power to establish qualifications and maximum hours of service for all of the carrier's drivers and mechanics and that the motor carrier exemption therefore applied to all such employees. *Id.* at p. 434.

Subsequent opinions have explained that the jurisdiction of the Secretary of Labor extends to drivers who reasonably could be expected to drive an interstate route, meaning that it is more than a remote possibility. *Walters*, *supra*, 569 F.Supp.2d at p. 1292; *Garcia*, *supra*, 955 F.Supp. at p. 77.

This is a very technical exemption, with detailed definitions of what a motor carrier is (generally, a commercial motor vehicle weighing over 10,000 pounds).

There is a problem if the employer's fleet has both vehicles weighing more and less than 10,000 pounds. Some courts have held that when the employee's activities are divided between commercial and non-commercial vehicles, the exemption favors coverage as long as the employee's time operating or servicing commercial motor vehicles is more than *de minimis*. *Wells v. FedEx Ground Packaging System, Inc.,* 979 F.Supp.2d 1006, 1033-34 (E.D. Mo. 2013), contains a discussion and cites cases in this regard. However, the DOL supports a different test, i.e., any driver, driver's helper, loader or mechanic whose work with vehicles weighing less than 10,000 pounds is more than *de minimis* is covered by the FLSA. Cases supporting this view include *Garcia v. Western Waste Services, Inc.,* 969 F.Supp.2d 1252, 1259-60 (D. Idaho 2013), and *Botera v. Commonwealth Limousine Services, Inc.,* 2013 WL 3929785, *12-13 (D. Mass. July 25, 2013).

C. Salary Agreements (Fluctuating Workweek and Belo Agreements)

The fluctuating workweek is a method of computation that an employer can use under the FLSA to determine a non-exempt employee's "regular rate" for employees who have hours of work that vary from week to week and whose compensation is determined by a compensation arrangement that includes a regular weekly salary that covers all hours worked. The current fluctuating workweek interpretation, which has remained unchanged since 1968, is at 29 C.F.R. § 778.114.

Under the DOL interpretation, there are four major requirements that must be met to use the fluctuating workweek methodology:

(1) the employee must receive a fixed amount as salary and straight time pay for whatever hours he works in a workweek, regardless of how many hours those are;

(2) the employee should not have a fixed or set schedule of hours;

(3) there must be a "clear mutual understanding" between the employer and employee that the salary covers all straight-time work performed; and

(4) the employee's salary must be sufficient so that the employee earns at least the equivalent of the applicable minimum wage for all hours worked in a workweek.

In *Overnight Motor Transp. Co. v. Missel,* 316 U.S. 576 (1942), the court discussed the fluctuating workweek and how to calculate overtime for a non-exempt employee whose compensation was based on a salary covering all hours worked in a workweek rather than on an hourly basis. The Court stated that such an employee's "regular rate" was calculated by dividing his weekly salary by the total number of hours worked in the workweek. The employee's overtime compensation was then calculated by multiplying one-half of the employee's overtime hours. In other words, there is an additional half-time due in addition to the employee's salary for weekly hours worked over 40.

Example:

Salary of $1,000 designed to compensate for all hours worked in a workweek

Employee works 50 hours in a particular workweek

Regular rate = 1,000 / 50 = $20/per hour.

Overtime due: $20 x .5 = $10; $10 x 10 hours - $100

Total compensation due for this week = $1,100

If the employer does not use the fluctuating workweek method to calculate overtime, the employee in the above example would be paid $1,375, since the regular rate would be determined by dividing his $1,000 salary by only 40 hours rather than 50 hours, making $37.50 his overtime rate for the ten overtime hours. The result of the use of the fluctuating workweek also means that the overtime rate will vary from workweek to workweek, depending upon the total number of hours worked during that workweek.

It should be noted that, as indicated above, a fluctuating workweek is not appropriate where the employee never works fewer than 40 hours per week. *Hassan v. GPM Investments, LLC,* 896 F.Supp.2d 145, 150 (D.Conn. 2012). However, an employee's hours need not fluctuate above and below 40 hours in any given workweek. *Aiken v. County of Hampton,* 176 F.3d 43 (4th Cir. 1998); *Condo v. Sysco Corp.,* 1 F.3d 599 (7th Cir. 1993). In *Stein v. Guardsmark, LLC,* Case No. 12 civ 4739, (S.D.N.Y. July 23, 2013), the court found it was sufficient that the employee's hours generally fluctuated from 50-55 hours per week and, within each week, also fluctuated from day to day.

While the "clear mutual understanding" between the employer and employee does not have to be in writing, it is highly recommended that the fluctuating workweek arrangement is in writing, preferably signed and dated by both the employer and employee. *Baily v. County of Georgetown,* 94 F.3d 152 (4th Cir. 1996). For example, in *Black v. SettlePOU,* Case No. 12-10972 (5th Cir. October 11, 2013), the court relied both on the company's employee handbook's definition of "workweek" as a predefined number of fixed hours, coupled with the company's refusal to pay any overtime no matter how many hours the employee worked in a workweek, to conclude that there was no "clear mutual understanding." In contrast, in *Stein, supra,* the court found that the employee had acquired the requisite mutual understanding from various sources, including her group interview, offer letter, emails with company officials, and her receipt of regular earning statements.

Furthermore, the salary prerequisite of this arrangement operates much like the salary requirement for the while collar overtime exemptions: an employer is precluded from making deductions from an employee's salary for absences occasioned by the employee. For example, in Wage and Hour Division Opinion Letter, FLSA 2006-15 (May 12, 2006), the Wage and Hour Division opined that it was not available where the employer make full-day deductions from a sick leave bank when the employee exhausted leave or had not earned enough leave to cover the absence.

While the Wage and Hour Division has stated that "occasional disciplinary deductions for willful absence or tardiness" may be made (Wage and Hour Operations Handbook, First Division, § 32b04b(b); *Sampson v. Apollo Res., Inc.,* 242 F.3d 629 (5th Cir. 2011)), it is this author's advice - erring on the side of caution - that no such deductions be made.

The use of the fluctuating workweek can be very valuable, in addition to its regular usage in ongoing employment, as a method for calculating backpay, for example, where it is found that an employee was erroneously classified as exempt. However, even here, it is critical that the employee's salary covered whatever hours the employee worked in a workweek, and that the employee accepted the salary knowing that it covered whatever hours they worked. The DOL and many courts of appeal have approved this approach (i.e., half time, not 1.5x, for each overtime hour worked). *See, e.g., Desmond v. PNGI Charles Town Gaming, LLC,* 630 F.3d 351 (4th Cir. 2011)(this case cites numerous other cases); *Urnikis-Negro v. Am. Family Prop. Servs.,* 616 F.3d 665 (7th Cir. 2010), cert. denied, 131 S.Ct. 1484 (2011); *Valerio v. Putman Assocs., Inc.,* 173 F.3d 35 (1st Cir. 1999); *Blackmon v. Brookside Grocery Co.,* 835 F.2d 1135 (5th Cir. 1988); Wage and Hour Division Opinion Letter, FLSA 2009-3 (Jan. 14, 2009). And at least one circuit changed its mind in short order on this issue. *Compare Black v. SettlePOU,* Case No. 12-10972 (5th Cir. October 11, 2013) with *Ransom v. M. Patel Enters., Inc.,* 734 F.3d 377 (5th Cir. 2013).

However, other courts have not allowed the use of the fluctuating workweek to retroactively calculate backpay in the context of a misclassification. According to these courts, the contemporaneous payment of overtime is necessary to the fluctuating workweek – or that there cannot be a clear mutual understanding between the employer and employee when the employee is not receiving overtime. *See, e.g., Wallace v. Countrywide Home Gas, Inc.,* 2013 WL 194458 (C.D. Cal. April 29, 2013); *Russell v. Wells Fargo and Co.,* 672 F.Supp.2d 1068 (N.D. Cal. 2009); *Blotzer v. L-3 Communications Corp.,* 2012 WL 6086931 (D. Ariz. Dec. 6, 2012); *Perkins v. Southern New England Tel. Co.,* 2011 WL 4460248 (D. Conn. Sept. 27, 2011); *Rainy v. Am. Forest and Paper Ass'n, Inc.,* 26 F.Supp.2d 82 (D.D.C. 1998).

Furthermore, the DOL has taken the position that the payment of bonus and other premium payments (e.g., shift differential, holiday pay, commissions, and other incentive bonuses) is incompatible with the fluctuating workweek method of computing overtime compensation. This means, for example, that any bonus has to be completely discretionary and able to be excluded from the employee's regular rate of pay under the FLSA. 76 Fed. Reg. 18850 (Apr. 5, 2011); *O'Brien v. Town of Agawam,* 350 F.3d 279 (1st Cir. 2003); *Adeva v. Intertek USA,* 2010 WL 97991 (D.N.J. Jan. 11, 2010); *Dooley v. Liberty Mut. Ins. Co.,* 369 F.Supp.2d 81 (D. Mass. 2005); *Ayers v. SGS ControlServ., Inc.,* 2007 WL 646326 (S.D.N.Y. Feb. 27, 2007). It is unclear how successful an argument would be that pointed out that none of these cases discussed *Overnight Motor Transportation Company.*

It should be clear from the above discussion that while the fluctuating workweek method can be advantageous for employers, it carries real risks. For example, RadioShack has litigated this issue in several cases throughout the country with different results. In *Sisson v. RadioShack,* 2013 U.S. Dist. LEXIS 40135 (N.D. Ohio Mar. 11, 2013), a federal district court concluded the bonus plan was unlawful. A few months later, in *Wills v. RadioShack Corp.,* 2013 U.S. Dist. LEXIS 159727 (S.D.N.Y. Nov. 7, 2013), a New York federal district court, concluded the same bonus plan was lawful. Both of these cases are currently on appeal to their respective circuit courts. In *Verderame v. RadioShack Corp.,* Case No. 2:13-cv-2539 (E.D. Pa. July 10, 2014), a Pennsylvania federal district court held that state law was stricter than federal law and that the compensation system violated state law – although it complied with federal law. (*Verderame* points up the need to consider whether state law allows the use of the fluctuating workweek method.) In each of these cases, the company used the fluctuating workweek to calculate overtime owed to non-exempt store managers. It paid them a base salary for all hours worked each workweek, plus overtime (at the halftime rate), together with certain non-discretionary quarterly and year-end bonuses that were tied strictly to certain performance metrics and not to the number of hours the employee worked. The issue before the court was whether this satisfied the requirement that the managers received a fixed weekly salary that did not vary with the number of hours they worked. This court found that the company had correctly utilized the fluctuating workweek because the bonuses were strictly performance-based and not related to the number of hours worked. However, had the company paid the store managers additional "hours based" bonuses (e.g., premiums for working holidays, weekends, nights, etc.), the company may not have won. See also, *Perez v. RadioShack Corp.,* 2005 U.S. Dist. LEIS 33420 (N.D. Ill. Dec. 14, 2005) ("Nothing in the language of § 778.114 mandates that the fluctuating workweek method of calculations is precluded where the overtime payments are awarded retroactively as a remedy").

Belo contracts are related to, but different than, the fluctuating workweek method. Named after the Supreme Court case that allowed this exception to the salary requirement, *Walling v. A.H. Belo Co.,* 316 U.S. 624 (1942), this exception is very narrow and specific and more restrictive than the fluctuating workweek method. 29 C.F.R. 778.400-414. A permissible Belo plan *must* be in writing either through a bona fide individual contract or pursuant to an agreement made as a result of collective bargaining by representatives of employees (29 U.S.C. § 207(f); 29 C.F.R. 778.407) and must also meet the following criteria:

(1) the nature of the employment must necessitate irregular hours of work. As stated in the CFR, "the nature of the employee's duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week." 29 C.F.R. 778.405. Examples in the regulations of jobs that might meet this criteria include outside buyers, on-call service professionals, insurance adjusters, newspaper reporters and photographers, and it is key that it is the work that necessitates the irregular hours, not the employer or employee. 29 C.F.R. 778.405.

(2) there must be significant variations in weekly hours of work both above and below the maximum limit of 40 hours of work. 29 C.F.R. 778.406. (Note: under a fluctuating workweek method, all of the workweeks could be overtime weeks.)

(3) the regular rate of pay may not be less than the minimum hourly rate. 29 C.F.R. 408(a).

(4) the employee's regular rate of pay has to be specified, and can only include hours worked, and not any other form of compensation such as bonuses or commissions that would normally have to be included in the calculation of the regular rate. 29 C.F.R. 778.408(c).

(5) the compensation must include a provision for payment of a maximum number of overtime hours at a rate of not less than 1.5 times the regular rate. 29 C.F.R. 778.409.

(6) the maximum number of hours worked for the guaranteed compensation cannot be for more than 60 hours per week. (After that, it is time and a half.) 29 C.F.R. 778.411.

Example of Belo agreement calculation:

Assume that both parties agree to a rate of $8/hour with a maximum number of hours of 50 per week.

Calculate the wages at straight time (50 hours x $8/hour = $400)

Calculate the overtime premium pay (10 hours x .5 x $8/hour = $40)

Calculate the employee's weekly salary ($400 + $40 = $440)

The employee is paid $440/week regardless of how much time the employee works that week, unless he performs no work at all during the workweek. But: even if he works 5 minutes, he must be paid $440 for that workweek. If he works 51 hours, he must be paid additional compensation for the time over 50 at 1.5 times his regular rate of pay, i.e., $12 for any time over 50 hours in a workweek.

Of course, even under a Belo contract, the premium pay portion of the salary is not restricted to 1.5 times the regular rate. If the parties agree to a higher premium, it must be applied to the entire maximum hours under the contract. However, any time over the agreed-upon maximum still only has to be paid at 1.5 times the regular rate.

A Belo contract can save an employer money under the FLSA, although it can be tricky to set up a payroll system that accounts for these kinds of contracts. As with any provision of the FLSA, employers must also comply with more stringent state laws.

D. Safe Harbor (error reporting)

As discussed above, if an employer makes an improper deduction from an exempt employee's salary, the exemption is lost if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice demonstrates that the employer did not intend to pay employees on a salary basis. The factors that will be considered when determining whether an employer has an actual practice of making improper deductions include, but are not limited to, the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If the facts demonstrate that the employer has an actual practice of making improper deductions, the exception is lost during the time period in which the improper deductions were made – not only for a specific employee, but for employees in the same job classification working for the same managers responsible for the actual improper deductions. 29 C.F.R. § 541.603(a), (b).

Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at one facility routinely docs the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager lose the exemption; engineers at other facilities or for other managers would remain exempt.

Improper deductions that are either isolated or inadvertent will not result in the loss of the exemption for employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions. 29 C.F.R. § 541.603(c).

If an employer (1) has a clearly communicated policy prohibiting improper deductions including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. 29 C.F.R. § 541.603(d).

The policy can be in an employee handbook, on the company intranet, posted on the employee bulletin board, or in a signed document (e.g., as part of the orientation package). This author recommends doing as many of these as possible, and the best evidence of a clearly communicated policy is a written one distributed to employees prior to the improper pay deductions.

Such a policy can reiterate the employer's policy of compensating employees in compliance with the law, and advise employees that in order to ensure that they are paid properly for all time worked and that no improper deductions are made, the employee must record all work time correctly, review paychecks promptly to report errors, and promptly report any errors. The policy should explain the salary basis requirements of the FLSA, and explain that the policy prohibits managers and supervisors from making improper deductions from the salaries of exempt employees. While not required, the policy can provide employees with information about when deductions from an exempt employee's salary are allowed (e.g., unpaid personal leave in full-day increments other than for sickness or disability, to offset amounts received as jury or witness fees or for military pay, etc.), as long as the list is complete or the policy states that these are just examples and is not a complete list. The policy should identify to whom errors, other pay problems or questions should be directed, including more than one avenue of complaint (e.g., to company managers or officials, hotline, etc.). As with similar policies, this policy should confirm that the company will promptly investigate and correct problems, including disciplining violators, and that no retaliation is allowed. (Of course, this should be coordinated with the employer's disciplinary policy.) While the policy can encourage employees to report violations in writing (and even include a form for that purpose), it is this author's recommendation that oral complaints also be allowed and be investigated in the same manner as written ones are.

The DOL's model policy can be found at www.dol.gov/whd/regs/compliance/fairpay/modelPolicy_PF.htm.

Such a policy is not only a good practice, but it can provide an invaluable defense. If used properly, the employer will not lose exempt status for an entire class of employees, as long as the improper calculation for a single employee was isolated or inadvertent. Employee complaints and their resolutions should be documented for future use.

Of course, if the employer (despite the policy) continues to make improper deductions after receiving employee complaints, or has an actual practice of making improper deductions, the employer will lose the defense and indeed, jeopardize the exempt status of an entire class.

Factors that can be used to determine whether the employer has such a practice include the number of improper deductions, the time frame, the number and geographic location of employees and managers in charge, and whether the employer has actually clearly communicated its policy prohibiting improper deductions.

In *Jordan v. GOBO, Inc.,* 2010 U.S. Dist. LEXIS 42778 (W.D. Va. 2010), an assistant restaurant manager claimed over 500 hours of unpaid overtime, partly based on his assertion that his exempt status was lost when the employer made improper deductions from his salary for missed workdays. The employer moved for summary judgment, relying in part on the fact that it had a written policy that prohibited such violations, that the policy invited employees to make complaints about potential violations and that the policy committed that the employer would correct any such violations. The employer also presented evidence that it followed this policy, promptly repaying the employee when the employer received notice of the improper deductions. In light of all the evidence, including the employer's Safe Harbor policy, the court held that the employer satisfied its burden to demonstrate that it had a compliant Safe Harbor policy and dismissed the employee's overtime claims. *See also, Ellis v. J.R.'s Country Stores, Inc.,* Case No. 12-cv-01916 (D. Col., July 12, 2013)(policy that prohibited improper deductions from an exempt employee's salary contained in the employee handbook supported summary judgment in the employer's favor in this putative class action).

E. Hot Goods Issues

The FLSA prohibits the shipment, offer for shipment, or sale in interstate commerce, of any goods produced in violation of the minimum wage, overtime pay, child labor or special minimum wage provisions. In the absence of an employer voluntarily correcting the violations, the Wage and Hour Division may seek to restrain the shipment of goods, e.g., not allow the manufacturer to ship the goods to the wholesaler. 29 U.S.C. 215(a).

While this provision is rather infrequently used, it has become more common under the Obama administration, being invoked in several states including actions against a Massachusetts sprouts grower and a Hawaiian basil producer charged with violating minimum wage laws. It recently came to the national forefront in a case involving Washington and Oregon farmers. It began in 2011, when the DOL went after three farms in Washington for child labor violations. Then it went after several Oregon blueberry growers, alleging that they had failed to pay minimum wage and overtime to migrant and seasonal agricultural workers. In one case, the DOL demanded payment of nearly $170,000 and a signed consent judgment and order before it would lift its hot goods designation that prevented the farm's customers from receiving any product during harvest. The problem, unlike most goods manufacturers, was that the berries at issue were highly perishable. Therefore, the farm had the unenviable choice to pay and sign or watch its entire crop perish while it fought the action.

Hot goods restraints have not been used extensively by the Wage and Hour Division in the past, but the Oregon blueberry farmers cases signal an increased potential use. Its use can be particularly problematic where the, as there, the product was perishable, or as in the case of fashion, the style may rapidly become out of date.

In 2013, two of the farms filed successful motions to nullify their consent agreements. U.S. Magistrate Judge Thomas Coffin wrote: "When one party must agree to a comparatively minor penalty or lose millions simply to engage in the judicial process, such heavy handed leverage is fraught with economic duress brought about by an unfair advantage."

It appears that the Wage and Hour Division will use the hot goods hammer primarily where it feels that workers are particularly vulnerable to "wage abuse." However, this covers a wide range of employees and industries, from hospitality and restaurants, to garment workers, to agricultural workers.

Farmers and their allies are backing a bill that would prevent the use of the hot goods provision to stop shipments of perishable crops. Its use could also be restricted through the budget process. However, given congressional gridlock, the outcome of this effort is uncertain.

In the meantime, the Wage and Hour Division was unsuccessful in persuading U.S. District Judge Michael McShane to overturn Magistrate Judge Coffin's ruling. The growers then asked for their money back. Not only has the government balked at returning the money (which was not put into escrow for some reason as had been traditionally done, but instead passed the payments along to the workers), but it has indicated it wants to amend the original complaints to claim that the farmers unlawfully withheld wages and hired pickers "off the books" in 2010 and 2011 and add the CEO of one farm and three labor contractors who worked for the farms as defendants.

Citicorp Indus. Credit Corp. v. Brock, 483 U.S. 27 (1987), is the only U.S. Supreme Court case to construe this provision. In that case, it broadly construed the provision and held that a secured creditor could be enjoined from selling goods it acquired from a debtor who produced the goods in violation of labor laws.

How best to avoid the hot goods provision? Employers in likely target industries or with workers who are likely targets of this provision (e.g., immigrant workers) should be particularly careful to comply with the FLSA. Typically, the Wage and Hour Division has not used the hot goods provision as the first step in holding employers accountable for workplace violations. It more commonly investigates alleged violations and tries to enter into a settlement agreement with the employer to remedy the violations and make changes to prevent them from recurring. Thus, particularly for employers that are likely targets of the hot goods provisions, working with the Division toward a solution may be the best bet.

F. State and Local Issues

This presentation only addresses certain issues under the FLSA. The FLSA sets a "floor" but not a "ceiling" for compensation. Many states and local jurisdictions have adopted laws and regulations that are more restrictive than the FLSA, e.g., higher minimum wages, more "triggers" for and higher overtime rates, fewer exemptions and exceptions, and additional requirements such as meal and rest breaks. The more pro-employee provision of any applicable law is going to apply.

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DEFENDING AGAINST DAMAGES IN WAGE AND HOUR LITIGATION: PREVENTIVE AND TRIAL TECHNIQUES

Class and Collective Action Defense Theories

A Live CLE Webinar

November 12, 2014

10:00 am to 11:30 am PST

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Note: These materials are designed to assist in issue-spotting and to highlight major differences between federal and California law. It does not identify or discuss every difference between these laws. Please consult an attorney if you have specific issues.

III. Class and Collective Action Defense Theories

A. Class Actions

Rule 23 class actions differ from FLSA-governed collective actions. They are often part of a lawsuit, however, so it is important to remember the key differences. In class actions, class certification depends on (a) numerosity, commonality, typicality, and adequacy; and (b) the predominance of common questions of law and fact, and the superiority of a class action to other methods of adjudication. Class certification is considered after discovery. Once the class is certified, notice is sent to class members allowing them to opt-out. Therefore, an employer's exposure is typically higher under a Rule 23 class action involving state law, than under an FLSA collective action.

Despite the differences between the two, many courts that have addressed the issue have held that the two kinds of cases are not "inherently incompatible" and allow both kinds of claims in the same lawsuit. The author does not recommend spending time and expense making this argument until after discovery has been conducted or as part of a class certification response brief. The preemptive motion is based on *Vinole v. Countrywide Home Loans,* 571 F.3d 935 (9th Cir. 2009). *Vinole* held that Rule 23 does not preclude a defendant from bringing a motion to deny class certification without waiting for the plaintiff to make his motion. However, since the court will be concerned about unduly prejudicing the plaintiff by an early defense-filed motion, it is important to give the plaintiff a sufficient opportunity to complete meaningful discovery prior to bringing the motion. For example, in *Vinole*, over 10 months had passed since removal of the case and the discovery cut-off date was only three weeks away. In such a motion, the plaintiff still has the burden of showing that each of the four elements under Rule 23 exists.

B. FLSA Collective Actions

In contrast to a Rule 23 class action, an FLSA collective action under section 216(b) focuses on "similarly situated" employees. This typically combines a number of the factors of a Rule 23 class action. Potential "parties" must consent in a writing filed with the court to "opt in" to the action. The district court can facilitate notice to putative collective members in appropriate cases. *Hoffman-LaRoche v. Sperling,* 493 U.S. 165 (1989).

The FLSA collective action has a two-phase certification process:

Absent significant discovery, the courts have generally used (1) a "lenient standard" at the conditional certification stage; and (2) a more stringent standard at the motion to decertify stage once there has been discovery. The courts vary significantly in applying the "lenient" standard at the conditional certification stage, so it is important to know your court and your judge.

Despite the "lenient" conditional certification standard, this motion and the defense to it remains a critical step in the defense of a collective action. Defendants want to position themselves to maximize their ability to defend and control the litigation.

If conditional certification is granted, notice is sent to putative collective members who opt-in. The court orders procedures to govern the opt-in period, and defendants should be sure that the procedures are appropriate and are followed. Following conditional certification, plaintiff's counsel will also seek access to employees' names and contact information to use during and after the case. Defendants should anticipate that news about the case will quickly spread among employees in a way that makes the company look bad, e.g., websites, emails, blogs, the press, and it may even attract the interest of unions. Not only does this put tremendous pressure on defendants, but it will start to increase the cost of defense.

However, defendants and defense counsel should not give up. Opt-in rates are typically rather low and often well less than half of the putative action. Furthermore, settlement is always an option, particularly once the number of collective members becomes relatively definite at the end of the notice period. Furthermore, a conditionally certified collective action may discourage other plaintiffs' attorneys from filing more actions. Lastly, particularly where a court has "rubber stamped" conditional certification, the later decertification process remains.

C. Defense Strategies:

1. Internal planning

Internal planning is important when an employer has a collective action filed.

Front-line supervisors/managers may find it helpful to have a neutral "basic script" to respond to employees' questions. They should be cautioned not to try to dissuade employees from opting into the case. They should move more difficult employee questions to a point person; the point person can respond with consistent answers to common questions. A point person should also be identified who will respond to inquiries from the press or other outside persons. Everyone should be clearly instructed, and the consistent message should be, that retaliation against named or opt-in members is absolutely prohibited.

2. Consider early motions

In the past, defendants often delayed merits-based analysis for the "second phase" of the case and focused on delaying or defeating the motion for conditional certification. However, given the trend toward blurring the lines between merit-based and procedural discovery, a prompt and accurate assessment of the facts may be the basis of a motion on the pleadings or early summary judgment motion if the facts show that one or more of the claims is based on faulty theories.

3. Conditional Certification

If you don't oppose a motion for conditional certification, it is certain that you will not win it! Even if opposition is not completely successful, it can result in a limited conditional certification order and set the stage for a more favorable ruling at a later stage. As with class actions, one of the first things to do is try to identify issues that involve highly individualized facts and differences. An essential argument to defeating conditional certification is persuading the court that it will have to conduct a mini-trial for each opt-in, which undermines the validity of the proposed collective action. Defendants should also be prepared to counter the plaintiff's argument that differences just go to damages. Challenge any conclusory or unsupported allegations in the plaintiff's motion. See, e.g., *Sanchez v. JMP Ventures, LLC,* 2014 U.S. Dist. LEXIS 14980 (S.D.N.Y. Jan 27, 2014)(although the bar for condition certification of a collective action is low, it is not "this low"). Even if the defense is not successful at this stage, a strong defense can be the basis of a more favorable settlement.

Despite the advantages of a strongly opposing conditional certification, there may be reasons in any given case that the defense decides not to oppose conditional certification. This may be based on knowledge about the jurisdiction, the judge's prior rulings, and what other courts have done in similar cases. If a low opt-in rate is likely, conditional certification may not be so detrimental. Furthermore, if a defendant believes it can obtain helpful admissions from plaintiffs during depositions, it may decide not to "preview" all of its arguments at the conditional certification stage. Furthermore, opposing the conditional certification motion is expensive (especially if there is a "declaration war"), and gathering declarations can create workplace discussion among potential plaintiffs. In addition, an agreement not to oppose the motion may be the basis for negotiating a more favorable member definition, notice content or form, and/or methodology for notice distribution. Defendants should also consider whether the best resolution might be post opt-in settlement.

The timing of the conditional certification motion can be important. For example, if the plaintiff seeks conditional certification early, the defendant will have little time to conduct discovery or gather opposition evidence. This may also play into the decision about how strongly to oppose conditional certification. However, the more discovery conducted prior to the motion might be the basis for arguing that the court should apply a higher standard.

4. Be familiar with current case law and trends

Being able to cite and discuss the most current case law, particularly major Supreme Court cases, is also critical. The pendulum seems to swing from one side to the other, and it may be starting to trend toward favoring the defense. This also includes keeping up with similar lawsuits with a particular court, judge, circuit, industry, or issues that may provide helpful guidance and/or tactics.

5. Sweat the "small stuff"

Don't let the focus on defeating certification blind you to the value in disputing the adequacy of the class representative or the numerosity of the proposed collective group. Sometimes these become winning arguments.

6. Think about using experts early

They can sometimes be quite helpful in fighting certification as well as on the merits.

7. Declarations and discovery

It is not uncommon for the primary discovery conducted prior to the conditional certification motion is in the form of declarations. Therefore, early in the case, the defendant should decide who should be approached about declarations. Managers and supervisors who have helpful information and would make good defense witnesses are commonly identified, but be aware that any signed declarations are discoverable and can be the basis of cross-examination or otherwise used by the other side. Therefore, defendants should also consider gathering declarations from putative collective members to lock in good evidence at an early stage. Decisions can and should be made on a case-by-case basis about whether to actually prepare a declaration for a putative collective member, but the process of interviews will help to quickly identify strengths and weaknesses of the case. The courts typically place less weight on declarations than depositions, but either can potentially be expensive and disruptive.

Each opt-in is a "party plaintiff." Discovery should be permitted as to each; any who refuse should be dismissed. Named plaintiffs can often be used to demonstrate differences. Since discovery can be very expensive and escalate quickly, defendants had to weigh the cost benefit and efficiency of discovery. At some point, there may be diminishing returns to taking endless depositions of opt-ins. Identify the "best" deponents and, if it is a multi-site case, the "best" locations. Discovery directed to named plaintiffs opt-ins should be easy to understand to minimize time spent and avoid discovery disputes. Opt-in depositions do not need to always be exhaustive, and all discovery should focus on the merits and likely damages.

Focus depositions of defense witnesses on well-defined issues involving carefully-selected and well-prepared PMKs to maintain a consistent "story." In addition to PMKs, there will be additional key witnesses that are likely to be deposed, and these persons should also be carefully prepared.

8. Partial victory can still be important

Defendants, of course, most often want to have as small a group certified as possible and argue that it should be limited to those who share a named plaintiff's position, location, and possibly even supervisor. To support this, evidence should be presented to persuade the court that the issue was not handled the same across the board, e.g., highlight the lack of an illegal policy, plan or decision and the lack of similarities among the plaintiffs, rather than focusing on a merits-based attack. When faced with a strong defense, the court may deny the motion without prejudice, redefine the class, or allow the plaintiff to re-file for conditional certification of a narrower group. See, e.g., *Lay v. Gold's Gym Int'l, Inc.,* 2013 U.S. Dist. LEXIS 144264 (W.D. Tex. Oct. 4, 2013)(defendant successfully argued that although the did not make a sufficient factual showing to permit conditional certification of a national class, even though the court conditionally certified a regional class).

9. Notice issues

There are some things to include and to avoid as part of the notice process to potential opt-ins, and defendants certainly want to have a court order detailing the process. Things to avoid include allowing multiple notices, phone calls, at-work postings, web postings, or allowing the postmark to serve as the determinant of a timely opt-in (only filing should count). Defendants will want the order to include a single distribution by U.S. mail with all other distribution and postings to end, and that contacts by email or phone or other methods should be prohibited. Social Security numbers should always be off-limits to protect privacy. Defendants will typically request that a third party administrator be used to distribute the notice; the TPA should be required to provide counsel with status reports and updated lists of opt-ins with pertinent information. Defendants will also want to know about all notices sent prior to court authorization. Invariably, the defense will have to consider potential compromises, e.g., a postcard reminder instead of repeated notices, whether and how to consider late opt-ins (e.g., requiring them to be collected and filed with objections reserved).

10. Beware of sampling!

Defendants should not stipulate to sampling or the use of surveys to determine liability.

A good case for defendants in this regard is *Duran v. U.S. Bank*, - Cal.4th - (California Supreme Court No. S200923, May 29, 2014). In *Duran*, the court held in an action involving the "outside sales" exemption under state law, that the trial court erred in trying a wage and hour class action by means of a sampling technique that neither provided a valid basis to determine liability nor permitted the defendant its due process right to raise affirmative defenses. In order to be exempt under state law, the employee had to spend more than half of his/her time on sales activities outside of the office. The trial court granted class certification, despite 75 declarations from the bank loan officers in question that they spent more than half of their time working outside the office. For the trial, the plaintiffs proposed a survey to determine how much time class members spent on outside sales activities, followed by a random sample of class members to proceed with focused discovery and a "phase one" trial. The plaintiffs proposed that if liability were found, that aggregate, class-wide damages would be determine at the "phase two" trial, and that the parties would then agree on a claims procedure to distribute damages to individual class members.

The defendant objected to the use of sampling and instead argued that the class should be divided into 20 or 30 groups, with special masters to conduct individualized hearings on liability and damages.

The trial court did not follow either of these two positions. Instead, it decided that at the "phase one" trial, it would take testimony from 20 randomly-selected class members (approximately 7.6% of the class) in addition to the tow named plaintiffs. Based on its findings about these witnesses, the trial court would decide at a "phase two" trial whether to extrapolate its "phase one" findings to the class as a whole. During the trial, the court ruled against the defendant on several evidentiary issues, and at the end held that since the defendant had not established that the position was exempt, *all* class members had been misclassified. At the "phase two" trial, the trial court also allowed in testimony from the plaintiff's expert that the "phase one" finding of liability could be extrapolated to the class with a 13% margin of error, and denied the defendant's request to admit evidence that at least some class members were correctly classified.

The California Supreme Court held that class should not be certified without a manageable trial plan. Certification should be continually reevaluated and the class decertified if individual issues are later established to predominate. Lastly, the employer has an absolute right to present its affirmative defenses. While the court stated that it would not go so far as to say that an employer's liability for misclassification may never be decided on a class-wide basis, it is certainly an important case for defendants.

11. Consider the early use of experts for data and job analyses

Experts can help find flaws in the plaintiff's theory of collective liability and analyze information and data to highlight differences among collective action members. They are invaluable in critiquing the plaintiff's survey tool, and showing how the results of a sample cannot be extrapolated to the collective group with an acceptable degree of statistical certainty.

Experts are also invaluable in evaluating other, more complicated sources of data besides timekeeping databases and payroll records. This includes such sources as email, electronic entry/exit swipes, software log in/log out entries, internet surfing activities, cash register transactions, phone data such as texts, voice logs, cameras, and microphones, travel itineraries, expense reports, sensing mobile devices, remote sensing, radio-frequency identification readers, and wireless sensor networks. Such data can be very helpful in determining how much time an employee spent doing certain tasks, whether they had time to take a break (and if so, when and for how long),

12. Decertification

Courts may be more inclined to decertify as the case gets closer to trial. Plaintiffs are often remiss in providing a detailed trial plan, but defendants should required them to do so loudly and often. The plan should require the plaintiff to establish at the earliest possible stage their theory for trying the case on the basis of collective proof. (Of course, the failure to do so can be used as a reason to deny conditional certification or win decertification.)

13. Hurray! We won decertification! Now what?

Defendants almost unanimously view defeating certification, either at the conditional or decertification stage, as a major victory. After all, that is what they were probably focused on!

However, it may not be all they hoped it would be. Traditionally, plaintiffs' attorneys in FLSA collective actions have not been particularly interested in filing individual actions or cases in multiple districts, but this result is certainly not unheard of. This means that the employer would face many cases in more than one jurisdiction, making it more expensive and disruptive to litigate, and harder to resolve all cases in one dispositive motion or settlement. To date, cases brought strictly under Rule 23 have almost never been re-filed as individual cases or in many different jurisdictions in the author's experience.

Decertification certainly gives leverage to settle all opt-in claims at a substantial discount if the employer is inclined to do so.

14. Heading toward trial

The defendant should continue to hammer on the plaintiff's trial plan.

Heading toward trial, defendants should argue that individual trials are needed for damages.

15. What about *Genesis HealthCare*?

Employers were briefly elated about the U.S. Supreme Court's holding in *Genesis HealthCare Corp. v. Symczyk,* 133 S.Ct. 1523 (2013). In that case, the Court decided that the named plaintiff's failure to accept a Rule 68 offer of judgment that the Court believed offered "complete relief" not only mooted her own claim but also the collective action allegations.

Later decisions have largely limited this holding to its facts. *Schlaud v. Snyder,* 717 F.3d 451 (6th Cir. 2013)(*Genesis* inapplicable to Rule 23 class action); *Michaels v. City of McPherson,* 2013 WL 3895343 (D. Kan. July 29, 2013)(distinguished *Genesis* because in the instant case the plaintiff filed a motion for conditional certification of the FLSA collective action before the defendant made its offer of judgment, compared with *Genesis* where the offer came before the certification motion was filed; defendant also failed to explain the basis for its calculation of the amount offered in settlement); *Velasquez v. Digital Page, Inc.,* 2013 WL 3376903 (E.D. N.Y. July 8, 2013)(case not moot because plaintiffs disputed the sufficiency of the offer of judgment).

However, in *Franco v. Allied Interstate LLC,* 2014 U.S. Dist. LEXIS 47077 (S.D.N.Y. Apr. 2, 2014), the named plaintiff sued the defendant for statutory damages under the federal Fair Debt Collection Practices Act. The defendant made a Rule 68 offer of judgment of one dollar more than the statutory maximum damages the plaintiff could receive, plus reasonable costs and attorneys' fees. The plaintiff refused the offer, and the defendant moved to dismiss the complaint on the grounds that it was moot. In this case, the court agreed, noting that this case was more clear-cut than most because the plaintiff only sought statutory damages.

16. Copycat cases

Not only is one class action dangerous enough, but there is the risk of copycat cases.

In *Murray v. Sears, Roebuck and Co.,* 2014 WL 563264 (N.D. Cal. Feb. 12, 2014), the court denied a motion for class certification. This was practically identical to a motion brought in the U.S. District Court for the Northern District of Illinois in *Thorogood v. Sears & Roebuck & Co.*, where the class certification was initially granted but then reversed by the Seventh Circuit. 547 F.3d 742 (7th Cir. 2008). The two cases asserted practically identical claims although under different state laws. Indeed, the *Murray* case was filed after the reversal in *Thorogood* by the same plaintiffs' attorneys in *Thorogood*, who sought to certify a California-only class that was practically identical to the class they failed to certify in *Thorogood.* The defendant argued that the certification denial in *Thorogood* controlled since the California court had to show "comity" with the Seventh Circuit. The Ninth Circuit acknowledged the risk of abuse by a plaintiff's attorney who continually files cases trying to find a court that will certify a class. It noted that while the United States Supreme Court's decision in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), "requires federal courts to show respect for prior class certification rulings, it does not require that they mechanically adopt those prior rulings whenever they are presented with a motion to certify a class in a copycat lawsuit." *Murray*, 2014 WL 563264 at *5. Although the Ninth Circuit did not accept the defendant's argument that the earlier decision would automatically preclude copycat class certification motions in other district courts, the court noted that the motion before it suffered from the same problems that led the *Thorogood* court to deny certification.

17. And don't overlook pre-litigation strategies! Going beyond compliance

a. Arbitration Issues

Many employers are interested in arbitration agreements, particularly if it contains an enforceable class action waiver provision. There are undeniable potential benefits to arbitration (e.g., the ability to include a class/collective action waiver, more confidentiality, higher perceived efficiency, no jury, and potentially improved defense negotiating position) but also some potential risks (e.g., the possibility for increased claims, limited opportunities for dispositive motions, arbitration costs, and limited appeal rights).

For the purpose of today's presentation, I want to focus on enforceability.

In *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013), the court issued an opinion concerning the availability of class procedures for parties to consumer contracts that provide for mandatory arbitration. In particular, the question was whether a contractual waiver of class arbitration was enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeded the potential recovery. In its 5-3 decision, the Court held that the class action waiver in the parties' contract was enforceable, even though the provision made it economically inefficient to prosecute the underlying Sherman Act claim. The Court started its analysis by emphasizing that arbitration is a matter of contract and that courts must "rigorously enforce" arbitration agreements according to their terms. The court noted two exceptions: where the FAA's mandate was overridden by a contrary congressional command, or where the parties' agreement included a prospective waiver of a federal statutory right ("effective vindication"). Neither was present here. Indeed, said the Court, the fact that it is not worth the expense involved in proving a statutory remedy does not eliminate the right to pursue that remedy.

Courts have relied on *Italian Colors* to enforce arbitration agreements in the employment context. *See, e.g., Richards v. Ernst & Young,* 2013 WL 4437601, at *2 (9th Cir. Aug. 21, 2013)(the plaintiff's employment-related claims against her employer were subject to a mandatory arbitration provision in the plaintiff's employment contract because "Congress ... 'did not expressly provide that it was overriding any provision in the FAA when it enacted the

NLR A [National Labor Relations Act] or the Norris-LaGuardia Act'")(citation omitted);[1] *Lloyd v. JPMorgan Chase & Co.,* 2013 WL 4828588, at *6 (S.D.N.Y. Sept. 9, 2013)(enforcing arbitration clause and class waiver against JPMorgan employees because "waivers of class arbitration should be enforced, notwithstanding any allegations that pursuing an individual claim would be cost prohibitive").

The U.S. Supreme Court is currently considering whether to hear *Iskanian v. CLS Transportation,* a June 2014 California Supreme Court decision. In that case, aside from state claim issues, the state court addressed whether class action waivers in mandatory employment agreements are enforceable. It held that they were. The Supreme Court may also take this opportunity to review whether a state claim such as that alleged (PAGA) which is a representative claim, is subject to the arbitration waiver.

In *Davis v. Nordstrom,* (9th Cir. June 23, 2014), the employer updated its arbitration agreement and added a class action waiver. The court held it was enforceable, noting that the employees had reasonable notice of the change to the employee handbook and that the employer did not seek enforcement of the new arbitration provision during the 30-day notice period.

The courts have disagreed on who decides whether an arbitration agreement allows for class arbitration. In *Opalinski v. Robert Half Int'l.,* (3rd Cir. July 30, 2014), the court considered an arbitration agreement that was silent on whether a class could proceed to arbitration. It held that the question of arbitrability was for the court to decide, although recognizing that procedural questions were generally for arbitrators to decide.

At least one court has addressed the enforceability of an FLSA collective action waiver in a severance agreement. In *Killion v. KeHE Distributors, Inc.,* Case No. 13-3357/4340 (6th Cir., July 30, 2014), the court rather surprisingly said no. It felt obligated to invalidate the waivers due to its earlier 2013 ruling that an employee cannot be bound by a contract with an employer that limits an employee's FLSA rights, reasoning that permitting waivers of FLSA collective action rights would give the employer an unjust advantage over its competitors and discourage employees from bringing individual claims for overtime because the potential recovery would be outweighed by litigation costs. This certainly seems at odds with recent Supreme Court precedent. It remains to be seen what the other circuits will do.

[1] The 9th Circuit subsequently "amended" the *Richards* decision "for the purposes of clarification" Dec. 9, but the amendments were "not substantive" in nature. *Richards v. Ernst & Young,* 2013 WL 6405045, at *1 (9th Cir. Dec. 9, 2013).

At the pre-certification stage, it may still be possible to enter into arbitration agreements, but this should only be done in close consultation with counsel.

b. Consider settling risky cases

Bad facts make bad law. Furthermore, discovery in a single-plaintiff case can result in morphing into a class action on the same and even potentially additional claims. Pay particular attention if the case is brought by someone who is known to file class actions.

c. Monitor other cases

You may be the first to be used in your industry, geographic area, or on a particular issue, but it is more likely that you won't be the first. Monitoring claims, particularly class actions, against competitors with similar business practices can give you important lead time to address and correct problems.

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