Tuesday, October 26
11:00am-12:30pm

606 - Wage and Hour Update: Legal Developments and Emerging Trends in Wage and Hour Collective Actions

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Session 606

Faculty Biographies

Paul DeCamp

Paul DeCamp is a partner in the Washington, DC Region office of Jackson Lewis LLP and national chair of the firm's Wage and Hour Practice Group. He devotes his entire practice to representing employers in wage and hour matters across the country, including class and collective actions, Department of Labor investigations, and counseling.

Before joining Jackson Lewis, Mr. DeCamp served as administrator of the U.S. Department of Labor's Wage and Hour Division. Appointed by the President, he was the chief federal officer responsible for enforcing and interpreting the Nation's wage and hour laws. He led an agency with approximately 1,300 employees in more than 220 offices nationwide, with an annual budget of more than $170 million. Before his appointment as administrator, Mr. DeCamp served as senior policy advisor to the Assistant Secretary of Labor for Employment Standards. In that capacity, he was a member of the Wage and Hour Division's Executive Team and provided legal and policy advice on the full range of wage and hour matters, with emphasis on the Fair Labor Standards Act and the Family and Medical Leave Act.

Mr. DeCamp received his AB, magna cum laude, from Harvard College. He received his JD from the Columbia University School of Law, where he was a Notes Editor for the Columbia Law Review and the Director of the First-Year Moot Court Program. After law school, he clerked for the Honorable Alan E. Norris of the U.S. Court of Appeals for the Sixth Circuit.

Skip Hulett

Jimmy D. "Skip" Hulett, Jr. is the general counsel for Goodman Networks, Inc., a fast growing telecommunications services company. He is based out of San Antonio, Texas and is charged with the overall responsibility for handling the company's legal matters. His responsibilities include the review, oversight, and management of litigation, contracts & licensing, corporate governance, business transactions, and risk management. He works closely with the human resources department on employment issues impacting the company.

Prior to joining Goodman Networks, Mr. Hulett served as a State District Judge in Beaumont, Texas, and later provided of counsel services for the San Antonio law firm of Ball & Weed where he concentrated on mediation and complex litigation.

He is a life fellow with the Texas Bar Foundation and serves on the alumni board of his law school. He is active in Christian ministry, and presently serves as an elder at Watermark Church Boerne, and on the board of directors for Christian Unity Ministries.

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Mr. Hulett received a BS from Lamar University and is a graduate of the Texas Tech University School of Law.

Richard Sedory

Rich Sedory is general counsel and corporate vice president of legal affairs and administration for Transtar Holding Company. His responsibilities include legal, human resources, insurance/risk, compliance and facilities. Transtar is the largest supplier of original equipment and aftermarket replacement parts to the automotive repair industry.

Mr. Sedory was with United Technologies as staff attorney following law school, and then joined PNC Bank where he progressed through positions of increasing responsibility as chief employment and benefits counsel; regional vice president, and senior vice president of human resources. Thereafter, Mr. Sedory joined the University of Pittsburgh Medical Center Health System as senior vice president and chief HR officer. Mr. Sedory then became the chief administrative officer for printCafe Systems.

Mr. Sedory does pro bono legal work, is a speaker at CLE programs, and volunteers with the Pennsylvania schools' mock trial competition, and various career transition and re-employment agencies. Mr. Sedory is also past president of the Pittsburgh Human Resource Planning Society and is on the membership committee at Treesdale Country Club.

Mr. Sedory is a graduate of the University of Pittsburgh and received his law degree from the University of Pittsburgh School of Law.

Darryl Uffelmann

Darryl Uffelmann is the director of labor and employee relations and director of corporate compliance for Kansas City Power & Light (KCP&L). As the director of labor and employee relations, he is responsible for execution of HR strategies and ongoing HR support to all business units. In his role as director of corporate compliance, he is responsible for the company-wide corporate compliance program and serves as chair of the corporate compliance committee reporting to the board audit committee and senior management.

Prior to this, Mr. Uffelmann was the corporate compliance officer, director of labor and employee relations, and senior corporate counsel at Aquila, Inc. He coordinated many facets of the company's compliance culture reporting directly to the board audit committee and was responsible for employee relations across the company, overseeing the relationships with the company's unionized workforces. In addition, he was responsible for handling all employment related disputes and litigation. Mr. Uffelmann's initial responsibilities when he joined the Office of the General Counsel included handling government investigations related to the former energy trading operations and managing litigation company-wide. Immediately prior to joining Aquila, Mr. Uffelmann

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practiced labor and employment law at Blackwell Sanders Peper Martin exclusively representing employers.

He is a member of the Missouri Bar, ABA, ACC, and the Society for Human Resources Management.

Mr. Uffelmann received a bachelor's degree from the University of Kansas in Lawrence, Kansas, and a master's of public administration and law degree from the University of Missouri - Kansas City.

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Why These Issues Matter

- U.S. Department of Labor estimates that > 70% of employers are out of compliance with the FLSA
- DOL is hiring 250 new investigators (33% increase) and is seeking funding for about 90 more
- Since 2001, W&H cases have surpassed EEO cases as the most common workplace-law class actions
- In 2009, the ten largest reported wage and hour settlements averaged > $36 million each

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Why These Issues Matter

DOL's enforcement projections:

- Wage and Hour Division compliance actions will increase more than 20% in FY2010 over FY 2009
- FY2011 compliance actions will increase more than ***41%*** over FY2010 levels
- This goal represents a more than ***70%*** increase in the agency's workload in just two years

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Key Substantive Issues For 2011

1. Narrowing of the administrative exemption
   - The production/administration dichotomy rises from the ashes
   - Pharmaceutical sales representatives
   - DOL changes course, concluding that individual bank customers do not have "business operations"

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Key Substantive Issues For 2011

2. Independent contractor status under fire
   - Major focus of DOL, IRS, and state agencies
   - Employee Misclassification Prevention Act (proposed)
   - Changes to state law

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Key Substantive Issues For 2011

3. Off-the-clock time
   - Donning / doffing
   - Rounding
   - Computer boot-up, log-off
   - *De minimis* time?
   - PDAs and Smart Phones

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Key Substantive Issues For 2011

4. Meal and rest periods
   - State law, particularly in California
   - Automatic 30-minute deductions for meal periods

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Key Substantive Issues For 2011

5. Tipped employees
   - Dual jobs
   - Entitlement to service charges under state law?
   - Tip pooling
   - Customary and reasonable

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Change Management

- I think that we have a big wage and hour problem
- I don't want to continue a non-compliant practice
- I don't want to get the company sued
- What do I do?

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Litigation Issues To Watch In 2011

1. Hybrid state / federal class cases
   - FLSA opt-in collective plus state-law opt-out class
   - Can a case have both types of class at the same time?
   - Several cases pending in the circuits

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Litigation Issues To Watch In 2011

2. E-discovery
   - Every in-house counsel's favorite topic
   - Managing record preservation
   - Managing data gathering

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Litigation Issues To Watch In 2011

3. Calculating backpay in misclassification cases
   - Half-time?
   - Time and a half?
   - This one issue affects exposure by a factor of three or more

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Litigation Issues To Watch In 2011

4. Nationwide classes based on common law
   - Examples
   - At least one court has endorsed this concept
   - Consequences

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WAGE AND HOUR UPDATE: LEGAL DEVELOPMENTS AND EMERGING TRENDS IN WAGE AND HOUR COLLECTIVE ACTIONS

Association of Corporate Counsel
2010 Annual Meeting

October 24-27, 2010
San Antonio, Texas

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OVERVIEW

For many employers, wage and hour class and collective actions present the single greatest threat of workplace-related liability. Often these matters come as a genuine surprise to in-house counsel who believe that their company's policies and practices are both lawful and ethical. The cost of defending a wage and hour class case can quickly reach six or even seven figures, and that is before any payment to the other side to resolve the matter. These cases drain legal department budgets, leaving little if any money available for other essential activities, and tie up key personnel in human resources, payroll, operations, and information technology to gather documents and data for the litigation. And it is not merely the occasional rogue employer that is subject to a wage and hour class claim; the Wage and Hour Division ("WHD") of the U.S. Department of Labor ("DOL") routinely reports that seventy percent or more of the businesses with which it interacts are out of compliance with the Fair Labor Standards Act (the "FLSA").[1]

The good news is that these cases are largely preventable if an employer understands the issues the plaintiffs' bar is targeting. This paper addresses several of the most important substantive trends in wage and hour class and collective actions, as well as a number of important litigation issues that bear on how these cases proceed in court. If you review these issues and then take a critical look at your wage and hour practices, you may be able to take steps to significantly reduce your exposure to large-scale wage and hour litigation.

KEY SUBSTANTIVE ISSUES FOR 2011 AND BEYOND

One of the best indicators that an employer may be at risk for a wage and hour class claim is the existence of such litigation against competitors in the same industry. Pay practices such as treating a particular type of worker as exempt from overtime or as an independent contractor are often relatively consistent within an industry. If a company's competitors are facing class litigation, there is a very good chance that plaintiffs' attorneys are reviewing the company's practices and looking for a potential plaintiff to bring a case similar to the complaints already on file.

In the absence of such a clear signal of risk, another way to judge the likelihood of litigation is to understand what issues are giving rise to cases today. The following topics represent some of the key substantive wage and hour issues for the coming year: (1) the narrowing of the administrative exemption, (2) the classification of workers as independent contractors, (3) pre-shift and post-shift activity, (4) PDAs and smart phones, (5) meal and rest periods, and (6) the rules regarding compensating tipped employees.

I. NARROWING OF THE ADMINISTRATIVE EXEMPTION

Both DOL and the federal judiciary are utilizing an increasingly narrow interpretation of the overtime exemptions under the FLSA, particularly the administrative exemption. This increased narrowing is both troublesome and confusing to businesses and their attorneys.

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[1] 29 U.S.C. §§ 201-219. *See, e.g.*, www.dol.gov/whd/statistics/2008FiscalYear.pdf, at 2 (FY 2008: 78% violation rate); www.dol.gov/whd/statistics/200212.htm (FY 2002: approximately 70% violation rate).

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In order to qualify for the administrative exemption, several criteria must be met. First, the employee must be compensated on a salary basis at a rate not less than $455 per week. Second, 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. Third, the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. Moreover, to qualify for the administrative exemption, the employee must perform work directly related to assisting with the running or servicing of the business. It is this last factor that has become increasingly prevalent in both the courts and DOL, despite the de-emphasis of this factor in the 2004 amendments to the regulations.

A. Re-Emergence of Production/Administration Dichotomy

The U.S. Court of Appeals for the Second Circuit provides the best examples of the recent decisions narrowing the applicability of the administrative exemption. On November 20, 2009, the United States Court of Appeals for the Second Circuit held that the plaintiff, an underwriter tasked with approving loans, had not been properly classified by his employer as exempt from the FLSA's overtime pay requirements under the "administrative exemption" because he "did not perform work directly related to management policies or general business operations" of his employer. *Whalen v. J.P. Morgan Chase & Co.*, No. 08-4092-cv (2d Cir. Nov. 20, 2009). The court inexplicably relied on pre-2004 DOL regulations, which corresponded with the dates of plaintiff's employment and which distinguish "administrative" work from "production" work. This "production/administration dichotomy" refers to whether an employee's work involves running or servicing a business (administrative work) or producing the commodity or service that the employer exists to produce (production work). The court reasoned plaintiff's position fell under the category of production rather than administrative work, relying on the facts that underwriters were evaluated on the basis of "productivity" and that the underwriters were directly engaged in creating the "goods"—loans and other financial services—that were produced and sold by the company. This case appeared an anomaly, as the vast majority of courts have abandoned the administrative/production dichotomy. However, the Second Circuit soon showed a trend of narrowing the administrative exemption.

DOL has similarly revitalized application of the administrative/production dichotomy. Departing from long-standing practice of providing guidance regarding interpretive regulations by issuing detailed opinion letters on specific factual scenarios under the FLSA, DOL issued its first "Administrator's Interpretation" on March 24, 2010.[2] In this first Administrator's Interpretation No. 2010-1, WHD concluded that employees who perform the "typical" duties of a mortgage loan officer employee do not qualify as exempt administrative employees under section 13(a)(1) of the FLSA. The Interpretation withdraws a 2006 opinion letter that concluded that certain mortgage loan officer employees qualified for the administrative exemption. In reaching this conclusion, WHD relied upon its own investigations and selected case law regarding mortgage loan officers, rather than focusing on specific facts proposed by an employer

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[2] WHD will now issue Administrator's Interpretations of law and regulations that apply to all those affected by the regulation at issue. WHD noted that because "slight differences in the assumed facts may result in a different outcome" the Interpretations will be "useful in clarifying the law as it relates to an entire industry." *See* www.dol.gov/whd/opinion/opinion.htm.

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as the former Opinion Letters did. In so doing, WHD glossed over the many factual variations of duties performed by employees in these roles and instead purports to provide blanket guidance to the entire financial services industry.

WHD examined the "typical" job duties of a mortgage loan officer, including: (1) collecting financial information from customers, including credit reports; (2) running collected information through a computer program to identify suitable loan products; (3) assessing the options available to customers and matching the customer's needs with the available products; and (4) compiling customer documents for forwarding to an underwriter or loan processor. DOL weighed these duties against the FLSA regulations' test for the administrative exemption, focusing on the second part of the test: whether an employee's primary duty is "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." *See* 29 C.F.R. § 541.200. To meet this requirement, an employee must "perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201. WHD concluded that mortgage loan officers' duties are "production" work because they relate to the "product" the employer exists to produce: mortgages. Accordingly, WHD determined that these workers are not exempt under the administrative exemption. This opinion is an example of the re-emergence of the production/administration dichotomy as a major factor in the analysis.

This trend has management-side attorneys somewhat perplexed, as the dichotomy's significance was greatly reduced in 2004. Before the FLSA's regulations were amended in 2004, they distinguished between "activities relating to the administrative operations of a business" and "production work." However, DOL abandoned this language in the 2004 amendments. The amended regulations refer to "administrative work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line." 29 C.F.R. § 541.201(a). DOL explained that while the production/administration dichotomy was still relevant, it should not be used as "a dispositive test for exemption." *See* Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,141 (Apr. 23, 2004). Rather, the production/administration dichotomy is one piece in a larger inquiry. DOL explained that the dichotomy is determinative only for work that falls "squarely on the production side." *Id*. Nonetheless, the *Whalen* case and DOL's first Administrator's Interpretation make clear that the production/administration dichotomy is not a thing of the past. Rather, it is currently being applied to limit the use of the administrative exemption. Thus, employers, human resource employees, and attorneys must be diligent in their review and classification of administrative positions, paying special attention to positions that might involve production work.

B. Second Circuit's Narrowing of the Administrative Exemption in Pharmaceutical Sales Representative Context

Whether pharmaceutical sales representatives ("PSRs") are exempt under the FLSA is a hot issue right now in district courts, and the issue has since made it to circuit level. Some

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district courts have held that PSRs are exempt under the administrative exemption, and others have held that they are exempt under the outside sales exemption.

On July 6 2010, the Court of Appeals for the Second Circuit held that PSRs are not exempt administrative or outside sales employees. *In re Novartis Wage & Hour Litig.*, 2010 U.S. App. LEXIS 13708 (2d Cir. 2010). The Court concurred with and deferred to the position of the U.S. Secretary of Labor, who appeared as *amicus curiae*. In the underlying lawsuit, plaintiffs/PSRs sued their employer, Novartis Corporation, alleging that they were misclassified and thus owed overtime compensation. Novartis employed PSRs to meet with physicians to educate them on company products and encourage them to prescribe those products. Due to FDA guidelines, PSRs are prohibited from directly selling prescription drugs to patients or physicians. Instead, each PSR's goal was to obtain a commitment from physicians that they will prescribe the Company's drugs. The company provided PRSs with training on messaging that is compliant with the FDA regulations, as well as complaint promotional materials. Plaintiffs' total compensation, including bonus, for 2005 was over $90,000 each, and many earned in excess of $100,000.

In 2009, the District Court for the Southern District of New York held that the PSRs were exempt outside sales employees because their role constituted sufficient sales activity under the spirit of the FLSA. 593 F. Supp. 2d 637 (S.D.N.Y. 2009). Moreover, the District Court held that the administrative exemption was applicable because the PSRs performed non-production work that plays a crucial role in the dissemination of product information. The District Court held that the PSRs regularly utilized sufficient independent discretion and judgment in tailoring the message for each physician.

On appeal, the Second Circuit reversed the District Court. The Court showed great deference to the Secretary of Labor's view that the exercise of independent discretion and judgment as to matters of significance required for the administrative exemption "means more than simply the need to use skill in applying well-established techniques or procedures prescribed by the employer." After analyzing the PSRs' (i) ability to answer physicians' questions regarding products; (ii) ability to develop a rapport with physicians; (iii) ability to remember past conversations with physicians; and (iv) ability to recognize whether a message has been persuasive, the Court held that the Plaintiffs did not exercise sufficient independent discretion and judgment as to matters of significance, but rather applied skills gained through training. Accordingly, the Court held that the administrative exemption is inapplicable. The Court again deferred to the Secretary's interpretation that the PSRs' promotional work with physicians is not "making sales" within the purview of the outside sales exemption, and held that the outside sales exemption is inapplicable.

While this decision is alarming for pharmaceutical companies, the one other circuit to decide this issue came to the opposite conclusion. On February 2, 2010, the Third Circuit issued its decision in *Smith v. Johnson & Johnson*, 93 F.3d 280 (3d Cir. 2010). That ruling affirmed the District Court of New Jersey's grant of summary judgment in favor of Johnson & Johnson, concluding that the company's PSRs fall within the administrative exemption to the overtime requirements of the FLSA. The Court held that the duties of the former-PSR plaintiff that "required [plaintiff] to form a strategic plan designed to maximize sales in her territory" satisfied the requirement under the FLSA that the duties "directly relate to the management or general

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business operations of the employer" in order to qualify for the administrative exemption. The Third Circuit found that the plaintiff managed her own territory without direct supervision which "involved a high level of planning and foresight, and the strategic plan that she developed guided the execution of her remaining duties." Specifically, the plaintiff in Smith was unsupervised 95% of her working time. She was responsible for planning and prioritizing her meetings with doctors to maximize sales results. The plaintiff was required to be inventive in appealing to reluctant doctors and utilized her budget to provide food to physician's offices, meals for physicians, and educational seminars for healthcare providers. The PSR in Smith worked off of a prepared "message" provided by the company but had some discretion on how to communicate with each doctor. Johnson & Johnson identified "high-priority" doctors for PSRs, but it was left to the plaintiff's discretion to decide how often and when to visit different healthcare providers. Based on these facts, the Third Circuit concluded that plaintiff met the administrative exemption's requirements of discretion and independent judgment beyond dispute.

In an environment where employers tend to look to the administrative exemption as a catchall for positions that do not fall easily within the other white-collar exemptions, the recent case law and the DOL's Administrator's Interpretation send a clear message: the administrative exemption is no such catch-all exemption. Rather, the administrative exemption is becoming increasingly difficult to invoke in the changing legal landscape, and employers need to diligently assure that they are in compliance with the law in order to avoid the collective action monsters that can lead to millions of dollars in liability.

II. INDEPENDENT CONTRACTOR STATUS UNDER FIRE

In recent years, employers have faced an increasing number of legal challenges to businesses' use of independent contractor labor. These challenges are coming from multiple directions: both the courts and DOL, primarily WHD, are taking very close looks at independent contractor classification, and there is pending legislation aggressively dealing with misclassification. In addition, taxing authorities at the state and federal level increasingly view challenges to independent contractor status as a potential source of tax revenues. For example, in February 2010, the Internal Revenue Service began a three-year program to conduct approximately 6,000 random audits of businesses that use independent contractors. Some states have also pursued unemployment compensation audits focusing on independent contractor status. Any attention that this issue receives from agencies outside the wage and hour context can potentially trigger a wage and hour claim, including a DOL investigation or a class or collective action. The ramifications for misclassification are more significant now than ever, necessitating that businesses be aware of challenges they face and actively ensure they are in compliance.

A. DOL's Focus on Independent Contractor Classification

With the change in administrations in 2009, WHD has become increasingly aggressive in investigating compliance in independent contractor classification, particularly in the context of overtime and minimum wage claims. WHD's primary strategy to achieve compliance goals includes targeting industries in which violations are most likely to occur, and identifying vulnerable workers. WHD specifically includes industries with a lot of independent contractors and regular subcontracting practices as the industries with the highest frequency of compliance

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problems. In focusing on independent contractor classification, WHD's stated purpose is to promote and achieve compliance, not to change the definition of who is an independent contractor.

In furtherance of its aggressive agenda, WHD has hired 250 new investigators in the past year, and plans to hire approximately 90 more in 2010. DOL's 2011 proposed budget is a strong indication of DOL's focus on misclassification. The proposal includes $25 million for a joint Labor-Treasury initiative, called "The Employee Misclassification Initiative," with the goal of identifying and deterring misclassification of employees as independent contractors. The initiative includes $12 million for WHD to hire approximately 90 new investigators who will specifically target industries with misclassification characteristics, such as construction, child care, home health care, grocery stores, janitorial, business services, poultry and meat processing, and landscaping. In addition, the budget request includes a request for $1.6 million and 10 additional attorneys for the Solicitor's Office to pursue misclassification litigation, including multi-State litigation to coordinate enforcement with States. Funding that is not allocated to WHD is, in part, intended to go to DOL's Employment and Training Administration ("ETA"). ETA will award grants to states to increase compliance enforcement and will reward those states who are most successful. Additionally, the initiative includes funding for OSHA to modify its investigative guidelines in order to allow OSHA inspectors to identify instances of misclassification and notify WHD. DOL's budget proposal sends a clear signal to employers that utilize a large percentage of independent contractors that these companies should make serious and significant efforts to ensure these classifications are in compliance.

B. Employee Misclassification Prevention Act (H.R. 5107, S. 3254)

As DOL increases its attention to independent contractor misclassification, federal lawmakers are also making legislative efforts to tackle the issue. The Employee Misclassification Prevention Act proposes to provide workers with benefits they are not entitled to as independent contractors. Currently, only those classified as employees are entitled to the protections of wage and hour laws, employment discrimination laws, and unemployment and workers' compensation insurance. This legislation would amend the FLSA to strengthen enforcement and penalties for misclassification of employees as independent contractors.

On April 22, 2010, Ohio Senator Brown introduced S. 3254 and California Representative Woolsey introduced H.R. 5107. S. 3254 was referred to the Committee on Health, Education, Labor, and Pensions. H.R. 5107 was referred to the House Committees on Education and Labor and Ways and Means.

The legislation requires employers to provide notice to employees and non-employees of their classification. Employers must also notify these workers that their rights to wage and hour protections depend upon proper classification. The legislation creates a rebuttable presumption that a worker who is remunerated for the performance of labor and services by an employer is an employee of that employer if the employer fails to keep the required records or provide the required notice. Additionally, the legislation includes new record-keeping requirements, and employers must include in these records an accurate classification of the status of each worker as either an employee or non-employee. The legislation would also require state unemployment

insurance agencies to conduct auditing and investigative programs to detect employers that misclassify.

The bill would double the amount of liquidated damages for maximum hours, minimum wage, and notice of classification violations by an employer, and subjects a person who violates such requirements to a civil penalty of up to $1,100, and also subjects such a person who repeatedly or willfully violates such requirements to a civil penalty of up to $5,000 for each violation.

The legislation would require any office, administration, or division of DOL to report any misclassification of an employee by a person subject to the FLSA that it discovers to WHD. It further authorizes WHD to report such information to the Internal Revenue Service (IRS). The legislation also directs the Secretary of Labor to establish a webpage on DOL's website that summarizes the rights of employees under this bill and other appropriate information. The legislation would also require DOL to target industries it determines to have frequent incidence of misclassifying workers for investigations.

Secretary of Labor Hilda Solis issued a statement supporting the bill and affirming the DOL's committing to targeting worker misclassification. Secretary Solis stated that the new bill would provide workers with the "critical workplace protections and employment benefits to which they are legally entitled."

C. Activity in the States

The federal government is not alone in its aggressive agenda to combat independent contractor misclassification. In recent years, many states have enacted or amended legislation dealing with independent contractor classification, or created task forces to combat misclassification.

In 2007, Minnesota and Colorado both enacted new laws cracking down on misclassification of employees as independent contractors. In 2008, legislatures in California, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Maryland, Minnesota, New Hampshire, New York, Pennsylvania, Rhode Island, Vermont, and Wisconsin all introduced similar laws, some of which are detailed below.

In 2008, Connecticut's HB 5113 and SB 454 established a commission to review the problem of employer misclassification for purposes of avoiding obligations under state and federal labor, employment, and tax laws.

Utah's SB 159 makes it fraud to misclassify an employee to avoid the obligation to obtain workers' compensation insurance coverage, and SB 189 establishes a council to study how to reduce costs resulting from the misclassification of workers.

In June 2009, the Colorado legislature enacted the Misclassification of Employees as Independent Contractors Act. The new law creates a complaint process for workers who believe that they have been misclassified as independent contractors for purposes of unemployment insurance, and a process for the Colorado Department of Labor and Employment's Division of

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Employment and Training to issue Advisory Opinions to employers seeking advice on the proper classification of workers. The Act has strict penalties for misclassification.

On August 28, 2009, the Maryland Department of Labor, Licensing, and Regulation (DLLR) published its proposed regulations to implement the recently enacted Workplace Fraud Act of 2009, which took effect on October 1, 2009. While the Act and regulations currently affect primarily those employers in the construction and landscape industries, all Maryland employers should pay close attention because all employers are covered under the law for unemployment insurance (UI) purposes. The state's UI division investigates employee classification through both random and targeted audits and when a person claims UI benefits but is not listed as a covered employee. In addition, Governor Martin O'Malley has made it very clear that he hopes to target other industries as soon as possible. To further this goal, the governor issued an Executive Order to create a task force to begin targeting employers in other industries that purportedly regularly misclassify employees as independent contractors.

In May 5, 2010, Connecticut Governor Jodi Rell signed into law An Act Implementing the Recommendations of the Joint Enforcement Commission on Employee Misclassification, effective on October 1, 2010. The law increased the state's civil penalty for independent contractor misclassification from $300 per violation to $300 *per day* per violation. It also expanded criminal liability for employers who knowingly misclassify workers with the intent to injure, defraud or deceive the state because of their failure to pay workers' compensation or second injury fund assessments.

Also in May 2010, Wisconsin Governor Jim Doyle signed Senate Bill 672 and Assembly Bill 929 which both address misclassification of employees.

Additionally, the New York Attorney General's office has aggressively pursued wage claims against joint employers, including against large supermarket and drugstore chains for unpaid wages due to delivery workers misclassified as independent contractors.

D. Federal Cases

Several federal decisions deserve attention to get a feel of the current legal landscape. In *Hopkins v. Cornerstone America,* 545 F.3d 338 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1635 (2009), the U.S. Court of Appeals for the Fifth Circuit determined that plaintiffs, insurance sales leaders, were misclassified as independent contractors and were therefore employees eligible for overtime pay. Cornerstone America is the sales and marketing division of a national life insurance company. Certain of the company's sales agents are promoted to the management-level position, "sales leader." Sales leaders primarily earn their income from commissions on sales made by their subordinate agents. The company classified the sales leaders as independent contractors. A group of sales agents filed suit against the company, alleging that they were employees entitled to overtime wages. The district court granted the plaintiffs' motion for summary judgment. In affirming the district court's decision, the Fifth Circuit applied the economic realities test and reasoned that the managers were economically dependent upon the company for which they worked, instead of being in business for themselves. The court relied on several factors in reaching that the company exercises a substantial amount of control over the plaintiffs' ability to earn income. The company controlled the hiring, firing, assignment, and

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promotion of the agents whom the plaintiffs supervised. A majority of the sales leaders received most of their pay based on commissions earned by the subordinate agents. The company paid for and controlled much of the advertising, set prices and types of policies, and determined the geographic territory of each sales leader and subordinate agent. Sales leaders were prevented from acquiring leads except through the company. Sales leaders were prohibited from selling other companies' products, and from owning or operating other businesses. The Sales leaders had no specialized skills, and their business was not portable. According to this decision, in order to truly classify a worker as an independent contractor, the economic realities of the situation should show that the worker possesses some unique skill, and that he or she is allowed to control the methods and means by which that skill is exercised.

In *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), the U.S. Court of Appeals for the D.C. Circuit laid out a new set of rules regarding classification of independent contractors. The underlying issue involved the Company's refusal to bargain with truck drivers on the basis of their perceived status as independent contractors. The workers sought relief from the NLRB, who in turn determined that the workers were employees under the common law test. In a 2-1 decision, the D.C. Circuit set aside the NLRB's finding and determined that its analytical approach had evolved over time, and the circuit will henceforth differentiate employees from independent contractors based on the extent of "entrepreneurial opportunity" available to the worker. In applying this new analytical approach, the Court held that the drivers were independent contractors who were not covered by the NLRA. The company did not control hours of work, breaks, what routes drivers follow, or other details of performance; the company did not discipline drivers; the drivers provide their own vehicles, which they are free to use for other purposes; the drivers were free to independently incorporate; the drivers could sell or assign their routes or hire employees to cover routes. The D.C. Circuit's approach to the classification analysis is markedly different from rules established by other courts.

Employers should be encouraged by the decision in *Bamgbose v. Delta-T Group, Inc.*, 2010 U.S. Dist. LEXIS 10681 (Feb. 8, 2010). There, a group of temporary healthcare workers who were classified as independent contractors filed a lawsuit claiming they were misclassified and thus owed overtime under the FLSA. Delta-T Group, Inc. provides referral service for specialized types of healthcare professionals. The company maintains a registry of workers and matches them with employers in need of services in a variety of working conditions. Workers ranged from individuals with high school diplomas to individuals with doctorate degrees. Because the class of plaintiffs was not similarly situated, the court denied conditional certification of an opt-in class because of individualized issues bearing on status of independent contractor versus employee.

The messages from the federal government and the courts are clear: DOL is poised to take a leading role in cracking down on employers it suspects of misclassifying employees as independent contractors, and state legislatures and federal courts appeal willing to follow suit. Class-action plaintiffs' lawyers are seeking out workers who might have been misclassified, making increased collective actions in this area an inevitable reality. Companies that use independent contractors are strongly urged to ensure classification compliance in order to avoid falling victim to the current assault on independent contractor misclassification.

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III. Renewed Focus on Pre-Shift and Post-Shift Activity

The FLSA requires employers to pay a minimum wage for each hour it employs an employee, as well as an overtime premium for hours worked in excess of forty per week. *See* 29 U.S.C. §§ 206, 207. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as working time. Generally speaking, an employee's work time is compensable if it is: (1) for the employer's benefit; (2) controlled by the employer; or (3) permitted by the employer. The Portal-to-Portal Act of 1947, however, relieves employers from compensating employees for "activities which are preliminary or postliminary to [the] principal activity or activities." 29 U.S.C. § 254(a). What constitutes preliminary and postliminary activities have been the center of litigation for many years. Recently, litigation addressing what constitutes compensable time has focused on donning and doffing type claims outside the poultry and meatpacking industry, as well as other pre-shift and post-shift tasks and duties performed by employees while commuting or outside the office. Therefore, compliance with the minimum wage and overtime obligations require employers to accurate identify what activities constitute "work."

The Supreme Court's 2005 ruling in *IBP, Inc. v. Alvarez*, a donning and doffing case in the poultry industry, focused the attention of the plaintiffs' bar on potentially compensable pre-shift and post-shift tasks. 546 U.S. 21 (2005). The *Alvarez* Court explicitly held that activities that are integral and indispensible to principal activities are themselves principal activities, and activities occurring after the first principal activity and before the last principal activity are compensable. The court found that because doffing gear that is "integral and indispensible" to employees' work is a "principal activity" under the statute, the continuous workday rule mandates that time spent waiting to doff is not affected by the Portal to Portal Act and is instead covered by the FLSA. *Id.*

Since *Alvarez*, numerous federal courts have taken a variety of positions on issues such as how to draw the line between non-compensable changing of clothing and compensable changing into and out of work gear, whether a principal activity at home starts the "continuous workday" and thus renders any subsequent driving time compensable, and whether and how to apply the *de minimis* rule regarding small amounts of time spent on these types of tasks.

A. Is the Time Spent Getting Ready for Work Compensable?

1. The Changing Definition of "Clothes"

Generally, the time an employee spends changing clothes or showering need not be compensated unless it is done at the work site at the employer's request or required by the nature of the principal duties. However, it is important for employers to monitor the ever changing interpretation of "changing clothes" in Section 3(*o*) of the FLSA. This section specifically excludes from the definition of "hours worked" any "time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide CBA applicable to the particular employee." 29 U.S.C. § 203(*o*). What constitutes "clothes" has been a focus of several WHD opinion letters since 1997.

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In 1997, WHD first considered whether protective equipment could be "clothes" under the Section 3(*o*) exclusion and concluded that the time spent putting on, taking off, and cleaning the protective equipment utilized in the meat packing industry was compensable. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter (Dec. 3, 1997). According to the 1997 opinion letter, the "plain meaning" of "clothes" as used in Section 3(*o*) did not encompass protective equipment (*e.g.*, mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts). *Id.* This interpretation was affirmed in 1998 and 2001 opinion letters. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter (Feb. 18, 1998); U.S. Department of Labor, Wage and Hour Division, Opinion Letter (Jan. 15, 2001). Based on these opinion letters, it was clear to employers that donning and doffing protective equipment did not fall under the Section 3(*o*).

However, after the change of administration, the Wage and Hour Division Administrator took the opposite position in 2002 and issued an opinion letter concluding that "clothes" under Section 3(*o*) included the protective equipment typically worn by meat packing employees and, therefore, the time spent donning and doffing such equipment could fall under Section 3(*o*)'s exclusion. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter FLSA2002-2 (June 6, 2002). This position was reaffirmed in 2007. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter FLSA 2007-10 (May 14, 2007).

Once again, after a change in administration, WHD changed its interpretation of "clothes." In 2010, the Deputy Administrator released an Interpretation that returned to the interpretation of Section (*o*) utilized in the 1997, 1998, and 2001 opinion letters. The current administration found that, based on its statutory language and legislative history of the FLSA, the Section 3(*o*) exclusion does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job. *See* Administrator's Interpretation No. 2010-2, June 16, 2010. However, the Administrator's Interpretation states that even if donning and doffing is excluded from the calculation of compensable time by Section 3(*o*), it can still constitute a principal activity for purposes of signaling the start of the compensable workday. *Alvarez*, 546 U.S. at 37. Therefore, time spent in donning and doffing activities, as well as any walking and waiting time that occurs after the employee engages in his or her first principal activity and before he or she finished his or her last principal activity, is part of the "continuous workday" and is compensable under the FLSA. *Id.* at 37.

It is important for employers to be aware of the breadth of this Interpretation, which applies to all industries and not just employees in the meat packing industry. By recognizing that clothes changing covered by Section 3(*o*) may be a principal activity, the Deputy Administrator has put employers on notice that where that is the case, subsequent activities, including walking and waiting, are compensable.

2. What Constitutes Compensable Pre-Shift and Post-Shift Activity

Compensation for pre-shift and post-shift tasks continues to be a subject of debate and has recently focused on whether employees are required to don and doff at the worksite or have the option of donning and doffing at home. Most court cases addressing this issue have concluded that the time spent donning and doffing uniforms and protective gear is not

compensable under the FLSA where an employee may do so at home. In a recent collective action brought by patrol officers against the City of Mesa claiming that they should have been compensated for time spent donning and doffing required police uniforms and protective gear, the Ninth Circuit affirmed the grant of summary judgment in favor of the City. *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010). The court concluded that the officers were not entitled to compensation for donning and doffing because: (1) the officers had the option of donning and doffing at home; and (2) the uniforms and gear were not "integral and indispensable" for police work, as defined in previous case law. *Id.*; *see also Dager v. City of Phoenix*, 646 F. Supp. 2d 1085 (D. Ariz. 2009), *aff'd*, 2010 U.S. App. LEXIS 10981 (9th Cir. May 28, 2010). These decisions are noteworthy because district courts have reached different conclusions. For example, in 2007, a Northern District of California judge granted summary judgment for a group of police officers seeking compensation under the FLSA for time spent donning and doffing uniforms and equipment, finding that the donning and doffing was necessary to the principal work performed and it was done for the benefit of the employer. *See Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200 (N.D. Cal. 2007).

Travel time is also a subject of constant scrutiny under the FLSA. Courts are typically not receptive to claims for compensation for travel as a passenger before an employee's first principal activity of the day and after the last principal activity of the day, because such claims are excluded by the Portal to Portal Pay Act. 29 U.S.C. § 254. However, when determining whether certain tasks performed during an employee's commute are compensable, an important factor to consider is whether the performance of such tasks materially alters the employee's commute. If the answer to that question is yes, the commute may be compensable. For example, in *Singh v. City of New York*, the Second Circuit held that carrying files while commuting, without any other employment-related activity, does not transform the entire commute into compensable work under the FLSA. 524 F.3d 361 (2d Cir. 2008). In particular, inspectors who commuted by bus and train claimed that carrying and safeguarding the inspection documents slowed them down by 10 to 15 minutes a day while they took inconvenient stops to secure a spot on a less crowded train or had to stop to secure the documents before attending social functions after work. The court concluded that the plaintiffs' use of their commuting time was materially unaltered by the requirement to carry inspection documents because they could still read, listen to music, eat, and run errands. However, if such tasks added time to the employees' commutes, such additional time may be compensable because it is both required by the employer and the time spent is necessarily and primarily for the benefit of the employer. *Id.* at 370.

The court's decision rested on its conclusion that the employer was not the primary beneficiary of the commute time, but cautioned that the employer was "pushing the limits on the burdens it may impose on its employees during a commute." 524 F.3d at 370. The Court concluded that while its holding was based on the primary benefit test, its analysis was similar to a *de minimis* test. "[W]hen an employee is minimally restricted by an employer during a commute, such that his or her use of commuting time is materially unaltered, the commuting time will generally not be compensable under the FLSA." *Id.* at 369.

B. What Constitutes *De Minimis*, and Therefore Non-Compensable, Time?

Courts have recognized that although tasks may be integral and indispensable to a principal activity, employees cannot recover for otherwise compensable time if it is *de minimis*.

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Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984). There are numerous decisions applying the *de minimis* rule to claims of overtime compensation under the FLSA and it is likely that these claims will continue. In general, federal courts apply the principle that "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. . . . It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Albrecht v. Wackenhut Corp.*, 2010 U.S. App. LEXIS 10973 at *3 (2d Cir. N.Y. May 28, 2010) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)). Many courts consider three factors in determining whether otherwise compensable time should be considered *de minimis*: (1) the practical administrative difficulty of recording additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis. *Singh*, 524 F.3d at 371.

In *Albrecht*, the security guards alleged that time spent obtaining and returning their firearms and radios pre-shift and post-shift constituted a "principal activity" under the FLSA, and thus was compensable. The court held that the plaintiffs failed to controvert evidence in the record that such "arming up" and "arming down" involved only 30-90 seconds, and thus was *de minimis*. *Id*. at *5. The Court acknowledged the plaintiffs' argument that a requirement that non-exempt employees be present and available "15 minutes before the start of a scheduled shift" could give rise to a viable claim under the FLSA, but held that this claim was not properly alleged in the original complaint, which was limited to the time related to arming up and down. *Id*. at *5-6. While this result is favorable to employers, they should still think carefully before treating mandatory time spent on the premises to be non-compensable as a preliminary and/or *de minimis* activity.

Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable. *See E.I. du Pont de Nemours & Co. v. Harrup*, 227 F.2d 133, 135-36 (4th Cir. 1955) (finding preliminary activities of 10 minutes in length are so insignificant and of so short a duration as to fall within the classification of de minimis and thus unworthy of compensation); *Carter v. Panama Canal Co.*, 314 F. Supp. 386, 392 (D.D.C. 1970) (preliminary activities of 2 to 15 minutes per day fall under the *de minimis* rule as not compensable); *Hodgson v. Katz & Besthoff, #38, Inc.*, 365 F. Supp. 1193, 1197 n.3 (W.D. La. 1973) (1-10 minutes spent by employees before shift to count their cash bank and ensure everything is in order was *de minimis*).

IV. PDAs and Smart Phones: The Next Wave

As discussed in the previous section, the FLSA requires employers to pay employees for all hours worked in a workday. DOL has adopted the continuous workday rule, which means that the "workday" is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b). This includes pre- and post-shift activities, such as donning and doffing protective clothing, but does not include tasks constituting a few seconds or minutes of work beyond the scheduled working hours. As technology changes and more and more employees have remote access to employer servers and email, conduct work activities on cellular telephones and smart phones outside the office, and are required to access work related e-mails, voice-mail messages, and text messages outside an employee's normal working hours, an employer's responsibility to

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determine what constitutes compensable time has become more difficult. Recently-filed lawsuits involving employer-issued smart phones highlight the challenges of employers to meet the business needs of a service-focused economy while complying with wage and hour laws. In an attempt to avoid litigation regarding "off the clock" work, the best practice is to require employees to record all time spent performing any work-related activities and to pay employees for that time.

At least one court has held that checking e-mail at home, and other related activities, can be a principal activity for purposes of the continuous workday, thereby rendering commuting time after the first principal activity and before the final principal activity of the workday compensable as well. In *Dooley v. Liberty Mutual Insurance Co.*, 307 F. Supp. 2d 234 (D. Mass. 2004), a federal court in Massachusetts considered this issue regarding an insurance company's automobile damage appraisers. While at home at the start or end of each workday, these employees were required to check their e-mail and voice-mail, make various telephone calls, download their assignments for the following day, and perform other work-related tasks. The employer paid for these tasks if the employees reported spending time on the duties. *See id.* at 239-40. The employees, however, also sought compensation for the time spent driving from home to their first appointment of the day and from their last appointment back home. The court agreed the driving time was compensable because the employer required the employees to perform the various tasks before and after driving, rendering the tasks principal activities. *Id.* at 242.

However, if it is an employee's choice to perform tasks such as synching his or her personal digital assistant and receiving and responding to e-mails and voice-mails from home, it does not automatically mean that these tasks are compensable because they might not be "integral" and "indispensable" to the employee being able to perform the essential functions of his or her position. *Kuebel v. Black & Decker (U.S.) Inc.,* 2009 U.S. Dist. LEXIS 43846 (W.D.N.Y. May 18, 2009) (employee's commute time is not compensable because his workday did not begin and end at home when he voluntarily performed tasks including synching his personal digital assistant, loading and unloading his car, reviewing company training and instructions and receiving and responding to e-mails and voice-mails). Making commute time compensable merely because an employee performed any "principal activity" at home "would be a violation of the letter and spirit of the FLSA." *Lemmon*, 538 F. Supp. 2d at 1209.

The *Dooley* decision serves as a caution for any employer that requires, informally expects, or permits non-exempt employees to perform tasks such as checking or responding to e-mail and voice-mail, and logging onto the computer network away from the workplace and outside of normal working hours that these may be compensable principal work.

Many other types of activities associated with the modern work environment have been at issue as to whether they are non-compensable pre- and post-shift tasks or compensable time as part of the continuous workday. For example, in *Rutti v. Lojack Corp.* the Ninth Circuit concluded that the time employees who worked from their homes or on-site at customer locations spend receiving assignments and mapping routes to the customer locations was not compensable. 596 F.3d 1046 (9th Cir. 2010). However, the court did note that because the employer required the employees to transmit data from a handheld device to the company's servers each day, and because this activity was both a regular duty and primarily for the

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company's benefit, the time spent performing this task may be compensable work time if employees must spend more than a minimal amount of time doing so. *Id.*

Additionally, over the past two years, several lawsuits have been filed as a result of these conveniences of modern technology. In November 2008, an assistant store manager filed a lawsuit against AT&T Mobility seeking unpaid wages and overtime for reviewing and responding to work-related phone calls, e-mails, and text messages off her employer-issued smart phone while "off the clock." *Zivali v. AT&T Mobility LLC*, No. 08-cv-10310 (S.D.N.Y., filed Nov. 26, 2008). In July 2009, T-Mobile USA, Inc. was sued by current and former employees for unpaid working time claiming they were required to use their T-Mobile issued phones to read and respond to messages outside of working hours. *Agui v. T-Mobile USA, Inc.*, No. 09-cv-2955 (E.D.N.Y., filed July 10, 2009). Additionally, an employee sued CB Richard Ellis Group, Inc. for unpaid work time after hours that included reading and responding to e-mails on company-issued smart phone. *Rulli v. CB Richard Ellis, Inc.*, No. 09-cv-00289 (E.D. Wis., filed Mar. 13, 2009). More recently, a police sergeant working for the City of Chicago filed a collective action on behalf of other similarly situated Police Department members who were provided personal data devices that they were required to review and respond to work-related e-mails after their normal working hours without receiving any compensation for such hours. *Allen v. City of Chicago,* No. 10-cv-03183 (N.D. Ill., filed May 24, 2010).

Whether the time spent reading and responding to e-mails outside of work time is compensable may depend on whether such time is *de minimis*. Under the *de minimis* rule, an employer may be able to avoid liability for the time a non-exempt employee spends using smart phones if the work lasts only a few seconds or a couple of minutes. However, whether the time spent using a smart phone is *de minimis* may depend on: (1) the practical administrative difficulty of recording additional time, (2) the size of the claim in the aggregate, and (3) whether the claimants performed the work on a regular basis. *See generally, Singh v. City of New York*, 524 F.3d 361 at 371 (2d Cir. 2008).

V. MEAL & REST PERIODS AND THE RISKS OF AUTOMATIC TIME DEDUCTION

The FLSA does not require lunch or rest breaks. However, when employers do offer short breaks (usually lasting about 5 to 20 minutes), federal law considers the breaks as compensable work hours that would be included in the sum of hours worked during the work week and considered in determining whether overtime was worked. *See* 29 C.F.R. § 785.18. Bona fide meal periods (typically lasting at least 30 minutes), serve a purpose different from coffee or snack breaks and, thus, are not work time and are not compensable. *See id.* § 785.19. However, approximately 18 states have statutes requiring meal or rest periods during the work day.

Most notable is California, which has some of the toughest rules in the country. Meal and rest break class actions are an epidemic in California courts. One highly publicized case resulted in a jury verdict in excess of $170 million against a single employer. The California Supreme Court granted review of the appellate court's ruling in *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25 (2008). The appellate court had held that California employers need only provide meal and rest breaks, not ensure that the breaks are taken. The appellate court also found that employers cannot be liable for off-the-clock work unless they

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knew or should have known employees were working off the clock. Finally, the appellate court vacated class certification as the issues involved individualized inquiries that could "only be decided on a case by case basis." The California Supreme Court has granted review to determine the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly workers. The outcome of this case could dramatically impact the flexibility of workplaces in California.

As employers are becoming increasingly wary of how to account for employees' meal breaks in their time records, many businesses mistakenly conclude that auto-deduction timekeeping is the perfect solution. Employers often view auto-deduct mechanisms for meal breaks as an easy, efficient way to capture employees' working time. However, these same mechanisms keep wage and hour attorneys awake at night, and can turn into an employer's nightmare, as there is a current trend of massive class and collective actions dealing with auto-deduction.

Auto-deduction is not, by itself, unlawful. What *is* unlawful is not accurately recording employees' time. Under the FLSA, an employer is required to record the number of hours worked each day and the number of hours worked each workweek for each employee. Indeed, liability under the FLSA attaches for failure to pay for meal breaks only if an employee receives less than the minimum wage for each hour worked during the week or if the employee works more than 40 hours in the workweek and is due overtime. However, in the event of litigation or an investigation by the DOL in which workers contend that the time records do not reflect the reality of the workplace, the burden is for all intents and purposes on the employer to prove that its time records are accurate. When an employer has a policy to auto-deduct for meal breaks, proving the accuracy of each and every meal break can be difficult, if not impossible. Violations are likely, and in many cases inevitable, when an employer is not in a position to ensure that each worker took the full meal break without interruption.

Moreover, during the all-important certification stage of an FLSA case, the court often focuses on the policy and whether the policy maintained could result in repeated wage violations, not whether specific violations occurred. Where an employer maintains such a policy, plaintiffs have an easy means of demonstrating that numerous employees are "similarly situated," and thereby obtaining class certification, because of the existence of a generally applicable practice. Even if an employer is able to demonstrate the validity of each and every meal deduction, it will likely be able to do so only after several months or years of costly litigation.

Several states, including California, have timekeeping/recordkeeping requirements that are more robust than the FLSA. For example, Connecticut also requires that employers record the beginning and end time of each work period, computed to the nearest 15 minutes. It is not sufficient to record the total number of hours and minutes worked; thus, an auto-deduct feature that does not record the end of a work period and beginning of a work period representing the meal break would not be compliant.

Employers in the health care industry are currently the targets of multiple FLSA lawsuits in several Northeastern states for their use of auto-deduct for meal breaks. Many of these cases have been brought by a single law firm, Thomas & Solomon LLP. In Pennsylvania, Thomas & Solomon has filed lawsuits against at least 10 institutions alleging that health care employers

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have failed to pay employees for all of the time hourly employees worked. In New York, the firm has filed lawsuits against five health care institutions and is currently investigating at least seven others. In Massachusetts, the firm has filed lawsuits against five health care providers in Boston and is investigating two other health care institutions. The healthcare industry has been targeted because interrupted meal breaks are common in hospitals, where circumstances that require immediate attention often occur. Auto-deducts might not allow for the necessary flexibility in the workplace.

The lesson to be learned from the onslaught of class and collective actions with auto-deduction at their root is that it is best practice to have employees clock in and out for meals in real time. Employers with strong records showing exactly when an employee worked have the highest likelihood of avoiding the stress and expense of these enormous lawsuits.

VI. TIPPED EMPLOYEES

A fast-growing area of wage and hour law revolves around workers who regularly receive tips in the course of their employment. Because employer policies regarding tipped employees likely extend to numerous employees, such policies are ripe for class treatment and thus particularly attractive to the plaintiffs' bar. The hospitality and food service industries have been hit with countless suits all over the country in the past few years.

A. History

In the 1966 amendments to the FLSA, the Congress expanded the law to include certain areas of work that had been omitted from the 1938 statute. Among them were workers engaged in service and retail occupations. Under the FLSA, an employer may reduce the cash wage paid to a tipped employee to as low as $2.13 per hour so long as the combination of tips and cash income from the employer equals or exceeds the federal minimum wage.

Before the 1966 amendments, restaurant employees were not subject to the statute's minimum wage and overtime protections. The amendments extended coverage to restaurant employees but acknowledged and endorsed longstanding industry practice by providing for a sub-minimum or tip-credit wage for individuals in tipped occupations. *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101, 52 Stat. 1061 (1966).

B. Key Definitions

1. Tipped Employees

"Tipped employees" are employees who work in an occupation in which they regularly receive more than $30 per month in tips. 29 U.S.C. § 203(t). These employees are subject to unique federal (and some state) minimum wage standards. Notwithstanding the current minimum wage of $7.25 per hour, the FLSA provides that tipped employees may be paid an hourly rate of $2.13 per hour. 29 U.S.C. § 203(m). The employer is permitted to take a "tip credit" for the $5.12 difference between the tip-credit minimum wage and the standard federal

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minimum wage. At all times, however, the employee must receive at least the standard federal minimum wage in total compensation for all hour worked.[3]

2. Tips Versus Compulsory Service Charge

A tip is "a sum presented by a customer as a gift or gratuity in recognition of some service performed by him." 29 C.F.R. § 531.51. This definition may seem obvious, tips are distinguished from compulsory service charges. Compulsory service charges are *not* considered tips and, even if the employer distributes them to employees, they cannot be used to satisfy the tip credit.[4] 29 C.F.R. § 531.55. If customers provide additional money above the compulsory service charge as a gratuity, these additional amounts are treated as tips. *Id*.

C. Who Is Properly a Tipped Employee?

In most situations, it is clear what is and is not a tipped occupation and when an employee is working in a specific occupation. For example, an employee can work as both a hotel maintenance employee and also as a waiter in the hotel restaurant. If the employee customarily and regularly receives at least $30 per month in tips, it is proper to take the tip credit only for the hours in which he works as a waiter. No tip credit can be claimed for the hours the employee spends performing maintenance duties.

By contrast, the tip credit is available for time an employee spends engaged in the tipped occupation, even though those duties do not directly generate tips. DOL has recognized the reality that a waitress who spends time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses incidental to her regular duties, where such tasks and are regularly assigned to waitresses at that establishment, remains engaged in a "tipped occupation." 29 C.F.R. § 531.56(e); U.S. Department of Labor, Wage and Hour Division, FIELD OPERATIONS HANDBOOK ("FOH") § 30d00(e).

Recently, however, much has been made about an employee in a tipped occupation performing allegedly incidental tasks that plaintiffs characterize as "non-tipped." Numerous cases have reached the courts based upon DOL guidance in the FOH that instructs the agency's investigators to limit tipped employees eligible for tip-credit wages to circumstances in which the tipped employee spends less than 20% of his or her time performing general preparation work or maintenance. FOH § 30d00(e). That portion of the FOH, in turn, derives from a series of opinion letters the agency issued in the 1970s and 1980s.

In May 2007, the Western District of Missouri issued the very first *judicial* decision attempting to analyze whether and to what extent tipped employees in restaurants can be paid a tip-credit wage below minimum wage for various tasks such as washing dishes or rolling silverware performed for short intervals of time interspersed throughout the workday. *Fast v.*

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[3] Some states do not allow for a tip credit to be taken at all (*e.g.*, California, Washington, Oregon). Some states require a higher total minimum wage (*e.g.*, Washington, D.C.) or require a higher minimum cash wage to be paid when taking the tip credit (*e.g.*, Florida, New York).

[4] Some states require employers to distribute compulsory service charges to employees or require disclosure to patrons of how the service charge is distributed (*e.g.*, Tennessee, Washington).

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Applebee's Int'l, 502 F. Supp. 2d 996 (W.D. Mo. 2007). Relying heavily on the FOH, the district court in *Fast* ruled in 2007 that the duties of tipped employees fall into three categories: (1) tip-producing duties; (2) duties incidental to tip-producing work; and (3) duties unrelated to tip-producing work. *Fast*, 502 F. Supp. 2d at 1002. The court held that an employer may only take the tip credit for "Category 2" work if, *in the aggregate*, these duties account for less than 20% of the employee's working time even though they are "related" to the employee's tipped occupation. *Id*. Indeed, such "aggregation" of incidental duties was not addressed by the statute, regulations, opinion letters, or the FOH.

This novel analytic scheme seemingly created bright line rules upon which plaintiffs could base a slew of class claims. Employers in the service industry, and restaurants in particular, are defending an onslaught of lawsuits espousing theories of liability and damages that are not tethered to the original text or purpose of the FLSA or similar state laws. The court's decision in *Fast* is currently before the Eight Circuit on interlocutory appeal.

D. Requirements

In addition to ensuring that tipped employee receive no less than the federal minimum wage for all hours worked, the statute and regulations impose other requirements on employers that avail themselves of the tip-credit rate.

1. Notice

An employer must notify an employee of "the provisions of [29 U.S.C. § 203(m)]" if it pays the employee a tip credit rate. An employer who fails to meet this requirement risks invalidating their use of the tip credit such that the standard minimum wage is due for all hours worked.

Current DOL regulations do not define what constitutes adequate notice. Recent case law provides additional guidance, but it is still a developing body of law. For example, in *Pellon v. Business Representation International, Inc.*, the court found that the standard DOL poster that included information on the tip-credit rate together with employee pay stubs showing the tip-credit rate were sufficient to demonstrate notice. 528 F. Supp. 2d 1306, 1309-12 (S.D. Fla. 2006). In *Kilgore v. Outback Steakhouse of Florida, Inc*., the court concluded that an employer was required to inform employees only that it intended to take the tip credit, but was not required to explain the tip credit. 160 F.3d 294, 302 (6th Cir. 1998).

Because the potential liability can be quite high if an employer fails to meet the notice requirements of the FLSA, it is highly recommended that employers provide written notification to each tipped employee. As an added measure, employers may wish to obtain a signed acknowledgement from each employee that they have received notice of the tip credit.

2. Retention of Tips

In order for an employer to claim the tip credit, the employee must also be permitted to retain his or her tips. The employee cannot be required to share tips with the employer or with non-tipped employees. An employee may be required to participate in a valid tip pool, however, subject to restrictions in some states. 29 U.S.C. § 203(m).

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From a management perspective, tip pooling can serve several important purposes. First, it provides a fair distribution of tips to employees, like bartenders or bussers, who customarily receive smaller tips but are integral to the service of customers. Second, servers who are assigned slow sections of a restaurant or who serve low-tipping guests are fairly compensated.

Tip pools are expressly permitted by the FLSA. *Id.*; *see also* 29 C.F.R. § 531.54. Involuntary tip pools are also permitted. In general, employers are permitted to determine their tip pooling arrangement among and between employees participating in the tip pool. There are a few requirements, however.

For a tip pool to be valid, it must only include individuals working in an occupation in which they customarily and regularly receive tips. For example, waiters, bussers, and bartenders can be included but cooks, janitors, and dishwashers cannot. This is true even if a position generally only receives tips *because of* the tip pool (e.g., bussers). This may seem somewhat circular. The key to the analysis is whether an individual's occupation includes regular customer interaction. *See Kilgore*, 160 F.3d at 306.

In addition to limiting a tip pool to individuals in occupations who customarily and regularly receive tips, employers are also ineligible to participate in a tip pool. The FLSA's definition of an "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(m). Courts generally use the "economic reality test" to determine whether an individual qualifies as an employer. The factors considered are whether the individual: (1) has the power to hire and fire employees, (2) supervises and controls employee work schedules or conditions of employment, (3) determines the rate and method of pay for employees, and (4) maintains employment records. The more factors present, the more likely it is that the individual will be seen as an employer and ineligible to participate in the tip pool. *See Chung v. New Silver Palace Rest., Inc.*, 246 F. Supp. 2d 220 (S.D.N.Y. 2002).

Aside from the obvious positions, determining whether an individual is properly included in a tip pool can be very fact-intensive. If it is an issue to be litigated, this can result in significant costs. For example, in *Roussell v. Brinker*, S.D. Tex., No. 05-3733, an opt-in class of tipped employees was conditionally certified based on allegations that Quality Assurance ("QA") or Expediter employees at Chili's restaurants were improperly included in the tip pool. More than 3,500 current and former employees in more than 45 states opted into the class. After extensive (and expensive) discovery and motions practice, the district court decertified the class on the eve of trial. In March 2009, the case went to trial with 56 individual plaintiffs who had participated in discovery. Evidence varied regarding the amount and nature of interaction QAs had with customers. The jury determined that the QAs were not valid participants in the tip pool and thus the tip pool was illegal. The matter is now on appeal to the Fifth Circuit (Case No. 09-20561).

However, the Ninth Circuit recently ruled that the FLSA does not restrict employer-mandated tip pooling arrangements when the employer does *not* take the tip credit. *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010). In *Woody Woo*, all tips received by the restaurant staff were included in the tip pool. The restaurant then redistributed all of the tips to restaurant employees, including employees who did not regularly receive tips—*i.e.*, kitchen personnel. Importantly, all employees were paid at the *standard* minimum wage rate (no tip

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credit was taken). This holding contravenes guidance provided by the DOL in FACT SHEET #15: TIPPED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT, which states that an employer must allow an employee to retain all tips, whether or not the employer elects to take a tip credit for tips received, except to the extent the employee participates in a valid tip pooling arrangement. *See* http://www.dol.gov/whd/regs/compliance/whdfs15.pdf. A "valid tip pooling arrangement" would only include individuals who customarily and regularly receive tips, unlike the participants in *Woody Woo*.

Indeed, the *Woody Woo* decision is somewhat similar to another West Coast case that garnered a lot of attention: *Chau v. Starbucks Corp*., which involved a specific section of the California Labor Code stating:

> No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.

Cal. Lab. Code § 351.

The plaintiffs in *Chau* alleged that the tip pool (resulting from a communal tip jar) was invalid because it included baristas and shift supervisors. Baristas are responsible for customer service, such as cashiering and making coffee. Shift supervisors have similar duties, but also supervise baristas, open and close the store, and deposit money. After a bench trial, the San Diego County Superior Court entered a verdict of $86 million in favor of the plaintiffs.

The California Court of Appeal reversed the trial court's decision. The appellate court distinguished between two types of tip-pooling, one in which employees all contribute their tips to a pool that are then distributed among non-managers, and the other in which a tip jar is left and the money is shared only among employees who provide the service for which the tips were left. In the second scenario, there is no indication from the customer as to the intended recipient of the tip. In addition, because the shift supervisors spend the vast majority of their time the same customer service duties as baristas, it is just as likely that the tips are intended for shift supervisors as for baristas.

3. Customary and Reasonable

It is often said that for a tip pooling arrangement to be valid, an employee must not be required to relinquish more than a "customary and reasonable" amount of tips to the tip pool. The requirement that the tip-out be no more than what is "customary and reasonable" is not based on the statute, but rather a DOL opinion letter. U.S. Department of Labor, Wage and Hour Division, Opinion Letter (March 26, 1976). For enforcement purposes, DOL considers a tip-out requirement of as much as 15% of an employee's tips to be "customary and reasonable" by

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definition. FOH § 30d04(a)(1988). These guidelines have been questioned by the courts and some have refused to follow them. *See, e.g.*, *Kilgore*, 160 F.3d at 302-03).

E. Overtime Calculation for Tipped Employees

When tipped employees work overtime hours, employers must be careful to calculate and pay overtime wages based on the employee's correct hourly rate. In other words, overtime must be calculated based on the employee's full minimum wage (currently $7.25 under the FLSA) and not based upon the employee's reduced hourly wage (that reflects the tip credit). Only after overtime wages are calculated using the employee's full minimum wage can employers subtract the total tip credit from the wages due.

* * *

In the past several years, there has been a significant increase in lawsuits claiming tip credit violations by service industry employers. Large numbers of hotels and restaurants all over the country are now facing expensive litigation battles over the way they pay tipped employees. The unfortunate problem is that many of these employers are following industry standards which violate the law, even if only technically. Employers tend to believe that they are in compliance because they are complying with industry standards. In this case, however, there is no "safety in numbers." Because of the prevalence of these types of claims, it is crucial that restaurants and other service industry employers claiming a tip credit understand the nuts and bolts of the tip credit.

HOT LITIGATION ISSUES

In addition to the substantive issues discussed above, there are a number of important issues of procedure and remedy that substantially affect the course of wage and hour class litigation. These matters drive the size of the plaintiff class, the claims that are allowed to proceed on a class basis, the burdens of discovery, and more. The central litigation issues for the wage and hour class actions include the following: (1) the viability of so-called "hybrid" cases, (2) e-discovery, (3) how to calculate back overtime in a misclassification case, and (4) the emerging trend of plaintiffs trying to use state-law claims to obtain nationwide classes.

I. Hybrid Wage and Hour Actions

Frequently, plaintiffs' counsel try to obtain more leverage for the wage and hour cases they file by bringing "hybrid" actions in which they allege claims under both the FLSA and any relevant state wage and hour statutes. In many cases, plaintiffs move for certification of both a collective action (under § 16(b) of the FLSA, 29 U.S.C. § 216(b)) and a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure regarding the state law claim.[5]

[5] Of all of the states that have wage and hour statutes governing minimum wage and overtime, only a handful require plaintiffs to use an opt-in collective action mechanism similar to the FLSA.

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A. Collective Actions and Class Actions Compared

In an FLSA collective action an individual must affirmatively opt into the action after the action has been certified for collective treatment and putative class members receive notice of the action in order to become a party to the lawsuit. 29 U.S.C. § 216(b). By contrast, under Rule 23's class action mechanism, once a class is certified, all individuals who meet the class definition become part of the class and are thus bound by the outcome unless they affirmatively opt out of the action. Clearly, these mechanisms yield class sizes because while class members can affirmatively opt out of litigation under Rule 23, courts and empirical studies have made clear that the practical reality is that few individuals actually avail themselves of this option.[6] Thus, a company defending hybrid wage and hour claims should make a strong effort to defeat Rule 23 class certification.

Courts universally hold that the requirements of certification under § 16(b) are much less rigorous than Rule 23. Section 16(b) only requires that named and opt-in plaintiffs be "similarly situated." The majority of courts have adopted a two-tiered analysis for certification. *See, e.g.*, *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 264 (D. Conn. 2002). First, courts make a preliminary determination of whether the plaintiffs are similarly situated to determine whether the court should allow notice of the action to potential opt-in plaintiffs ("conditional certification"). Then, after further discovery, the court will reconsider the issue to determine whether certification is still proper. Typically, the burden of proof for conditional certification is rather low. The low burden of proof is considered appropriate because (1) certification does not automatically result in hundreds or thousands of plaintiffs being included in the litigation and (2) the two-tiered certification process provides a check to the conditional certification.

Certification of a class pursuant to Rule 23(b)(3) requires that plaintiffs demonstrate numerosity, commonality, typicality, adequacy of representation, predominance, and superiority in order to proceed on a class basis. In wage and hour hybrid actions, the focus tends to be on "predominance" (that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members") and "superiority" (that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). Fed. R. Civ. P. 23(b)(3). Relevant considerations for the court in making these determinations include:

(1) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
(2) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(3) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

[6] *See e.g.*, Ellis v. Edward D. Jones & Co., 527 F. Supp. 2d 439, 445(W.D. Pa. 2007). One study shows that approximately 1% of class members opt out of class actions in all cases other than mass tort actions. Mass tort actions can have up an opt-out rate of up to 4.6%. *See* Theodore Eisenberg and Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1548 (2004).

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(4) The difficulties likely to be encountered in the management of the class.

Id. Rule 23 gives the district courts "broad discretion to determine whether certification of a class-action law suit is appropriate." *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008) (citing *Chavez v. Ill. State Police*, 251 F.3d 612, 629 (7th Cir. 2001)).

B. Defeating Opt-In Class Certification in Hybrid Actions

Certification of a Rule 23 class is proper only if plaintiffs can demonstrate that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." This burden rests on the plaintiffs and thus is a point at which defendants should consider focusing efforts to defeat class certification. Specifically, in a hybrid action, defendants can argue that Rule 23 class certification should be denied because (1) use of Rule 23's class mechanism would thwart congressional intent in creating the opt-in mechanism in Section 16(b); (2) the two procedures are inconsistent and could interfere with class members' substantive rights under the FLSA; and (3) there is a likelihood of confusion among potential plaintiffs results. For all of these reasons, certification of an opt-out class fails to meet the "superiority" requirement of Rule 23.

Congress's intent in creating the opt-in procedure for FLSA claims was "for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers from the burden of representative actions." *Riddle v. Nat'l Sec. Agency, Inc.*, 2007 U.S. Dist. LEXIS 68842, *10 (N.D. Ill. June 22, 2007) (quoting *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989)). To that end, Congress passed the Portal-to-Portal Act to amend the FLSA by requiring each party plaintiff to file his or her own consent to join the action. 29 U.S.C. § 256. Thus, "allowing [a plaintiff] to use supplemental state-law claims to certify an opt-out class in federal court would undermine Congress's intent to limit these types of claims to collective actions." *McClain v. Leona's Pizzeria, Inc.*, 22 F.R.D. 574, 577 (N.D. Ill. 2004). Ignoring congressional intent would also lead to very real conflicts for individual class members.

As discussed, the procedures require potential class members to respond differently to the Section 16(b) notice and the Rule 23 class notice if he or she wishes to join the action. To join the Section 16(b) collective, an individual must file a notice of consent to join the case. To join the Rule 23 class, the individual need not do anything. A class member's inaction on both fronts would result in the individual joining the class action and not participating in the collective action.

There is a very real threat of extinguishing substantive rights of individuals who did not opt in to the FLSA collective, but were swept into the Rule 23 class because they failed to opt out. The adjudication of the state-law claims—either successfully or unsuccessfully—would result in the preclusion of the federal rights of those workers. In *Chao v. A-One Medical Services, Inc.*, the Ninth Circuit affirmed the dismissal of one of the eight former employees because the employee had previously litigated a state law claim for overtime against the employer. 346 F.3d 908, 923 (9th Cir. 2003). The court determined that the FLSA claim was barred by *res judicata* because the FLSA claim was based on the same operative facts as the state

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claim. *Id*. at 921-23. Thus, if a court allows a hybrid action to proceed and adjudicates an absent class member's state-law overtime claim, the substantive FLSA rights of the individual would be extinguished.

Because of the different actions required for class members to join either the Section 16(b) collective or the Rule 23 class, there is a very real risk of confusing the class members. A current or former restaurant worker who simultaneously receives notice of two distinct types of classes, with opposite procedural methods, may be confused regarding his or her rights and responsibilities should be considered by a court when deciding whether opt-out class treatment of state claims is the "superior" method of adjudication.

C. The Split in the Case Law

Federal district courts and courts of appeals have come to inconsistent conclusions regarding whether federal and state wage and hour actions can proceed under both opt-in and opt-out mechanisms. When disallowing both to proceed at once, federal courts typically allow the FLSA collective action to proceed while declining to certify the Rule 23 class.[7] However, some federal courts allow opt-in and opt-out mechanisms to be used concomitantly in the same case.[8]

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[7] *See, e.g.*, Powers v. Centennial Commc'ns Corp., 2009 U.S. Dist. LEXIS 116819, at *27-29 (N.D. Ind. Dec. 14, 2009) (granting plaintiffs' motion to certify FLSA collective action, denying motion to certify Rule 23 state-law class); Ervin v. O.S. Rest. Servs. Inc., 2009 U.S. Dist. LEXIS 56062 (N.D. Ill. July 1, 2009) (granting plaintiffs' motion to certify FLSA collective action, denying motion to certify Rule 23 state-law class because it failed to meet superiority test); Pridemore v. Jiffy Mini-Marts, Inc., 2008 U.S. Dist. LEXIS 95760, at *13 (S.D. Ind. Nov. 24, 2008) (denying plaintiffs' motion to certify Rule 23 state-law class where FLSA collective action had previously been certified); Molina v. First Line Solutions LLC, 566 F. Supp. 2d 770, 789-790 (N.D. Ill. 2007) (granting plaintiffs' motion for FLSA collective action, denying certification of Rule 23 state-law class); Riddle v. NSA, Inc., 2007 U.S. Dist. LEXIS 95807 (N.D. Ill. June 22, 2007) (granting plaintiffs' motion for FLSA collective action, denying certification of Rule 23 state-law class); Westfall v. Kendle Int'l, 2007 U.S. Dist. LEXIS 11304, at *42 (N.D. W. Va. Feb. 15, 2007) (granting plaintiffs' motion for FLSA collective action, denying motion to certify Rule 23 state-law class); Moeck v. Gray Supply Corp., 2006 U.S. Dist. LEXIS 511, at *15-16 (D.N.J. Jan. 5, 2006) (denying plaintiff's motion to certify Rule 23 state wage and hour law class); Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 471 (N.D. Cal. 2004) (granting plaintiff's motion for FLSA collective action, denying motion to certify Rule 23 state-law class); McClain v. Leona's Pizzeria, Inc., 222 F.R.D. 574, 578 (N.D. Ill. 2004) (denying plaintiffs' motion to certify Rule 23 state-law class); Harper v. Yale Int'l Ins. Agency, Inc., 2004 U.S. Dist. LEXIS 8476, at *19 (N.D. Ill. May 12, 2004) (granting defendant's motion to decertify Rule 23 state-law class where FLSA collective action had previously been certified); De La Fuente v. FMP Ipsen Heat Treating, Inc., 2002 U.S. Dist. LEXIS 24040, at *7 (N.D. Ill. Dec. 13, 2002) (granting plaintiffs' motion to begin opt-in notice, denying certification of Rule 23 state-law class); Muecke v. A-Reliable Auto Parts and Wreckers, Inc., 2002 U.S. Dist. LEXIS 11917, at *5-8 (N.D. Ill. June 21, 2002) (granting plaintiffs' motion for FLSA collective action, denying certification of Rule 23 state-law class); Thiebes v. Wal-Mart Stores, Inc., 2002 U.S. Dist. LEXIS 664, at *9 (D. Or. Jan. 9, 2002) (denying plaintiffs' motion to certify Rule 23 state-law class where collective action had previously been certified); Rodriguez v. The Texan, Inc., 2001 U.S. Dist. LEXIS 24652 (N.D. Ill. Mar. 5, 2001); *see also* Marquez v. PartyLite Worldwide, Inc., 2007 U.S. Dist. LEXIS 63301, at *16 (N.D. Ill. Aug. 27, 2007) (denying defendant's motion to dismiss state-law class claims, but warning that "an opt-out class action is not likely to be the superior method for resolving plaintiffs' state-law [overtime] claims").

[8] *See e.g.*, Hernandez, et al. v. Gatto Indust. Platers, Inc., 2009 U.S. Dist. LEXIS 36023 (N.D. Ill. April 28, 2009); DeKeyser v. Thyssenkrupp Waupaca, Inc., 589 F. Supp. 2d 1026 (E.D. Wis. 2008); Musch v. Domtar Indus., Inc., 252 F.R.D. 456 (W.D. Wis. 2008); O'Brien v. Encotech Constr. Servs., Inc., 203 F.R.D. 346 (N.D. Ill. 2001); McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 304 (D. Mass. 2004); Perkins v. S. New England Tel. Co., 2009

Some courts have focused on whether the district court should exercise supplemental jurisdiction over the state law claims and/or whether the mechanism for certifying FLSA claims preempts using a different mechanism for certifying state claims. For example, one of the few circuit courts to address the issue based its decision to disallow the hybrid action by declining to exercise supplemental jurisdiction over opt-out class members who did not also opt into the FLSA action. *DeAsencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir. 2003). Relying on preemption and supplemental jurisdiction arguments may be riskier than relying on the very requirements of Rule 23's "superiority" requirement. By relying on Rule 23's superiority requirement, the judge has wide discretion to consider various factors within the context managing the specific case and is less likely to be constrained by longstanding case law regarding preemption or supplemental jurisdiction.

This issue is currently a secondary issue on appeal in the Third Circuit in *Parker v. Nutrisystem*, No. 09-3545. Depending on the court's decision regarding the primary issue in the case, it is possible the court may not reach this issue. Oral argument in this case was held in June 2010. There may be a ruling before the end of the year.

This issue is the primary issue on appeal in the Seventh Circuit in *Ervin v. O.S. Restaurant Services, Inc.*, No. 09-3029. Oral argument was held in April 2010. There may be a ruling before the end of the year.

D. The Department of Labor

DOL has filed *amicus* briefs in support of plaintiffs in both *Parker* and *Ervin*. DOL argued that there is no inherent incompatibility between opt-in and opt-out cases despite the potential for some plaintiffs to lose their rights under the FLSA because they fail to opt-out of the state law class. This is a significant departure from DOL's previous position that the FLSA's written consent requirement was a *substantive right* of potential claimants. *See* Amicus Brief to the Fourth Circuit in *Long John Silver's Rest. Inc. v. Cole*, June 21, 2006, http://www.dol.gov/sol/media/briefs/ljs-06-21-2006.htm#B. On the other hand, the Rule 23 class mechanism is a procedural mechanism that does not create any substantive rights and is limited

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U.S. Dist LEXIS 10625 (D. Conn. Feb. 12, 2009); Gardner v. Western Beef Props., Inc., 2008 U.S. Dist. LEXIS 47027 (E.D.N.Y. June 17, 2008); Hendricks v. JPMorgan Chase, N.A., 2008 U.S. Dist. LEXIS 99788 (D. Conn. Nov. 21, 2008); Krichman v. J.P. Morgan Chase & Co., 2008 U.S. Dist. LEXIS 99481 (S.D.N.Y. Dec. 8, 2008); Brickey v. Dolencorp, 244 F.R.D. 176 (W.D.N.Y. 2007); Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 374 (S.D.N.Y. 2007); Freeman v. Hoffmann-La Roche, 2007 U.S. Dist. LEXIS 92589 (D.N.J. Dec. 18, 2007); Lehman v. Legg Mason, Inc., 532 F. Supp. 2d 726 (M.D. Pa. 2007); Hickton v. Enterprise Rent-A-Car Co., Inc., 2008 U.S. Dist. LEXIS 86604 (W.D. Pa. Sept. 12, 2008); Westfall v. Kendle Intern. CPU, LLC, 2007 U.S. Dist. LEXIS 10026 (N.D. W. Va. Feb. 15, 2007); Beltran-Benitez v. Sea Safari, Ltd., 180 F. Supp. 2d 772 (E.D.N.C. 2001); Jackson v. City of San Antonio, 220 F.R.D. 55 (W.D. Tex. 2003); Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870 (N.D. Iowa 2008); Osby v. Citigroup, Inc., 2008 U.S. Dist. LEXIS 39041 (W.D. Mo. May 14, 2008); Salazar v. AgriProcessors, Inc., 527 F. Supp. 2d 873 (N.D. Iowa 2007); Frank v. Gold'n Plump Poultry, Inc., 2005 U.S. Dist. LEXIS 20441 (D. Minn. Sep. 14, 2005); Robertson v. LTS Mgmt. Servs. LLC, 2008 U.S. Dist. LEXIS 79486 (W.D. Mo. Oct. 9, 2008); Baas v. Dollar Tree Stores, Inc., 2007 U.S. Dist. LEXIS 65979 (N.D. Cal. Aug. 29, 2007); Ellison v. Autozone Inc., 2007 U.S. Dist. LEXIS 70187 (N.D. Cal. Sep. 13, 2007); Silverman v. SmithKline Beecham Corp., 2007 U.S. Dist. LEXIS 80035 (C.D. Cal. Oct. 16, 2007); Barnett v. Wash. Mut. Bank, FA, 2004 U.S. Dist. LEXIS 18491 (N.D. Cal. Sep. 9, 2004); Bamonte v. City of Mesa, 2007 U.S. Dist. LEXIS 50101 (D. Ariz. July 10, 2007); Cryer v. InterSolutions, Inc., 2007 U.S. Dist. LEXIS 29241 (D.D.C. Apr. 20, 2007).

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by the Rules Enabling Act, 28 U.S.C. § 2072(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997). Thus, DOL fails to reconcile the fact that the position it has taken—that opt-in and opt-out procedures are not incompatible—thus allows a substantive right to be thwarted by a procedural mechanism.

* * *

An employer's best strategy to combat dual-filed wage claims is to avoid them all together. In this respect, employers should take steps to ensure that their pay practices are in full compliance with the FLSA and similar state laws. However, an employer that is faced with a hybrid wage and hour action can use Rule 23's requirements to combat plaintiffs' attempt to exponentially multiply the potential class of plaintiffs.

II. E-DISCOVERY

War stories of days when young lawyers were sent to warehouses in the middle of nowhere to comb through dusty boxes of documents are as quaint as carbon paper and white-out. Today, 98% of business records are electronic, the vast majority of which are never converted to paper form. When these electronic records must be maintained and produced in the course of litigation companies, and their counsel, can find themselves ill prepared to deal with the minutiae of the duties required of them by the Federal Rules of Civil Procedure and federal judges.

A. The Problem

For good reason, corporate counsel often cite Electronic Discovery ("e-discovery") as *the* major problem in litigation today. The e-discovery headache can multiply for wage and hour cases because the use of class and collective actions may extend discovery requirements to thousands of current and former employees. In addition, wage and hour cases often require coordination with timekeeping and payroll vendors that may have exclusive access and independent retention policies regarding some of the relevant electronic data. While in most wage and hour cases, the parties are not looking for the proverbial "smoking gun" in gigabyte after gigabyte of electronically stored information ("ESI"), ESI can play a part of numerous offensive and defensive strategies. For example, the content of ESI (including e-mails) can be used as evidence relating to duties of employees in misclassification cases. ESI content can also become evidence of willfulness or whether individual liability extends to managers or company executives. Time stamps on e-mails, and even the dreaded "metadata" of documents, can serve as evidence of hours worked in determining both liability and damages.

B. The Rules

The Federal Rules were amended nearly four years ago to address the very real problem of e-discovery. The rules govern ESI, which not only includes all computer files, but all other electronic information, such as voice-mail, videos, and text messages. Although the rules clarify certain issues, they also impose very stringent time requirements. And despite the amendments, most U.S. businesses and other large organizations have not adopted adequate policies and procedures to meet many of the requirements of the Federal Rules.

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The e-discovery amendments to the Federal Rules are found in Rules 16, 26, 33, 34, 37, and 45. These rules cover five key areas: (1) definition of discoverable material; (2) early attention to issues relating to electronic discovery, including the format of production; (3) discovery of electronically stored information from sources that are not reasonably accessible; (4) the procedure for asserting claim of privilege or work product protection after production; and (5) a "safe harbor" limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine operation of computer systems.

1. Definition of Discoverable Material

Rules 26(a)(1), 33, and 34, acknowledge that ESI is discoverable. ESI is meant to include any type of information that can be stored electronically. It is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and technological developments. When these amendments were written, Facebook and Twitter did not exist and text messaging was not nearly as prevalent. Any policies and protocols a company creates must be continuously updated to address new technology. Indeed, many wage and hour cases are multi-year affairs. Litigation hold protocols issued in a single case may need to be updated throughout the litigation.

2. Electronic Discovery Issues Must Be Addressed Early

Several of the amendments require the parties to address ESI early in the discovery process. Early attention is crucial to control the scope and expense of electronic discovery, and to avoid discovery disputes. Rule 26(a)(1)(B) adds ESI to the list of items to be included in a party's initial disclosures. Rule 16(b)(5) includes provisions for the disclosure or discovery of ESI as an item that may appropriately be included in the court's scheduling order. Rule 26(f) expands the list of issues that must be discussed as a part of the meet and confer process. In addition, Rule 26(f) requires parties to develop a discovery plan to address issues relating to the discovery of ESI, including the form or forms in which it will be produced. It also requires parties to discuss any issues relating to the preservation of discoverable information, and address issues relating to claims of privilege or work product protection.

3. Format of ESI Production

Rule 34(b) was amended to address the format of production of ESI, and permits the requesting party to designate the form or forms in which it wants ESI to be produced. The rule does not *require* the requesting party to choose a form of production because a party may not have a preference or may not know what form the producing party uses to maintain its ESI. The rule also provides a framework for resolving disputes over the form of production, in the event that the responding party objects to the requested format(s). Finally, the rule provides that if a request does not specify a form of production, or if the responding party objects to the requested form(s), the responding party must notify the requesting party of the form in which they intend to produce the ESI, with the option of producing either (1) in a form in which the information is ordinarily maintained, or (2) in a reasonably usable form.

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4. Electronically Stored Information from Sources that Are Not Reasonably Accessible

Rule 26(b)(2) creates a two-pronged approach to the production of ESI, distinguishing between ESI that is reasonably accessible and ESI that is not reasonably accessible. Under the new rule, a responding party is not required to produce ESI from sources that it identifies as not reasonably accessible because of undue burden or cost. If the requesting party moves to compel discovery of such information, the responding party must show that the information is not reasonably accessible because of undue burden or cost. Once that showing is made, a court may order discovery only for good cause, subject to the provisions of the current Rule 26(b)(2)(i)-(iii).

5. Post-Production Claims of Privilege or Work Product Protection

Rule 26(b)(5) adds a procedure through which a party who has inadvertently produced trial preparation material or privileged information may assert a protective claim as to that material. The rule provides that once the party seeking to establish a privilege or work-product claim notifies the receiving parties of the claim and the grounds for it, the receiving parties must return, sequester, or destroy the specified information. The rule *does not* address whether the privilege or protection was waived by the production but only prohibits the receiving party from using or disclosing the information, and requires the producing party to preserve the information, until the claim is resolved.

6. The Safe Harbor Provision

Rule 37(f) provides that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system. This addresses the routine modification, overwriting, and deletion of information that attends the normal use of electronic information systems.

The "routine operation of an electronic information system" refers to the ways in which such systems are generally designed and programmed to meet the party's technical and business needs, and includes the alteration and overwriting of information that often takes place without the operator's specific direction or awareness. The Advisory Committee observed that such features are "essential to the operation of electronic information systems," and that there is "no direct counterpart in hard-copy documents."

The protection of Rule 37(f) applies only to information lost due to the *routine operation* of an information system, and only if such operation was in good faith. The existence of a preservation obligation may determine whether or not the operation was in good faith. The Advisory Committee and expressly cautioned: "A party cannot exploit the routine operation of an information system to evade discovery obligations by failing to prevent destruction of stored information that it is required to preserve."

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C. How Courts Apply the Rules

A body of case law has developed from both before and after the passage of the amendments to the Federal Rules and places a heavy burden on outside counsel and parties to identify and preserve relevant ESI. The most influential of these cases are the *Zubulake v. UBS Warburg* series (*Zubulake I-V*).[9] Indeed, requirements relating to e-discovery are often referred to as the *Zubulake* duties. Although the duty to identify and preserve potentially relevant information seems self-explanatory, judges expect parties and counsel to undertake detailed and specific tasks to fulfill these duties. When parties fail to adequately perform their duties, the results can be disastrous. *See QualComm, Inc. v. Broadcom, Corp.*, 207 U.S. Dist. LEXIS 57122 (S.D. Cal. Aug. 6, 2007) (plaintiff required to pay defendant $8 million for cost of litigation due to misconduct regarding retention and production of ESI); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 2006 U.S. Dist. LEXIS 87096 (S.D.N.Y. Nov. 30, 2006) (sanctions awarded when attorneys depend on the client's IT personnel to collect evidence from a database, and do not supervise nor understand it themselves, and the corporate IT staff is untrained in e-discovery and fail to produce relevant email); *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 22, 2006) (defendant and its lawyers each sanctioned and ordered to pay $22,581 for breaching the *Zubulake* duty and failing to find "hidden server partitions" containing crucial evidence, a failure which the judge described as "gross negligence."); *Danis v. USN Commc'ns, Inc.*, 2000 U.S. Dist. LEXIS 16900 (N.D. Ill. Oct. 20, 2000) ($10,000 fine imposed against CEO personally when the young general counsel he hired to supervise ESI preservation was grossly negligent).

D. Guidelines for Fulfilling *Zubulake* Duties

In order to adequately preserve relevant ESI, the litigants and counsel must first **identify**: (a) when litigation is reasonably anticipated; (b) the potential scope (subject matter and timeframe) of the litigation; and (c) the method, manner, and systems in which the company stores ESI. Litigation is reasonably anticipated when the company is on notice that there is a "credible threat" of litigation. In determining what constitutes a "credible threat," the company should consider its experience with past similar threats. Companies should establish procedures to report potential litigation threats and educate managers, compliance personnel, human resources personnel, and officers and directors in identifying and reporting potential litigation.

In determining the scope of preservation, litigants and counsel should consider: (1) the subject matter of the discoverable ESI that should be preserved; (2) the potential witnesses and custodians who may possess or control the discoverable ESI; and (3) the time frame of the discoverable ESI. Outside counsel should be prepared to learn, and litigants should be prepared to explain: where documents and emails are stored; how often and to what location laptops and personal computers are backed up; whether, when and under what circumstances data from laptops are copied into repositories; what type of information is contained within the various databases and repositories; what records are maintained regarding the search for, and collection

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[9] Zubulake v. UBS Warburg, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*); 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*); 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*).

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of, documents for litigation. Judge Scheindlin specified that counsel's duty to identify how and where potentially relevant ESI was stored required the following:

> Counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures in the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information.

Zubulake v. UBS, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*).

Once the universe of ESI is identified, the litigants and counsel can undertake the duty of **preserving** the ESI. The most effective polices regarding the preservation of ESI have two elements: (a) protocols and procedures for the preservation and destruction of records in the normal course of business and (b) protocols and procedures for the preservation and destruction of records when a threat of litigation exists. The adoption and consistent implementation of a written policy regarding retention and destruction of documents is a key factor to show reasonableness and good faith in the event any relevant ESI is lost. It is important to make this document detailed enough to cover all potential types of ESI, but not so complicated that the policy is difficult to adhere to or to enforce.

The importance of such a policy is twofold: (1) if, contrary to the written policy, ESI is *retained* for extended periods of time, in various forms that may have become obsolete, the company may have to produce it; and (2) if, in keeping with the written policy, ESI is *deleted*, the company may be able to prove the loss of evidence was the result of routine and good faith operations. This assumes, however, that: (a) the company has such a manual; and (b) the book is routinely followed. In the event a written records retention policy is not uniformly followed, a court will look to actual practices of a company to determine its "routine, good faith operation."

In the vast majority of cases, the *Zubulake* duty requires a written litigation hold communication. Rule 26(b)(2)(C) requires that the scope of a litigation hold be proportional to the matter. The company should consider the nature of the issues raised in the matter as well as the company's and counsels' experience in similar circumstances. Counsel should avoid sending a "form" litigation hold notice without providing guidance relevant to the company's information systems and the subject matter of the litigation.

A legal hold is most effective when it:

- Identifies the persons who are likely to have relevant information and communicates a preservation notice to those persons;
- Communicates the preservation notice in a manner that ensures the recipients will receive actual, comprehensible, an effective notice of the requirement to preserve information;
- Is in written form;

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- Clearly defines what information is to be preserved and how the preservation is to be undertaken;
- Is periodically reviewed, and, when necessary, reissued in either its original or amended form.

In addition, the company and/or counsel should at follow up with at least the key witnesses of the litigation as well as key IT personnel and custodians of records to provide further guidance and to ensure the litigation hold was completed. In the case of large companies, this may be in the form of a checklist and accompanying certification that must be returned to in-house or outside counsel.

In **collecting** the relevant ESI, it is important to work with opposing counsel, to the extent possible, to determine the scope of the collection (subject matter, timeframe, format). Specifically, defining whether or not ESI must be produced in its native form and whether original metadata is relevant to the matter will significantly change the scope of e-discovery. In addition, working with opposing counsel to identify relevant search terms and databases can prevent the over-collection of data, but can also prevent costly discovery disputes later in litigation. Over-collection of data means that irrelevant data must also be processed, reviewed, and analyzed. Time and money spent on software and hardware that can produce well-tailored collections and accurately defining the relevant data to be collected will result in considerable cost savings later in discovery.

Thus, the **processing, reviewing, and analyzing** the data is dependent on the effective management and execution of the previous steps. Here too, communication with opposing counsel can be enormously helpful. Litigants can devise a number of ways to reduce the burdens of these stages. Parties can agree on the amount of pre-production privilege review that is reasonable for the producing party to undertake, formulate agreements that preserve post-production assertion of privilege within a reasonable time, and determine any protective orders or confidentiality orders that should be in place regarding who may have access to the information that is produced.

The investment of time and resources in a thorough review and analysis by outside counsel of the documents collected is imperative to this process. First, thoughtful review will likely reduce the number of documents collected to a subset of documents that are responsive to the discovery requests. Second, a detailed analysis of how to identify the importance and relevance of each document to the company's arguments and/or defenses for each cause of action will save time and money in subsequent re-reviews of key documents. This process can also aid the company in valuing the case and determining whether and when to settle an action.

The final burden is **producing** ESI to the opposing party. Depending on whether the production is made in native format or in .jpeg, .pdf, or .tiff format, the producing party should take care to produce the ESI in such a manner that prevents the ESI from being altered by the receiving party.

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* * *

E-discovery issues can cause a litigation budget to multiply quickly. Companies should take steps before litigation is threatened to establish procedures and maintain an information infrastructure that makes compliance with the *Zubulake* duties. Companies who do so will streamline the process and reduce long term costs associated with e-discovery.

III. CALCULATING BACKPAY IN MISCLASSIFICATION CASES

Seventy-two years after the passage of the FLSA, it is hard to imagine that courts would still disagree regarding the proper calculation method for backpay in misclassification cases. Of course the issue of how to calculate damages is of great importance because the decision can result in a substantial difference between potential damages awards. The vast delta between the two calculations can make cases much more difficult to settle.

A. The Two Methods of Calculation

Over approximately the past 25 years, two very different approaches to calculating backpay in misclassification cases have emerged. One line of authority, exemplified by the decision of the U.S. Court of Appeals for the Fifth Circuit in *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988), treats the employee's salary as earned during all hours worked in the workweek. To calculate overtime for a workweek using this method, one divides the weekly salary by the hours worked during the week to yield the regular rate. The overtime due equals one half of the regular rate, multiplied by the hours worked beyond forty for the week. Thus, for an employee with a weekly salary of $600 who works 50 hours in a week, the overtime due under this method would be $600 divided by 50 hours, which produces a regular rate of $12 per hour, multiplied by one half (i.e., $6 per hour), for each of the 10 hours of overtime, for an overtime entitlement of $60 for the workweek, over and above the $600 salary.

The other line of authority, typified by the ruling of the U.S. District Court for the District of Columbia in *Rainey v. American Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 99-102 (D.D.C. 1998), treats the salary as earned during only the first 40 hours per workweek unless the employer has satisfied all the criteria for the "fluctuating workweek" method of calculating overtime. Under this approach, the overtime due equals the regular rate multiplied by one and one half, then multiplied by the hours above 40 in the workweek. Using the same example of an employee with a $600 weekly salary who works 50 hours, the overtime due would be $600 divided by 40 hours, for a regular rate of $15 per hour, multiplied by 1-1/2 (i.e., $22.50 per hour), for each of the 10 hours of overtime, for an overtime entitlement of $225 for the workweek.

These methods differ in the basic assumption of whether the employee's salary provides "straight time" for all hours worked, such that only the additional half-time premium is needed for the hours above 40 in the workweek, or whether instead the salary provides no compensation for the overtime hours, thereby resulting in the employer owing full time and a half for those hours.

The two methods also use different denominators to calculate the regular rate—i.e., dividing the weekly salary by all hours worked versus 40 hours—the differences between these

two methods become more prominent as the number of hours worked increases. For example, when a misclassified salaried employee establishes entitlement to overtime based on 45 hours of work per week, the back overtime resulting from the *Rainey* method is 3.375 times greater than the result obtained from the *Blackmon* method. That multiplier grows to 3.75 at 50 hours per week, 4.5 at 60 hours per week, and 5.25 at 70 hours per week.

B. DOL'S Perspective

DOL has long interpreted the FLSA as requiring the *Blackmon* method of calculating overtime, which treats the salary as earned over the course of all the hours it is intended to compensate. DOL's regulations provide that "[t]he regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek *for which such compensation was paid*." 29 C.F.R. § 778.109 (emphasis added); *see also* FOH § 32b00. More specifically, "[i]f the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours *which the salary is intended to compensate*." 29 C.F.R. § 778.113(a) (emphasis added); *see also* FOH § 32b04a(a). Therefore, when an employee works hours that vary from week to week, "[s]ince straight time compensation has already been paid, such an employee must receive additional [overtime] compensation for each [overtime] hour in a particular [workweek] computed at not less than one-half the regular rate obtained by dividing the weekly salary by the number of hours worked in that [workweek]." FOH § 32b04b(a). On January 14, 2009, DOL reiterated its interpretation in an opinion letter. U.S. Department of Labor, Wage and Hour Division, Opinion Letter FLSA2009-3 (Jan. 14, 2009).

In general, DOL's focus is on the parties' intent regarding what hours the salary covers. If the employer and the employee understand that the salary represents the employee's pay for all hours worked and that no separate payment will be made for hours above 40 per workweek, then DOL interprets the proper measure of back pay in a misclassification scenario as the additional half-time. By contrast, when the employer deducts from the "salary" in short weeks, such as by paying 90 percent of the weekly pay when an employee works 36 hours in a workweek, DOL will conclude that the salary is in reality an agreed sum to cover 40 hours of work, such that full time and a half would be due for hours beyond 40.

The courts that follow the *Rainey* approach, by contrast, focus not on the parties' intent or DOL's interpretation of the FLSA and its regulations, but rather on whether the employer complied with the "fluctuating workweek" regulation. That regulation prescribes how employers can pay overtime to salaried personnel who work hours that "fluctuate from week to week." The regulation authorizes payment of overtime using what amounts to the *Blackmon* method as long as:

1. "there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek";
2. "the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for

every hour worked in those workweeks in which the number of hours he works is greatest";
3. the employee "receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay"; and
4. "the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked."

29 C.F.R. § 778.114(a), (c).

The regulation provides that "where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the [FLSA] cannot be rested on any application of the fluctuating workweek overtime formula." *Id.* § 778.114(c).

Courts adhering to the *Rainey* approach hold that an employer that failed to comply with the fluctuating workweek regulation during the time it classified the employee as exempt cannot use the *Blackmon* methodology to calculate back overtime. Of course, this represents a fundamental misunderstanding of the purpose of the regulation.

C. The Intent Behind Section 778.114

DOL promulgated section 778.114 in 1968, with amendment in 1981, to reflect the holding of the U.S. Supreme Court in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942). *See* 73 Fed. Reg. 43,654, 43,662 (July 28, 2008) (notice of proposed rulemaking under the FLSA detailing the history of the fluctuating workweek regulation). In *Missel*, the Court concluded that when a nonexempt employee received a fixed salary for all hours worked but did not receive overtime, the proper remedy was the additional half-time based on all hours worked in the workweek. This is the same calculation as is found in the *Blackmon* line of authority, and this is the calculation that DOL endorsed in the fluctuating workweek regulation.

The critical point to understand about section 778.114, which the *Rainey* line of decisions fails to recognize, is that the regulation provides guidance regarding how to comply with the law. It is forward-looking, not an attempt to alter the usual rules in the context of remediating past violations. Although the regulation provides that "compliance with the [FLSA] cannot be rested" on the fluctuating workweek method when the regulation is not adhered to—such as when an employer fails to pay overtime—this merely shows what is obvious: that failure to pay overtime or otherwise to comply with the regulation may result in an employer violating the law.

Establishing a violation is a very different question from the appropriate remedy for that violation. As shown above, *Missel* and DOL's regulations already answer the remedy question, requiring the *Blackmon* half-time methodology. Moreover, requiring that employers comply with the fluctuating workweek regulation with regard to employees (mis)classified as exempt in order to be able to use the *Blackmon* remedy calculation is particularly nonsensical because employees classified as exempt almost never receive contemporaneous overtime payments. The defining difference between exempt and nonexempt employees is the requirement to pay nonexempt employees overtime and the absence of an obligation to pay overtime to exempt

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workers. Obviously, employers that classify an employee as exempt will almost by definition not comply with the fluctuating workweek regulation.

Indeed, even DOL's reliance on § 778.114 to support a half-time calculation in its recent opinion letter continues to perpetuate confusion on this issue. In *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008 (N.D. Cal. 2009), the court discounted DOL's opinion letter because it did not explain why § 778.114 should be applied retrospectively and viewed this as a departure from DOL's previous interpretations of § 778.114. In reality, DOL has been calculating misclassification backpay in this manner for years, but it was the reference to § 778.114 that continues to confuse the issue.

D. A Court Finally Gets It Right

The Seventh Circuit recently tackled this issue in *Urnikis-Negro v. American Family Property Services*, — F.3d —, 2010 U.S. App. LEXIS 16126 (7th Cir. Aug. 4, 2010). In its analysis, the court followed the *Blackmon* line of cases and allocated the weekly salary paid to plaintiff to cover all hours worked, but specifically rejected § 778.114 as the basis for its decision. The court noted that decisions in that find §778.114 inapplicable should not simply assume that the weekly salary paid can only be allocated to the first forty hours worked per week. Because the employee's regular rate of pay is a factual matter, the court reasoned, "and if the parties in fact agreed that a fixed weekly salary would constitute payment at the regular rate for all hours worked . . . there is no factual basis for deeming the salary to constitute straight time compensation for 40 hours alone." *Urnikis-Negro*, 2010 U.S. App. LEXIS 16126, *44.

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Courts should abandon their misinterpretation of the fluctuating workweek regulation and recognize that the controlling inquiry for purposes of calculating back overtime in exemption misclassification cases is the parties' intent regarding whether the employee's salary covers all hours worked in a workweek—as DOL and the Supreme Court have made clear—or, instead, merely reflects an agreed-upon amount for the first 40 hours of work. In the typical misclassification case, when an employee classified as exempt did not receive contemporaneous overtime payments, the clear intent of the parties is that the salary provides straight time for all hours worked. An employee who works for weeks, months, or years without receiving overtime payments in addition to his or her salary plainly understands that the employer has not agreed to provide additional compensation for hours beyond 40 per workweek. When the employer has misclassified that employee as exempt under such circumstances, the employee is entitled to the additional half-time for any overtime worked.

IV. USE OF COMMON LAW CLAIMS TO OBTAIN NATIONWIDE RULE 23 CLASS

As discussed above, FLSA opt-in collective actions are of a character entirely different from opt-out class actions under Rule 23. Notably, "Rule 23 cannot be invoked to circumvent the consent requirement of [the FLSA]." *LaChapelle v. Owens-Illinois, Inc.,* 513 F.2d 286, 288 (5th Cir. 1975). And, unlike a class action under Rule 23, there is no tolling of an individual plaintiff's claim until he or she files the consent to opt-in. Due to these procedural differences between FLSA collective actions and Rule 23 class actions, more and more plaintiffs are now

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trying to use common-law claims under state law in order to obtain certification of a nationwide class under Rule 23. In order to defeat these claims, employers have argued that the "[c]ommon law claims based on the same facts and circumstances as an FLSA claim may be preempted under the FLSA, *Roble v. Celestica Corp.*, 2006 U.S. Dist. LEXIS 94067 (D. Minn. Dec. 29, 2006), and that plaintiffs cannot meet the requirements of Rule 23 because of variations in state law from jurisdiction to jurisdiction.

A. Preemption of Common Law Claims

In assessing whether state common law claims are preempted by the FLSA, courts look to the basis of the claims, in particular whether the "common law claims are based on the same facts and circumstances as [the] FLSA claims." *Johnston v. Davis Sec., Inc.*, 217 F. Supp. 2d 1224, 1227 (D. Utah 2002); *Chen v. St. Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 293 (E.D.N.Y. 2005) (because the plaintiffs' common law negligence claim was "grounded in the same facts" as the FLSA claim, the negligence claim should be dismissed). Numerous other district courts have arrived at the same conclusion that state common law claims grounded on the same facts as FLSA claims are preempted.[10]

Ruling that an employee cannot circumvent the FLSA by pleading causes of action under state common law, the U.S. Court of Appeals for the Fourth Circuit rejected an attempt to invoke North Carolina state laws to obtain relief that is available only under the FLSA. *Anderson v. Sara Lee Corp.*, 508 F.3d 181 (4th Cir. 2007). The court affirmed a district court's dismissal of

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[10] *See, e.g.*, Kronick v. Bebe Stores, Inc., 2008 U.S. Dist. LEXIS 74967, *10-12 (D.N.J. Sept. 29, 2008) (where state law claims are based on failure to compensate the plaintiffs for overtime and meal breaks, "all such claims are merely based upon the same facts and circumstances which also form the basis of [the] [p]laintiffs' FLSA claim. These claims are, therefore, preempted by the FLSA and will be accordingly dismissed"); Ellis v. Edward D. Jones & Co., L.P., 527 F. Supp. 2d 439, 454 (W.D. Pa. 2007) (dismissing common law fraud claims because "so long as the common law claims are grounded on the same facts as the FLSA claims and are therefore duplicative, [the] [p]laintiffs' sole remedy lies with the FLSA"); Kaur v. Royal Arcadia Palace, Inc., 2007 U.S. Dist. LEXIS 94556, *50-51 (E.D.N.Y. Dec. 21, 2007) (awarding summary judgment on fraud claim pertaining to back-wages "premised upon the same facts as the FLSA claim"); *Roble*, 2006 U.S. Dist. LEXIS 94067 at *3 (suggesting that the court would later deem state common law claims to be superseded by FLSA if discovery revealed that state claims were duplicative of FLSA claims); Choimbol v. Fairfield Resorts, 2006 U.S. Dist. LEXIS 68225, at *22 (E.D. Va. Sept. 11, 2006) ("[T]he Plaintiff's common law claims . . . stem directly from their minimum wage and overtime claims under the FLSA. Defendants['] withholding of deposits and misrepresentation of minimum wage and overtime pay due to Plaintiffs merely recasts the central claim in this case: violation of the FLSA."); *Moeck v. Gray Supply Corp.*, 2006 U.S. Dist. LEXIS 511, at *4 (D.N.J. Jan. 5, 2006) ("Although the law is unsettled as to whether the FLSA preempts state common law causes of action, most courts have held that claims directly covered by the FLSA (such as overtime), must be brought under the FLSA."); Sorensen v. CHT Corp., 2004 U.S. Dist. LEXIS 3729, at *22 (N.D. Ill. Mar. 9, 2004) (dismissing state law unjust enrichment claims "based on the same factual assertions as their FLSA claims"); *Johnston*, 217 F. Supp. 2d at 1227-28 (finding that plaintiff's common law claims, including gross negligence and negligent misrepresentation, were preempted under the FLSA because they were based on the same facts and circumstances as her FLSA claims, namely, overtime violations); Alexander v. Vesta Ins. Group, Inc., 147 F. Supp. 2d 1223, 1240-41 (N.D. Ala. 2001) (granting summary judgment on fraud claims based on alleged misrepresentations as to the plaintiffs' overtime entitlement under the FLSA because the plaintiffs could not merely recast FLSA claims as common law claims to recover damages not available under the FLSA); Petras v. Johnson, 1993 U.S. Dist. LEXIS 8464 at *3 (S.D.N.Y. June 22, 1993) (granting summary judgment on the plaintiffs' state law fraud claims); Nettles v. Techplan Corp., 704 F. Supp. 95, 100 (D.S.C. 1988) (awarding summary judgment to the employer on a negligence claim as duplicative of FLSA claim, thereby implicitly ruling that the negligence claim was FLSA-preempted).

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several state law claims and remanded the remaining state law claims to the lower court with instructions to dismiss them without prejudice, to give the plaintiffs an opportunity to pursue claims under the FLSA. The plaintiffs and class members were current and former employees of a bakery. In the state court complaint, the plaintiffs claimed that the employer had violated the "applicable wage and hour law" by failing to compensate workers for time spent complying with the company's "Dress and Undress Rule." The complaint did not plead claims directly under the FLSA, but rather, pleaded claims under North Carolina law for breach of contract, negligence, fraud, conversion (unlawful taking), and unfair trade practices. The employer removed the case to federal court.

The Fourth Circuit affirmed the district court's dismissal of the plaintiffs' conversion and unfair trade practices claims. It further determined that the district court should have dismissed the contract, negligence and fraud claims as preempted by the FLSA. The court considered the issue of whether the remaining claims for breach of contract, negligence and fraud were preempted by the FLSA.

Based on an analysis of "conflict" or "obstacle" preemption (a doctrine requiring state law to yield to federal law where state law may stand as an obstacle to federal legal interests), the court noted that the causes of action were related to the unpaid time spent "donning and doffing" work garments associated with the plaintiffs' employment. The court determined that the state claims depended on establishing that the employer violated the FLSA and required essentially the same proof as claims asserted under the FLSA. Because of this *duplication of proof*, the court held that the state law claims were preempted by the federal law. The court noted that Congress prescribed the exclusive remedies under the FLSA. The North Carolina laws invoked by plaintiffs did not entitle them to any substantive right to unpaid wages, but rather, only provided a source of *remedies* for the alleged underlying FLSA violations. Because the FLSA provides several avenues of remedies, attempting to obtain remedies via state law claims produced an irreconcilable conflict between state and federal law, the court concluded.

B. Failure to Satisfy the Requirements of Rule 23

Another obstacle facing plaintiffs attempting to use common law claims to obtain nationwide class actions is Rule 23 itself. Rule 23(a) requires that one or more members of a class may sue on behalf of all members only if:

> (1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Because Rule 23(b)(3) would most likely apply as well, the plaintiffs would also be required to demonstrate that "questions of law or fact common to class members [must] predominate over any questions affecting only individual members, and . . . a class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) typically applies when a plaintiff seeks

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"predominately money damages." *Ramirez v. DeCoster*, 194 F.R.D. 348, 352 (D. Me. 2000) ("The relief sought in this case is predominantly money damages and, as such, is inappropriate for 23(b)(2) certification.").

Many courts have found that the certification of a multi-state class action, which would require the application of the law of various states, is inherently unworkable because individual questions of state law, as well as the varying questions of fact necessitated by these legal differences, would easily overwhelm any questions common to the class. As one court recently observed:

> [T]here is simply no efficiency in asking a trial judge to manage the laws of 50 different states as they apply to plaintiffs' contract claims and the varied factual scenarios inherent therein. "Beyond the difficult task of correctly determining foreign law, the nationwide class action may present an even greater problem because of the sheer burden of organizing and following fifty or more different bodies of complex substantive principles. Although the comparison obviously is inexact, ***one can appreciate the magnitude of the trial judge's task by imagining a first-year law student who, instead of a course in contracts, is required simultaneously to enroll in fifty courses, each covering the contract law of a single state, and to apply each body of law correctly on the final examination***."

Schnall v. AT&T Wireless Servs., Inc, 2010 Wash. LEXIS 61, at *20 (Wash., Jan. 21, 2010) (emphasis added) (citations omitted). Therefore, "[b]ased primarily on the burden of applying multiple states' laws, an overwhelming number of federal courts have denied certification of nationwide state-law class actions." *Id.* at *12-15.[11]

It may also be difficult for the plaintiff to satisfy the adequacy or superiority elements of Rule 23. In order to satisfy Rule 23(b)(3)'s superiority requirement, a class action must represent the best "available method[] for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Court must determine that a nationwide class action is the superior method for resolving the claims of any potential class members when compared to other alternatives such as statewide class actions. Factors relevant to the superiority test are: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D). Applying the laws of multiple states in a single class action would most likely make such action unmanageable as compared to alternative methods of litigation, such as separate class action suits in each state.

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[11] Quoting Rory Ryan, Comment, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467 (2002) (citations omitted).

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Moreover, the named plaintiffs may not have standing to bring claims under the common laws of states other than the states in which they live or work. Therefore, the plaintiffs would not be adequate representatives of the employees in all states. As the U.S. District Court in Massachusetts recently explained:

> The named plaintiff in a class action must meet all the jurisdictional requirements to bring an individual suit asserting the same claims, including standing. . . . ***If a complaint includes multiple claims, at least one named plaintiff class representative must have Article III standing to raise each claim.*** When no named representative has standing at the time the suit is brought, the court should dismiss the suit for lack of jurisdiction notwithstanding the class allegations.

Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 658 F. Supp. 2d 299, 304 (D. Mass. 2009) (Stearns, J.) (emphasis added) (citation omitted). *See also Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) ("there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class"). As a result, before a class can be certified, the court must determine that at least one of the named plaintiffs has standing to raise each claim raised against the defendants. *Id.*

CONCLUSION

Although there is much for in-house counsel to be concerned about in the wage and hour area, it is never too late to take steps to improve your enterprise's compliance posture and to reduce the likelihood of a wage and hour class or collective action. A careful review of an employer's wage and hour practices will usually uncover several opportunities to make changes that can render a company a less attractive litigation target. Moreover, good faith efforts to comply with the law can prevent the accrual of further liability, shorten the potential limitations period for claims, lessen or eliminate additional remedies such as liquidated damages, and earn good will with the workforce by demonstrating a commitment to paying workers properly under the law. In short, compliance pays, especially when it comes to wage and hour issues.

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Wage and Hour Compliance Hot Spots

Finding the multi-million dollar needle in the haystack before the plaintiffs' lawyer and/or DOL

In 2009 the DOL declared that it would increase Wage and Hour Division (WHD) staff by 250 field investigators in order to refocus the agency on its enforcement efforts and its use of heavy penalties. Considering that more than $185 million was recovered in 2008 by the WHD when the department was criticized by some as ineffective, imagine the increase in lawsuits and fines with its new and aggressive focus on enforcement.

Employers seeking to reduce wage and hour exposure should acknowledge the reality of increased DOL enforcement and costly collective actions. Some steps employers can take to prevent costly wage and hour enforcement actions and litigation include:

- Understand the wage and hour enforcement and litigation occurring in their industry and in the same geographic areas.

- Identify and understand all applicable sources of wage and hour obligations:
  - FLSA regulations
  - Past Opinion Letters / New Administrator Interpretations
  - Case law
  - DOL Field Operations Handbook ("FOH")
  - DOL website (www.dol.gov)
  - State law
  - State regulations/interpretive guidance

- Understand what exempt classifications are claimed to ensure employees are properly classified as exempt or non-exempt
  - Pay particular attention to actual job duties and not just titles/job descriptions
  - Understand whether job responsibilities have changed over time
  - Be sensitive to situations where exempt "managers" have responsibilities similar to employees the manage (*e.g.*, leads)
  - Understand whether "volunteers" are really employees under applicable law
  - Pay particular attention to whether matters in which employees exercise discretion are related to the operations of the employer more so than the production output or service provided by the business

- Ensure exempt employees are paid on a salary basis without any improper deductions (exception for public employers)
  - Pay attention to any improper partial day deductions from exempt employees for jury duty, temporary military leave, minor/non-safety

related workplace violations, and during layoff and shutdown situations ("low census" policies)
  - Check for a communicated "safe harbor" policy to ensure exempt employees are not subject to improper salary deductions and requires employees to notify the employer of improper deduction with assurances that improper deductions will be reimbursed

- Ensure accurate wage and hour recordkeeping policies are in place and that accurate records are kept to substantiate classification and payroll practices
  - Pay attention to rounding practices used when recording working time
  - Understand any estimation of time worked for submission
  - Know who can submit and change time submitted and whether/how such changes are annotated
  - Consider having employees certify accuracy of payroll submissions
  - Make sure earnings statement comply with all requirements
  - Understand special recordkeeping requirements applicable to your industry (*e.g.*, recordkeeping requirements for hospital employees on 14 day workweek)

- Ensure non-exempt employees are properly reporting all time worked
  - Have documented training for all management and supervisory employees regarding compensable off-the-clock activities and enforcement of overtime policies
  - Understand whether any work related activity done pre-shift and post-shift is compensable and properly reported (*e.g.*, donning/doffing, logging in, completing reports, walking time, etc.)
  - Ensure employees affirmatively instructed to record all time worked and do so
  - Consider whether employees can realistically complete work in budgeted hours
  - Understand the organization's use of remote technology for work, who is provided the tools access, and whether there is a common understanding of compensable time surrounding use of such technology
  - Pay attention to whether work is done at home or expected to be done and compensation practices
  - Scrutinize meal and break periods
    - Understand amount of time allotted
    - Understand restrictions on use of time
    - Pay attention to whether employees are encouraged or discouraged to take
  - Understand on-call, standby, and waiting time policies and employee freedom to engage in personal activities
    - Ensure payment to employees for all time worked when called to duty during on-call time
  - Be sensitive to any allegations that supervisors tell employees to not write down time or that employees not writing down time voluntarily
  - Ensure employees are paid for all hours submitted

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  - Ensure employees are paid for work of unauthorized overtime but overtime policy is enforced
  - Pay attention to situations where employees work at two different locations and aggregation of hours in the workweek
  - Is travel time properly accounted for at beginning/end of work day and during work day?
    - For employees with company vehicles, is there an understanding that normal commute time is not compensable?
    - Ensure proper understanding of time to be submitted
    - Ensure all travel time submitted
    - Ensure all travel time paid
  - Understand pay practices surrounding training time and whether meets strict criteria for non-payment of training time

- Ensure posting requirements are understood, complied with, and a system is in place to ensure timely updating

- Ensure the regular rate of pay and overtime rate are calculated accurately

- Are wage payments made on a timely basis?

- Carefully consider any wholesale changes to any wage and hour policies and classification of employees

- Consider conducting a comprehensive wage and hour audit and attendant privilege issues

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