



**Monday, October 1, 2012**

**2:30 PM - 4:00 PM**

**502 – Don't Mess with the Money! Wage & Hour Compliance: Managing Risk in a New Era of Enforcement**

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*Vice President and Group Counsel*  
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**Susan Shelton**

*General Counsel*  
The Portillo Restaurant Group

## Faculty Biographies

### **Erica Chmielewski**

Erica Chmielewski is senior legal counsel for labor, employment, and immigration matters at Terex Corporation in Westport, CT. In this role, she advises business and human resources professionals on a full spectrum of employment issues in the US and internationally, manages employment charges and litigation, assists with collective bargaining matters, and coordinates all global immigration for the company's employees. Ms. Chmielewski is also very active in policy development and training on employment and global mobility issues.

Prior to joining Terex, Ms. Chmielewski practiced law as an associate with Day Pitney LLP (formerly Day, Berry & Howard, LLP). Ms. Chmielewski counseled and represented employers on a wide range of employment matters, including wage and hour issues, discrimination and retaliation claims, and hiring, disciplining, and terminating employees. She also assisted with breach of contract, general tort, product liability, and government investigations matters.

Ms. Chmielewski currently co-chairs the policy subcommittee of the ACC's Employment and Labor Law Committee. Ms. Chmielewski is also a legal volunteer for the Pro Bono Partnership and a past member of the board of directors of the Center for Women and Families of Eastern Fairfield County.

Ms. Chmielewski received a BA in business management/marketing from Sacred Heart University and is a graduate of the Quinnipiac University School of Law, where she served as Law Review executive managing editor.

### **Nicky Jatana**

Nicky Jatana is a partner in the Los Angeles, CA office of Jackson Lewis LLP. Her practice focuses on employment litigation, as well as on advising employers regarding daily workplace issues. Her background includes, litigation involving wrongful termination, discrimination, harassment, breach of contract, wage and hour, preventive advice and training, and other labor and employment-related matters. She has litigated numerous wage and hour class and multi-plaintiff actions and has trial experience. Ms. Jatana conducts training seminars and frequently speaks publicly on a multitude of employment law topics. Her experience includes handling employment matters from both in-house counsel and outside counsel perspectives.

Ms. Jatana practices in both state and federal court. She has represented employers in the retail, restaurant, manufacturing, pharmaceutical, transportation and banking industries, among others.

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Ms. Jatana received her undergraduate degree from Rutgers College in New Brunswick, NJ, and her law degree from University of the Pacific, McGeorge School of Law in Sacramento, CA. During law school Ms. Jatana excelled as an author and editor for *The Transnational Lawyer* and received honors in trial advocacy. She is a member of the labor and employment law section of the State Bar of California and a member of the Los Angeles County Bar Association, the South Asian Bar Association and the National South Asian Bar Association. Ms. Jatana also volunteers her time as a board associate of the Big Brothers Big Sisters of Los Angeles and the Inland Empire.

### **Lisa Lewis**

Lisa Merklin Lewis is vice president and group counsel of the employment law group in the general counsel's organization at Ameriprise Financial, Inc. She provides legal support to human resources and management concerning a wide variety of employment-related matters.

Prior to coming to Ameriprise Financial, Ms. Lewis was in-house employment counsel for ING Americas US Legal Services. Ms. Lewis has also been a litigation associate at Meagher & Geer, PLLP, in Minneapolis, MN.

Ms. Lewis received her bachelor's degree from St. Olaf College, a PhD in medieval history from Cornell University, and her JD from the University of Minnesota Law School.


### **Susan Shelton**

Susan B. Shelton is general counsel of The Portillo Restaurant Group, one of the largest privately held restaurant groups in the midwest. The company currently operates in three states and has four separate restaurant concepts and two commissaries. Ms. Shelton's responsibilities include counseling on commercial transactions, employment and regulatory matters and general oversight of all legal functions of the company.

Prior to joining Portillo's, Ms. Shelton was a partner with the law firm of Gallagher and Joslyn, where she practiced corporate and employment law.

Ms. Shelton is a member of the Illinois State Bar Association, the American Bar Association and ACC.

Ms. Shelton received her JD from DePaul College of Law and her BA in Economics from Wheaton College.



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## Don't Mess With The Money! Wage and Hour Compliance: Managing Risk in a New Era of Enforcement

Session #502  
Association of Corporate Counsel 2012 Annual Meeting  
Orlando, Florida

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## Wage and Hour Law

- Wage and hour law risks affect employers in every industry -- now more than ever. The US Department of Labor's Strategic Plan for 2011-2016 includes new enforcement efforts, some targeting specific industries. Learn about DOL's enforcement strategies for the coming years and explore how refreshing your compliance program can go a long way in mitigating wage-and-hour risks.
- Hear about DOL's "We Can Help" and "Plan, Prevent, Protect" campaigns, how these efforts present new challenges to employers and how they may affect your organization's risk calculations. This session will include recommended compliance program enhancements to mitigate the risk presented by the increased enforcement climate.




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## Regulatory Scrutiny - General Overview

- From April 1, 2010 through March 31, 2011, plaintiffs filed 7,008 FLSA cases in the federal courts.
- This represents an increase of more than 15% over the prior year.
- FLSA lawsuits increased from 7,006 reported in March 2011 to 7,064 reported in March 2012



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## Regulatory Scrutiny - General Overview

**DOL's wage and hour enforcement under the present administration has become markedly more hostile toward employers.**

- No more opinion letters.
- Broad "Administrator Interpretations" adverse to employers, including overturning prior rulings.
- Numerous amicus curiae briefs taking uniformly pro-worker positions.
- "Bridge to Justice" program trying to connect workers with private lawyers.
- Timekeeping Smartphone app.
- Investigators are being instructed to impose civil money penalties in first investigations under certain circumstances, and to levy CMPs in virtually all "repeat" violation scenarios.
- Generally insisting on enterprise-wide resolution, even including across different entities in a corporate structure, as opposed to addressing the specific employees, sites, or practices that prompted the investigation.
- "Liquidated damages are the new normal."

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## Comparison: Which EEOC Charges are Filed Most Frequently?

Charge	Number of Filings (FY 2011)
Retaliation	37,334
Race Discrimination	35,295
Sex/Gender Discrimination	28,534
Disability Discrimination	25,742
Age Discrimination	23,465
National Origin Discrimination	11,833
Religious Discrimination	4,151
<b>Equal Pay Act Violations</b>	<b>919</b>
GINA Discrimination	245

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## DOL: “Plan, Prevent, Protect”

- Short explanation: Employers and others in the Department's regulated communities must understand that the burden is on **them** to obey the law, not on the Labor Department to **catch them** violating the law
- Historically: DOL has developed compliance programs targeted at **specific** workplace risks and hazards
- Requirements: “Plan/Prevent/Protect” strategy will require all regulated entities to take three steps to ensure safe and secure workplaces and compliance with the law

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## DOL: "Plan, Prevent, Protect"

**"Plan":**

- requirement that employers create a plan for identifying and remediating risks of legal violations and other risks to workers
  - For example, "Right to Know Under the Fair Labor Standards Act": update the recordkeeping regulations under the Fair Labor Standards Act in order to enhance the transparency and disclosure to workers as to how pay is computed
- the plans would be made available to workers so they can fully understand them and help to monitor their implementation.


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## DOL: "Plan, Prevent, Protect"

**"Prevent":**

- requirement that employers thoroughly and completely implement the plan in a manner that prevents legal violations.
- The plan cannot be a mere paper process.
- The employer or other regulated entity cannot draft a plan and then put it on a shelf.
- The plan must be fully implemented for the employer to comply with the "Plan/Prevent/Protect" compliance strategy.



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## DOL: “Plan, Prevent, Protect”

**"Protect":**

- Requirement that the employer ensures that the plan's objectives are met on a regular basis.
- Just any plan will not do.
- The plan must actually protect workers from violations of their workplace rights.



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## DOL: “Plan, Prevent, Protect”

- Employers who fail to take these steps will be considered out of compliance with the law and subject to remedial action.
- Employers, unions, and others who follow the Department's "Plan/Prevent/Protect" strategy will assure compliance with employment laws before Labor Department enforcement personnel arrive at their doorsteps
- Compliance will assure that workers get the safe, healthy, diverse, family-friendly, and fair workplaces they deserve.



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## Initiatives Supporting “Plan, Prevent, Protect”

**Injury and Illness Prevention Program (OSHA)**

- OSHA is developing a rulemaking that would require employers to implement Injury and Illness Prevention Programs.

**Infectious Diseases (OSHA)**

- OSHA developed a request for information on infectious diseases to better assess the extent of the problem and better understand ways to protect healthcare workers from infectious diseases.

**Right to Know (WHD)**

- Update the recordkeeping regulations under the Fair Labor Standards Act in order to enhance the transparency and disclosure to workers of their status as the employer’s employee or some other status, such as an independent contractor, and if an employee, how their pay is computed

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## Initiatives Supporting “Plan, Prevent, Protect” *(continued)*

**Construction Contractor Affirmative Action Requirements (OFCCP)**

- Government contractors and subcontractors must comply with laws and regulations that ban discrimination and establish affirmative action requirements to ensure equal employment opportunity.

**Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Safety and Health Standards (MSHA)**

- Section 303(d) of the Federal Mine Safety and Health Act (Mine Act) requires mine operators to conduct pre-shift examinations in areas where miners work or travel for violations of mandatory health or safety standards. This section was previously covered by regulation. The final regulation is currently being cleared by the Department.

**Pattern of Violations (MSHA)**

- MSHA will develop a final rule to revise the Agency’s regulation on pattern of violations


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## Wage Theft Statutes

**What is wage theft?**

- “Wage theft” occurs when workers do not receive their legally or contractually promised wages.
- Common allegations of wage theft involve:
  - non-payment of overtime
  - last paycheck late or withheld
  - not paying for all hours worked
  - not paying minimum wage
  - not paying a worker at all
  - improper deductions
  - commission payment at termination



**Wage and Hour We Can Help**

Agricultural Workers  
 Hours Worked  
 Safe Transportation  
 Last Paycheck  
 Migrant and Seasonal Workers  
 Recordkeeping

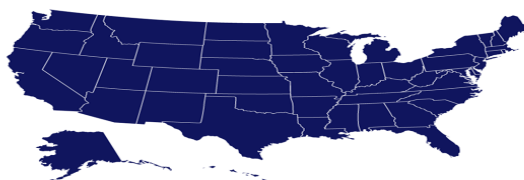
Field Sanitation  
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 Child Labor  
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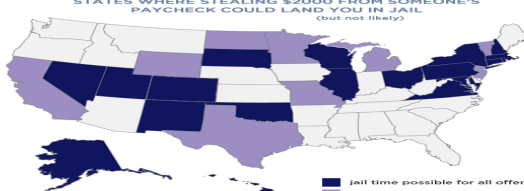
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## Wage Theft Overview



STATES WHERE STEALING \$2000 FROM SOMEONE ON THE STREET COULD LAND YOU IN JAIL.

**WHERE THEFT IS A CRIME ...AND WHERE IT ISN'T**




STATES WHERE STEALING \$2000 FROM SOMEONE'S PAYCHECK COULD LAND YOU IN JAIL (but not likely)

■ jail time possible for all offenses  
 ■ jail time possible for some offenses


On average, low-wage workers have over \$2000 stolen from their paychecks per year.  
 To find out where your state ranks on WAGE THEFT, visit: [progressivestates.org/wagetheft](http://progressivestates.org/wagetheft)

PROGRESSIVE STATES Network



## Wage Theft Statutes

- Increasing state focus on ensuring proper wage payment
  - Notices to employees
  - Recordkeeping obligations
  - Pay stub requirements
  - Payment at termination
  - Criminalize failure to pay



## Wage Theft Statutes

### NEW YORK

- 2011 - New York Wage Theft Prevention Act

Provide give notice of certain information to all employees in English and in their primary language

- At time of hire; and
- On or before February 1<sup>st</sup> of each calendar year

### Identify employees' primary language

- Employer must ask this question to all employees at time of hire
- DOL has forms in various languages

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## Wage Theft Statutes

### NEW YORK [cont'd]

**What must be included in notice:**

- Rate/rates of pay (hour, shift, day, week, salary, piece, commission)
- Overtime rate of pay (if applicable)
- Allowances claimed as part of minimum wage (tips, meal, lodging, etc.)
- Regular pay day
- Name of employer and any "d/b/a" names of employer
- Address of employer's main office
- Mailing address of employer
- Telephone number of employer
- "Other information as the Commissioner deems material and necessary"

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## Wage Theft Statutes

NEW YORK [cont'd]

Acknowledgement of Receipt of Notice:

- Acknowledgment must be signed and dated by each employee
- Must include an affirmation by employee that employee accurately identified his or her primary language to the employer, and that the notice provided by the employer to such employee was in the language so identified

Timing

- Employers must provide written wage notice at least seven (7) days before implementing any changes to information in employee's most recent wage notice...unless modifications are reflected in employee's wage statement

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## Wage Theft Statutes

### NEW YORK [cont'd]

#### Contents of Wage Statement

- Wage statement must include the following information to avoid additional notice requirement:
  - Dates of work covered by the payment
  - Employee name
  - Employer name, address and telephone number
  - Hours worked, rates of paid and basis thereof (e.g. hour, day or week)
  - Gross wages
  - Credit/allowances claimed (e.g., tips, meals and lodging)
  - Deductions from wages
  - Net wages


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## Wage Theft Statutes

### CALIFORNIA AB 469 Wage Theft Prevention Act


- Primary changes include:
  - Gives DLSE 3 years (not 1) to commence action to collect unpaid penalties or fees
  - Empowers Labor Comm'r to impose two-year (instead of 6 month) bond to cover underpaid wages on employers found guilty of wage non-payment
  - Requires employers to keep payroll records for 3 years (instead of 2)
  - Prohibits employers from preventing employees from keeping personal records of their hours worked
  - Criminalizes "willful failure to pay" final court judgment or Labor Commissioner Order (\$10-20K fines or jail)
  - Establishes minimum penalties



## Wage Theft Statutes

### CALIFORNIA [cont'd]

- New Labor Code Sec. 2810.5 requiring disclosures at time of hire for nonexempt employees of:
  - Rate of pay/basis of pay
  - Allowances (meal/lodging etc.)
  - Paydays
  - Employer “dba,” phone # and physical address
  - Worker’s compensation insurer information
  - Must be consistently updated – notifications within 7 days of any change, unless info is on paystub or other writing.



## Wage Theft Statutes By State

- **Illinois** – The Illinois Wage Payment and Collection Act went into law on January 1, 2011. Provides Illinois DOL with additional enforcement resources, including enhanced penalties against employers who refuse to cooperate with the Department’s investigation and enforcement activities.
- **Maryland** – The Maryland Wage Payment & Collection Law governs the timing of payment and payment of wages (such as salary, bonus or commissions) upon the termination of employment and also adjusted the definition of ‘wage’ to include overtime wages.
- **Massachusetts** – Massachusetts passed a bill in 2008 to Clarify the Law to Protect Employee Compensation that states that employers found guilty of violating wage and hour laws, including inadvertent violations, will be subject to mandatory treble damages.
- **Missouri** – Missouri has laws on the books to protect employees from getting misclassified as independent contractors and has given the Missouri Attorney General the power to go after employers.
- **Nebraska** – Nebraska passed the Employee Classification Act in 2010 to provide for protection of workers in construction and delivery services from misclassification as subcontractors for the purposes of tax withholding, unemployment insurance and workers' compensation insurance benefits.

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## Wage Theft Statutes By State


- **New Mexico** – New Mexico passed a law increasing employer liability for the failure of paying wages as well as provided protection to employees from retaliation.
- **Texas** - Under Texas law, cases of wage theft are handled by local law enforcement under the Theft of Services law. Prosecution depends on establishing intent to steal, and the law now specifies that partial payment of wages is not sufficient to negate an intent to steal wages.
- **Utah** - In 2008 Utah passed SB 159 which makes it fraud to misclassify an employee to avoid the obligation to obtain workers' compensation insurance coverage, and it establishes a council to study how to reduce costs resulting from the misclassification of workers.
- **Washington** - Washington's law provides the State's Department of Labor and Industries with new tools to combat wage theft, including imposing penalties on businesses that repeatedly violate wage laws and allows the Department to require wage bonds of businesses that habitually fail to pay wages owed to their workers.

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## Wage Theft Statutes

- **Best Practices**
  - Multistate employers must monitor state laws
  - Payment at termination major source of potential violations
    - Short time limits for involuntary terminations – consider paying extra days in lieu of notice
    - Payment of commissions at termination – some states limit ability to withhold
    - Payment of unused vacation



## Independent Contractors


- Increasing regulatory scrutiny on both federal and state level
  - Tax Gap – withholding and underpayment of income taxes
  - Tax Gap – unemployment compensation and workers' compensation systems
  - Concerns about abuse of workers not covered by protective legislation or health insurance



## Independent Contractors


- President Obama's 2011 State of the Union
  - "So tonight, I'm asking Democrats and Republicans to simplify the [tax] system. Get rid of the loopholes. Level the playing field. And use the savings to lower the corporate tax rate for the first time in 25 years — without adding to our deficit."
    - **Fair Playing Field Act of 2010:** bill was intended to close what the sponsors of the legislation referred to as a "tax loophole allowing businesses to misclassify workers as independent contractors
      - Bill was reintroduced to Congress on Mar 01, 2012
      - Currently, it is referred to committee





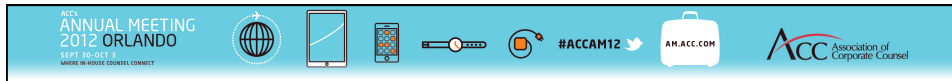
## Independent Contractors

- DOL's Misclassification Initiative
  - Purpose: DOL and Internal Revenue Service (IRS) will work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws
  - States that have entered into Memoranda of Understanding (MOU) with the DOL
- IRS Voluntary Compliance Settlement Program
  - Employers permitted to resolve past issues with payment of small tax amount



## Independent Contractors

- Who is an independent contractor?
  - Financial control
  - Behavioral control
  - Relationship between parties
- States use variants of ABC test
  - Free from control or direction
  - Service performed outside of the usual course of business
  - Customarily engaged in independently established trade
  - May result in different results than Federal test
    - Coverall Case (Awuah, et al. v. Coverall North America, 563 F.Supp.2d 312 (D. Mass.2008))
- **In 2010 there were 10.3 million independent contractors in the U.S., 7.4% of the workforce**
  - Source: U.S. Bureau of Labor Statistics, as cited in the Statistical Abstract of the United States: 2010, Table 595



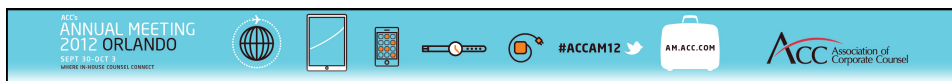
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## Independent Contractors

- Common issues
  - Bringing back retirees as contractors
  - Exerting excessive control over independent contractors or their employees
  - Keeping contractors on too long
  - Believing that a 1099 is magic!



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## Independent Contractors

- *Vizcaino v. Microsoft Corporation*, 97F.3d 1187 (9<sup>th</sup> Cir., 1996)
  - held that certain workers, originally hired as independent contractors, were entitled to benefits under Microsoft's 401(k) plan (the "Savings Plus Plan" or SPP) and Microsoft's Employee Stock Purchase Plan (ESPP)
  - Although hired to work on specific projects, seven of the eight workers had worked for Microsoft for at least two years.
  - They worked on site, shared the same supervisors, performed the same functions, and worked the same core hours as the regular employees
  - Key: Relationship with employer

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## Independent Contractors

- Best practices
  - Ensure all contractors have written agreements
  - Obtain contractors from 3<sup>rd</sup> party vendors
  - Monitor length of engagements
  - Don't treat them like employees
  - Make sure your benefit plans have *Microsoft* language

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## Internships

- With the economic downturn, the Department of Labor (DOL) has taken a stronger look at internships – especially ones that have been historically unpaid
- In April 2010, the DOL issued a Fact Sheet that in most cases considers interns to be employees
  - The Fair Labor Standards Act (FLSA) defines the term “employ” very broadly as including to “suffer or permit to work.”
  - Individuals who are “suffered or permitted” to work must be compensated under the law for the services they perform for an employer.

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## Internships

- The DOL Fact Sheet only applies to “for-profit” entities
- The DOL understands that individuals “volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations.”
- For these “non-profit” internships, the DOL will not presume an employment relationship

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## Internships

The DOL outlined a 6 factor test to determine if an internship can be unpaid:


- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

IF ALL 6 ARE MET AN EMPLOYMENT RELATIONSHIP IS SAID NOT TO EXIST AND WAGE/HOUR RESTRICTIONS DO NOT APPLY




## Internships

- States are also joining with DOL
- New York has outlined an 11 factor test
  - 6 factor DOL test + 5 additional criteria
    - Under the supervision of someone knowledgeable in the industry
    - No employee benefits
    - General training for the industry – not employer specific
    - Not the same screening process as employees
    - Position advertisements focus on education and training
- In addition, Courts will be joining in the analysis
  - Lawsuit brought by former Hearst Corporation interns



## Internships

- Is this the end of unpaid internships?
- Carefully consider:
  1. Type of work
    - educational v. company work
    - Structure the internship around a classroom or academic experience not normal business operations (college or university oversight)
  2. Nature of relationship with employer
    - heavily supervised v. treated like everyone else
    - No employee benefits or pre-employment process
  3. Primary beneficiary
    - educational experience v. completely necessary work
    - Focus on transferrable skills, not just those particular to the employer's operations
    - Do not depend on the work of the intern – job shadowing opportunities only
  4. Expectations
    - educational experience v. trial run
    - No potential for immediate future job




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## What is Working Time?

- “Hours Worked” includes all the time an employee is:
  - On duty
  - On the employer’s premises
  - At any prescribed place of work
  - Off duty or on-call if the employee is not able to use this time effectively for personal purposes



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## What Time Counts as “Hours Worked”?


- “Continuous workday” rule?
- The *de minimis* doctrine?
- Donning and doffing?
- Travel time?
- Time spent logging on/off of computer?
- Rounding practices?

**The compensability of much overtime work is dependent on several factors.**



**Factors to Consider: What Time Counts as “Hours Worked”?**

- (1)** The activities must be primarily for the benefit of the employer to count as hours worked.
- (2)** The activity must be a principal activity or “integral and indispensable” to a principal activity to count as hours worked.
- (3)** Activities at home that may constitute work are only compensable if the employer knew or should’ve known that an employee was engaged in such activities. Actual employer knowledge and/or approval of overtime work is NOT required however.
- (4)** If the activities undertaken at home are limited or isolated they may fall within and be properly excluded under the *de minimis* doctrine.



**Continuous Workday Rule**



- Generally requires inclusion of all time after the start of an employee’s workday.
- If an employee performs a task that is primarily for the benefit of the employer, they ordinarily must be compensated for such time. Additionally, once an employee has engaged in such a principal activity their workday is regarded as having commenced.
- Not triggered when the employee engages in work activities that are regarded as *de minimis*.

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## Donning and Doffing

- Whether time spent donning and doffing clothes and protective gear is compensable largely depends on:
  - whether the time spent may properly be regarded as *de minimis*; and
  - if the activities are an integral part of an employee's principal job duties

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## The *De Minimis* Doctrine

- The U.S. Court of Appeals for the 9<sup>th</sup> Circuit espoused a three-pronged test for determining when the doctrine should be applied, considering:
  1. "The practical administrative difficulty of recording the additional time;
  2. The aggregate amount of compensable time; and
  3. The regularity of the additional work."

*Lindow v. United States*, 738 F.2d 1057, 1063 (9<sup>th</sup> Cir. 1984)



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## Donning and Doffing

- Employers need not compensate employees for activities that are preliminary or postliminary to their principal work activities.
  - *Albrecht v. Wackenhut Corp.*, 379 Fed. Appx. 65 (2010).
- Work activities must be an integral and indispensable part of principal work duties to be compensable.
  - *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)







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## Court Treatment of Donning and Doffing Issues

<b>Compensable:</b>	<b>Not Compensable:</b>
<ul style="list-style-type: none"> <li>• Meat processing employees donning protective gear and walking to and from changing areas               <ul style="list-style-type: none"> <li>– <i>IBP v. Alvarez</i>, 546 U.S. 21 (2005)</li> </ul> </li> <li>• Poultry processing plant employees donning and doffing their protective gear at the beginning and end of a work shift               <ul style="list-style-type: none"> <li>– <i>Perez v. Mountaire Farms</i>, 650 F.3d 350, 2011 U.S. App. LEXIS 11547 (3d Cir June 7, 2011)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Donning and doffing security gear is not integral and indispensable to principal job activities               <ul style="list-style-type: none"> <li>– <i>Albrecht v. Wackenhut Corp.</i>, 379 Fed. Appx. 65 (2010)</li> </ul> </li> <li>• Nuclear power plant employees not entitled to compensation for generic, non-unique protective gear               <ul style="list-style-type: none"> <li>– <i>Gorman v. Consolidated Edison Corp.</i>, 488 F.3d 586 (2d Cir. 2007)</li> </ul> </li> <li>• Food processing plant employees not entitled to compensation for aprons, gloves, boots, hard hats, earplugs and safety glasses               <ul style="list-style-type: none"> <li>– <i>Salazar v. Butterball, LLC</i>, 644 F.3d 1130 (10<sup>th</sup> Cir. 2011)</li> </ul> </li> </ul>

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## Donning and Doffing

- Analyze the amount of time it takes employees to perform required tasks prior to and after the actual work shift
- What type of actions are required?
  - Specific PPE?
  - Unique v. Non-Unique (Just ear plugs and hard hats)?
- What type of industry?


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## Portal-to-Portal Act

- Intended to make time spent commuting between an employee's home and workplace non-compensable.
- Excludes from compensable time activities which are preliminary or postliminary to principal activities.





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## Travel Time During the Workday

- Commuting from home-to-work and work-to-home is generally not compensable working time.
  - This is true even when an employee travels to different job sites each day, has a longer commute than most, commutes with other employees to work or utilizes a company vehicle.
- Time spent traveling during the working day is compensable, i.e. driving between different worksites or customer locations.








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## Special Assignments: Travel Time During the Work Day

- There's a distinction between commuting time and other types of travel:
- An employee must generally be paid for time spent traveling to work on special one-day assignments to a location other than where they regularly work. (29 CFR §785.37)
  - Applies when an "employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city."
  - Focused on "unusual" assignments and not applicable to employees who are regularly assigned to travel to different work sites.








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## When is Overnight Travel Time Compensable?


- Travel away from home is work time when the travel cuts into the employee's normal workday.
  - Travel away from home during an employee's normal working hours is compensable.
  - Travel away from home on Saturdays, Sundays and holidays which corresponds to an employee's normal working hours is compensable.

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## When is Overnight Travel Time Not Compensable?

- Travel away from home outside an employee's normal working hours on a public conveyance is generally not compensable.
- Regular meal periods are not counted as hours worked.



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## Computer Usage: Time Spent Booting Up

- Time spent logging into a computer, waiting for it to boot up or otherwise readying equipment for operation is generally regarded as an integral aspect of a principal activity. 29 CFR §790.8(b).
  - Sprint settled for \$295,429 in back wages and paid a \$120,000 fine for failing to pay overtime to 1,013 workers from 2005 to 2007 for the approximately 9 minutes each day spent starting up computers, downloading applications and checking e-mails.
  - 29 CFR §790.8(b)(1) (lathe workers who frequently oil or clean their machines are engaging in “an integral part of the principal activity”).

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## Employer Rounding Practices

- The FLSA allows an employer to round employee time.
- However, an employer may violated the FLSA requirements if the employer always rounds employee time down.
  - Generally employer rounding practices will be accepted provided that they do not result, over a period of time, in a failure to properly compensate employees for the time they have worked. 29 CFR 785.48(b).


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## Employer Rounding Practices, Best Practices

- For an employer who rounds employee time to the nearest quarter hour: Employee time from 1 to 7 minutes may be rounded down, but employee time from 8 to 14 minutes must be rounded up and counted as a quarter hour of work time.



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## EXEMPTIONS - In General

- Who is Exempt
  - Executive, administrative, and professional employees, outside sales employees, and certain skilled computer professionals
- Less Common exemptions
  - Employees of certain seasonal amusement or recreational establishments
  - Employees of certain small newspapers and switchboard operators of small telephone companies
  - Employees engaged in newspaper delivery
  - Farm workers employed on small farms (i.e., those that used less than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year)
  - Casual babysitters and persons employed as companions to the elderly or infirm
- Other employees are exempt only from overtime pay requirements
  - Examples: Auto, truck, trailer, farm implement, boat, or aircraft salespersons
- Other employees are partially exempt from overtime pay requirements
  - Examples: Employees of hospitals and residential care establishments with special agreements

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## EXEMPTIONS - Special Examples

- Pharmaceutical Sales Representatives (PSRs)
  - *Christopher v. Smithkline Beecham Corp., dba GlaxoSmithKline (2012) 2012 U.S. LEXIS 4657.*
    - exempt from overtime laws despite the fact that they do not technically “make sales” because PSRs qualify under the outside sales exemption
    - relied heavily on the fact that the pharmaceutical industry is subject to extensive federal regulations , preventing PSRs from selling
      - PSRs try to persuade physicians to write prescriptions for their employer’s products (detailing)
    - “sales” require a “functional, rather than a formal, inquiry that views an employee’s responsibilities in the context of the particular industry in which the employee works.”
  - What does this mean for employers?
    - Victory
    - can continue their current practice of classifying PSRs as exempt and compensating them on a commission basis

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## EXEMPTIONS - Special Examples - Mortgage Bankers, Exempt?

- First “Administrator’s opinion” issued March 24, 2010 reversed prior DOL opinion letter stating that mortgage loan officers qualify for the administrative exemption under the FLSA.
- Issue – Primary duty test: Is work directly related to management and general business operations of the employer or employer’s customers?
- Because customers were individuals, did not have “business operations,” and therefore primary duty was sales.



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## EXEMPTIONS - Special Examples Mortgage Bankers, Court Ratification

- On June 6, 2012 the U.S. District Court for the Central District of Columbia held that mortgage loan officers, based on their typical duties, do not qualify for the administrative exemption from overtime pay under the FLSA. *Mortgage Bankers Association v. Solis*, 2012 U.S. Dist. LEXIS 70270 (D.D.C. 2012)

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## EXEMPTIONS - Special Examples

- Registered Representatives  
*In re RBC Dain Rauscher Overtime Litigation* (2010 D.C. Minn.) 703 F. Supp. 2d 910.
- The court confirmed that the non-sales-related activities of registered reps are exempt duties under the administrative exemption.
- However, the court denied RBC's motion for summary judgment for a variety of reasons. In one instance the court contended that it could not grant summary judgment, because the plaintiff's clients were all individuals, not institutions. Relying on the recently issued mortgage banker opinion, the court claimed that because individuals acting in their personal capacities don't have "management or general business operations," the advisor could not be engaged in duties "directly related to the management or general business operations of their . . . employer's customers" and therefore, the plaintiff might not be exempt.
- Contradicts prior Opinion Letter issued in 2006




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## Fair Labor Standards Act (FLSA)

- It is important for employer's to comply with the FLSA, as even small violations can add up in the aggregate.



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## FLSA Liability

- Violations of the FLSA may result in:
  - Liability for up to 2 years of unpaid back wages due
  - Liquidated damages in an amount equal to the amount of back wages due
  - Attorneys' fees and costs
  - For willful violations, back wages and liquidated damages for a 3-year period

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## Equal Pay Act of 1963

- Amendment to the FLSA
- *Gender and wage and hour* components which require that female employees performing substantially similar job functions receive equal remuneration along side their male counterparts.

“No employer having employees subject to any provisions of this section [section 206 of title 29 of the United States Code] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs[,] the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex [ . . . . ]”

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## Tipping

- Tip Credit
  - Employer may pay an hourly rate below federal minimum wage.
  - Hourly rate + tips = at least minimum wage
  - Difference between the employees wage and minimum wage is known as a tip credit.
  - Federal law currently allows an hourly wage as low as \$2.13/hour, allowing a maximum tip credit of 5.12/hour.
  - State laws may not permit the use of the tip credit or less of a tip credit, requiring a higher hourly wage. For example, Nevada does not permit the use of the tip credit

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## Tipping

- Tip Pools
  - Employers may require employees to participate in a tip pool or sharing arrangement, **so long as** the only participants are employees who regularly receive tips.
    - Excludes:
      - Managers
      - Dishwashers
      - Cooks
      - Chefs

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## Tipping

- Other Considerations/Problems
  - Tip Compliance Agreements: Agreement with the IRS to educated employees and report all tips. The IRS will not examine the participant's tip income while the agreement is in effect.
  - Time and Payroll Systems must support the payroll processing of the tip credit, tip pool or compliance agreements.
  - If actual tips fall below the credit, the employee's rate must be adjusted to meet the minimum wage.

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## Tipping

- Other Considerations/Problems
  - Credit Cards:
    - If the tip is charged, the employer may pay the employee the tip less the percentage that the employer pays the credit card company to process the tip.
    - The processing charge that is passed on to the employee may not reduce the wage below minimum wage.
    - The processing charge may not exceed the amount actually charged by the credit card company.
    - The charged tip must be paid to the employee no later than the regular pay day. The employer cannot wait until it receives payment from the credit card company.

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## Tipping

- Other Considerations/Problems
  - Deductions for walk-outs, breakage, or shortages (if permitted in your state) may not be made if the effect is to reduce the employee's wages below the minimum wage.
  - Overtime must be calculated using the full minimum wage, not inclusive of the tip credit.
  - Employer must inform each tipped employee about the tip credit allowance (including amount to be credited) before the credit is utilized.

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## Tipping


- Other Considerations/Problems
  - Dual Jobs:
    - Tip credit only permitted for the hours spent in the tipped occupation.
    - Time spent in duties related to the tipped occupation is permitted, provided that the duties are incidental to the regular duties and are generally assigned to such occupations.
    - No clear standard exists to determine what duties are outside of a tipped occupation.

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## Tipping

- Other Considerations/Problems
  - Dual Jobs:
    - DOL 1988 Handbook added a 20% limitation, whereby a tipped employee cannot spend more than 20% of their time performing general preparation work or maintenance.
    - Jan/March 2009 Opinion letter disavowed the 20% rule. This Opinion letter was then withdrawn.
    - DOL Fact Sheet #15 issued providing that an employee cannot spend in excess of 20% of the workweek performing related duties.
    - Plaintiff attorneys argue that the damages for exceeding the "20%" limit is that the tip credit is no longer available for that work week.
    - Creates a nightmare for an employer to track time between tip-producing and non-tip-producing activities.




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## Tipping Cases

- These class actions generally combine claims under state and federal law.
  - FLSA requires that plaintiffs opt in.
  - Most states include plaintiffs unless they opt out.








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## Tipping Cases

- *Fast v. Applebee's Int'l, Inc.*, 2011 U.S. App. LEXIS 8178 (8th Cir. Apr. 21, 2011) (affirming district court's summary judgment ruling)
- *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010) (employer can have non-tipped employees in tip pool if no tip credit taken)
- DOL's FLSA Final Rule issued on April 5, 2011 (rejects *Cumbie*)


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## Wal-Mart Stores, Inc. v. Dukes

- How Does Dukes Impact Wage and hour Class Actions


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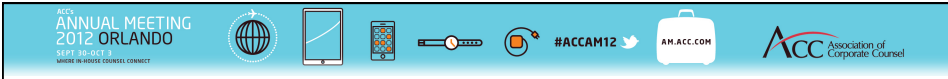


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## Offers of Judgment

- *Avila v. Watts Electric Co, Inc.*: the employer made offers of judgment to both employees, which included the total amount of wages owed and reasonable attorney's fees and costs to be determined by the court. Each plaintiff rejected the offer of judgment. Defendant filed a Rule 68 motion to dismiss for lack of subject matter jurisdiction, arguing that the failure to accept the offer of judgment deprived that court of jurisdiction and rendered the case moot. The court agreed and dismissed the matter.



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## Offers of Judgment

- *Genesis HealthCare Corp. v. Symczyk*: The U. S. Supreme court has agreed to decide whether a collective action file under the FLSA is rendered moot of the defense make an offer of judgment in the full amount of the representative plaintiff's individual claim.