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511 Federal and State Wage and Hour Issues

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Faculty Biographies

Megan Belcher

Megan Belcher is senior counsel for ConAgra Foods, Inc., a Fortune 500 Consumer Package Goods company, in Omaha, NE. In her position, Ms. Belcher handles the labor and employment matters for the company, which includes managing employment litigation nationally and internationally, and provides day-to-day legal counsel to the company's human resources and operations functions.

Prior to joining ConAgra, Ms. Belcher practiced in the labor and employment department at Husch Blackwell Sanders LLP in its Kansas City, MO office, where she focused her litigation practice on the defense of corporate clients in their labor and employment matters.

Ms. Belcher received a BA with honors from the University of Missouri, and is a graduate of Boston College Law School. Ms. Belcher also holds a Certificate in Human Resources Studies from Cornell University's School of Industrial and Labor Relations, and is certified as a Senior Professional in Human Resources by the Society for Human Resources Management.

Nicky Jatana

Nicky Jatana is a partner with Jackson Lewis LLP in their Los Angeles office. Ms. Jatana's 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. Ms. Jatana has litigated numerous wage and hour class and multi-plaintiff actions and has trial experience. Her experience includes handling employment matters from both in-house counsel and outside counsel perspectives.

Prior to joining Jackson Lewis LLP, Ms. Jatana practiced employment law at the law firms of Porter, Scott, Weiberg & Delehant and McGuireWoods LLP.

Ms. Jatana 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.

Ms. Jatana received a BA from Rutgers College and is a graduate of the University of the Pacific, McGeorge School of Law in Sacramento, CA.

Nicole Theophilus

Nicole Theophilus is the chief employment counsel for ConAgra Foods, Inc. in Omaha, NE. In her position, Ms. Theophilus handles the labor, employment, and benefits work for the company, which includes managing employment litigation nationally and internationally.

Prior to joining ConAgra Foods, Ms. Theophilus practiced law as a partner with Husch Blackwell Sanders LLP both in Kansas City, MO, and in Omaha, NE.

Ms. Theophilus received her BA cum laude from Drake University and is a graduate with distinction from the University of Nebraska College of Law.

Federal and State Wage and Hour Issues: What's New, What To Look Out For And What You Can Do To Minimize Exposure

What We Are Covering Today

- Current litigation trends
- Areas of primary risk
- Best practices to assist in removing or reducing risk of non-compliance
- Concerns and/or questions

Why Are We Here?

- Employers more frequently are being confronted with collective actions under federal and/or state laws
- Employees are seeking alleged unpaid wages/ overtime pay
- Under state laws, employees may also seek penalties
- FLSA collective/class action lawsuits exceed the total actions filed under the other employment laws combined
- The federal wage and hour division estimates that 72% of employers violate the FLSA in some substantive manner

Wage and Hour Trends and Updates

Misclassification, Meal & Rest Breaks, Hours of Work, Tipping and Preemption

What are the problem causers showing up on the trend line?

Leading trend setters include:

- Challenges to exempt status: misclassification, state law differences and issues relating to joint employment or independent contractors
- Compensable hours of work: have multiple time systems helped or sustained the problem?
- Compensation for overtime pay or, what is the "regular rate" and what's included in it?
- Off-the-clock work

Exempt vs. Non-Exempt Status

- "Exempt" employees are those exempt from wage-hour requirements, including OT
- FLSA:
  - Bona fide executive, administrative, or professional employees are exempt
  - Salary "Basis" Requirement: Under 2004 regulations, employees must be paid at least $455/ week
  - Primary Duty Requirement: Employee's primary duty must be management of the enterprise or a subdivision thereof
  - Subordinates Requirement: Employee must regularly and customarily direct the work of two or more other employees within that enterprise or subdivision thereof

Hours of Work

- Compensable Working Times Under the FLSA includes:
  - Idle or stand-by time controlled or requested by the employer;
  - Time spent by an employee outside of normal hours "required, suffered or permitted to work"
  - Work performed for employer away from the premises or on the job site; and
  - Off-duty or on-call time if employee cannot use time effectively for own purposes

Meal & Rest Periods

- The FLSA does not require employers to provide any meal or rest periods
- In California, however, employers need only provide meal and rest periods
  - *Brinker Rest. Corp. v. Sup. Ct.* (Cal.Ct.App. (San Diego) July 22, 2008): California employers need only provide, not enforce, meal and rest breaks
- *Braun v. Wal-Mart, Inc.* (Minn. Dakota County, June 30, 2008): Court found that employer violated the Minnesota Fair Labor Standards Act by failing to maintain accurate time records, requiring employees to work "off the clock" and denying employees adequate meal and rest periods. Court awarded $6.5 million.

DOL Opinion Provides Guidance

- Opinion Issued May 15, 2008
- Clarified compensable work time under the FLSA regarding meal breaks, straight time and overtime
- If an employee fails to take a 30-minute unpaid meal break and the failure to take a meal break does not cause the employee to work more than 40 hours in the workweek, no additional compensation is due to the employee if the employee's total wages for the workweek divided by the compensable hours worked equal or exceed the applicable minimum wage.

DOL Opinion Provides Guidance

- If an employee fails to take a 30-minute unpaid meal break and the employee *does* work more than 40 hours in the workweek, the 30-minute unpaid meal break must be counted for purposes of determining overtime compensation. An employee must be paid all straight-time wages due for all hours worked before an employee can be said to be paid statutory overtime compensation due.
- If an employee who is regularly scheduled to work 35 hours per week works before the employee's scheduled start time or after the employee's scheduled end time and the employee's total hours are less than 40 hours per workweek, the employee is not due additional straight time compensation if the employee's total wages for the workweek divided by the compensable hours worked equal or exceed the applicable minimum wage.

Hours of Work

- Donning and doffing (*Alvarez v. IBP*)
  - Supreme Court's definition of the "continuous work day"
  - Might this impact industries other than only slaughter houses or meat packing plants?
- Off-the-clock time
  - Anything done preliminary to starting work?
  - Employees doing work at home then traveling?
- *Singh v. City of New York* (2d Cir. April 29, 2008): Carrying and safeguarding files while commuting does not require FLSA pay, despite documents slowing employees down

DOL Opinion Provides Guidance

- If an employee receives certain types of premium pay that are not otherwise legally required, that pay need not be included in the employer's regular rate of pay for purposes of computing overtime compensation. Also, certain types of premium pay must be credited toward the employee's overtime compensation requirements.
- Rounding of time is allowed so long as the employer does not arbitrarily fail to count an employee's fixed or regular working time. Rounding to the nearest five minutes, one-tenth, or one-quarter of an hour is acceptable if, in the aggregate, the employer compensates employees properly for all the time they have worked.

Tips and Tip-Pooling

- Tipped employees are those who customarily and regularly receive more than $30/month in tips.
- Tips actually received by tipped employees may be counted as wages for purposes of the FLSA, but the employer must pay not less than $2.13/hr in direct wages.
- To use a tip credit, employers must inform employees and ensure that they receive the minimum wage.
- All tips earned are the property of the employee, *not* the employer. However, valid tip pooling arrangements are permissible.
- Managers, dishwashers, cooks, chefs and janitors may not participate in tip pooling arrangements.

Tips and Tip-Pooling

- In California, tips on credit cards may not be reduced to pay the credit card company's servicing fees.
- **Recent *Starbucks* Decision**:
  - CA San Diego Superior Court found that shift-supervisors cannot share in the tips from the tip pool and awarded baristas $86,687,926 plus interest! (That's a $105 Million "Tip")

Tips and Tip-Pooling: Proposed Regulations

- Proposed rule changes incorporate 1974 amendments to 29 U.S.C. §203, legislative history, subsequent court decisions, and the Department's interpretations (July 28, 2008)
- Basically clarifies §3(m) of the FLSA defining wages, permitting "tip credits" and "tip pooling."
- Eliminates references to employment agreements providing that either tips are the property of the employer or that employees will turn tips over to their employers.

Tips and Tip-Pooling: Proposed Regulations

- Proposed rule deletes the provision permitting employees to petition the Wage and Hour Administrator for tip credit review.
- Proposed rule confirms that 3(m) of the FLSA does not impose a maximum tip pool contribution percentage. However, the employer must inform each employee of the required tip pool contribution, and an employee's participation in a tip pool cannot bring the employee's wages below minimum wage.

Overtime

- Overtime = time-and-one-half an employee's regular rate of pay for all hours worked in excess of forty (40) hours in a workweek.
- *Chao v. Gotham Registry, Inc.* (2d Cir. Jan. 24, 2008): Employer had to pay employee one-and-a-half times the regular rate of pay as compensation to employees who performed overtime work even though the work was not authorized and was in violation of company policy. Overtime work that an employer has prohibited and does not desire is still subject to the FLSA.

Class Actions

- "Similarly Situated" Employees
- Opt-In Class
- Class Notice
- No Preclusive Effect on Non-Participants– Multiple Collective Actions
- Since 2000, approximately 5,000 wage and hour class actions have been filed in California alone. Many employers have had multiple suits by several, and sometimes the same, lawyers.

FLSA Preempts Duplicative State Law Claims

- 4th Circuit (*Anderson v. Sara Lee Corp.*): Court rejected an employee's attempt to invoke North Carolina state laws to obtain relief that is only available under the FLSA. State claims were preempted by federal law because the state claims required the same proof as claims asserted under the FLSA.
- Circuit Courts are split on this issue.

Pending Legislation: Paycheck Fairness Act

- On July 31, 2008, the House of Representatives passed the Paycheck Fairness Act and this law could be enacted in 2009.
- If enacted, the legislation would significantly alter key provisions of the Equal Pay Act of 1963 ("EPA"), which amended the FLSA to "prohibit discrimination on account of sex in the payment of wages by employers."
  - Make it more difficult for employers to prevail on the EPA's "any factor other than sex" defense.
  - Make punitive and compensatory damages available without requiring proof of discriminatory intent.
  - Make it easier for plaintiffs to bring class action lawsuits.
  - Expand the definition of "same establishment."
  - Protect employees who share salary information from retaliation.
  - Impose additional obligations on the Equal Employment Opportunity Commission ("EEOC") and Department of Labor for monitoring and remedying pay inequality.

Wage and Hour Traps

The Most Common Ways Companies Violate Wage and Hour Law

Incorrect Use of "Comp Time" for Non-Exempt Employees

- Private employers generally may not provide non-exempt workers with "comp time" in lieu of overtime unless:
  - "Comp time" is taken during the same pay period in which it is accrued; and
  - Employee receives one-and-a-half hours of "comp time" for each hour of overtime

Incorrect Rounding of Employee Work Time

- Time clocks are not mandatory
- Employer may record starting and stopping times to the nearest:
  - Five Minutes;
  - One-tenth of an hour;
  - Quarter of an hour.
- Employer must round up and down uniformly. Employer cannot always "round down."

Incorrect Treatment of Breaks and Meal Periods

- Rest Periods
  - Not required by FLSA
  - Rest periods/coffee breaks from 5 to 20 minutes are compensable working time
- Meal Periods
  - Not required by FLSA but may be required by state law!
  - Meal periods are non-working time if:
    - They are at least 30 minutes long; and
    - Employee is completely relieved of duties

Insufficient Recordkeeping

- Employers are obligated to maintain detailed payroll records
  - The statue of limitations for FLSA claims is 2 years, 3 years if the violation is "willful"
  - States may be different…for example:
    - New York Labor law has a 6 year statute of limitations
    - California Labor law has a 3 year status of limitations

Insufficient Recordkeeping

- Employers must maintain the following information for all exempt and non-exempt employees:
  - Name and Address
  - Date of Birth (if 18 years or younger)
  - Sex and Occupation
  - Total Weekly Earnings
  - Dates of Wage Payments
  - Dates of Pay Periods
  - Deductions or Additions to Pay
  - Wage Basis, i.e. hourly or salary
- Some states have very specific requirements

Insufficient Recordkeeping

- Employers must also maintain the following additional information for all non-exempt employees:
  - Regular Hourly Rate
  - Total Hours Worked Per Day
  - Total Hours Worked Per Week
  - Straight Time Earnings for the First 40 Hours Per Week
  - Payments Excluded from the Regular Rate of Pay
  - Weekly Overtime Payments
- Some states have very specific requirements

Miscalculating the "Regular Rate" of Pay

- Overtime pay is computed on the basis of an employee's "regular rate" (not limited to "hourly rate") of pay
- May change depending on how employees are paid (hourly, salary, piecework) and if employees are paid bonuses or commissions
- If an employee receives other types of compensation in addition to his hourly rate, some of these payments must be included in the regular hourly rate…

Miscalculating the "Regular Rate" of Pay

Payments which must be included:

- Awards, prizes, bonuses or incentives for quality, quantity or efficiency;
- Bonuses based on hours worked;
- Commission Payments;
- Reasonable cost of employer provided lodgings, meals and other facilities furnished to employees;
- Shift Differentials and "dirty" work premiums; and
- Lump sum on-call payments.

Payments which DO NOT need to be included:

- Suggestion Plan Awards;
- Discretionary Bonuses;
- Employee Referral Bonus;
- Employee Benefit Plan Contributions;
- Paid Leave From Work;
- Expense Reimbursements;
- Premium Payments for work on weekends, holidays or night **if** the premium is paid at a rate one-and-a-half times the regular rate paid for work during other hours; and
- Gifts.

Always Check State Law!

Compliance with Wage and Hour Laws

What Employers Should Do

- Review pay practices for non-exempt employees to ensure they are paid for all hours worked
- Implement clear policies requiring employees to record all work time and providing meal and rest breaks
- Self-audit to detect common violations

What Employers Should Do

- Build "Good Faith" Defense to FLSA Claims:
  - Sound Policies
  - Reporting mechanism for alleged violations
  - Review and certification of payroll records
  - Safe Harbor Policy
  - Audit for Compliance

Why Internal Audits?

- Our experience tells us that most wage-hour type issues can be detected in a comprehensive audit
- Part of an on-going educational process
  - People come and go but problems stay
  - The law and legal landscape are constantly in motion
- Consider, for example, ability to update job descriptions as part of annual evaluation process
- Look to ensure they are meeting expectations

Solutions Do Exist!

- Audit positions with a realistic approach
  - Exempt in fact or historic/industry view?
  - What deductions are made from salaries?
  - Can you really defend exempt status? How?
  - Inquire as to which exemption to defend
  - Look at rules for each and every state with "exempt" staff
  - Check for minors:
    - Most common issue –exceeding hours rules

Minimizing Liability

- **Potential Misclassification Issues –Managers**
  - As part of the resolution of prior class actions, companies have reclassified its assistant managers from exempt to non-exempt if job duties are not primarily exempt
  - Ensure that employees' primary duties are exempt work
  - Which exemption is appropriate: Executive Exemption, Professional Exemption or Administrative Exemption?
  - Job titles are IRRELEVANT!

Minimizing Liability

- **Meal and Rest Breaks**
  - This requires operational compliance at employment sites. Ensure that written policies and procedures cover this issue in detail. Also, all managers should receive training and retraining on the meal and rest break rules.
  - Consider adding additional measures to ensure compliance:
    - Implement state-wide measures to pay penalty for missed meal periods
    - Modification of shift scheduling system so all shifts greater than 5 hours will need to have meal periods starting no later than four hours and 45 min. into the shift

FEDERAL AND STATE WAGE AND HOUR ISSUES RECENT DEVELOPMENTS

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- **Pending Legislation: Paycheck Fairness Act (H.R. 1338)**

On July 31, 2008, the House of Representatives passed the Paycheck Fairness Act by a vote of 247-178, largely divided by party lines with Democrats supporting the bill. The law may not be enacted this year, but could be in 2009. If enacted, the legislation would significantly alter key provisions of the Equal Pay Act of 1963 ("EPA"), which amended the FLSA to "prohibit discrimination on account of sex in the payment of wages by employers."

The Paycheck Fairness Act calls for stricter enforcement provisions than those available under the EPA, as well as heightened government involvement in remedying pay inequality. If enacted, the legislation would:

- Make it more difficult for employers to prevail on the EPA's "any factor other than sex" defense. Under the proposed legislation, employers would have to demonstrate that any pay differential is based on a "bona fide factor other than sex, such as education, training, or experience" *and*, among other requirements, is "consistent with business necessity." The defense would be inapplicable if the plaintiff demonstrates that "an alternative employment practice exists that would serve the same business purpose."
- Make punitive and compensatory damages available without requiring proof of discriminatory intent. Unlike Title VII of the Civil Rights Act of 1964, the EPA does not require plaintiffs to prove that pay inequality resulted from intentional discrimination. Whereas the EPA provides for equitable relief, such as back pay awards, employers could be faced with punitive damages without any showing of intentional discrimination under the proposed amendments. [The OMB's Statement of Administration Policy takes issue with the punitive damages provision, stating: "To permit punitive damages in the absence of intent or reckless indifference would be wrong." Further, according to the OMB, changing the affirmative defense standard to require proof of business necessity would put a "tremendous burden on employers."]
- Make it easier for plaintiffs to bring class action lawsuits. The Paycheck Fairness Act would specifically allow for "opt-out" class actions under Rule 23 of the Federal Rules of Civil Procedure. The EPA, on the other hand, is governed by the FLSA's procedural rules, which require plaintiffs to "opt-in" to a class action by giving consent in writing. The distinction between the two provisions is important, as class size is likely to be much larger with an opt-out certification where employees need not affirmatively decide to join the case.
- Expand the definition of "same establishment." The proposed legislation would define "establishment" to mean "workplaces located in the same county or similar political subdivision of a State."
- Protect employees who share salary information from retaliation. Although the National Labor Relations Act already protects employees who share salary information with co-workers, the Paycheck Fairness Act would provide broader protection. For example, it could be permissible under the legislation for employees to share wage information regarding all employees.
- Impose additional obligations on the Equal Employment Opportunity Commission ("EEOC") and Department of Labor for monitoring and remedying pay inequality. The Paycheck Fairness Act would direct the EEOC to provide employee training regarding pay discrimination and authorize the Secretary of Labor to establish programs to help women improve their negotiation skills. The bill would also direct the EEOC to collect pay information from employers and impose obligations on the Office of Federal Contract Compliance Programs for performing compensation discrimination analyses.

- **Fourth Circuit Rules that FLSA Preempts Duplicative State Law Claims**

Anderson, et al. v. Sara Lee Corp., et al. No. 05-1091, 508 F.3d 181, (4th Cir. November 19, 2007)

Ruling that an employee cannot circumvent the FLSA by pleading causes of action under state common law, the U.S. Fourth Circuit Court of Appeals in Richmond rejected an attempt to invoke North Carolina state laws to obtain relief that is only available under the FLSA. The Court affirmed a district court's dismissal of 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 North Carolina bakery. In their 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, pled 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 in the Eastern District of North Carolina.

The plaintiffs' claims focused on the company's "Dress and Undress Rule." They claimed that the "Dress and Undress Rule" required employees to spend time "donning and doffing" uniforms and/or protective gear, time for which they were not compensated. The Court affirmed the District Court's dismissal of the plaintiffs' conversion and unfair trade practices claims and further determined that the district court should have dismissed the contract, negligence and fraud claims as 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.

The Circuit Courts are split on the issue of preemption of state law claims by the FLSA.

- **Second Circuit Says Company Policy Restricting Overtime Does Not Trump Compensation Obligations**

Chao v. Gotham Registry, Inc., No. 06-2432-cv, 514 F.3d 280 (2d Cir. Jan. 24, 2008)

The Second Circuit held that the nurse staffing agency Gotham had to pay employees one-and-a-half times the regular rate of pay as compensation to employees who performed overtime work even though the work was not authorized and was in violation of company policy. Gotham matches nurses with hospitals and claimed that it had little to do with the employment relationship, other than to pay the nurses from the compensation it receives from the hospitals. Prior to 1992, hospitals paid Gotham straight-time wages for the nurses' overtime hours. Gotham, accordingly, did not pay the nurses overtime compensation. This ended in 1994 when Gotham entered into a consent decree with the Secretary of Labor, agreeing to pay appropriate overtime compensation. The arrangement was unprofitable for Gotham though as the hospitals continued to only pay straight time wages for all hours.

So, Gotham printed a disclaimer on nurses' timesheets, saying "You must notify Gotham in advance and receive authorization from Gotham for any shift or partial shift that will bring your total hours to more than 40 hours in any given week. If you fail to do so, you will not be paid overtime rates

for those hours." Many nurses did not seek pre-authorization for overtime, but Gotham tried to negotiate larger fees with the hospitals to compensate nurses who worked overtime. If they were successful, Gotham passed on the overtime premiums to the nurses, but 90 percent of the hospitals did not agree to the higher rate.

The Secretary of Labor disapproved of Gotham's new practice and filed a petition in federal district court in New York to hold Gotham in civil contempt of the 1994 consent order. The district court, finding that the unapproved hours were not "work" under the FLSA, refused the petition. The Secretary of Labor then appealed to the 2nd Circuit.

The Second Circuit found that overtime work that an employer has prohibited and does not desire is subject to the FLSA. The Court was persuaded by a DOL regulation and the approach taken by the Tenth and Eleventh Circuits, the Court agreed that Gotham did not do enough to prevent overtime work. It could have disciplined nurses who violated company policy or just refused to pay the nurses altogether for any time over 40 hours. The Court rejected the Ninth Circuit ruling that employers need not pay overtime rates when employees know that overtime work is not expected, are not pressured to work overtime, and can complete their work during normal working hours. Although the Court found that Gotham was required to pay overtime wage premiums even when company policy restricted overtime work, it did not find Gotham in civil contempt. The Court explained that the question of whether an employer must pay overtime to employees who perform work for an employer who has "prohibited and does not desire, was not the subject of an obvious answer." Given the circuit conflict on this issue, the Supreme Court may be called upon to settle this issue in the future.

- **Immigrant Workers' Fear of Retaliation Cited for Federal Court's Approving State Law Wage and Hour Class Action**

Guzman v. VLM, Inc., d/b/a Reliable Bakery, et al., No. 07-cv-1126, 2008 LEXIS 15821, (E.D.N.Y. March 2, 2008)

The District Court certified a class action under FRCP 23 for immigrant bakery worker plaintiffs to pursue their claims for unpaid overtime under New York's Labor Law. The plaintiffs, bakery workers, sued their employer and its president claiming that they regularly worked over 40 hours per week, but did not receive overtime pay in violation of the FLSA and New York Labor Law.

The Court determined that the class action was necessary to protect the immigrant plaintiffs from retaliation for participating in a collective action under the FLSA, which requires that participants affirmatively "opt in" to a lawsuit. The Court noted that while it had certified a collective FLSA action in October 2007, only four out of the estimated 133 to 250 workers had opted into the collective action. The Court stated that "the FLSA's opt-in procedure is simply not an equivalent stand-in for a class action in this case." It noted that Second Circuit precedent permitted federal and state law class actions to proceed simultaneously.

This decision seeks to address a concern of wage-hour class action participants that may be especially acute in the case of immigrant workers – that they will suffer retaliation – in a unique way. The protection of passivity afforded by the solution, however, is not complete. At some point, the workers will need to participate actively in the case, either in discovery or a trial, either of which could raise the specter of job loss in the minds of these workers.

- **California Court Orders $105 Million "Tip" to Starbucks Baristas**

Chou v. Starbucks Corp., No. GIC836925 (Cal. Super. Court, March 19, 2008)

A San Diego, California Superior Court Judge found that Starbucks unlawfully allowed shift supervisors to share in a portion of tips left in jars and entered judgment in a class action against the company in the amount of $86.7 Million plus interest, which plaintiffs' attorneys estimate at $105 Million for a class of approximately 100,000. The Court also entered an injunction against the company prohibiting shift supervisors from sharing in any tip pool.

The lawsuit, filed by a college student who worked at a Starbucks from 2003 to 2004, focused on an interpretation of California's Labor Code regarding the payment of tips to employees and the practice of tip pooling. Section 351 of the Labor Code provides, in relevant part, "No employer or agent shall collect, take, or receive a gratuity or any part thereof that is paid, given to, or left for an employee by a

patron." Section 350 of the Labor Code defines "agent" as "every person other than the employee having the authority to hire or discharge any employee or supervise, direct of control the acts of the employees."

The California Court of Appeal and the DLSE have interpreted these provisions to allow for tip polling among workers in the "chain of service" provided that employers and agents who "hire or discharge any employee or supervise, direct, or control the acts of employees" do not share in the tips. The DLSE has provided examples of employees in the "chain of service:" waitpersons, bus persons, bartenders, hosts and hostesses, wine stewards and "front room" chefs in the restaurant industry. The DLSE has noted that its list is "by no means all inclusive." (DLSE Opinion Letter 2005.09.08).

At issue in the Starbucks case was whether the shift supervisors were "agents" prohibited by Section 351 from sharing in the tip pool. The shift supervisors were paid $1.50 to $2.65 per hour more than baristas. However, like baristas, shift supervisors had customer service responsibilities, such as making coffee, working the register, and serving customers. In addition, unlike baristas, shift supervisors were responsible for scheduling workers and directing work flow. Based on these additional responsibilities, the Court ruled that the shift supervisors were "agents" and not entitled to share in the tips.

The decision is perplexing given that the law's purpose which was to prevent bona fide managers who do not engage in customer service tip generating activity from taking tips from true customer service employees. In addition, Starbucks settled a costly misclassification class action earlier this decade when store managers and assistant managers claimed they were not true managers because of their extensive customer service duties. Starbucks has said it will appeal the decision.

See also, Department of Labor Proposed Regulations regarding Tip-Pooling attached hereto following page 18.

- **Second Circuit Says Carrying Files While Commuting Does Not Require FLSA Pay**

Singh v. City of New York, No. 06-2960-cv, 524 F.3d 361 (2d Cir. April 29, 2008)

The Second Circuit affirmed the District Court's grant of summary judgment for the employer in this FLSA action brought by fire alarm inspectors who claimed their commute times were extended because they had to carry and safeguard cumbersome inspection documents in briefcases provided by their employer. In particular, the inspectors commuting by bus and train and 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 Second Circuit found that "in the commuting context, we believe that the appropriate application of the predominant benefit test is whether an employer's restrictions hinder the employees' ability to use their commuting time as they otherwise would have had there been no work-related restrictions." The Court found that "the mere carrying of a briefcase without any other employment-related responsibilities does not transform the plaintiffs' entire commute into work" entitling the employees to compensation under the FLSA. 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.

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." The Court concluded that while its holding was based on the primary benefit test, its analysis was similar to a *de minimis* test. "When 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."

- **DOL Provides Guidance Regarding Hours Worked Under the FLSA**

In an **Opinion Letter dated May 15, 2008**, the U.S. Department of Labor clarified compensable work time under the FLSA in regard to meal breaks, straight time and overtime:

1. If an employee fails to take a 30-minute unpaid meal break and the failure to take a meal break does not cause the employee to work more than 40 hours in the workweek, no additional compensation is due to the employee if the employee's total wages for the workweek divided by the compensable hours worked equal or exceed the applicable minimum wage.
2. If an employee fails to take a 30-minute unpaid meal break and the employee *does* work more than 40 hours in the workweek, the 30-minute unpaid meal break must be counted for purposes of determining overtime compensation. An employee must be paid all straight-time wages due for all hours worked before an employee can be said to be paid statutory overtime compensation due.
3. If an employee who is regularly scheduled to work 35 hours per week works before the employee's scheduled start time or after the employee's scheduled end time and the employee's total hours are less than 40 hours per workweek, the employee is not due additional straight time compensation if the employee's total wages for the workweek divided by the compensable hours worked equal or exceed the applicable minimum wage.
4. If an employee receives certain types of premium pay that are not otherwise legally required, that pay need not be included in the employer's regular rate of pay for purposes of computing overtime compensation. Also, certain types of premium pay must be credited toward the employee's overtime compensation requirements.
5. Rounding of time is allowed so long as the employer does not arbitrarily fail to count an employee's fixed or regular working time. Rounding to the nearest five minutes, one-tenth, or one-quarter of an hour is acceptable if, in the aggregate, the employer compensates employees properly for all the time they have worked.

- **Employees Awarded Unprecedented $6.5 Million for Minnesota Wage and Hour Class Action**

  Braun v. Wal-Mart, Inc. No. 19-C0-01-9790 (Minn. Dakota County, June 30, 2008)

In this first of its kind class action ruling, the Minnesota district court found that the employer violated the Minnesota Fair Labor Standards Act ("MFLSA"), the Court determined that the employer failed to maintain accurate time records, required employees to work "off the clock" and denied employees adequate meal and rest periods in violation of Minnesota wage law. In its 151-page decision, the Court found that the employer's conduct was willful and awarded $6.5 Million in compensatory damages to the class of nearly 56,000 employees in Minnesota.

In determining whether the employer violated the MFLSA, the Court found that with respect to rest breaks for Minnesota employees, Wal-Mart failed to have its legal department and human resources division review and comply with the law. The Court also found that the employer's failure to make compliance with corporate and statutory requirements for meal and rest periods and off-the-clock work a meaningful factor in supervisor and management evaluations play a significant role in the number of violations. This contributed to the Court finding that the employer knew or should have known of the widespread problems.

While the employer has avoided the greater compensatory damage award plaintiffs sought ($25 Million), the Court has set the case for an October jury trial to decide what additional penalties and punitive damages should be awarded. The punitive damages portion of the trial is significant because the Court found over two million violations, and Minnesota law provides for a civil penalty up to $1,000 per violation, meaning a potential additional exposure of $2 Billion for the company. A Court trial regarding injunctive relief has also been set.

This decision followed the Minnesota Supreme Court's June 2008 decision in *Milner v. Farmers Ins. Exch.*, 748 N.W. 2d 608 (Minn. 2008) in which the state high court recognized a class action wage and hour claim brought under the MFLSA and clarified that the statute provides for a private right of action for civil penalties and injunctive relief.

- **California Employers Need Only Provide, Not Enforce, Meal and Rest Periods**

Brinker Rest. Corp. v. Superior Court (Hohnbaum), No. D049331, 2008 Cal.App. LEXIS 1138, (Cal. Ct. App. (San Diego) July 22, 2008)

The Fourth District Court of Appeal sitting in San Diego ruled that California employers need only provide meal and rest breaks, not ensure that the breaks are taken. The Court found that employers cannot be liable for off-the-clock work unless they knew or should have known employees were working off the clock. Finally, the Court vacated class certification as the issues involved individualized inquiries which could "only be decided on a case by case basis."

Brinker operates 137 restaurants in California and has written policies regarding meal and rest periods and against working off the clock. After the state Department of Labor Standards Enforcement ("DLSE") investigated allegations of the employer's failure to provide meal and rest period (which resulted in a settlement), several employees filed individual lawsuits alleging that Brinker failed to provide meal and rest periods and forced employees to work off of the clock. The individual plaintiffs sought to represent a class of 59,000 employees to recover unpaid overtime wages. In 2006, the trial court granted class certification. Brinker appealed.

Plaintiffs' counsel has stated that they will appeal the decision to the California Supreme Court. In the interim, however, the DLSE is enforcing the decision. In a memorandum dated July 25, 2008 from the state Labor Commissioner, Deputy Chief, and Chief Counsel to all DLSE staff, the DLSE has instructed its staff to "follow the rulings in the *Brinker* decision immediately and the decision shall be applied to pending matters."

- **Department of Labor Proposed Regulations Regarding Tip-Pooling**

  Section 7 Fair Labor Standards Act Amendments of 1974, subsection B:
  "Tipped Employees," July 28, 2008, attached hereto

  - Proposed rule changes incorporate 1974 amendments to 29 U.S.C. §203, legislative history, subsequent court decisions, and the Department's interpretations (July 28, 2008)
  - Basically clarifies §3(m) of the FLSA defining wages, permitting "tip credits" and "tip pooling."
  - Eliminates references to employment agreements providing that either tips are the property of the employer or that employees will turn tips over to their employers.
  - Proposed rule deletes the provision permitting employees to petition the Wage and Hour Administrator for tip credit review.
  - Proposed rule confirms that 3(m) of the FLSA does not impose a maximum tip pool contribution percentage. However, the employer must inform each employee of the required tip pool contribution, and an employee's participation in a tip pool cannot bring the employee's wages below minimum wage.

PART 122—REGISTRATION OF MANUFACTURERS AND EXPORTERS

1. The authority citation for part 122 continues to read as follows:

Authority: Secs. 2 and 38, Public Law 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); E.O. 11958, 42 FR 4311, 1977 Comp. p. 79, 22 U.S.C. 2651a.

2. Section 122.2 is amended by revising paragraph (a) to read as follows:

§ 122.2 Submission of registration statement.

(a) *General.* The Department of State Form DS–2032 (Statement of Registration) and the transmittal letter required by paragraph (b) of this section must be submitted by an intended registrant with a payment (by check or money order) payable to the Department of State of the fee prescribed in § 122.3(a) of this subchapter. Checks and money orders must be in U.S. currency, and checks must be payable through a U.S. financial institution. In addition, the Statement of Registration and transmittal letter must be signed by a senior officer who has been empowered by the intended registrant to sign such documents. The intended registrant also shall submit documentation that demonstrates that it is incorporated or otherwise authorized to do business in the United States. The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package. Registrants may not establish new entities for the purpose of reducing registration fees.

* * * * *

3. Section 122.3 is amended by revising paragraph (a) to read as follows:

§ 122.3 Registration fees.

(a) A person who is required to register must do so on an annual basis upon submission of a completed Form DS–2032, transmittal letter, and payment of a fee as follows:

(1) *Tier 1:* A set fee of $2,250 per year is required for new registrants or registrants who have not submitted any applications during a 12-month period ending 90 days prior to expiration of the current registration.

(2) *Tier 2:* A set fee of $2,750 per year is required for registrants who have submitted ten or fewer applications during a 12-month period ending 90 days prior to expiration of the current registration.

(3) *Tier 3:* The third tier is for registrants who have submitted more than ten applications during a 12-month period ending 90 days prior to expiration of the current registration. For this tier, registrants will pay a fee of $2,750 plus an additional fee based on the number of applications submitted. The additional fee will be determined by multiplying $250 times the number of applications over ten submitted during a 12-month period ending 90 days prior to expiration of the current registration.

(4) For universities and other registrants exempt from income taxation pursuant to 26 U.S.C. 501(c)(3), their fee may be reduced to the Tier 1 registration fee provided proof of such status is submitted with their registration package.

(5) The fee for registrants whose total registration fee is greater than 3% of the total value of applications submitted during the 12-month period ending 90 days prior to expiration of the current registration will be reduced to 3% of such total application value or $2,750, which ever is greater.

(6) For those renewing a registration, notice of the fee due for the next year's registration will be sent to the Senior Officer signing the previous DS2032 at least 60 days prior to its expiration date.

(7) For purposes of this subsection, "*applications*" refers to the actions enumerated within Sections 123 through 125 of the ITAR that require DDTC to review, adjudicate and issue responses to.

* * * * *

PART 129—REGISTRATION AND LICENSING OF BROKERS

4. The authority citation for part 129 continues to read as follows:

Authority: Sec. 38, Pub. L. 104–164, 110 Stat. 1437 (22 U.S.C. 2778).

5. Section 129.4 is amended by revising paragraph (a) to read as follows:

§ 129.4 Registration statement and fees.

(a) *General.* The Department of State Form DS–2032 (Statement of Registration) and the transmittal letter meeting the requirements of § 122.2(b) of this subchapter must be submitted by an intended registrant with a payment by check or money order payable to the Department of State of the fees prescribed in Section 122.3(a) of this subchapter. The Statement of Registration and transmittal letter must be signed by a senior officer who has been empowered by the intended registrant to sign such documents. The intended registrant shall also submit documentation that demonstrates that it is incorporated or otherwise authorized to do business in the United States. The requirement to submit a Department of State Form DS–2032 and to submit documentation demonstrating incorporation or authorization to do business in the United States does not exclude foreign persons from the requirement to register. Foreign persons who are required to register shall provide information that is substantially similar in content as that which a U.S. person would provide under this provision (e.g., foreign business license or similar authorization to do business). The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package with payment. Registrants may not establish new entities for the purpose of reducing registration fees.

* * * * *

Dated: July 3, 2008.

John C. Rood,

Acting Under Secretary for Arms Control, and International Security, Department of State.

[FR Doc. E8–17232 Filed 7–25–08; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 4, 531, 553, 778, 779, 780, 785, 786, and 790

RIN 1215–AB13

Updating Regulations Issued Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Employment Standards Administration, Department of Labor.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: In this proposed rule, the Department of Labor (Department or DOL) proposes to revise regulations issued pursuant to the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 (Portal Act) that have become out of date because of subsequent legislation or court decisions. These proposed revisions will conform the regulations to FLSA amendments passed in 1974, 1977, 1996, 1997, 1998, 1999, 2000, and 2007, and Portal Act amendments passed in 1996.

DATES: Comments must be received on or before September 11, 2008.

ADDRESSES: You may submit comments, identified by RIN 1215–AB13, by either one of the following methods:

- *Electronic comments, through the federal eRulemaking Portal: http://*

Based upon the court decisions, the Wage and Hour Division has adopted an enforcement position since 1987 that Wage and Hour "will no longer deny the [overtime] exemption for such employees," and that the regulation would be revised. *See* Wage and Hour Division Field Operations Handbook (FOH) section 24L04(k). Therefore, this proposed rule changes § 779.372(c), entitled "Salesman, partsman, or mechanic," to follow the courts' consistent holdings that employees performing the duties typical of service advisors are within the section 13(b)(10)(A) exemption. Section 779.372(c)(1) is revised to include such an employee as a salesman primarily engaged in servicing automobiles. Section 779.372(c)(4) is rewritten to clarify that such employees qualify for the exemption.

B. Tipped Employees

Section 3(m) of the FLSA defines the term "wage" and includes conditions for taking tip credits when making wage payments to qualifying tipped employees under the FLSA. The Department's tip credit regulations were promulgated in 1967, one year after hotels and restaurants were brought under the FLSA. Section 13(e) of the Fair Labor Standards Act Amendments of 1974 amended the last sentence of section 3(m) by providing that an employer could not take a tip credit unless:

(1) [its] employee has been informed by the employer of the provisions of this subsection and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Public Law No. 93–259, § 13(e), 88 Stat. 55.

Prior notice by the employer to employees of the employer's intent to avail itself of the tip credit is a statutory requirement pursuant to the 1974 amendments. Courts have disallowed the use of the tip credit for lack of notice even "where the employee has actually received and retained base wages and tips that together amply satisfy the minimum wage requirements," remarking that "[i]f the penalty for omitting notice appears harsh, it is also true that notice is not difficult for the employer to provide." *Reich* v. *Chez Robert, Inc.*, 28 F.3d 401, 404 (3d Cir. 1994) (citing *Martin* v. *Tango's Restaurant*, 969 F.2d 1319, 1323 (1st Cir. 1992)). Although written notice is frequently provided, it is not required to satisfy the employer's notice burden. *Compare Kilgore* v. *Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 299 (6th Cir. 1998) (written notice provided to all applicants as matter of course), *with Pellon* v. *Business Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1310–11 (S.D. Fla. 2007), *appeal docketed*, No. 08–10133 (11th Cir. Jan. 8, 2008) (Section 3(m)'s requirement was met through verbal notice that plaintiff would be paid $2.13 plus tips, combined with prominent display of FLSA poster explaining tip credit). Additionally, while employees must be "informed" of the employer's use of the tip credit, the employer need not "explain" the tip credit. *See Kilgore*, 160 F.3d at 298 ("[A]n employer must provide notice to the employees, but need not necessarily 'explain' the tip credit * * * '[I]nform' requires less from an employer than the word 'explain.'"); *cf. Bonham* v. *Copper Cellar Corp.*, 476 F. Supp. at 101 & n.6 ("vague references to conversations about the minimum wage" are insufficient to establish section 3(m) notice).

The second provision of the 1974 amendments to section 3(m) made it clear that tipped employees must receive at least the minimum wage and must generally retain any tips received by them as gratuities for services performed. An employer, however, can take advantage of a "tip credit" to offset a portion of its minimum wage obligation. Prior to the 1974 amendments, the compensation of tipped employees was often a matter of agreement. Tipped employees could agree, for example, that an employer was only obligated to pay cash wages when an employee's tips were less than the minimum wage, or that the employee's tips would be turned over to the employer, who could then use the tips to pay the minimum wage. *See Usery* v. *Emersons Ltd.*, 1976 WL 1668, *2 (E.D. Va. 1976), *vacated and remanded on other grounds sub. nom. Marshall* v. *Emersons Ltd.*, 593 F.2d 565 (4th Cir. 1979). The 1974 amendments to section 3(m) were intended to prohibit such agreements. *See* S. Rep. No. 93–690, at 43 (1974) ("The latter provision is added to make clear the original Congressional intent that an employer could not use the tips of a 'tipped employee' to satisfy more than 50 percent of the Act's applicable minimum wage."). The Department's current regulations, which were in effect prior to the 1974 amendments and allowed an employer to require employees to turn over all their tips to the employer, were therefore invalidated by the amendment to the extent that turning tips over to the employer effectively cuts into the minimum wage.

Under the 1974 amendments to section 3(m), an employer's ability to utilize an employee's tips to satisfy any portion of the employer's minimum wage obligation was limited to taking a credit against the employee's tips of up to 50 percent of that obligation. Section 3(m) provides the only method by which an employer may use tips received by an employee to satisfy the employer's minimum wage obligation. An employer's only options under section 3(m) are to take a credit against the employee's tips of up to the statutory differential, or to pay the entire minimum wage directly. *See* Wage and Hour Opinion Letter WH–536, 1989 WL 610348 (October 26, 1989) (defining when an employer does not claim a tip credit as when the employer does not retain any tips and pays the employee the minimum wage).

Thus, in a situation in which an employee earns $10 an hour in tips and the employer pays $2.13 an hour in cash wages and claims the statutory maximum as a tip credit, the employee has received only the minimum wage under section 3(m). (Under section 3(m), the "wage" of a tipped employee equals the sum of the cash wage paid by the employer and the amount it claimed as a tip credit.) The amount of tips the employee received in excess of the tip credit are not considered "wages" paid by the employer and any deductions from the employee's tips made by the employer would therefore result in a violation of the employer's minimum wage obligation. If, however, the employer paid the employee a direct wage in excess of the minimum wage—and thus did not claim a credit against any portion of the employee's tips—the employer would be able to make deductions so long as they did not reduce the direct wage payment below the minimum wage. *See* Wage and Hour Opinion Letter WH–536, 1989 WL 610348 (October 26, 1989). In such a situation, the deduction would be viewed as coming from the employer's wage payment that exceeds the minimum wage.

The proposed rule updates the regulations to incorporate the 1974 amendments, the legislative history, subsequent court decisions, and the Department's interpretations. Sections 531.52, 531.55(a), 531.55(b), and 531.59 eliminate references to employment agreements providing either that tips are the property of the employer or that employees will turn tips over to their employers, and clarify that the availability of the tip credit provided by section 3(m) requires that all tips

received must be paid out to tipped employees in accordance with the 1974 amendments. Section 531.55(a), which describes compulsory service charges, also is updated by changing the example of such a charge from 10 percent to 15 percent to reflect more current customary industry practices.

The 1974 amendments also clarified that section 3(m)'s statement that employees must retain their tips does not preclude the practice of tip pooling "among employees who customarily and regularly receive tips." 29 U.S.C. 203(m). The Department's regulation on the subject provides that "the amounts received and retained by each individual [through a tip pooling arrangement] as his own are counted as his tips for purposes of the Act." 29 CFR 531.54.

Wage and Hour interpreted the tip pooling clause more fully in opinion letters and in its FOH. The FOH provides, for example, that a tip pooling arrangement cannot require employees to contribute a greater percentage of their tips to the tip pool than is "customary and reasonable." FOH section 30d04(b). The agency expanded upon this position, in its opinion letters and in litigation, that "customary and reasonable" equates to 15 percent of an employee's tips or two percent of daily gross sales. *See, e.g.*, Wage and Hour Opinion Letter WH–468, 1978 WL 51429 (Sept. 5, 1978). Several courts have rejected the agency's maximum contribution percentages, however, "because neither the statute nor the regulations mention [the requirement stated in the agency interpretation] and the opinion letters do not explain the statutory source for the limitation that they create." *Kilgore* v. *Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 302–03 (6th Cir. 1998); *see Davis* v. *B&S, Inc.*, 38 F. Supp. 2d 707, 718 n.16 (N.D. Ind. 1998) (citing *Dole* v. *Continental Cuisine, Inc.*, 751 F. Supp. 799, 803 (E.D. Ark. 1990) ("The Court can find no statutory or regulatory authority for the Secretary's opinion [articulated in an opinion letter] that contributions in excess of 15% of tips or 2% of daily gross sales are excessive."')). Based on these court decisions and the unequivocal statutory language, the proposed rule updates § 531.54 to clarify that section 3(m) of the FLSA does not impose a maximum tip pool contribution percentage. However, the proposed rule states that the employer must inform each employee of the required tip pool contribution, and an employee's participation in a tip pool cannot bring the employee's wages below the minimum wage.

The 1974 amendments also revised another aspect of section 3(m). Prior to the 1974 amendments, section 3(m) of the FLSA provided that an employee could petition the Wage and Hour Administrator to review the tip credit claimed by an employer. *See* Public Law No. 89–601, 80 Stat. 830 (1966) ("[I]n the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased * * * the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount."). The 1974 amendments eliminated the review clause to clarify that the employer, not the employee, bears the ultimate burden of proving "the amount of tip credit, if any, [he] is entitled to claim." S. Rep. No. 93–690, at 43. Two outdated regulatory provisions promulgated in 1967, however, still purport to permit petitions to the Wage and Hour Administrator for tip credit review despite the fact that the statute no longer provides for this review. *See* 29 CFR 531.7, 531.59.

Consistent with the 1974 amendments, this proposed rule deletes section 531.7, which permits employees to petition the Wage and Hour Administrator for tip credit review. References to the Administrator's review in section 531.59 are also deleted, and the language is updated to reflect the burden on the employer to prove the amount of the tip credit to which it is entitled.

8. Fair Labor Standards Act Amendments of 1977

On November 1, 1977, Congress amended section 3(t) of the FLSA, 29 U.S.C. 203(t). Public Law No. 95–151, § 3(a), 91 Stat. 1245. Section 3(t) of the FLSA defines the phrase "tipped employee." Prior to the 1977 amendment, the definition encompassed "any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips." The 1977 amendment raised the threshold in section 3(t) to $30 a month in tips.

To reflect the 1977 amendment, this proposed rule changes the references in 29 CFR 531.50(b), 531.51, 531.56(a)–(e), 531.57, and 531.58 from $20 to $30.

9. Meal Credit Under Section 3(m)

The proposed rule further amends § 531.30 to incorporate Wage and Hour's longstanding enforcement position regarding the voluntary acceptance of meals. A "wage" paid pursuant to section 3(m) of the FLSA may include "the reasonable cost * * * to the employer of furnishing * * * board, lodging, or other facilities * * * customarily furnished by such employer to his employees." 29 U.S.C. 203(m). "Facilities" include employer-provided meals. *See* 29 CFR 531.32. The Department's regulation at 29 CFR 531.30, however, provides that an employer's ability to take credit for a facility is limited to those instances where an employee's acceptance was "voluntary and uncoerced." In other words, an employer could not take a wage credit for employees who did not choose to accept the meal.

After a number of courts rejected the agency's position on this point with regard to credit for meals, the agency adopted an enforcement position providing that an employer can take a meal credit even if an employee does not voluntarily accept the meal. *See* FOH section 30c09(b) ("WH no longer enforces the 'voluntary' provision with respect to meals."); *see also Davis Bros., Inc.* v. *Donovan*, 700 F.2d 1368, 1370 (11th Cir. 1983); *Donovan* v. *Miller Properties, Inc.*, 711 F.2d 49, 50 (5th Cir. 1983).

Thus, under the agency's current enforcement policy articulated in the FOH, an employer may require an employee to accept a meal provided by the employer as a condition of employment, and may take credit for the actual cost of that meal even if the employee's acceptance is not voluntary. The proposed rule amends 29 CFR 531.30 to reflect previous court decisions and the agency's current enforcement posture on meal credits.

10. Section 7(o) Compensatory Time Off

Section 7 of the FLSA requires that a covered employee receive compensation for hours worked in excess of 40 in a workweek at a rate not less than one and one-half times the regular rate of pay at which the employee is employed. 29 U.S.C. 207(a). In 1985, subsequent to the U.S. Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which held that the FLSA may be constitutionally applied to state and local governments, Congress added section 7(o), 29 U.S.C. 207(o), to the FLSA to permit public agencies to grant employees compensatory time off in lieu of cash overtime compensation pursuant to an agreement with employees or their representatives. The purpose of this exception to the Act's usual requirement of cash overtime pay was "to provide flexibility to state and local government employers and an