Chapter 1

Wage-and-Hour Issues

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§ 1:1 Introduction

Wage-and-hour collective and class actions present real and substantial risks to employers. Employers should therefore be aware that they will be forced to defend such actions, and should be prepared to respond. Staying updated regarding the changes in state and federal laws is the key to avoiding many wage-and-hour pitfalls. Employers should analyze the issues discussed in this chapter and then consider auditing their workplace practices to ensure compliance with both federal and state wage-and-hour laws and regulations. Although the auditing process may be burdensome, it will likely pay for itself by reducing the substantial risk that comes with wage-and-hour litigation.

Wage-and-hour litigation was in flux throughout 2017. Initially, the U.S. Supreme Court applied Rule 23 principles in arriving at its decision in *Tyson Foods, Inc. v. Bouaphakeo*,[1] although the impact of the decision in determining whether and under what circumstances a Rule 23 analysis is appropriate in the context of an FLSA collective action remain unclear. Further, the passing of Justice Antonin Scalia and subsequent appointment of Neil Gorsuch may

1. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016); *see infra* section 1:3.1[B].

alter the Court's labor and employment law jurisprudence in the years to come. Also, although the U.S. Department of Labor (DOL) was set to implement its overtime regulations on December 1, 2016, a federal district court in Texas issued a permanent injunction to prevent them from taking effect.[2] The fate of these rules is uncertain as President Trump's administration begins to define its enforcement priorities, and the DOL shifts toward what is anticipated to be a more business-friendly position on a multitude of wage-and-hour issues. In addition, the DOL in the latter half of 2017 rescinded administrative guidance liberally defining joint employment and guidance aimed at restricting employers' classification of workers as independent contractors.

At the state level, California's Fair Pay Act was amended to provide further worker protections, continuing to make it arguably the strongest equal pay protections in the country. In general, the law requires equal pay for substantially similar work and requires employers to articulate a greater justification for pay disparities based on gender, race, and ethnicity.[3] Further, the California Supreme Court clarified an employer's duty to provide "suitable seating" to employees in *Kilby v. CVS*.

In addition to the case law and statutory amendments, employers continue to grapple with the challenges that arise from hiring interns, properly classifying a diversified workforce, alternative work arrangement requests, and potential off-the-clock work issues, among others.

§ 1:2 The Legal Framework of Wage-and-Hour Laws

The federal Fair Labor Standards Act (FLSA)[4] and its corresponding regulations[5] set forth provisions and standards concerning minimum wages, equal pay, overtime pay, record keeping, and child labor. The FLSA also contains an anti-retaliation provision, which the U.S. Supreme Court has held covers employees that orally complain of federal wage-and-hour violations.[6] These basic requirements apply to

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2. Nevada v. U.S. Dep't of Labor, 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).
3. *See infra* section 1:2.17.
4. 29 U.S.C. § 201 *et seq*.
5. 29 C.F.R. § 510 *et seq*.
6. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011).

employees engaged in, or producing goods for, interstate commerce, and other employees designated by the statute, including employees of state and local governments, and foreign employees working in the United States on temporary guest worker visas.[7] The FLSA is administered by the DOL's Wage and Hour Division. Although the FLSA does not protect all employees, most employers are covered by the FLSA, and must comply with its requirements.

FLSA wage-and-hour disputes generally may not be settled privately without approval from either the DOL or a court.[8] However, in *Martin v. Spring Break '83 Products LLC*,[9] the Fifth Circuit approved a settlement agreement that resolved a bona fide dispute as to the number of hours worked and provided payment to the employees for those hours. In distinguishing the Eleventh Circuit's judgment in *Lynn's Food*, the Fifth Circuit noted that there was no evidence that the employees in *Lynn's Food* were aware of their rights under the FLSA or consulted an attorney, whereas the employees in *Martin* were represented by counsel in a pending action and were aware of their rights under the FLSA when they received and accepted payment pursuant to the settlement agreement.[10]

As with most states, New York and California have their own wage-and-hour laws. The New York Labor Law[11] contains few wage-and-hour protections in addition to those prescribed by the FLSA. The labor law, however, provides for enforcement by the New York State Department of Labor as well as private party litigation. The

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7. Castellanos-Contreras v. Decatur Hotels, LLC, 488 F. Supp. 2d 565 (E.D. La. 2007) (FLSA protection available to citizens and aliens alike, and whether the alien is documented or undocumented is irrelevant), *rev'd on other grounds*, 622 F.3d 393 (5th Cir. 2010).
8. *See* Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982) (refusing to enforce private settlement agreements negotiated by employer after unsuccessful attempts to negotiate settlement with DOL).
9. Martin v. Spring Break '83 Prods. LLC, 688 F.3d 247 (5th Cir.), *cert. denied*, 133 S. Ct. 795 (2012).
10. *Id.*, 688 F.3d at 256 n.10. *But see* Steele v. Staffmark Invs., LLC, 172 F. Supp. 3d 1024, 1028 (W.D. Tenn. 2016) (holding that parties' arguments against the necessity for court approval of an FLSA settlement could not surmount the strong "public policy that favors court approval" of such agreements); Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 528 (E.D. Pa. 2016) (rejecting the *Martin* standard in favor of ex ante judicial scrutiny of private FLSA settlements).
11. N.Y. LAB. LAW § 160 *et seq.*; 12 N.Y. COMP. CODES R. & REGS. pt. 125 *et seq.*

Division of Labor Standards of the New York State Department of Labor enforces New York's wage-and-hour laws.

The primary California counterpart to the FLSA is a series of wage orders promulgated pursuant to the California Labor Code by the Industrial Welfare Commission (IWC). Wage orders carry the force of law; employers who violate them are subject to civil and/or criminal penalties. Seventeen wage orders are presently in effect, establishing minimum wages and conditions of employment for employees in thirteen different industries, three groups of occupations, and "miscellaneous employees" not governed by the other sixteen wage orders. The Division of Labor Standards Enforcement (DLSE), headed by the California Labor Commissioner, is responsible for interpreting and enforcing California's wage-and-hour laws. The California Labor Code also contains many specific wage-and-hour rules.

Most employers are subject to both the federal and state wage-and-hour laws and must comply with *both* laws. When there is a conflict between state law and the FLSA, or the FLSA and another federal law, the law more favorable to the employee applies. Therefore, an employer subject to both the FLSA and state wage-and-hour laws may not ignore either one just because its wage-and-hour practices are exempt from, or in compliance with, the other. This is particularly important to remember in the context of the DOL's 2004 regulations refining the "white collar" exemptions to the FLSA's overtime mandates.[12] While the 2004 federal regulations may expand the ranks of employees who are overtime-exempt, more protective state law may continue to cover employees.

§ 1:2.1 Minimum Wage

[A] FLSA

The FLSA specifies the federal minimum wage provisions.[13] Effective July 24, 2009, the federal minimum wage is $7.25 per hour. Many states also have minimum wage laws, with some states providing greater employee protections. Various minimum wage exceptions apply under specific circumstances to workers with disabilities, full-time students, youth under the age of twenty in their first ninety consecutive calendar days of employment, tipped employees, and student-learners.

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12. *See infra* section 1:2.2[A][1].
13. 29 U.S.C. § 206(a)(1).

The Second and Third Circuits have held that the FLSA does not provide a basis to recover "gap-time" wages, meaning wages for hours under forty in a week that do not drop an employee's wages below minimum wage.[14] And under the Second Circuit's holding in *Lundy*, as long as an employee receives at least minimum wage, he or she cannot recover for non-overtime hours.[15]

[B] California

California's minimum wage is currently $10.50 per hour.[16] In addition to state-wide minimum wage requirements, individual cities in California may maintain ordinances that establish a higher local minimum wage. Indeed, at least one such ordinance has been upheld even where the ordinance had extraterritorial effects.[17]

One California appellate court has addressed the proper method for determining whether California minimum wage law has been violated and reached a conclusion that is different than one would expect under the FLSA.[18] In *Armenta v. Osmose, Inc.*, the employees testified that they were not paid for particular activities, including maintaining company trucks and repairing tools. The employees' testimony was supported by a supervisor's testimony that the employees were not paid for drive time or after servicing the final site of the day, despite the written employment policy to the contrary. The employer argued that this did not constitute a violation of California minimum wage law because employees' total weekly compensation was in excess of the total weekly hours worked multiplied by the minimum wage. A prior federal decision interpreting California law had expressly approved of this approach.[19]

Rejecting *Medrano*, the *Armenta* court held that the averaging method utilized by federal courts does not satisfy California's minimum wage requirements because while it "may be appropriate when

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14. Davis v. Abington Mem'l Hosp., 765 F.3d 236, 244 (3d Cir. 2014); Lundy v. Catholic Health Sys. of Long Island, Inc., 711 F.3d 106 (2d Cir. 2013).
15. *Lundy*, 711 F.3d at 115–16.
16. CAL. LAB. CODE § 1182.12.
17. *See* Amaral v. Cintas Corp. No. 2, 78 Cal. Rptr. 3d 572 (Ct. App. 2008).
18. *See* Armenta v. Osmose, Inc., 37 Cal. Rptr. 3d 460, 467–69 (Ct. App. 2005). The employees chose not to seek recovery for their uncompensated time at their contractual hourly rate, seeking only recovery for the employer's failure to pay minimum wages.
19. *See* Medrano v. D'Arrigo Bros. Co. of Cal., 336 F. Supp. 2d 1053 (N.D. Cal. 2004).

considered in light of federal public policy, it does not advance the policies underlying California's minimum wage law and regulations."[20] In addition, the court also relied on California Labor Code sections 221–23, noting that these statutes "articulate the principal [sic] that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation."[21] In *Armenta*, the agreed rate was between $9.08 and $20.00 for employees. Employees were not paid, however, for compensable hours that the employer categorized as "nonproductive." The court emphasized that permitting an employer to average payment over hours worked, so long as that amount was in excess of minimum wage, would permit the employer to "effectively reduce[ ] . . . [an employee's] contractual hourly rate."[22] Accordingly, the *Armenta* court held that the employer had violated California minimum wage law.[23]

[C] New York

Effective December 31, 2016, New York's minimum wage increased from $9.00 to $9.70 per hour and increased again, effective December 31, 2016, to $10.40 per hour.

Assuming that tips are customarily and usually part of an employee's remuneration in the particular industry and there is adequate evidence that the employee received tips of at least the amount of the allowance, employers may take a tip credit against the minimum wage. Along with the minimum wage increases, the permissible tip credits increased in 2015, 2016, and 2017. The maximum

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20. *See Armenta*, 37 Cal. Rptr. 3d at 368.
21. *Id*. at 467.
22. *Id.* at 468.
23. *Cf.* Fitz-Gerald v. SkyWest, Inc., 65 Cal. Rptr. 3d 913 (Ct. App. 2007). The court, which was the same court that decided *Armenta*, opined that the actual rule to be extracted from *Armenta* was that "the state 'minimum wage standard applies to each hour worked by [employees] for which they were not paid.' An employer may not invoke a federal wage averaging formula to defend against a minimum wage claim where the employer, in violation of its own wage agreement, pays no wage for an hour worked." *Id.* at 916–17; *see also* Gonzalez v. Downtown LA Motors, LP, 155 Cal. Rptr. 3d 18, 29–30 (Ct. App. 2013) (applying *Armenta*'s reasoning to auto mechanics compensated on a piece-rate basis, the court held that California law required a separate minimum wage for all non-productive hours worked during the workday, despite the fact that the mechanics' average compensation exceeded minimum wage).

permissible tip credit depends on the employer's industry and the governing Minimum Wage Order.[24] For example, the permissible tip credit for employees governed by the Miscellaneous Industries Wage Order, which covers all non-specified industries, is $1.95 for NYC employees of large employers (eleven or more employees) whose weekly average of tips received is between $1.95 and $3.20; $1.80 for NYC employees of small employers (ten or fewer employees) whose weekly average of tips received is between $1.80 and $2.95; and $1.65 an hour for employees of employers outside of NYC whose weekly average of tips received is between $1.65 and $2.70 per hour.[25]

If an employee prevails in any court action for a wage underpayment, the employee is entitled to recover the full amount of the overpayment, reasonable attorney fees, and, unless the employer proves a good-faith basis to believe its underpayment was in compliance with the law, liquidated damages in the total amount of the wages found to be due.[26]

Finally, on April 1, 2014, the New York City Earned Sick Time Act became effective, which requires New York City businesses with twenty or more employees to provide up to forty hours of annual paid sick leave.

§ 1:2.2 Overtime Exemptions

[A] FLSA

The FLSA provides that employees who work more than forty hours in a week must be paid for the excess hours at one and one-half times the regular rate of pay.[27]

Extensive regulations and interpretive authority apply to the calculation of overtime pay under the FLSA. These sources of authority make compliance with federal overtime laws extremely time-consuming and labor-intensive. As a result, some employers have attempted to prevent non-exempt employees from working overtime. At least one court opined that a "no overtime" policy—even when

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24. *See* 12 N.Y. COMP. CODES R. & REGS. § 142-2.5 (Miscellaneous Industries and Occupations); 12 N.Y. COMP. CODES R. & REGS. § 146-1.3 (Hospitality Industry).
25. 12 N.Y. COMP. CODES R. & REGS. § 142-2.5(b)(2)(c).
26. N.Y. LAB. LAW § 198(1-a). This issue and other notice requirements are further discussed in section 1:2.12[B], *infra*.
27. 29 U.S.C. § 207(a)(1).

accompanied by frequent reminders to employees, a legend on their time sheets, and denials of overtime work authorization requests—is insufficient to protect an employer from a finding that it violated the FLSA when the employer fails to pay overtime it knows occurred.[28] In *Chao v. Gotham Registry, Inc.*, the Second Circuit held that an employer must "adopt *all possible measures* to achieve [compliance with the FLSA]."[29] In this case, the court opined that the company could have disciplined nurses who violated the "no overtime" rule, disavowed paying overtime entirely, or contracted in advance with hospitals to charge a higher fee when nurses worked overtime.[30]

Failure to comply with the FLSA's overtime pay requirements may result in an employer being held liable for the amount of unpaid overtime as well as liquidated damages, unless it can show that it acted in "good faith" and with "reasonable grounds for believing" that it was in compliance with the FLSA.[31]

[A][1] Federal White Collar Overtime Regulations

Marking the first substantive update in fifty years, in 2004, the DOL overhauled its regulations governing overtime eligibility for "white collar" workers under the FLSA. These regulations set forth requirements for the "white collar exemptions," which include both compensation and duties tests. In March 2014, President Obama directed the DOL to update these regulations. In response, on July 6, 2015, the DOL published a notice of proposed rulemaking signaling the agency's intention to significantly increase the salary thresholds for both the "white collar overtime exemption" and the "highly compensated employee exemption." Following a high volume of public comments on the proposal, the DOL announced the publication of its final rulemaking on May 23, 2016.[32] However, before the regulations could take effect on December 1, 2016, the Eastern District

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28. *See* Chao v. Gotham Registry, Inc., 514 F.3d 280, 291 (2d Cir. 2008).
29. *Id*. (emphasis added).
30. *But see* Kellar v. Summit Seating, Inc., 664 F.3d 169 (7th Cir. 2011) (declining to impose liability under the FLSA in the absence of employer's actual or constructive knowledge of unauthorized pre-shift overtime).
31. *See* Chao v. Barbeque Ventures, LLC, 547 F.3d 938 (8th Cir. 2008) (employer's lack of specific knowledge that its employees were working at more than one franchise location was insufficient to avoid liquidated damages).
32. 29 C.F.R. pt. 541 (2016).

of Texas issued a nationwide injunction stopping the implementation of those regulations.[33] In 2017, the district court permanently enjoined the regulations on the basis that the proposed salary threshold increase was so great as to render the duties test a nullity.[34] The DOL under the Trump administration has indicated its opposition to the proposed regulations and in November 2017 requested a stay of its appeal pending the outcome of new rulemaking.[35] The DOL is anticipated to propose a more modest adjustment to the existing salary basis test than that proposed in 2015.

[A][1][a] Minimum Salary Requirement

Under current regulations, workers earning less than $455 per week—or $23,660 per year—are guaranteed overtime.[36] Beginning December 1, 2016, new DOL regulations would have raised the minimum salary threshold to $913 per week—or $47,476 per year—for most categories of exempt employees. In late November 2016, these rules were enjoined by a federal district court in Texas.[37] Also, as of January 1, 2020, the regulations provide for automatic, triennial updates to the base salary and compensation levels, and index such updates to a figure representing the "40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region" in the preceding year.[38]

[A][1][b] Rules for "Highly Compensated" Employees

Any employee performing office or non-manual work who is paid total annual compensation of $100,000 or more (including at least $455 per week paid on a salary basis) is exempt from the overtime requirements of the FLSA so long as the employee customarily and regularly performs at least *one* of the duties of an exempt executive,

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33. Plano Chamber of Commerce et al. v. Thomas E. Perez, et al., No. 4:16-cv-732-ALM (E.D. Tex. Nov. 22, 2016).
34. Nevada v. U.S. Dep't of Labor, 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).
35. State of Nevada v. U.S. Dep't of Labor, 17-41130 (5th Cir. Nov. 2, 2017).
36. 29 C.F.R. § 541.600; *see* DOL Opinion Letter FLSA 2008-1NA (Feb. 14, 2008) (employer may not prorate the minimum allowable salary of an exempt employee by paying $15,000 to reflect the twenty-hour-per-week part-time status).
37. Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).
38. 29 C.F.R. § 541.607.

administrative, or professional employee.[39] New DOL rulemaking, effective December 1, 2016, would have further set the minimum compensation level for highly compensated employees at the ninetieth percentile of full-time non-hourly workers nationally and provided for future increases in the minimum salary level in the same manner as for other categories of exempt employees. Like the increased minimum salary requirement for other exempt employees, however, enforcement of the rule was enjoined in November 2016.

Employers may use any consecutive fifty-two-week period to calculate annual compensation, and the $100,000 requirement may be prorated for employees who do not work a full year.[40] Commissions and non-discretionary compensation—including bonuses—count toward the $100,000 annual compensation requirement.[41] If an employee's total annual compensation does not meet the minimum threshold by the end of the fifty-two-week period, the employer may pay the employee the difference within a month after the end of the year in order to invoke the exemption.[42]

This rule explicitly does not apply to non-management production-line workers or laborers or employees whose work involves repetitive, manual labor or physical skill, no matter how much they are paid.[43]

[A][1][c] Salary Basis Requirement

Exempt white collar employees must generally be paid on a salary basis. This means that employees must be paid a predetermined amount each week that is not subject to reduction because of variations in the quantity or quality of the work performed.[44] DOL opinion letters state that day-to-day or week-to-week fluctuations in employee compensation because of the changing needs of a business "are precisely the circumstances the salary basis is intended to preclude."[45]

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39. *Id.* § 541.601(a); *see, e.g.*, Anani v. CVS RX Servs., Inc., 730 F.3d 146 (2d Cir. 2013) (affirming summary judgment against pharmacist whose guaranteed salary plus compensation for additional hours exceeded $100,000 annually).
40. 29 C.F.R. § 541.601(a)(3)–(4).
41. *Id.* § 541.601(b)(1).
42. *Id.* § 541.601(b)(2).
43. *Id.* § 541.601(d).
44. *Id.* § 541.602(a).
45. *See* DOL Opinion Letter FLSA 2009-14 (Mar. 6, 2009); DOL Opinion Letter FLSA 2009-18 (Mar. 6, 2009); *see also* Archuleta v. Wal-Mart Stores, Inc., 543 F.3d 1226 (10th Cir. 2008) (an employer can change an

Under the proposed 2016 revisions to the DOL regulations, employers may satisfy up to 10% of the salary requirement with non-uniform or irregular payments, including those comprising nondiscretionary bonuses, incentives, and commissions, provided the payments are made at least quarterly. If by the last pay period of the quarter the employer has failed to adequately compensate an employee using a combination of fixed salary and other nondiscretionary payments, the employer may avoid forfeiture of the employee's exempt status by making one final payment in an amount sufficient to achieve the required salary level "no later than the next pay period after the end of the quarter."[46]

[A][1][c][i] Permissible Deductions

Employers may make the following deductions from an employee's salary without losing the exemption:

(1) deductions for a full-day absence for personal reasons; or

(2) deductions for a full-day absence caused by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy, or practice; or

(3) penalties imposed in good faith for infractions of workplace conduct rules of major significance and imposed pursuant to a generally applicable written policy.[47]

The DOL does not construe the term "workplace conduct" expansively.[48] Accordingly, permissible salary deductions are limited to cases of serious misconduct, for example, sexual harassment, and may not be used as a way to discipline exempt employees for infractions such as performance or attendance problems.[49] An employer is not entitled to consider an employee exempt if the employer docks

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employee's salary up to two times in one year without losing the exemption, but two of the plaintiffs' salaries had been changed so frequently as to create a jury issue on whether the employees were actually hourly—rather than salaried—employees).

46. 29 C.F.R. § 541.601(a)(3).
47. *Id.* § 541.602(b).
48. *See* 69 Fed. Reg. at 22,177.
49. *Id*.

an employee's pay for violations of non-safety-related rules or if it makes partial-day deductions.[50]

Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In addition, the DOL has opined that an employer may make permissible salary deductions for absences due to inclement weather under some circumstances.[51] Specifically, an employer may deduct a full day's salary from an employee who is absent from work for a full day due to inclement weather only when the workplace is open for business and the employee has no sick or vacation time available. The DOL considers such an absence to be "for personal reasons" and to not "constitute an absence due to sickness or disability." If the workplace is closed for a full workweek, then the employer may deduct a full week's salary from the employee without violating the salary basis requirement.

The DOL has noted that employers may make deductions from employee leave banks without affecting FLSA-exempt status and that employees may take "completely voluntary" time off without changing their status under the FLSA.[52]

[A][1][c][ii] Consequences of Improper Deductions

Under the white collar overtime regulations, an exemption is lost only if there is an "actual practice" of making improper deductions.[53]

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50. Ergo v. Int'l Merch. Servs., 519 F. Supp. 2d 765 (N.D. Ill. 2007) (improper pay-docking handbook policy made deductions for discipline and partial-day absences and included suspension for personal phone calls, tardiness, and dress code violations); Friedman v. S. Fla. Psychiatric Assocs., Inc., 139 F. App'x 183, 185 (11th Cir. 2005) (when Friedman's salary was docked for partial days' absences, "the salary basis of pay was violated, and Friedman was rendered non-exempt and was entitled to overtime").
51. *See* DOL Opinion Letter FLSA 2005-41 (Oct. 24, 2005); DOL Opinion Letter FLSA 2005-46 (Oct. 28, 2005).
52. DOL Opinion Letter FLSA 2009-14 (Mar. 6, 2009).
53. 29 C.F.R. § 541.603(a); U.S. Dep't of Labor Fact Sheet #17G: Salary Basis Requirements and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA) (rev. July 2008); *see also* Baden-Winterwood v. Life Time Fitness, Inc., 566 F.3d 618 (6th Cir. 2009) (policy did not create a theoretical possibility of deduction, but rather plainly laid out a policy under which the employer would make future deductions); Grass v. Damar Servs., Inc., 2014 WL 2773027, at *11 (S.D. Ind. June 19, 2014)

The factors evaluated in determining the existence of such a practice include:

(1) the number of improper deductions (particularly as compared to the number of employee infractions warranting discipline);

(2) the time period during which such deductions were made;

(3) the number and location of the affected employees and the managers responsible for the improper deductions; and

(4) whether the employer has a clearly communicated policy permitting or prohibiting the deductions.[54]

Even where such a practice can be shown, the loss of the exemption is limited to:

(1) the time period during which the improper deductions were made;

(2) for employees in the same job classification;

(3) who work for the managers who were responsible for the deductions.[55]

[A][1][c][iii] Safe Harbor

Improper deductions that are isolated or inadvertent will not result in a loss of the exemption for the employees subject to the improper deduction, provided that such employees are reimbursed

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(citing lack of evidence as to any employer policy, procedure, or practice as fatal to an employee's improper deductions claim).

54. *Id.*; *see also* Cash v. Cycle Craft Co., 508 F.3d 680 (1st Cir. 2007) (two aberrant paychecks issued to an employee out of approximately fifty that were received did not represent a practice that was inconsistent with the company's claim of exempt status); DOL Opinion Letter FLSA 2006-7 (Mar. 10, 2006) (stating employer who imposes fine against employees who damage equipment will preclude those employees from satisfying salary basis test); Galdo v. PPL Elec. Utils. Corp., 2016 WL 454416, at *4 (E.D. Pa. Feb. 5, 2016) ("the fact that one employee was subject to partial-day docking on one occasion during the relevant period" will not suffice to create a genuine issue of material fact as to whether an employer engaged in a practice of improper deductions).

55. 29 C.F.R. § 541.603(b).

for the improper deductions.[56] Further, the white collar overtime regulations provide a safe harbor whereby an employer will not lose an exemption for any employees if the employer:

(1) has a clearly articulated policy prohibiting improper deductions that includes a complaint procedure;

(2) reimburses employees for improper deductions; and

(3) makes a good-faith commitment to comply with the rules in the future.[57]

With regard to establishing a clearly communicated policy, the DOL recommends distributing a written policy to employees by, for example, providing a copy of the policy at employees' time of hire, including the policy in the company handbook, or publishing the policy on the company intranet.[58]

[A][1][d] White Collar Exemption

In addition to satisfying salary requirements, employees must also satisfy the requirements of the duties test to qualify as exempt under a white collar exemption.

[A][1][d][i] Executive Exemption

To qualify for the executive exemption, an employee's primary duty must be managing the enterprise or a recognized department or subdivision of the enterprise.[59] Under the DOL regulations, five factors should be considered to determine whether an employee qualifies for the FLSA's executive exemption:

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56. *Id.* § 541.603(c); *see, e.g.*, Ellis v. J.R.'s Country Stores, Inc., 779 F.3d 1184 (10th Cir. 2015) (holding a solitary improper deduction was sufficiently isolated to fall within the safe harbor provision where the employee-plaintiff was timely and appropriately reimbursed).
57. 29 C.F.R. § 541.603(d).
58. *Id.*
59. *Id.* § 541.100(a)(2). *Compare* Thomas v. Speedway Super-Am., LLC, 506 F.3d 496 (6th Cir. 2007) (holding gas station and convenience store manager exempt executives despite performing non-managerial functions and being closely supervised), *with* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233 (11th Cir. 2008) (finding store managers were incorrectly classified as exempt because nearly 90% of their work consisted of manual labor; employees awarded $35.6 million in unpaid overtime).

(1) the amount of time spent performing managerial duties;

(2) the relative importance of an employee's managerial and non-managerial duties;

(3) the frequency with which an employee may exercise discretionary powers;

(4) the employee's relative freedom from supervision; and

(5) the relationship between the purportedly exempt employee's wages and the wages paid to other employees performing similar, non-exempt work.[60]

In order to qualify as a department or subdivision of an enterprise, the unit must have a permanent status and a continuing function.[61] Physical, functional, or shift separation is not required to constitute a department or subdivision.[62]

An employee's "primary duty" is defined as the "principal, main, major or most important duty that the employee performs" based on all of the facts in each case with major emphasis on the character of the employee's job as a whole.[63] The regulation further states that "[t]he amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement."[64] Courts have not applied a simple "clock" standard to determine an employee's primary duty, and may, for example, consider whether managers led other employees by example or served as role models for nonsupervisory employees.[65] Courts have further

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60. 29 C.F.R. § 541.103; *see* Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259 (11th Cir. 2008) (employer's designation of store managers as exempt erroneous because their actual duties were not predominantly management functions).
61. 29 C.F.R. § 541.103.
62. Ramos v. Baldor Specialty Foods, Inc., 687 F.3d 554 (2d Cir. 2012) (holding team captains exempt executives where teams had defined membership, were led and supervised by the same captain each shift, met in assigned work areas, and employees did not switch teams without transfer).
63. 29 C.F.R. § 541.700(a).
64. *Id.* § 541.700(b).
65. *See* Mims v. Starbucks Corp., 2007 WL 10369 (S.D. Tex. Jan. 2, 2007) (holding that Starbucks store managers were properly categorized as

noted that an employee's title or designation is not "talismanic" for the purpose of establishing whether, consistent with the primary duty analysis, the employee served within an exempt executive role.[66]

In addition, the employee must regularly direct the work of at least two full-time employees (or the equivalent) and have the authority to hire or fire other employees.[67] In the absence of such authority, the employee's recommendations as to the hiring, firing, advancement, promotion, or other status change of employees must be given particular weight.[68] Factors considered in determining whether these criteria can be met include:

(1) whether it is part of the employee's job to make recommendations regarding the status change of other employees;

(2) the frequency with which the employee's recommendations are made or requested; and

(3) the frequency with which the employee's recommendations are relied on.[69]

Generally, the executive's recommendations must pertain to employees whom the executive customarily and regularly directs.[70]

The DOL issued an opinion letter that reiterated its position that a manager need not be physically present to supervise two full-time employees.[71] The opinion was issued in response to a question concerning retail managers who manage a number of employees, but

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"executives" for purposes of FLSA exemption, despite claims that they devoted less than 50% of their time to managerial responsibilities); *see also* Taylor v. AutoZone, Inc., 2014 WL 5843522, at *2 (D. Ariz. Nov. 12, 2014) ("The primary duty analysis is based on the totality of the circumstances, with the major emphasis on the character of the employee's job as a whole.").

66. *See, e.g.*, Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259, 1264 (11th Cir. 2008) (requiring a thorough assessment of the specifics duties of each purportedly exempt employee).
67. 29 C.F.R. § 541.100(a)(3)–(4).
68. *Id.* § 541.100(a)(4).
69. *Id.* § 541.105.
70. *Id.*; *cf.* Christofferson v. United States, 67 Fed. Cl. 68, 78–80 (2005) (holding that former managers could make claim for overtime pay in light of conflicting testimony regarding their ability to hire and fire).
71. DOL Opinion Letter FLSA 2006-35 (Sept. 21, 2006) (opining that a manager who had supervisory authority over five to eight individuals, but only worked with one at any given time, was exempt).

work with only a single employee at any given time. In finding the manager exempt, the DOL noted that a manager does not have to work at the same time as his/her subordinates to satisfy the requirement of customarily and regularly directing the work of two or more employees.

Under the federal regulations, the executive exemption automatically applies to individuals who own at least 20% of an enterprise and who are actively engaged in management.[72]

[A][1][d][ii] Administrative Exemption

In order to satisfy the administrative exemption, exempt administrative employees must exercise discretion and independent judgment with respect to matters of significance.[73] Under the federal regulations, "[i]n general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered."[74]

In addition, the primary duty of exempt administrative employees must also involve the performance of office or non-manual work related to the management or general business operations of the employer or the employer's customers.[75] Although not dispositive, DOL opinion letters still utilize the production/staff dichotomy as a useful tool to identify employees that should be excluded from the exemption.[76] Examples of exempt administrative positions are set out at 29 C.F.R. § 541.203 and include insurance claims adjusters, investment advisers, "team leaders," and human resources managers. The DOL has also issued several opinion letters that provide further examples.[77]

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72. 29 C.F.R. § 541.101.
73. *Id*. § 541.202.
74. *Id*. § 541.202(a).
75. *Id*. § 541.201; *see also* Adams v. BSI Mgmt. Sys. Am., Inc., 523 F. App'x 658 (11th Cir. 2013) (holding Supply Chain Security Program Manager who ran projects for employer's customers, including creating project tasks and plans, was exempt under administrative exemption).
76. DOL Opinion Letter FLSA 2007-8 (Feb. 15, 2007); *cf.* Desmond v. PNGI Charles Town Gaming, LLC, 564 F.3d 688 (4th Cir. 2009) (employee performing production duties mandated by state law and unrelated to the general business functions of the employer was not an exempt administrative employee).
77. *See, e.g.*, DOL Opinion Letter FLSA 2009-4 (Jan. 14, 2009) (convention and visitors services sales manager exempt); DOL Opinion Letter

The application of the administrative exemption to mortgage loan officers has been subject to differing opinions by the DOL. Previously, the DOL opined that loan officers generally meet the requirements of the exemption.[78] The D.C. Circuit refused to follow the 2010 interpretation on the grounds that the DOL did not follow the Administrative Procedures Act in revising its interpretation without a notice-and-comment period.[79] However, the U.S. Supreme Court has since confirmed that the promulgation of interpretive rules under the APA does not require a notice-and-comment period, and ultimately upheld the DOL's interpretive rule as procedurally sound.[80] Neither court, however, has opined on the merits of the DOL's position.

[A][1][d][iii] Professional Exemption

The professional exemption comprises two separate exemptions: the learned professional exemption and the creative professional exemption. The learned professional exemption requires that an employee's primary duty must be performing work that requires advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction.[81]

According to the DOL, the best evidence that an employee meets this last requirement is possession of the appropriate academic degree, although the exemption is now explicitly available to employees who perform the same work as colleagues with degrees but who have attained their advanced knowledge through a combination

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FLSA 2008-3 (Apr. 21, 2008) (product technology application and marketing analysts are exempt); DOL Opinion Letter FLSA 2008-1 (Mar. 6, 2008) (motor home manufacturer purchasing agents are exempt); DOL Opinion Letter FLSA 2007-8 (Feb. 15, 2007) (school resource officers are exempt); DOL Opinion Letter FLSA 2007-7 (Feb. 8, 2007) (case managers who do not personally deliver or administer services to the consumer, but who are responsible for planning and helping to obtain those services from third-party service providers are not exempt).

78. *See* DOL Opinion Letter FLSA 2006-31 (Sept. 8, 2006). The DOL vacated this opinion in 2010 and held prospectively that loan officers do not qualify for the exemption. DOL Administrator's Interpretation No. 2010-1 (Mar. 24, 2010).

79. Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013).

80. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

81. 29 C.F.R. § 541.301(a).

of work experience and intellectual instruction.[82] The DOL has further clarified that "work requiring advanced knowledge" is predominantly intellectual work, "requiring the consistent exercise of discretion and judgment as distinguished from performance of routine mental, manual, mechanical or physical work."[83] In another letter, which discusses paralegals and legal assistants, the DOL emphasized that having an advanced degree alone is not enough to classify for the exemption if the degree is not necessary or not related to the work performed.[84]

To qualify as exempt as a creative professional, an employee must have the primary duty of performing work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.[85] Courts have interpreted the creative professional exemption to capture both traditional and non-traditional "creative endeavors," ranging from web design to the culinary arts.[86]

[A][1][d][iv] Computer Employee Exemption

The computer employee exemption requires that an employee be paid $455 per week on a salary or fee basis, or be paid at an hourly rate of not less than $27.63. The exemption also requires that the employee's primary duty consist of the application of systems analysis; or testing of computer systems or programs related to user or system design specifications or machine operating systems.[87]

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82. *Id*. § 541.301(d); DOL Opinion Letter FLSA 2005-50 (Nov. 4, 2005); Young v. Cooper Cameron Corp., 586 F.3d 201 (2d Cir. Nov. 12, 2009) (product design specialist with twenty years of experience in engineering field was not exempt because position did not require formal advanced education).
83. *See* DOL Opinion Letter FLSA 2005-50 (Nov. 4, 2005).
84. DOL Opinion Letter FLSA 2005-54 (Dec. 16, 2005) (stating paralegals are not exempt under learned professional or the administrative exemption).
85. 29 C.F.R. § 541.302(a).
86. *See* Karropoulos v. Soup du Jour, Ltd., 128 F. Supp. 3d 518, 536 (E.D.N.Y. 2015) (denying defendant's motion for summary judgment where plaintiff's contention that his primary duty was as a line cook rather than a "truly original chef" created a genuine issue of material fact). *But see* Henderson v. 1400 Northside Drive, Inc., 110 F. Supp. 3d 1318, 1322 (N.D. Ga. 2015) (exotic dancer not a creative professional within the "narrow exemption" where plaintiff's "artistic expression" did not reflect a sufficient degree of creativity).
87. 29 C.F.R. § 541.400.

[A][1][d][v] Outside Sales Exemption

Under the federal regulations, an exempt outside sales employee's primary duty must be to make sales or obtain orders or contracts.[88]

The outside sales exemption also requires that the employee be customarily and regularly engaged away from the employer's place of business.[89] The salary requirements applicable to the other exemptions do not apply to outside sales employees.[90]

On June 18, 2012, the U.S. Supreme Court resolved a circuit split concerning the application of the outside sales exemption to pharmaceutical sales representatives (PSRs).[91] In *Christopher v. SmithKline Beecham Corp.*, the Supreme Court held the PSRs at issue were exempt from overtime as outside salespersons under the FLSA. In so holding, the Court looked to the statutory definition of "sale," which includes "any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*."[92] The Court concluded that the PSRs' primary duty of obtaining nonbinding commitments

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88. *Id*. § 541.500(a)(1)(i)–(ii); *see also* Meza v. Intelligent Mexican Mktg., 720 F.3d 577 (5th Cir. 2013) (route salesman who inspected, delivered, and sold food products held as exempt "outside salesman"); Gregory v. First Title of Am., Inc., 555 F.3d 1300 (11th Cir. 2009) (marketing executive whose primary duty was to generate orders qualified for outside sales exemption); Clements v. Serco, Inc., 530 F.3d 1224 (10th Cir. 2008) (former civilian military recruiters were not exempt outside salespersons where the recruiters did not obtain commitments from recruits and, therefore, were not engaged in sales).
89. 29 C.F.R. § 541.500(a)(2); *see also* DOL Opinion Letter FLSA 2008-6NA (May 8, 2008) (sales workers who performed their primary duties away from the employer's own place of business qualified for the exemption even though they were stationed for days at a time at fixed locations); DOL Opinion Letter FLSA 2007-4 (Jan. 25, 2007) (timeshare sales representatives who work from resort selling resort properties are not performing outside sales because resort is their workplace); DOL Opinion Letter FLSA 2007-2 (Jan. 25, 2007) (opining that representatives selling homes are exempt because they leave the temporary facility to "[go] to the site of the property or to prospects as a part of making his sales," and therefore meet the "outside" sales work requirement); DOL Opinion Letter FLSA 2007-1 (Jan. 25, 2007) (evidence that sales representative selling homes is required to spend time at homesite with the customer and continue to sell features at the homesites underscores that work is done outside of office).
90. 29 C.F.R. § 541.500(c).
91. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012).
92. 29 U.S.C. § 203(k) (emphasis added).

from physicians to prescribe one of the respondent's drugs "comfortably falls within the catchall category of 'other disposition'" because, given regulatory constraints in the pharmaceutical industry, it "is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells."[93]

[A][2] Commission Sales Exemption

The FLSA provides that employers who operate retail or other service establishments do not violate the overtime provision of paying time and a half for hours in excess of forty in a workweek if "the employee's regular rate of pay exceeds one and a half times the minimum wage rate, and more than half of the employee's compensation for a representative period of at least one month consists of commissions on goods or services."[94]

The term "retail or service establishment" means an establishment 75% of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.[95] Establishments outside the retail concept that are not within the statutory definition because they are not traditionally "retail" include such establishments as an insurance company and an electric power company selling electrical energy to private consumers, accounting firms, investment counseling firms, hospital equipment firms, engineering firms, etc.[96]

Employees in the financial industry generally may not qualify for the commission sales exemption unless the employer can prove it is involved in "retail" because financial companies lack the retail concept.[97]

The U.S. Court of Appeals for the Seventh Circuit has held that automotive mechanics were working on a commission and, thus, exempt from earning overtime where the mechanics were paid based on a formula that considered the amount of work they did more than the number of hours they worked.[98] Comparing the mechanics to

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93. *Christopher*, 132 S. Ct. at 2172.
94. 29 U.S.C. § 207(i).
95. 29 C.F.R. § 779.411.
96. *Id.* §§ 779.316, 779.317.
97. Mitchell v. Ky. Fin. Co., 359 U.S. 290 (1959); *see also* Gieg v. DDR, Inc., 407 F.3d 1038 (9th Cir. 2005) (holding that FLSA commission sales exemption is meant to apply to all employees of retail and service establishments, and not just to employees earning a commission).
98. Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505 (7th Cir. 2007).

real estate brokers, the Seventh Circuit stated that the "essence of a commission is that it bases compensation on sales."[99]

[A][3] Motor Carrier Act Exemption

Going back to 1935, truck drivers engaged in interstate commerce have been exempt from overtime by virtue of the Motor Carrier Act, which gave the Department of Transportation jurisdiction to regulate overtime for truck drivers.[100] Under the motor carrier exemption, drivers and their helpers, loaders, and mechanics whose work affects the safe operation in interstate commerce of vehicles weighing more than 10,000 pounds, designed or used to transport more than eight passengers for compensation (or more than fifteen not for compensation), or used in transporting hazardous material are exempt from the overtime requirements of the FLSA.[101] However, if an employee spends any part of his/her workweek performing duties in small vehicles (1,000 pounds or less), the motor carrier exemption is inapplicable in that workweek.[102]

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99. *Id.* at 508; *see also* Alvarado v. Corp. Cleaning Servs., Inc., 782 F.3d 365, 367 (7th Cir. 2015) (holding window washer was paid on a commission basis where hours were irregular, where the employee was paid only if there had been a sale of window-washing services to a third party, and where compensation was in proportion to the price paid for services).

100. This policy was enshrined in the FLSA at 29 U.S.C. § 213(b) and amended August 10, 2005, by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), in 2008, by the Technical Corrections Act.

101. *See* U.S. Dep't of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2010-2, Change in Application of the FLSA § 13(b)(1) "Motor Carrier Exemption" (Nov. 4, 2010); *see also* McCall v. Disabled Am. Veterans, 723 F.3d 962 (8th Cir. 2013) (applying exemption where employee drove truck with gross vehicle weight rating in excess of 10,000 lbs., although vehicles often weighed less than 10,000 lbs.); Albanil v. Coast 2 Coast, Inc., 444 F. App'x 788 (5th Cir. 2011) (confirming combined weight of pickup and trailer used). *But cf.* McMaster v. E. Armored Servs., Inc., 780 F.3d 167, 170 (3d Cir. 2015) (holding that the plain language of section 306(a) of the Corrections Act extends FLSA section 7 overtime requirements to "covered employees" under the act "notwithstanding" the Motor Carrier Exemption, absent a "plausible alternative construction" of the statute or "legislative history probative of a drafting error").

102. Field Assistance Bulletin No. 2010-2.

[A][4] Companionship Exemption

The FLSA provides a companionship exemption from minimum wage and overtime requirements for domestic care workers who provide companionship services to individuals who are unable to care for themselves due to age or infirmity.[103] The DOL has historically defined this exemption to apply to employees working directly for a household using the employee's services and third-party agencies. New DOL regulations were set to take effect on January 1, 2015, and would have narrowed the exemption to exclude employees of third-party companies.[104] However, these regulations were vacated by the U.S. District Court for the District of Columbia in December 2014.[105] On appeal the D.C. Circuit reversed, concluding that the DOL's interpretation of the FLSA to exclude third-party companies was reasonable and neither arbitrary nor capricious.[106]

[A][5] *The* Belo *Plan*

Section 207(f) of the FLSA provides an exception from overtime pay requirements for certain employees with duties necessitating irregular hours of work.[107] This provision applies if there is an agreement to provide a weekly guaranteed salary for no more than sixty hours at a regular rate of pay that is not less than the applicable minimum wage and compensation at not less than one and one-half times the regular rate of pay for all hours worked over forty in a workweek. This is the only provision of the FLSA that allows non-exempt employees to receive the same amount of total compensation each week, regardless of the number of overtime hours worked.[108] This is known as the "*Belo* plan."[109]

The *Belo* plan allows a fixed payment when the employee's duties necessitate irregular work hours and total wages would vary widely from week to week if hourly.[110] To qualify, the "nature of the

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103. 29 U.S.C. § 213(a)(15).
104. Application of the Fair Labor Standards Act to Domestic Service; Final Rule, 78 Fed. Reg. 60,454 (Oct. 1, 2013).
105. *See* Home Care Ass'n of Am. v. Weil, 76 F. Supp. 3d 138 (D.D.C. 2014).
106. Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016).
107. 29 U.S.C. § 207(f).
108. DOL Opinion Letter FLSA 2009-3NA (Jan. 15, 2009).
109. *See* Walling v. A.H. Belo Corp., 316 U.S. 624 (1942).
110. *See* 29 C.F.R. § 778.404.

employee's duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week."[111] Also, the duties must require significant variations both above and below the statutory weekly limit on non-overtime hours.[112] The *Belo* agreement does not have to be in writing; the agreement must, however, be "bona fide," implying that "contract and settlement of its terms were done in good faith."[113] However, employers remain subject to the FLSA record-keeping requirements at 29 C.F.R. part 516, particularly the requirement to keep accurate records of employees' hours of work. The employer must also keep a copy of the individual employee's contract or the collective bargaining agreement governing the plan, or a written memorandum summarizing its terms if the agreement is not in writing.[114]

[B] "White Collar" (New York) Exemptions

As under the FLSA, the most commonly invoked exemptions to the overtime requirements of the New York Labor Law are the "white collar" exemptions for executive, administrative, and professional employees.[115] To be exempt from New York's minimum wage requirements, executive and administrative employees must receive a salary of no less than $975.00 per week for employers with eleven or more employees and $900.00 per week for employers with ten or fewer

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111. *Id*. § 778.405. The DOL opined that the proposed *Belo* plan addressed in Opinion Letter FLSA 2009-3NA did not meet this part of the test because the employer did not establish that the employees' irregular hours were beyond the reasonable control of the employer. Opinion Letter FLSA 2009-3NA.

112. *Id.* The proposed *Belo* plan in Opinion Letter FLSA 2009-3NA does not include examples of employees working less than the forty-hour standard workweek as required under section 778.406, and is correspondingly noncompliant with the relevant FLSA provision. *See* 29 C.F.R. § 778.406 ("where the fluctuations in an employee's hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not 'irregular' within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption").

113. 29 C.F.R. § 778.407.

114. *Id*. § 516.24.

115. Like the FLSA, New York law also provides exemptions for, inter alia, farm laborers, taxi drivers, and others. *Compare* 29 U.S.C. § 213, *with* N.Y. LAB. LAW § 651(5).

employees in New York City, $825.00 for employers in Nassau, Suffolk and Westchester counties, and $780.00 per week for employers elsewhere in the state, effective December 31, 2017.[116]

Although New York has explicitly adopted the FLSA's statutory provisions regarding overtime exemptions,[117] it has promulgated its own corresponding regulations.

In theory, there are several distinctions between New York's regulatory framework and the federal exemptions from overtime. For example, while the federal regulations require exempt employees to exercise discretion, the New York regulations provide that exempt employees must "customarily and regularly" or, in the case of the professional exemption, "consistently" exercise discretion.[118] Notwithstanding any apparent distinctions, however, courts continue to analyze New York claims under the federal rubric.[119]

[C] California Exemptions

[C][1] Executive Exemption

To qualify for this exemption under California law, executive employees must meet five basic requirements. They must:

(1) manage the enterprise, or a recognized subdivision thereof;

(2) customarily and regularly direct the work of two or more other employees;

(3) have the authority to hire, fire, or promote employees, or make other similar personnel decisions, or their recommendations in this regard must be given particular weight;

(4) customarily and regularly exercise discretion and independent judgment;

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116. 12 N.Y. COMP. CODES R. & REGS. § 142-2.14.
117. *Id.* § 142-2.2.
118. *Id.* § 142-2.14.
119. *See, e.g.*, Ramos v. Baldor Specialty Foods, Inc., 687 F.3d 554, 555 n.1 (2d Cir. 2012) ("Like the FLSA, the [New York Labor Law] mandates overtime and applies the same exemptions as the FLSA. We therefore discuss only the FLSA, and do not engage in a separate analysis of plaintiffs' [New York Labor Law] claims, which fail for the same reasons as their FLSA claims." (internal citations and quotations omitted)).

(5) primarily be engaged in duties that meet the test of the exemption, meaning that they must spend more than 50% of their work time engaged in such duties.

For purposes of determining whether an employee is primarily engaged in exempt duties, the IWC clarified that employers should take into account the realistic expectations and requirements of the job and look to the FLSA and federal regulations for guidance. The IWC also stated that exempt work includes all work that is directly and closely related to exempt work, as well as work performed to carry out exempt functions.

[C][2] Administrative Exemption

Administrative employees must be primarily engaged in the following duties:

(1) Performing either office or non-manual work directly related to management policies or general business operations;

(2) Customarily and regularly exercising discretion and independent judgment on matters of consequence.

(3) Either regularly and directly assisting a proprietor, or another exempt administrative or executive employee; or performing under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or executing under only general supervision special assignments and tasks.

As with the executive exemption, employers should look to federal law and the realistic requirements and expectations of the job to determine whether the employee is primarily engaged in exempt work.

The California Supreme Court addressed the proper test to determine the application of the administrative exemption in *Harris v. Superior Court*.[120] Ultimately, the court determined that to qualify for the administrative exemption, "employees must (1) be paid at a certain level [twice the minimum wage], (2) their work must be administrative, (3) their primary duties must involve that administrative work, and (4) they must discharge those primary duties by regularly exercising independent judgment and discretion."[121]

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120. Harris v. Superior Court, 266 P.3d 953 (Cal. 2011).
121. *Id.* at 957.

In addition to meeting the duties prong as described in *Harris*, employees must also be paid a salary, defined as a predetermined amount that is not subject to reduction based on the quantity or quality of work.[122] Applying this rule, the court found that an insurance claims adjuster did not qualify for the administrative exemption because he was not paid a guaranteed salary and his pay would vary based upon the number of claims he processed.[123]

[C][3] Professional Exemption

Professional employees include those who are licensed or certified by the State of California and primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting. The exemption does not include licensed pharmacists or registered nurses.

The professional exemption also covers employees primarily engaged in a "learned or artistic" profession. To qualify as "learned," the work must require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. This does not include knowledge derived from a general academic education, an apprenticeship, or on-the-job training to perform routine tasks incidental to exempt work. Historically, the California Labor Commissioner took the position that the learned professional exemption required a degree above a bachelor's degree, although this requirement was deleted in late 2006.

"Artistic" work must be original and creative in a recognized field of artistic endeavor, as opposed to work that can be produced by a person endowed with general manual or intellectual ability and training, and be the result of the invention, imagination, or talent of the employee. In either case, the work must be predominantly intellectual and varied in character. The California Labor Commissioner has clarified that recognized fields include not only traditional media (for example, musical instruments and paint), but also newer evolving media (for example, music synthesizers, and computer graphic and art design programs).

Like the other white collar exemptions, exempt professional employees must also customarily and regularly exercise discretion and independent judgment in the performance of their duties.

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122. Negri v. Koning & Assocs., 156 Cal. Rptr. 3d 697, 702 (Ct. App. 2013).
123. *Id.* at 698–99.

[C][4] Outside Sales Exemption

California law exempts outside salespersons from overtime laws.[124] The IWC defines an "outside salesperson" as "any person, 18 years of age or over, who customarily and regularly works more than half of the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities."[125] "Working time" includes time spent on activities related to selling, such as preparation, travel time, and paperwork.[126]

[C][5] Other Exemptions

[C][5][a] Computer Professionals

Computer software professionals are exempt from the daily overtime requirements if all of the following apply:

(1) The employee is primarily engaged in work that is intellectual and creative and that requires the exercise of discretion and independent judgment, and the employee is primarily engaged in duties that consist of one or more of the following:

  (a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system-functional specifications.

  (b) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

  (c) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(2) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of this exemption.[127]

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124. CAL. LAB. CODE § 1171.
125. CAL. CODE REGS. tit. 8, § 11070.
126. Ramirez v. Yosemite Water Co., 978 P.2d 2, 13 (Cal. 1999).
127. CAL. LAB. CODE § 515.5.

An employee is not required to be "highly skilled" in computer systems analysis, programming, *and* software engineering, but rather only needs to have one of the skills to satisfy the duties test.

In addition to the duties test, computer professionals must also meet a minimum pay requirement to be considered exempt. This minimum amount changes each year.[128] California's Assembly Bill 10 (AB 10) provided a relatively significant change for employers that were previously concerned over liability and hour-tracking headaches. The language changes in AB 10 clarify that employers will not face increased liability if an exempt computer professional works over forty hours in a given week and, further, that employers will not be required to maintain records of the hours worked by full-time exempt computer professionals. Effective January 1, 2017, the employee's hourly rate of pay must not be less than $42.39, or, if the employee is paid on a salaried basis, not less than $88,381.55 annually for full-time employment, which is paid at least once a month and in a monthly amount of not less than $7,359.88.

The computer professional exemption is not applicable if:

(1) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(2) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(3) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(4) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

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128. *See* S.B. 929 (Cal. 2007) and A.B. 10 (Cal. 2008), *amending* CAL. LAB. CODE § 515.5(a)(4).

(5) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, set-up and installation instructions, and other similar written information, either for print or for on-screen media, or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(6) The employee is engaged in . . . activities . . . for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.[129]

[C][5][b] Certain Medical Professionals

While registered nurses may not be exempt under the professional exemption, the California legislature carved out an exception for certified midwives, certified nurse anesthetists, and certified nurse practitioners who are primarily engaged to perform duties for which their respective certification is required pursuant to the California Business and Professions Code.[130] Furthermore, licensed physicians and surgeons are exempt from the requirement of overtime pay if their hourly rate of pay is $55.00 or more.[131] The Division of Labor Statistics and Research adjusts this threshold rate of pay each year based on the Consumer Price Index, and the rate as of January 2016 is $76.24 per hour.[132] This exemption does not apply if the physician or surgeon is an intern or resident, or is covered by a collective bargaining agreement.[133]

[C][5][c] Commissioned Employees

Section 3(B) of IWC Wage Order 7 exempts from the overtime provisions employees whose earnings in a regular pay period exceed one and one-half times the minimum wage and more than half of whose earnings for the pay period consist of commissions.[134] "Commissioned wages" are defined as "compensation paid to any person for services rendered in the sale of such employer's property or services

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129. CAL. LAB. CODE § 515.5.
130. *Id.* § 515(f)(2)(A)–(C).
131. *Id.* § 515.6(a).
132. *Id.*
133. *Id.* § 515.6(b).
134. *See* IWC Wage Orders 4-2001 and 7-2001.

and based proportionately upon the amount or value thereof."[135] This exemption requires that an employee receive at least $15.01 for each hour worked.

While an employer is not required to pay commissions each pay period, an employer may not attribute commission wages paid in one pay period to other pay periods in order to satisfy the minimum earnings requirement of the commissioned employee exemption.[136]

In *Muldrow v. Surrex Solutions Corp.*,[137] the plaintiffs challenged their status as exempt commissioned employees under California law. To be properly classified as exempt, the court noted, employees must meet two criteria. First, they must be involved in selling a product or service, as opposed to making the product or rendering the service. Second, the amount of their compensation must be a percentage of the price of the product or service.[138] The plaintiffs in *Muldrow* were primarily engaged in recruiting job candidates and placing them with "client" employers. Employees would receive payments based either on a percentage of the placement fee charged to the client by Surrex, or as a percentage of the hourly rate charged to the client by Surrex. Plaintiffs argued that the formula determining their commissions was "too complex" and that commissions must be based only on a straight percentage of profits or service price. The court rejected that rigid formulation and held that a compensation plan based on profits (that is, incorporating overhead and other costs) was sufficiently related to the price of services sold to constitute commissions for the purposes of the exemption.

[C][6] Salary Basis Test

For exemptions other than the commissioned sales exemption, California Labor Code section 515(a) requires that exempt employees earn "a monthly salary equivalent to no less than two times the state minimum wage for full-time employment."[139] As a general rule, the Labor Commissioner has indicated that the FLSA's salary basis requirements will be followed in California. To determine the minimum weekly salary requirements employers should look to the

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135. CAL. LAB. CODE § 204.1.
136. Peabody v. Time Warner Cable, Inc., 328 P.3d 1028, 1032 (Cal. 2014).
137. Muldrow v. Surrex Sols. Corp., 146 Cal. Rptr. 3d 447 (Ct. App. 2012).
138. *Id.* at 1391, citing Keyes Motors, Inc. v. Div. of Labor Standards Enf't, 242 Cal. Rptr. 3d 873 (Ct. App. 1987).
139. CAL. LAB. CODE § 515(a).

remuneration requirements set forth in the IWC Wage Orders, multiply this sum by 12, divide by 52, and then compare the result to the employee's weekly salary to determine whether the employee's salary is sufficient. Currently, exempt employees will need to make at least $43,680 annually, or $840 per week. The Labor Commissioner also stated that an employee's weekly salary cannot be subject to reduction because of variations in the quality of the work performed. Thus, as under the FLSA requirements, employees must receive their contractual salaries in full for any workweek in which they perform any work without regard to the number of days or hours worked. This rule, however, is subject to the other general rule that employees need not be paid for any week in which they perform no work. Unlike the FLSA, however, the DLSE stated that *all* deductions for rule infractions are impermissible, and will not be allowed.[140]

On March 1, 2002, the Labor Commissioner issued an opinion letter confirming that the state salary basis requirement is generally consistent with federal regulations. Labor Code section 515(a)'s reference to a "monthly salary" that is "no less than two times the state minimum wage for full-time employment" did not change the weekly salary basis analysis, according to the Labor Commissioner, because full-time employment is defined by Labor Code section 515(c) as "employment in which an employee is employed for 40 hours per *week*" (emphasis added).

[C][7] *Extraterritorial Application of the Labor Code—The* Sullivan v. Oracle *Decision*

In a 2011 opinion,[141] the California Supreme Court expanded the scope of California's overtime laws to nonresidents working temporarily in California. Employers now must pay careful attention to which employees work in California and how they are compensated. The California Supreme Court decision stemmed from a case before the Ninth Circuit, where the Ninth Circuit withdrew its opinion and certified the following three questions to the California Supreme Court:

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140. *But see* Rhea v. Gen. Atomics, 174 Cal. Rptr. 3d 862 (Ct. App. 2014) (holding that policies requiring use of accrued vacation for any partial-day absences of any duration do not violate the salary basis test, even when increments of one hour or less are used).

141. Sullivan v. Oracle Corp., 254 P.3d 237 (Cal. 2011).

> First, does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week?
>
> Second, does [California Business and Professions Code section] § 17200 apply to the overtime work described in question one?
>
> Third, does [California Business and Professions Code section] § 17200 apply to overtime work performed outside California for a California-based employer by out-of-state plaintiffs in the circumstances of this case if the employer failed to comply with the overtime provisions of the FLSA?[142]

Regarding the first certified question, the California Supreme Court held that California's overtime laws are broadly worded and do not distinguish between residents and nonresidents. The court examined the overtime laws in Arizona and Colorado and found that those states had expressed no interest in regulating overtime performed by their residents working in other states, while California has an important public policy goal of preventing the "evils of overwork" performed in California. To exclude nonresidents, the court explained, would sacrifice California's important public policy goals and would encourage employers to import into California unprotected workers from other states.

With respect to the second and third questions, because California overtime laws apply to nonresidents working in California, the court also held that the Unfair Competition Law (UCL) applies to such work, thereby allowing unpaid overtime to serve as the basis for UCL claims. The court rejected the application of the UCL to claims for unpaid overtime under the FLSA for work performed outside of California, finding that nothing in the UCL's language or legislative history suggested that it was to apply to extraterritorial harms.

The court was very careful to limit its holding to the specific facts of the case, however: residents of Colorado and Arizona employed by a California-based employer, working for a full day or week in California, are entitled to the protection of California's overtime laws. The court declined to address the applicability of California's numerous other wage-and-hour laws to nonresident employees.

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142. Sullivan v. Oracle Corp., 557 F.3d at 979, 983 (9th Cir. 2009).

§ 1:2.3 Independent Contractors and Temporary Workers

Employers are increasingly utilizing independent contractors and temporary employees to bolster their workforces. Use of such individuals, however, can be risky if they are not properly classified. In principle, classifying workers as independent contractors or temporary employees allows employers to avoid certain payroll taxes and costly employee benefits. If workers are misclassified, however, the potential damages can include huge amounts for unpaid benefits, taxes, and penalties. Large companies and governmental entities alike have been the targets of actions challenging the independent contractor and/or temporary worker classification. The DOL has continued to make the issue of misclassification one of its top enforcement priorities.

Indeed, in recent years, several government initiatives at the federal and state level have focused exclusively on the issue of misclassification of independent contractors, including the DOL's Misclassification Initiative—which was launched under former Vice President Biden's Middle Class Task Force—and state efforts in California, Massachusetts, Michigan, Montana, New Jersey, and New York. The IRS has also refocused its attention on independent contractor misclassifications. In one of the larger fines imposed in recent years, the IRS fined FedEx Corporation $319 million because the company's delivery drivers should have been classified as employees for federal employment tax purposes.

Not only are these agencies independently increasing their scrutiny of employee classification issues, but agencies are working together to combat independent contractor misclassifications. In September 2011, the DOL entered into a memorandum of understanding with the IRS and, to date, the DOL has also entered agreements with a number of states to coordinate enforcement efforts.[143] Those states include Alabama, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, Rhode Island, Texas, Utah, Washington, Wisconsin, and Wyoming. New York also is looking to coordinate enforcement efforts across its state agencies with the New York Joint Enforcement

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143. DOL Memorandum of Understanding, Release No. 11-1373-NAT (Sept. 19, 2011).

Taskforce on Employee Misclassification, which focuses on sharing relevant information, coordinating investigations and enforcement actions, and educating the business community and the public as to these issues.

States have also enacted their own misclassification regulations. California,[144] Colorado, Delaware, Illinois, Maryland, Massachusetts,[145] and New Jersey have all enacted comprehensive statutes that include some or all of the following: presumptions that a worker is an employee unless the employer shows the worker to be an independent contractor, fines, stop-work orders, debarment from state contracts, imprisonment, and penalties for retaliation. Some of these statutes are limited to the construction and/or landscaping industries. A few of the statutes include a notice requirement, meaning the employer has to give notice at the commencement of the relationship to the worker that the worker is an independent contractor.[146] In Delaware, compliance with the notice requirement creates a presumption that the employer exercised good faith in determining the worker's classification.[147] Maryland gives the employer a forty-five-day window to pay restitution and come into compliance with the statute before instituting penalties if the mistake was not made "knowingly."[148]

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144. California's "Independent Contractor Law" creates additional penalties for independent contractor misclassification. This law applies to all employers and creates civil penalties of between $5,000 and $25,000 for willful misclassifications. In addition, the law requires any willful violator who misclassifies a worker to prominently display a violation notice on its website that must be posted for one year and signed by an officer of the company. CAL. LAB. CODE §§ 226.8, 2753.

145. In Mass. Delivery Ass'n v. Coakley, 769 F.3d 11 (1st Cir. 2014), the First Circuit held that state laws concerning a motor carrier's "transportation of property" are preempted by the Federal Aviation Administration Authorization Act (FAAAA), and so remanded to determine whether MASS. GEN. LAWS ch. 149, § 148(b) satisfied the "broad" preemption test on a review of the full record; *see* Mass. Delivery Ass'n v. Healey, 117 F. Supp. 3d 86, 98 (D. Mass. 2015) (holding section 148(b) preempted by the FAAAA), *aff'd*, 821 F.3d 187 (1st Cir. 2016).

146. *See generally* COLO. REV. STAT. § 8-72-114; 820 ILL. COMP. STAT. 185/1; MD. CODE REGS. 09.12.40.02; MASS. GEN. LAWS ch. 149, § 148B (d); N.J. STAT. ANN. § 34:15-79.

147. DEL. CODE ANN. tit. 6 §§ 3501–14.

148. MD. CODE ANN., LAB. & EMPL. §§ 3-901 to 3-920.

[A] Independent Contractors

Independent contractors can be broadly defined as workers who contract with the hiring party to provide a specific result under only limited supervision. Under the law, independent contractors are granted far less protection than employees. For example, only "employees" receive the protections afforded under the FLSA.[149] Unless an employer-employee relationship exists, a person performing work for another is not an "employee" under the wage-and-hour laws.

It is well established and the Supreme Court has specifically referred to the "striking breadth" of the FLSA's definition of the persons who are considered to be employees.[150] The term "employee" is defined in the FLSA as "any individual employed by an employer."[151] The statute does not, however, define the term "independent contractor."

With little guidance from the text of the FLSA, most courts will look to the "economic realities" of the relationship between the parties to determine if an individual is an independent contractor. The economic realities test centers on whether or not the worker is economically dependent upon the alleged employer for his or her livelihood and the reality of this relationship. The most important factors for determining a worker's status are:

(1) the degree of the alleged employer's right to control the manner in which the work is to be performed;

(2) the alleged employee's opportunity for profit or loss depending on his or her managerial skill;

(3) the alleged employee's investment in or source of the equipment or materials required for his or her task, or his or her employment of assistants;

(4) whether the service rendered requires a special skill;

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149. *See* 29 U.S.C. §§ 201–19.

150. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); *see also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) ("This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." (internal quotation marks omitted)).

151. 29 U.S.C. § 203(e)(1).

(5) whether the service rendered bears an integral relationship to the alleged employer's business; and

(6) the degree of permanence of the working relationship.[152]

In applying the "economic realities" factors, courts examine the totality of the circumstances to determine whether, as a matter of economic reality, the worker was dependent upon the business to which he or she rendered service.[153]

On July 15, 2015, the Administrator of the Wage and Hour Division of the DOL issued Administrator's Interpretation No. 2015-1 in an effort to articulate how the "economic realities" test should be applied. The interpretation is an expression of the viewpoint of the DOL that there is a widespread problem with misclassification of employees as independent contractors under the FLSA, stating that "[t]he ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business of him or herself. If the worker is economically dependent on the employer, then the worker is an employee."[154] Specifically, the interpretation states that the "economic realities" test should be applied in light of the "suffer or permit" definition of "employ" under the FLSA. "Thus,

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152. U.S. Dep't of Labor, Fact Sheet #13: Relationship Under the Fair Labor Standards Act (FLSA) (rev. July 2009), www.dol.gov/whd/regs/compliance/whdfs13.pdf. *See, e.g.*, Scantland v. Jeffrey Knight, Inc., 721 F.3d 1308 (11th Cir. 2013); Thibault v. Bellsouth Telecomm., Inc., 612 F.3d 843, 846 (5th Cir. 2010); Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979); *see also* U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #13: Employment.

153. *See, e.g., Scantland*, 721 F.3d at 1312 (explaining that the court views "the subsidiary facts relevant to each factor through the lens of "economic dependence" and whether they are more analogous to the "usual path" of an employee or an independent contractor"); Cromwell v. Driftwood Elec. Contractors, Inc., 348 F. App'x 57 (5th Cir. Oct. 12, 2009) (focus is whether, as a matter or economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself); Calle v. Chul Sun Kang Or, No. 11-0716, 2012 U.S. Dist. LEXIS 5742 (D. Md. Jan. 18, 2012) (concluding that because five of the six "economic reality" factors weigh in favor of employee status, the employer's motion for summary judgment on independent contractor relationship was denied).

154. U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 15, 2015), www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

applying the economic realities test in view of the expansive definition of 'employ' under the [FLSA], most workers are employees under the FLSA." The impact of the DOL's interpretation, which reflected substantial skepticism regarding the pre-existing federal regulation of independent contractors, had yet to play out in the courts before it was rescinded by the agency on June 7, 2017. The repeal casts renewed uncertainty over how the DOL, now operating under a new and more business-friendly administration, will approach independent contractor status under the FLSA.

In California, "once a plaintiff comes forward with evidence that he provided services for an employer, the [individual] has established a prima facie case that the relationship was one of employer/employee."[155] If the putative employee establishes this prima facie case, the burden then shifts to the employer to prove, if it can, that the putative employee was an independent contractor.[156] In order to rebut this determination, the employer needs to demonstrate that the eponymous "*Borello* factors" weigh in its favor. However, the most important consideration is the putative employer's "right to control work details."[157] In this regard, the pertinent question is "not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise."[158]

An appellate court in California also broadened the definition of "employee" using the "suffer or permit to work" standard. In *Dynamex Operations West v. Superior Court*,[159] the court concluded that any business that "suffers or permits" a worker to provide services is an employer. The appellate court concluded that the suffer-or-permit standard merely requires showing that the company either: (1) knew or should have known that the contractors were provided services; or (2) had the authority to negotiate the amount it would pay the contractors for their services. Critically, the appellate court abandoned all other tests of employment in favor of this broad "suffer or permit" standard, which originally arose from the child labor laws and was designed to determine whether two entities are joint employers, not

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155. Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010).
156. *Id.* at 901.
157. S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 48 Cal. 3d 341, 350 (1989).
158. Ayala v. Antelope Valley Newspapers Inc., 327 P.3d 165, 172 (Cal. 2014).
159. Dynamex Operations W. v. Superior Court, 179 Cal. Rptr. 3d 69 (Ct. App. 2014).

whether an individual is an employee or a contractor. The California Supreme Court has agreed to review the decision.[160]

[B] Temporary Workers and Joint Employment

A temporary employee is an individual who is employed by a personnel staffing company or temporary employment agency that provides its employees to other companies on an as-needed basis in order to meet the fluctuating workforce demands of its customers. Temporary employees are also referred to as "contingent workers."

Temporary employment and related forms of workplace relationships can qualify as forms of "joint employment." "Joint employment" or "co-employment" describes a legal relationship involving two or more employers.[161]

In June 2017, the DOL withdrew its administrative interpretation, issued in 2016, that offered nonbinding guidance regarding the FLSA's definition and treatment of joint employment. Administrative Interpretation No. 2016-01 expressed the agency's view that joint employment should be expansively defined under the statute, and differentiated between horizontal and vertical joint employment. The impact of the withdrawal is still uncertain, but suggests a retreat from the agency's relatively aggressive stance toward joint employment under the prior administration.

[B][1] Determining Employer Status

The determination of joint employment status can be important from the perspective of both the personnel staffing company and the customer-employer. Joint employer status requires that services be performed for each "employer," and that each one exercises some degree of control over the employee. Because the FLSA broadly defines the term employ to encompass parties who may not qualify under the stricter application of traditional agency law principles, appellate courts use a version of the "economic realities" test to determine, on a case-by-case basis, whether a party is an employee for the purposes of the statute. For example, the Second Circuit lists six factors that district courts should consider when determining, as a matter of economic reality, whether a party was an employer:[162]

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160. Dynamex Operations W. v. S.C. (Lee), 341 P.3d 438 (Cal. 2015).
161. *See* 29 C.F.R. § 791.2.
162. *See* Barfield v. N.Y.C. Health & Hosp. Corp., 537 F.3d 132, 140 (2d Cir. 2008) (citing Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003)).

(1) whether defendants' premises and equipment were used for plaintiff's work;

(2) whether the referral agencies had a business that could or did shift as a unit from one putative joint employer to another;

(3) the extent to which plaintiff performed a discrete line-job that was integral to defendants' process of production;

(4) whether responsibility under the contracts could pass from one subcontractor to another without material changes;

(5) the degree to which the defendants or their agents supervised plaintiff's work; and

(6) whether plaintiff worked exclusively or predominantly for the defendants.

Analyzing these factors, the court in *Barfield* found that:

> (1) Barfield worked on Bellevue's premises using Bellevue equipment; (2) no referral agency shifted its employees as a unit from one hospital to another, but instead each assigned health care workers, including Barfield, to the same facility whenever possible to ensure continuity of care; (3) Barfield performed work integral to Bellevue's operation; (4) Barfield's work responsibilities at Bellevue remained the same regardless of which agency referred her for a particular assignment; (5) Bellevue effectively controlled the on-site terms and conditions of Barfield's employment; and (6) Barfield worked exclusively for Bellevue.[163]

According to the court, in applying these factors, the hospital was a joint employer of the certified nursing assistant assigned to it by three different temporary agencies and, therefore, liable to the employee under the FLSA for unpaid overtime compensation.

Similarly, the Eleventh Circuit applied a multi-factor test to "shed light on the existence of economic dependence" in determining whether a joint employer relationship exists.[164] In *Layton v. DHL Express (USA), Inc.*, the court was charged with determining whether DHL was a joint employer of the drivers who were employed by a DHL contractor. The court concluded that DHL "simply tasked" and "provided little guidance regarding the manner by which to execute daily tasks."

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163. *Barfield*, 537 F.3d at 145.
164. Layton v. DHL Express (USA), Inc., 686 F.3d 1172 (11th Cir. 2012).

[B][2] Wage-and-Hour Issues

According to a 1968 DOL Opinion Letter addressing the joint employment regulation in 29 C.F.R. § 791.2, personnel staffing companies are the parties primarily responsible for maintaining records regarding the wages, hours worked, and overtime of their employees.[165] However, in the same letter, the DOL also stated that customer-employers may be held jointly liable for minimum wages and overtime, because those employees are typically jointly employed by both the personnel staffing company and its customers.[166]

As a result, if a joint employment relationship exists, there may be significant wage-and-hour consequences. For example, all the hours worked by an employee during the workweek for all employers considered joint employers will be counted when determining the amount of hours worked for wage-and-hour purposes. Additionally, joint employers are responsible, both individually and jointly, for compliance with applicable statutory requirements, including minimum wage, overtime pay, and record-keeping obligations. At the same time, each joint employer can take credit for all payments made to an employee by other joint employers.

California employers who utilize staffing agencies to supply temporary workers share in "all civil legal responsibility and civil liability" for the payment of wages and the provision of workers' compensation insurance.[167] This new section of the California Labor Code allows employers and staffing agencies to enter into indemnity provisions for violations of the law, but prohibits outright waiver of its requirements. The law is not applicable to employers with fewer than twenty-five total workers, including temporary employees supplied by a staffing agency, or employers utilizing fewer than five employees supplied by an agency at any given time.

§ 1:2.4 Interns

The FLSA does not specifically include an exemption from minimum wage and overtime payments for a "student intern." In fact, the term "intern" only appears once in the FLSA and once in the regulations, but neither reference applies to student interns. However, the DOL has rather extensive rulings and other guidance on "trainees,"

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165. DOL Opinion Letter No. 874 (Oct. 1, 1968).
166. *Id.*
167. CAL. LAB. CODE § 2810.3.

which are equivalent to interns for wage-and-hour purposes. Employers often assume that they can ignore the mandates of the FLSA when hiring interns. However, this assumption should be rigorously vetted against guidance provided by the DOL to determine whether the intern is actually an "employee" for purposes of the FLSA.

The DOL has distilled six factors that are considered helpful in distinguishing between a trainee/intern and a true employment relationship. The factors include whether:

(1) the training is similar to that which would be given in a vocational school;

(2) the training is for the benefit of the trainee;

(3) the trainee does not displace a regular employee and works under close observation;

(4) the training provider derives no immediate benefit from the trainee; in fact, its operations may be impeded;

(5) the trainee is not entitled to a job at the completion of the training; or

(6) the employer and the trainee understand that the trainee is not entitled to wages; however, a stipend may be permitted.

A number of other factors have been considered by other opinion letters, including: whether the individual is enrolled in school, taking classes concurrently with working, receiving academic credit for the work being performed, or paying tuition; whether the work is required for a degree; and whether school faculty are on staff. The court decisions applying these six factors, as well as other factors deemed relevant by the court, have not always been consistent. For example, at least one court held that the trainees were not employees and were not protected by the FLSA where five of the six criteria were met, but the fifth criterion was lacking because the trainees were promised employment before they completed the training.[168] Another court came to a different conclusion by focusing on just one of the six factors and finding that where the employer is the primary beneficiary of the trainees' labor, an employment relationship had been established.[169] However, the Second Circuit recently declined to utilize the six-factor test laid out by the DOL and instead adopted a

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168. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023 (10th Cir. 1993).
169. McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989).

"primary beneficiary test" in addressing whether unpaid workers on the set of Fox Searchlight's movie *Black Swan* qualified as interns.[170]

In an attempt to offer an alternative to the DOL's framework, the Second Circuit also laid out a "non-exhaustive set of considerations" for courts to weigh "[i]n the context of unpaid internships":

(1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

(2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

(3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

(4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

(5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

(6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

(7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[171]

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170. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2015) (holding that "the proper question is whether the intern or the employer is the primary beneficiary of the relationship"); *see also* Wang v. Hearst Corp., 617 F. App'x 35 (2d Cir. 2015) (same); *cf.* Winfield v. Babylon Beauty Sch. of Smithtown Inc., 89 F. Supp. 3d 556, 567 (E.D.N.Y. 2015) (noting the factor given the "most weight" in determining the existence of an employer-employee relationship exists is whether intern or the organization derives the most benefit from the intern's work).

171. *Glatt*, 791 F.3d at 384.

Much like the DOL's approach, "[n]o one factor is dispositive" and "courts may consider relevant evidence beyond the specific factors in appropriate cases."[172]

The California DLSE has taken the position in several opinion letters that employers should follow several additional requirements that stretch beyond the DOL's six criteria. The additional requirements are as follows:

- The training should be a part of an educational curriculum.
- The students should not be treated as employees for such purposes as receiving benefits.
- The training should be general, so as to qualify the trainees or students for work in any similar business, rather than designed specifically for a job with the employer offering the program.
- The screening process for the program is not the same as for employment.
- Advertisements for the program should be couched in terms of education rather than employment.

The New York City Human Rights Law has also been amended to define who should be classified as an "intern." Specifically, the amendment defines an "intern" as:

> [A]n individual who performs work for an employer on a temporary basis whose work: (a) provides training or supplements training given in an educational environment such that the employability of the individual performing the work may be enhanced; (b) provides experience for the benefit of the individual performing the work; and (c) is performed under the close supervision of existing staff. The term shall include such individuals without regard to whether the employer pays them a salary or wage.

§ 1:2.5 Tip Pooling and California Labor Code Section 351

Tip pooling has become the focus of many lawsuits against restaurants in the wage-and-hour context. Under 29 U.S.C. § 203(m),

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172. *Id.*

employers of tipped employees are permitted to pay a subminimum hourly wage of $2.13 and to supplement that wage with a "tip credit" sufficient to meet the statutory minimum wage when the employee does not earn sufficient tips to otherwise earn minimum wage. Section 203(m) states that "this section shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips." 29 C.F.R. § 531.52, effective 2011, made any tips the property of the employee who received them irrespective of whether the employer took a tip credit, thereby strictly curtailing tip pooling in many circumstances. In 2017, however, the DOL announced plans to repeal the regulation, restoring the former legal status of tip pooling and permitting employers who do not take a tip credit to pool tips among front and back of house employees. In *Cumbie v. Woody Woo, Inc.*,[173] the Ninth Circuit held that a restaurant that paid food servers the statutory minimum wage did not violate the FLSA by requiring food servers to pool and share tips with kitchen employees who are not customarily tipped by customers. The court reasoned that section 203(m) imposes conditions on employers who use the tip credit, and importantly, the court rejected the notion that the tips remain the property of an employee in the absence of a valid tip pool. Stated differently, the FLSA does not restrict tip pooling when no tip credit is taken.

The court also rejected the plaintiff's argument that the tip-pooling arrangement was prohibited by 29 C.F.R. § 531.35, which mandates that minimum wage payments be made "free and clear" without any "kickback" to the employer. The court again reasoned that section 203(m) does not alter the rule that tips belong to the servers to whom they were given only in the absence of an explicit understanding that is not otherwise prohibited by the FLSA. The court held that, because the FLSA does not restrict tip-pooling when no tip credit is taken, only the tips redistributed to the plaintiff from the pool belonged to her, and her contributions to the pool did not, and could not, reduce her wages below the statutory minimum. Finally, the court noted that the plaintiff received a minimum wage that was higher than the federal minimum wage, in addition to the portion of tips that she received. Applying *Cumbie*, courts construing this provision under the FLSA have found that including a

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173. Cumbie v. Woody Woo, Inc., d/b/a Vita Café, 596 F.3d 577 (9th Cir. 2010).

general manager who does not customarily and regularly receive tips prevents an employer from being entitled to a tip credit.[174]

In California, actions for violations of the Labor Code relating to tip-pooling may be more difficult for a plaintiff to pursue from the outset. Instead of relying on the Labor Code for a private right of action, potential plaintiffs must look to common-law torts such as conversion to recover misappropriated tips.[175]

§ 1:2.6 *Reimbursement of Expenses*

[A] California

California law requires an employer to indemnify an employee "for all that the employee necessarily expends in direct consequence of the discharge of the employee's duties."[176] Thus, for example, if an employee is sued individually for acts within the course and scope of his/her employment, an employer may have to indemnify the employee for his/her costs in defending against the lawsuit.[177] However, an employer need not indemnify an employee for the costs of counsel of the employee's choice.[178]

The California Supreme Court has held that it is not impermissible to reimburse employees through increased base salary or commission rates depending on the answers to three questions.[179] First, whether the employer adopted a practice or policy of reimbursing outside sales representatives for automobile expenses by paying them

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174. *See, e.g.*, Durnez v. R.J.E., LLC, 2015 WL 5607661, at *4 (D. Ariz. Sept. 24, 2015); *see also* Or. Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080, 1095 (9th Cir. 2016) (following the DOL's construction of the statute to extend the restrictions of 203(m) to all employers, and not only those who take a tip credit). *But see* Brueningsen v. Resort Express Inc., 2016 WL 1181683, at *5 (D. Utah Mar. 25, 2016) (rejecting the reasoning in *Perez* and holding that the court's construction in *Cumbie* trumps the DOL's construction to the extent the *Cumbie* decision followed from the unambiguous terms of the statute and left no room for agency discretion), *appeal filed*, No. 16-4198 (Nov. 16, 2016).
175. Lu v. Hawaiian Gardens Casino, Inc., 236 P.3d 346 (Cal. 2010).
176. CAL. LAB. CODE § 2802.
177. *See generally* Grissom v. Vons Cos., 1 Cal. Rptr. 2d 808, 1 Cal. App. 4th 52, 57–58 (Ct. App. 1991).
178. Carter v. Entercom Sacramento, LLC, 161 Cal. Rptr. 3d 782 (Ct. App. 2013).
179. Gattuso v. Harte-Hanks Shoppers, Inc., 169 P.3d 889, 902–03 (Cal. 2007).

higher commission rates and base salaries than it paid to inside sales representatives. Second, whether the employer established a method to apportion the enhanced compensation payments between compensation for labor performed and expense reimbursement. Finally, whether the amount paid for expense reimbursement was sufficient to reimburse the employees fully for the automobile expenses they reasonably and necessarily incurred. The court reversed the decision and remanded the case for consideration of these factors.

Any time an employee is required to make work-related calls on a personal cell phone, the employee must be reimbursed, even if the employee incurs no additional charges due to his or her enrollment in an unlimited use plan.[180] In order to be in compliance with section 2802 of the California Labor Code, the employer must reimburse the employee a reasonable percentage of the employee's cell phone bill.[181]

[B] New York

Effective December 31, 2017, employers in New York must reimburse employees between $6.20 and $16.20 per week if the employer requires uniforms but does not launder and maintain those uniforms.[182] The specific rate of reimbursement depends on how many hours per week the employee works, the size of the employer's workforce, and the employer's location.

Employers in the hospitality industry can qualify for the "wash and wear" exception to the uniform reimbursement requirement if the required uniforms are made of "wash and wear" materials, may be washed and dried with other personal clothes, do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment, and if the employees are provided with enough uniforms for the number of working days in an average workweek.[183]

§ 1:2.7 Wage Deductions (New York)

New York Labor Law section 193 permits wage deductions for:

- purchases at events sponsored by a bona fide charitable organization affiliated with the employer;

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180. Cochran v. Schwan's Home Serv., Inc., 176 Cal. Rptr. 3d 407, 412 (Ct. App. 2d Dist. 2014).
181. *Id*.
182. 12 N.Y. COMP. CODES R. & REGS. §§ 141-1.8(c), 142-2.5(c)(3), 142-3.5(c)(3), and 146-1.7.
183. *Id*. § 146-1.7(b).

- discounted parking or commuting passes;
- fitness center or health club membership dues;
- cafeteria or vending machine purchases made at the employer's facility;
- pharmacy purchases made at the employer's place of business;
- daycare expenses; and
- tuition, room, board, and fees for nursery, primary, secondary, and post-secondary education costs.

On October 9, 2013, almost one year after the New York Labor Law was amended to expand the scope of permissible wage deductions, the New York Department of Labor (NY DOL) issued regulations to guide employers on appropriate wage deductions.[184]

Among the information provided in the very detailed final regulations, the NY DOL clarifies what it means for a deduction to be "authorized" by an employee. Specifically, the regulations state that to be a valid authorization, it must be in writing and provide all of the terms and conditions of the deductions, its benefits, and the details of the manner in which deductions shall be made. The employee must have the opportunity to review the notice before any deductions are made or there are any changes in the amount of the deduction or a substantial change in the benefits of a deduction (which the NY DOL would view as *any* increase to the amount of the deduction). A single written authorization can be used to cover more than one deduction.

The regulations also address deductions for wage overpayments and salary advances. Section 193 of the New York Labor Law permits wage deductions to recoup overpayments of wages if an employee was overpaid due to a mathematical or other clerical error and for repayments on advances of salary or wages, but specifies that the NY DOL would issue regulations to address the scope of these provisions.

With respect to deductions for wage overpayments, the regulations provide:

- *Timing and Duration*: An employer can only recover wage overpayments through deductions when the overpayment is discovered within eight weeks after it is made, but the employer can take deductions for a period of six years from the original

184. *See id*. pt. 195.

overpayment. In other words, the regulations require an employer to learn about the overpayment within eight weeks of when the overpayment is made, but can spread the deductions to recover the overpayment over a six-year period.

- *Limitations on Amount of Deduction*: An employer can recover the entire overpayment in the next wage payment, so long as the entire overpayment is less than or equal to net wages earned after other permissible deductions. If the overpayment is larger than the following wage payment, the deductions cannot exceed 12.5% of the gross wages earned in the wage payment and the deductions cannot bring the effective hourly wage rate below the minimum hourly wage.
- *Notice of Intent to Deduct and Opportunity to Challenge*: Employers must give notice of the intent to commence deductions to recover overpayment at least three days prior to the deduction if the entire overpayment will be recovered from one wage payment, and at least three weeks prior to the first deduction if the overpayment will be paid back over time. The notice must contain the amount overpaid in total and per pay period, the total amount to be deducted, and the date(s) of the deduction. The notice must also explain how an employee can contest the overpayment and/or terms of recovery. An employer must follow a detailed procedure for handling disputes over the overpayment and/or recovery, including providing written notice of the employer's final determination within one week of meeting with the employee to discuss the issue. As long as the employee provides timely notice of his or her objection, no deductions can be taken until the dispute procedure is concluded. Failing to follow the dispute procedure will create a presumption that the contested deduction was impermissible.

As for salary advances, the regulations state:

- *Timing and Duration*: Once an advance is given, no further advance may be given until the existing advance has been repaid in full.
- *Limitations on Amount of Deduction*: The employer may recover advances through wage deductions no more frequently than one deduction per wage payment, but the amount of that recovery is determined by the written terms of the advance

authorization. Importantly, the advance authorization may permit total reclamation through deduction from the last wage payment if employment ends prior to the expiration of the advance authorization.

- *Opportunity to Challenge*: As with overpayments, the employer must provide employees with an opportunity to challenge a deduction that is not in accordance with the written authorization. However, an employee can only revoke the authorization prior to the actual provision of the advance by the employer.

§ 1:2.8 Hours Worked

[A] "Hours Worked" Defined

An employer is required to compensate non-exempt employees only for "hours worked." Generally, however, if an employee is "suffered or permitted" to work, even though not instructed or requested to do so, the time so spent is compensable working time, or "hours worked."[185]

The FLSA does not contain a specific definition of "hours worked." Instead, the DOL relies upon the definition first set out in *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*,[186] which held that employees must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." This definition was expanded later in *Anderson v. Mt. Clemens Pottery Co.*,[187] which held that the workweek includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." These holdings are codified at 29 C.F.R. § 778.223.

In *Integrity Staffing Solutions, Inc. v. Busk*,[188] the U.S. Supreme Court analyzed whether employees' time spent waiting to undergo and undergoing security screening prior to leaving work is compensable under the FLSA. The Ninth Circuit previously ruled that the employer had to pay overtime for the screening process, concluding

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185. 29 C.F.R. § 785.11.
186. Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944).
187. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690–91 (1946).
188. Integrity Staffing Sols., Inc. v. Busk, 135 S. Ct. 513 (2014).

that this after-work review was a job requirement and was for the company's benefit. The U.S. Supreme Court reversed, holding that the security screenings were "noncompensable postliminary activities." The Court reasoned that the screenings were not the principal activity that the employees were employed to perform. Nor were the screenings "integral and indispensable" to the employees' duties as warehouse workers. The Court held that "an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

California law provides a slightly different definition of "hours worked" that is broader than the federal standard. In *Mendiola v. CPS Security Solutions, Inc.*,[189] the California Supreme Court ruled that employees are entitled to compensation for all on-call hours spent at their assigned worksites, even when they are engaged in certain personal activities or sleep. The plaintiffs in *Mendiola* were security guards hired to protect construction sites overnight on weekdays and around the clock on weekends. The guards were required to periodically patrol and respond to disturbances by remaining on call throughout their shifts. While on call, guards were required to reside in trailers on site where they could engage in certain personal activities. The guards were permitted to leave the premises only if a relief guard was available and the assigned guard traveled no more than thirty minutes from the job site.

The *Mendiola* court found that, based on the level of control CPS exercised over the plaintiffs' on-call activities and the fact that the plaintiffs' "mere presence was integral to CPS's business," on-call time constituted "hours worked." In doing so, the court rejected CPS's reliance on a federal regulation, 29 C.F.R. § 785.23, which provides that workers who reside on an employer's premises are only counted as "working" during "time spent carrying out assigned duties," finding that the IWC had not expressed any clear intent to incorporate the federal understanding into the wage order at issue.

The court further held that CPS could not exclude any period of "sleep time" from the guards' twenty-four-hour weekend shifts. The court again eschewed reliance on a federal regulation, 29 C.F.R. § 785.22, which provides that employers and employees may agree that sleep time is not compensable. The court distinguished cases

189. Mendiola v. CPS Sec. Sols., Inc., 340 P.3d 355 (Cal. 2015).

and wage orders supporting a sleep time exception for workers in other industries (for example, ambulance drivers, in-home child care providers) and held that Wage Order No. 4 contained no such exception. In so holding, the court declined to defer to the DLSE's finding that CPS's policy complied with all applicable wage orders, emphasizing that the DLSE had changed its position over time and that the promulgating agency (the IWC) had not expressly incorporated any sleep time exception into the relevant wage order.

The Third Circuit recently considered whether, under 29 C.F.R. § 785.18, employee rest breaks of under twenty minutes are compensable as hours worked.[190] Defendant Progressive Business Publications maintained a policy permitting employees to take what Progressive characterized as periods of "flexible time" on demand throughout employees' work day. Progressive, however, compensated employees only for breaks lasting ninety seconds or less. In holding that Progressive's policy was unlawful, the court upheld the district court's interpretation of section 785.18 as creating a bright-line rule that breaks of twenty minutes or less are compensable working time. In so holding, the court dismissed as unrealistic the potential for virtually limitless breaks, so long as each break lasted less than twenty minutes.[191]

Employers should be conscious of additional state law standards governing employee rest breaks, including those that accord employees pre-determined and guaranteed rest break periods based on the number of hours worked in a shift.

[B] Meal Breaks

[B][1] FLSA

The FLSA does not require meal periods. However, insofar as meal periods are provided (that is, off-duty breaks typically thirty minutes or more in length), they are not considered work time, and employers are not required to compensate employees for meal period time.[192] In determining whether an allotted meal period is in fact compensable work time, courts will consider the "totality of the circumstances"

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190. Sec'y, U.S. Dep't of Labor v. Am. Future Sys., Inc., No. 16-2685 (3d Cir. 2017).
191. *Id.*
192. 29 C.F.R. § 785.19.

and evaluate whether the employee spends his or her break period in activities that inure predominately to the benefit of the employer.[193]

[B][2] California

California employers must comply with meal and rest period requirements, and may be liable for violations of such requirements. Specifically, under California Labor Code section 512 and the relevant IWC regulations, an employer must provide a thirty-minute meal break to employees who work more than five hours per day, a second break to employees working more than ten hours per day, and a ten-minute rest break every four hours or fraction worked thereof.[194] Under section 226.7, violation of meal or rest period requirements may result in an hour of pay to the employee.[195] A federal district court has determined that the plain wording of section 226.7 "is clear that an employer is liable [for a section 226.7 penalty] per work day, rather than per break not provided."[196]

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193. *See, e.g.*, Havrilla v. United States, 125 Fed. Cl. 454, 464 (2016) (abrogating the "complete relief" standard articulated in 29 C.F.R. § 785.19 and noting that appellate courts have generally not required that an employee be entirely removed from work duties to qualify as an uncompensated meal period).

194. On September 30, 2010, Governor Schwarzenegger signed into law AB 569, effective January 1, 2011. This law amends section 512 and exempts from the meal break requirements the following positions: construction workers, commercial drivers, security officers, and gas and electrical workers who are covered by a valid collective bargaining agreement containing specified terms.

195. A California court of appeal held that a plaintiff may not recover punitive damages in addition to the extra hour of pay provided for in Labor Code section 226.7 due to the "new right-exclusive remedy" doctrine and the more general principle that bars punitive damages awards absent breach of an obligation not arising from contract. Brewer v. Premier Golf Props., 86 Cal. Rptr. 3d 225 (Ct. App. 2008). According to the court, where a statute creates new rights and obligations not previously existing in the common law, the express statutory remedy is generally the exclusive remedy available for statutory violations. The *Brewer* court also applied its holdings to violations of Labor Code sections 226 (pay stubs) and 1197.1 (minimum wage).

196. Cordner v. Houston's Rests., 424 F. Supp. 2d 1205 (C.D. Cal. 2006); *cf.* Marlo v. UPS, Inc., 2009 U.S. Dist. LEXIS 41948 (C.D. Cal. May 5, 2009) (plaintiff able to recover one additional hour of pay for each *type* of violation listed in the statute per workday).

The California Supreme Court has resolved the issue of whether the extra hour of pay is a penalty or a wage, holding that the "one additional hour of pay" provided for in Labor Code section 226.7 is a wage or premium pay subject to a three-year statute of limitations.[197] In its opinion, the court looked to the statute's plain language, its administrative and legislative history, and its compensatory purpose.

In *Brinker Restaurant Corp. v. Superior Court*,[198] a highly anticipated decision, the California Supreme Court clarified employers' obligations to provide meal and rest periods under California law and provided guidance regarding class certification issues. On the most contentious of the issues raised in *Brinker*—the nature of an employer's duty to provide meal periods under California law—the court held that an employer's obligation is simply to relieve the employee of all duty for the designated period, with the employee free to use the time for whatever purpose he or she desires, but the employer need not ensure that no work is done.

With respect to rest periods, the court clarified both the timing of rest periods and the relationship between rest periods and meal periods. First, the court held that employers must authorize and permit rest periods at the rate of ten minutes of rest time per four hours or major fraction thereof (that is, more than two hours). Where an employee's shift lasts less than three and one-half hours, a rest break need not be provided. Thus, the court held that an employee is entitled to rest periods as follows: one ten-minute rest break for shifts from three and one-half to six hours in length, two ten-minute rest breaks for shifts of more than six hours up to ten hours, three ten-minute rest breaks for shifts of more than ten hours up to fourteen hours, and so on. The court also noted that the rest break could come before or after the meal period. Employers must make a good-faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that where practical considerations make it infeasible.

Following *Brinker*, meal and rest period class actions have become more difficult to certify, as acknowledged by the court in *In re Walgreen Co. Overtime Cases*.[199] Under *Brinker*'s "make available" standard, the fact an employee missed a meal period does not establish a

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197. Murphy v. Kenneth Cole Prods., Inc., 155 P.3d 284 (Cal. 2007).
198. Brinker Rest. Corp. v. Superior Court, 273 P.3d 513 (Cal. 2012).
199. *In re* Walgreen Co. Overtime Cases, 180 Cal. Rptr. 3d 38, 41 (Ct. App. 2014), *ordered not published* (Feb. 18, 2015).

violation; the court must additionally ask why each meal period was missed, making classwide determinations more difficult.[200] This standard also affects the assumptions an expert can rely on in making determinations regarding the number of potential meal and rest period violations. Under the "make available" standard, an expert may not assume that there is a violation every time an employee does not take a timely break.[201] The California Supreme Court in 2017 held that employers must relieve their employees of all duties during rest periods and relinquish any control over how employees spend their rest break time to comply with California law. In *Augustus v. ABM Security Services, Inc.*,[202] a group of security guards alleged they were not provided proper rest periods because their employer required them to remain on-call during their breaks. In analyzing whether the employer's conduct violated the California Labor Code, the California Supreme Court noted that unlike the language that expressly requires employees to be "relieved of all duty" during meal periods, the rules relating to rest periods contain no similar language. Nevertheless, the court still determined that the normal meaning of "rest" should be read to mean "the opposite of work." It then looked to language in Labor Code section 226.7, which prohibits employers from requiring "any employee to work during any meal or rest period," to infer that employers' responsibilities were "the same for meal and rest periods."The court then determined that employers must relieve employees from all duties and control during rest periods. As a result, requiring workers to remain on-call did not comply with the law. The court stated "one cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods." It explained that a rest period "means an interval of time free from labor, work, or any other employment-related duties. And employees must not only be relieved of work duties, but also be freed from employer control over how they spend their time."

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200. *Id.* at 42.
201. *Id.*
202. Augustus v. ABM Sec. Servs., Inc., 2 Cal. 5th 257 (2016).

[B][3] New York

New York Labor Law section 162 governs meal breaks. It requires a sixty-minute meal break for individuals employed in a factory. Other employees are entitled to receive a thirty-minute meal break between 11:00 A.M. and 2:00 P.M., assuming that the employee works a shift of more than six hours that extends over the noonday meal. If a person is employed for a shift that starts before 11:00 A.M. and continues to later than 7:00 P.M., the employee is entitled to an additional twenty-minute meal between 5:00 P.M. and 7:00 P.M. Finally, any individual who works a shift of more than six hours and that shift begins between 1:00 P.M. and 6:00 A.M. is entitled to a sixty-minute meal break (in a factory) or forty-five minutes (in a mercantile or other covered occupation).

[C] On-Call and Waiting Time Under the FLSA

Generally, non-exempt employees who are required to remain "on call," or who are required to remain near the employer's premises so that they cannot use the time effectively for their own personal purposes, are entitled to be compensated for the entire period spent on call.[203]

An employee who is required to leave word at his home or with company officials where he may be reached, but whose personal activities are not restricted to a significant extent, may not be entitled to compensation for time spent on call.[204]

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203. 29 C.F.R. § 785.17; *see also id.* § 785.15 (employee is entitled to compensation only for idle time when "the employee is unable to use the time effectively for his own purposes," and noting that messenger doing crossword puzzle while waiting for assignments is working during that period of inactivity); Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931 (9th Cir. 2004) (on-call time compensable where geographic and response time restrictions tethered employees to homes).

204. 29 C.F.R. §§ 785.17, 553.221(d) ("time spent at home on-call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits"); *see also* DOL Opinion Letter FLSA 2009-17 (Jan. 16, 2009) (private water company not required to pay emergency service workers for "on-call" time where employees were not restricted to any particular location and received only infrequent on-call requests); Jonites v. Exelon Corp., 522 F.3d 721 (7th Cir. 2008) (lineman required to be reachable by phone/beeper and within two-hour radius not eligible for overtime for on-call time).

[D] "De Minimis" Activities

A work-related activity is not compensable if the time spent on that activity is "de minimis." Examples of de minimis activities may include: punching a time card, entering a code to begin work on a computer, or putting on an apron to prepare for food handling work. Plaintiffs often assert that such activities are compensable in the aggregate, and, thus, overtime should be paid to the employees for engaging in any activity that generally occurs outside the forty-hour workweek.

Several factors are considered in determining whether an activity is de minimis, including:

(1) the amount of time spent on the additional work;

(2) the practical administrative difficulty of recording the additional time;

(3) the size of the claim in the aggregate; and

(4) whether the plaintiffs performed the additional work on a daily basis.[205]

Two issues that often come up in the context of analyzing whether work-related activity is de minimis or compensable time are: (1) whether employees must be compensated for the time spent walking from a locker room or other work-preparation area to their work stations; and (2) whether employees must be compensated for the time spent dressing into their work clothes. There are two statutory provisions applicable to this analysis. First, the Portal-to-Portal Act exempts from the minimum wage and overtime provisions of the FLSA "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform."[206] Second, section 3(o) of the FLSA excludes from the time during which an employee is entitled to be compensated "any time spent in changing clothes . . . at the beginning or end of each workday which was excluded from measured working time . . . by the express terms of or by custom or

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205. *See* Lindow v. United States, 738 F.2d 1057, 1062–63 (9th Cir. 1984) (holding that seven to eight minutes spent reading log book and exchanging information daily was de minimis and not compensable).

206. 29 U.S.C. § 254(a).

practice under a bona fide collective-bargaining agreement applicable to the particular employee."[207]

In *IBP, Inc. v. Alvarez*,[208] the U.S. Supreme Court analyzed whether time spent walking between changing rooms and production areas should be considered work time under the FLSA. On review, the Supreme Court agreed with the Ninth Circuit that time spent walking to and from the production floor, as well as waiting to remove protective clothing, were activities for which employees should be paid as part of a "continuous workday." By contrast, the Court held that "the time spent waiting to don—time that elapses *before* the principal activity of donning integral and indispensable gear" is not compensable. The Court differentiated waiting time, which may or may not be necessary depending on the particular situation of each employee, from the actual act of donning of certain types of protective gear, which the Court noted is always essential for the worker to do his/her job.[209]

In *Sandifer v. United States Steel Corp.*,[210] the Supreme Court grappled with the meaning of the phrase "changing clothes" in the FLSA. The high Court analyzed whether steelworkers were entitled to compensation for time spent donning and doffing protective gear required for their hazardous jobs in the company's steel plants. The Supreme Court held that "clothes," for the purposes of section 203(o), meant "items that are both designed and used to cover the body and are commonly regarded as articles of dress." Justice Scalia, writing for the Court, explained that this was the ordinary meaning from dictionaries in circulation at the time the provision was first added to the FLSA. The Court then defined "changing clothes" to include time employees spend altering their dress in addition to time spent

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207. *Id*. § 203(o).
208. IBP, Inc. v. Alvarez, 546 U.S. 21 (2005).
209. *Id.* at 39–40; *see also* Gorman v. Consol. Edison Corp., 488 F.3d 586 (2d Cir. 2007) (nuclear power plant employees not entitled to compensation under the FLSA for time spent going through security or "donning and doffing" personal protective gear consisting of helmet, safety glasses, and boots because pre- and post-work activities were not "integral" to "principal activities" for which employees were hired), *cert. denied*, 533 U.S. 1093 (2008). *But see* Franklin v. Kellogg Co., 619 F.3d 604, 620 (6th Cir. 2010) (finding donning and doffing of a protective uniform "integral and indispensable" where the activity is required by and primarily benefits the employer, whether or not the equipment is strictly "necessary" for the employee to complete his or her duties).
210. Sandifer v. U.S. Steel Corp., 134 S. Ct. 870 (2014).

substituting clothes. Applying these definitions to the case at hand, the Court held that nine of the twelve protective pieces of gear the employees had raised were "clothing" (such as the jacket, hat, pants, and hood), while the safety glasses, earplugs, and respirator were not. However, because the vast majority of the time these employees spent dressing was devoted to clothing, that time was not compensable pursuant to section 203(o).

Particular attention also should be paid to state law developments as to compensable time issues.[211] For example, although the U.S. Supreme Court has determined that bag checks are not compensable under *Busk*, the California Supreme Court has never weighed in on whether similar bag checks qualify as de minimis time under state wage and hour laws. In the pending *Frlekin v. Apple* case before the Ninth Circuit, the court has certified the following question to the California Supreme Court: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of California Industrial Welfare Commission Wage Order No. 7?"[212] In the lawsuit, the plaintiffs seek compensation for time spent waiting to undergo unpaid bag checks by managers upon leaving Apple's retail stores for breaks or changes in shifts. In its certified question, the Ninth Circuit noted there is "strong support" to follow in the form of the California Supreme Court's prior precedent of *Morillion v. Royal Packing Co.*,[213] which determined that time spent by employees using their own transportation to travel to a worksite even though the employer provided company shuttles was not compensable. However, the Ninth Circuit also questioned whether *Morillion* was distinguishable in the context of bag searches. The California Supreme Court has accepted the certified question and agreed to provide guidance.

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211. *See, e.g.*, See's Candy Shops, Inc. v. Superior Court, 210 Cal. App. 4th 889, 903 (2012) (granting summary judgment to employer on a challenge to the practice of rounding employee time punches to the nearest tenth of an hour and holding that if the policy is neutral both facially and as applied, the practice "is proper under California law").

212. Frlekin v. Apple, No. 15-17382, 2017 WL 3723235 (9th Cir. Aug. 16, 2017).

213. Morillion v. Royal Packing Co., 22 Cal. 4th 575 (2000).

[E] Travel Time

Ordinarily, employers need not compensate employees for travel time to and from work.[214] However, the Eleventh Circuit has held that county employees required to travel from home to a city parking lot to pick up a county car must be compensated from the time that they retrieve the car to the time that they return it at the end of the day.[215] The court reasoned that employees who were required to use county cars and protect them by leaving them in the county parking lot did so for the benefit of the county.

The issue of whether travel time is compensable becomes more complicated, however, when intertwined with preliminary and postliminary activities. In *Rutti v. Lojack Corp.*,[216] the Ninth Circuit held that time spent by an employee commuting to and from job sites in a company-provided vehicle was not compensable under the Employee Commuter Flexibility Act (ECFA), but was compensable under California law.

As the court explained, the ECFA, enacted in 1996, provides that an employer need not compensate an employee for use of a company vehicle where the use of the vehicle is not part of the employee's principal activities because its use is governed by an agreement between the employer and the employee.[217]

In addition, the court considered Rutti's preliminary activities and found that he offered no evidence as to whether those activities— receiving, mapping, and prioritizing jobs—were integral to his principal activities for Lojack and took more than a de minimis amount of time. However, as to the postliminary activities—namely, the required evening transmission of data—the court reversed the lower court's holding and found that the act of transmitting the data was, for the purposes of summary judgment, integral to Rutti's principal activities.

Finally, the court vacated the district court's grant of summary judgment and remanded on the narrow question of whether the time

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214. *See, e.g.*, Kuebel v. Black & Decker, Inc., 643 F.3d 352 (2d Cir. 2011) (retail specialist who commuted from home base to various worksites and who completed work tasks at home in mornings and evenings not entitled to payment for time spent commuting under FLSA or N.Y. law).
215. Burton v. Hillsborough County, 181 F. App'x 829 (11th Cir.), *cert. denied*, 549 U.S. 1019 (2006).
216. Rutti v. Lojack Corp., 596 F.3d 1046 (9th Cir. 2010).
217. *See* 29 U.S.C. § 254(a).

consumed by Rutti's postliminary data transmission responsibilities was de minimis, and therefore non-compensable.

§ 1:2.9 Calculating Overtime Premiums: Determining the Regular Rate

The overtime rules represent one of the most complicated, and perhaps most misunderstood areas of wage-and-hour law. Generally, the overtime rules require the employer to compensate non-exempt employees at a higher or premium rate once the number of hours worked by the employee exceeds a certain amount during a particular time period.

The amount of an employee's overtime premium is calculated with reference to the employee's "regular rate" of pay. Regardless of the method of compensation used by an employer—for example, hourly, salaried, commission, piecework, etc.—an employee's regular rate is computed as an hourly rate and is generally ascertained by dividing the employee's compensation in a given week by the number of hours actually worked in the same workweek. Despite the seemingly straightforward nature of this calculation, this issue has been under the scrutiny of the courts and the DOL.

In *Rodriguez v. Farm Stores Grocery, Inc.*,[218] the Eleventh Circuit held that the district court erred when it instructed the jury that an employee's "regular rate" for purposes of computing FLSA overtime pay is "determined by dividing all of the hours worked into the total wages for those hours."[219] Rather, the standard should have followed the Labor Department's interpretive bulletin that calculates an employee's regular rate of pay by dividing the individual's weekly salary by "the number of hours which the salary is intended to compensate."[220]

[A] Premium Pay

The circuits are divided over the interpretation of the FLSA's overtime-offsetting statute,[221] which governs when an employer may credit premium payments against overtime pay. The Eleventh Circuit, for example, has held that premium pay should be creditable

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218. Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259 (11th Cir. 2008).
219. *Id.* at 1265.
220. *Id.* at 1268; 29 C.F.R. § 778.113.
221. 29 U.S.C. § 207(h)(2).

toward any overtime compensation due under the FLSA.[222] However, the Sixth, Seventh, and Ninth Circuits have held that "premium pay" under section 207(h)(2) of the FLSA may only be credited against overtime pay during the same workweek.[223]

[B] Per Diem

In calculating the "regular rate" of pay, a per diem for payment of travel expenses is not part of regular pay and, therefore, should not raise the hourly rate for purposes of calculating overtime if the travel was primarily for the employer's benefit.[224] If the per diem is for the employee's own benefit, the payment will increase the employee's regular rate for overtime purposes.[225]

[C] Sick Leave Buy-Backs

Circuit courts are split as to whether sick leave buy-backs must be included in the calculation of an employee's regular rate.[226] The

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222. Kohlheim v. Glynn County, 915 F.2d 1473 (11th Cir. 1990); *see also* O'Brien v. Town of Agawam, 491 F. Supp. 2d 170, 176 (D. Mass. 2007).

223. Herman v. Fabri-Centers of Am., Inc., 308 F.3d 580, 590 (6th Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003); Howard v. City of Springfield, 274 F.3d 1141, 1149 (7th Cir. 2001); Haro v. City of Los Angeles, 745 F.3d 1249, 1260 (9th Cir. 2014).

224. 29 U.S.C. § 207(e)(2); 29 C.F.R. §§ 778.217(a), 778.22; Berry v. Excel Grp. Inc., 288 F.3d 252 (5th Cir. 2002) (per diem totaling $100 per week was reasonable reimbursement of employee's actual expenses and not included in computation of employee's regular rate).

225. 29 C.F.R. § 778.217(a); Gagnon v. United Technisource, Inc., 607 F.3d 1036, 1041 (5th Cir. 2010) (where the employer "artificially designat[es] a portion" of employee's wages as "per diem," per diem amount constitutes "remuneration for employment" and should be included as part of employee's regular rate).

226. *Compare* Acton v. City of Columbia, Mo., 436 F.3d 969, 977 (8th Cir. 2006) (sick leave buy-backs, which employees who regularly attended work were entitled to, encourage the work duty of work attendance and therefore must be included in calculation of regular rate), *and* Chavez v. City of Albuquerque, 630 F.3d 1300, 1307–09 (10th Cir. 2011) (analogizing sick leave buy-backs to attendance bonuses), *with* Featsent v. City of Youngstown, 70 F.3d 900 (6th Cir. 1995) (cash-out for unused sick leave is not pay for hours worked and need not be included in the employee's regular rate), *and* Balestrieri v. Menlo Park Fire Prot. Dist., 800 F.3d 1094 (9th Cir. 2015) (payments to firefighters for unused leave time did not figure into the "regular rate of pay" and were therefore excluded from overtime compensation calculations under the FLSA).

DOL has opined that stipends for non-use of sick leave should be included in an employee's regular rate of pay.[227]

[D] "Blended" Pay Rates

The regular rate for employees performing different work during a workweek that is compensated at different rates may be calculated by totaling the employee's pay for the week and dividing that total by the number of hours the employee worked.[228]

[E] California Regular Rate

Labor Code section 510 mandates that an employer pay an employee time and one-half for (1) more than eight hours of work in one workday, and (2) more than forty hours of work in any workweek. A California appellate court has held that the plain language of section 510 does not require an employer to compensate an employee at a rate higher than one and one-half times the regular rate of pay for any overtime performed on a holiday where the employee already received premium pay of time and one-half.[229]

In addition, effective January 1, 2013, California Labor Code section 515(d) was amended to read:

> (d) (1) For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary.
>
> (2) *Payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary.*[230]

§ 1:2.10 Implementing "Flextime" Schedules

Under the FLSA and the New York Labor Law, flexible scheduling arrangements in which an employee works over eight hours in a workday without overtime pay are permissible as long as the employee's hours do not exceed forty in a workweek. However, California's

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227. DOL Opinion Letter FLSA 2009-19 (Jan. 16, 2009).
228. Allen v. Bd. of Pub. Educ. for Bibb Cty., 495 F.3d 1306 (11th Cir. 2007).
229. Advance-Tech Sec. Servs., Inc. v. Superior Court, 77 Cal. Rptr. 3d 757 (Ct. App. 2008).
230. CAL. LAB. CODE § 515(d) (emphasis added).

requirement that overtime be paid to non-exempt employees who work more than eight hours in a workday or forty hours in a workweek creates difficulties for employers having flexible work schedules that do not involve overtime. To mitigate this difficulty, employers may propose an alternative workweek schedule or a menu of alternative schedules, of no longer than ten hours per day within a forty-hour workweek, without the payment of overtime.[231] The affected employees, however, must approve the alternative workweek schedule(s) by a two-thirds vote in a secret ballot, and the results of the election must be reported to the Division of Labor Statistics and Research within thirty days.[232] Employers may not reduce an employee's rate of hourly pay as a result of the adoption, repeal, or nullification of an alternative workweek schedule.[233]

Thus, if employees of a particular work unit adopt a workweek consisting of four ten-hour days, their employer must pay overtime only for hours worked in excess of ten per day or forty per week.[234] Furthermore, hours worked in excess of twelve per day, and hours in excess of eight on days worked beyond the regularly scheduled workweek, must be compensated at twice the employee's regular rate of pay.

For religious or other reasons, some employees may be unable to work an adopted alternative workweek schedule. Employers must make a reasonable effort to accommodate employees who were eligible to vote in the election and are unable to work an alternative schedule.[235] Employers are permitted to accommodate employees

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231. *Id*. § 511(a).
232. *Id.* § 511(a), (e). Alternative work schedules adopted before January 1, 2000, are not valid other than in three limited situations: (a) where the schedule consists of not more than four ten-hour workdays per week and was adopted by a two-thirds vote of the affected employees in a secret-ballot election pursuant to previously effective Wage Orders; (b) where an employee was already voluntarily working a schedule of not more than four ten-hour workdays per week as of July 1, 1999, and subsequently requested, in writing, that the schedule be continued after January 1, 2000; or (c) where an alternative workweek schedule in the healthcare industry was adopted by a two-thirds vote of affected employees pursuant to Wage Orders 4 and 5 in effect prior to 1998, provided the scheduled workdays consist of not more than twelve hours. *Id*. § 511(f)–(h).
233. *Id.* § 511(c).
234. Mitchell v. Yoplait, 19 Cal. Rptr. 3d 267 (App. Dep't Super. Ct. 2004).
235. CAL. LAB. CODE § 511(d).

hired after the election by providing eight-hour workday schedules.[236] Employers are required to explore "any available reasonable alternative means" of accommodating the religious belief or observance of any employee that conflicts with an adopted schedule, in accordance with the provision of the California Fair Employment and Housing Act forbidding discrimination in employment based on religion.[237]

§ 1:2.11 Workweek Designation

A California appellate court recently addressed the issue of workweek designation under California law. In *Seymore v. Metson Marine, Inc.*,[238] an appellate court held that an employer may not design a workweek schedule to avoid paying workers for overtime without a legitimate business reason. The plaintiff employees had worked consecutive fourteen-day "hitches" on the employer's ships providing emergency clean-up of environmentally hazardous discharges off the California coast. Each shift started on a Tuesday at noon and ended fourteen days later. Metson paid plaintiffs for twelve hours per day—eight hours at straight time, and four hours at time-and-a-half—whether they had worked twelve hours or not. The remaining hours were designated "stand by" time: eight hours for sleep; three hours for meals; and one hour for recreation. Plaintiffs could leave the ship, but they had to carry a pager and be able to return within thirty to forty-five minutes. In holding the employees were entitled to compensation for an additional four but not twelve hours in each twenty-four-hour period, the court reasoned that "nothing in the record suggests that the designation of the workweek was designed to serve a legitimate business purpose or any purpose other than the avoidance of the obligation to pay overtime wages."[239] Ultimately, the court held that defendants could not "artificially designate the workweek" to avoid its obligation to provide its employees overtime pay for a seventh consecutive day worked.

Furthermore, the California Supreme Court has clarified what constitutes a day of rest within the context of an employee's workweek.

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236. *Id*.
237. *Id*.
238. Seymore et al. v. Metson Marine, Inc., 128 Cal. Rptr. 3d 13 (Ct. App. 2011), *disapproved of on other grounds*, Mendiola v. CPS Sec. Sols., Inc., 340 P.3d 355, 362–63 (2015).
239. *Id*.

In *Mendoza v. Nordstrom*,[240] former Nordstrom employees alleged the company violated California's Labor Code by failing to provide them with one day of rest in seven and causing them to work more than six in seven days. Specifically, section 551 entitles employees to "one day's rest therefrom in seven." Section 552 prohibits employers from "caus[ing]" employees to work more than "six days in seven." Section 556, however, excepts from this prohibition employees whose "total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." The Ninth Circuit certified three questions to the California Supreme Court regarding the state's "day of rest" statutes:

1. Is the day of rest required by sections 551 and 552 calculated by the workweek, or does it apply on a rolling basis to any seven-consecutive-day period?

2. Does the exemption in section 556 apply so long as an employee works six hours or less on at least one day of the applicable week, or does it apply only when an employee works no more than six hours on each and every day of the week?

3. What does it mean for an employer to "cause" an employee to go without a day of rest (section 552): force, coerce, pressure, schedule, encourage, reward, permit, or something else?

The California Supreme Court analyzed the language and statutory history of the sections, their relationship with the wage orders promulgated by the Industrial Welfare Commission (IWC), and how they have been interpreted by the IWC and Division of Labor Standards Enforcement. Ultimately, the court answered the questions as such:

1. A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited.

2. The exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If on any one day an employee works more than six hours, a day of rest must be provided during that workweek, subject to whatever other exceptions might apply.

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240. Mendoza v. Nordstrom, 2 Cal. 5th 1074 (Cal. 2017).

3. An employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest.

§ 1:2.12 Employee Notice

[A] California

The California Wage Theft Prevention Act of 2011 requires employers to provide written notice of wage information to all new non-exempt employees at the time of hire. Specifically, the law requires employers to inform employees of the rate(s) and basis of pay, any credits taken against minimum wage, the regular pay day, the name, physical address, and telephone number of the employer's main office, the name, address and telephone number of the employer's workers' compensation office, and "any other information the Labor Commissioner deems material and necessary." The act requires the Labor Commissioner to prepare a template that complies with the requirements of the written notice.[241] The Labor Commissioner has opined that notice can be provided electronically, but the employer must have a system for the employee to acknowledge receipt and print the notice.

In addition, section 2751 of the California Labor Code provides:

> [w]henever an employer enters into a contract of employment with an employee for services to be rendered within this state and the contemplated method of payment of the employee involves commissions, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid.

Employers are required to provide a signed copy of the contract to and obtain a signed receipt from the employee.[242]

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241. The template is available at www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

242. CAL. LAB. CODE § 2751.

[B] New York

Pursuant to section 195 of the New York Labor Law, New York employees are entitled to receive written notice, at the time they are hired, of their regular rate of pay, regular pay day, overtime rate of pay (if overtime eligible), basis of pay (for example, whether the employee will be paid by the shift, hour, day, week, salary, piece, commission, or by another basis), any allowances (like tips) claimed as part of the minimum wage, and the employer's main address and phone number. Employers had been required to also issue annual wage notices, but on December 29, 2014, Governor Cuomo signed an amendment to New York's Wage Theft Prevention Act that repeals the annual wage notification provision for the upcoming year.[243] The amendment, however, does not relieve employers of their obligation to provide all newly hired employees with wage notices at the time of hiring. In fact, the bill increases penalties on employers who commit wage theft by failing to provide newly hired employees with wage notices.[244]

The NY DOL issued template wage notices for exempt employees, hourly employees, multiple hourly rate employees, employees paid on a weekly rate or a salary for a fixed number of hours, employees paid a salary based upon piece rate or flat rate, and employees working on public work projects.[245] Employers can use their own forms, so long as the information required by law is included in the forms distributed to employees.

Even if employers develop their own wage notice forms, employers might consider using the templates to provide notice to employees whose primary language is not English. Templates have been issued in Spanish, Italian, Korean, Chinese, Haitian Kreyòl, Polish, and Russian. Employers will be deemed to have satisfied their statutory obligation by providing English notice to those employees whose primary language is not one for which the NY DOL has issued a template, and will not be held responsible for any translation errors on the template forms.

The NY DOL has also endorsed the use of electronic notice and acknowledgment, provided that certain criteria are met. Specifically, electronic wage notices comply provided:

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243. Assembly Bill A8106C (N.Y. 2014).
244. *Id.*
245. The templates can be found at www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm.

(1) the employee has access to a computer with printing capabilities and there is no charge to print a copy of the notice;

(2) the notice is in a format that can be reviewed at the computer to which the employee has access; and

(3) the form of the acknowledgment is sufficient to guarantee that the employee has received and reviewed the notice, and the employee is aware that acknowledging the notice will have legally significant consequences.

As an example, the NY DOL suggests that an electronic response that affirmatively states that the employee acknowledges receipt of the notice would satisfy the statutory requirement.[246]

In addition to the above requirement, section 191(1)(c) of the New York Labor Law requires that employment contracts for commission salespersons be in writing. "Commission salesperson" includes "any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions[,]" but excludes "an employee whose principal activity is of a supervisory, managerial, executive or administrative nature." Section 190(6), which governs the frequency and method of payment to commission salespeople, requires that the written commission agreement include how the commission will be calculated, the frequency of reconciliation (if applicable), and any other information related to the payment of wages or commissions for that employee. The agreement must also be signed by both the employer and the commission salesperson and be retained by the employer for at least three years.

As a penalty, section 191(1)(c) establishes a rebuttable presumption that, if the terms of the commission arrangement are not memorialized in writing, the terms presented by the commission salesperson are presumed to be the agreed-upon terms.

§ 1:2.13 Fluctuating Workweeks

Employee advocates continue to challenge the fluctuating workweek rules governing overtime pay, particularly as applied retroactively as a measure of damages in misclassification cases.

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246. Request for Opinion Labor Law § 195(1) RO-09-0135.

The FLSA generally requires employers to pay non-exempt employees no less than one and one-half times the regular rate at which that employee is actually employed for any time that employee works over forty hours per week.[247] The fluctuating workweek (FWW) method is one of two methods approved, in certain circumstances, by the DOL in its regulations for determining an employee's regular rate of pay for overtime purposes.[248] An employer may use the FWW method of calculating overtime, under certain circumstances, to pay a fixed monthly salary to employees whose hours fluctuate from week to week pursuant to an understanding between the parties that the employee "will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many."[249]

[A] The FWW Method of Calculating Overtime

Under the statutory method of calculating overtime wages, an employee's weekly earnings are divided by 40 (for the forty-hour workweek) to determine her regular rate of pay, and then multiplied by 1.5 to determine her overtime rate.[250] This number is then multiplied by the numbers the employee worked over forty hours in a given week to determine how much the employee will be compensated for her overtime.

The FWW method varies this calculation in order to account for the agreement reached between the employer and the employee that all hours worked in any given week will be fully compensated by the fixed salary as straight time. An employee's regular rate of pay for an employee working under the FWW "is determined by dividing the number of hours worked in the workweek into the amount of the salary" for that week.[251] This number is then multiplied by 0.5 to determine the employee's overtime rate.[252] In turn, like the statutory method, the overtime rate is multiplied by the number of hours the

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247. 29 U.S.C. § 207(a)(1).
248. *See* 29 C.F.R. §§ 778.113 (the "statutory method"), 778.114 (the FWW method).
249. *Id*. § 778.114(a).
250. *Id*. § 778.113(a).
251. *Id*. § 778.114(a).
252. *Id.*

employee worked over forty during the week to determine how much the FWW will be compensated for overtime hours.[253]

The difference between the statutory method and the FWW method is the determination of the regular rate of pay from which the overtime wage is derived. Under the FWW method, an employee's regular rate of pay and, accordingly, the employee's overtime rates decrease as the employee's hours increase.

[B] Preconditions on Using the FWW Method

Because the FWW method of calculating overtime—which results in a reduced overtime rate the more an employee works—incentivizes employers to hire fewer employees and to increase the hours of existing employees, contrary to the goals of the FLSA, an employer must satisfy five criteria in order to employ the FWW method:

(1) The employee's hours must fluctuate from week to week.[254]

(2) The employee must receive a fixed salary that does not vary with the number of hours worked during the week (excluding overtime premiums).[255]

(3) The fixed amount must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage.

(4) The employer and the employee must share a "clear mutual understanding" that the employer will pay that fixed salary regardless of the number of hours worked.[256]

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253. *Id.*; *see also* Hunter v. Sprint Corp., 453 F. Supp. 2d 44, 58–59 (D.D.C. 2006).

254. *See Hunter*, 453 F. Supp. 2d at 60 (holding employer improperly used FWW method to determine employee's overtime in part because employee was assigned to regular shift).

255. *See* O'Brien v. Town of Agawam, 350 F.3d 279, 288–89 (1st Cir. 2003) (holding FWW method did not apply to calculation of police officers' overtime wages in part because, even though police officers received a fixed 1/52 of their annual base salary per week, compensation for shift differentials and additional non-FLSA "overtime" meant that officers did not receive a fixed wage every week).

256. *See Hunter*, 453 F. Supp. 2d at 60 (holding employer improperly used FWW method where employer maintained policy of deducting a full or partial day's pay if an employee was absent from work because of certain circumstances and did not have any earned leave available); *see also* Op. Letter of Wage & Hour Div., 1999 WL 1002415 (May 28, 1999)

(5) The employee must "receive[ ] extra compensation, in addition to [such] salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay."[257]

[C] Using the FWW Method to Calculate Damages in Misclassification Cases

During the transition between the Bush and Obama Administrations, the Wage and Hour Division issued an opinion letter approving the use of the FWW method in calculating retroactive overtime wages owed to employees whom the employer had misclassified as exempt from the FLSA's overtime provisions.[258] In issuing this opinion letter, the DOL follows two circuits that have adopted the approach for misclassification.[259]

In *Valerio v. Putnam Associates, Inc.*, the first case to determine that the FWW method applied to the calculation of damages for misclassified wage-and-hour plaintiffs, the First Circuit determined that the FWW method of calculating a misclassified employee's retroactive overtime involves the "narrow" question of "whether there existed a 'clear mutual understanding' that Valerio's fixed salary would be compensation for however many hours she worked each week."[260] The court determined that such an understanding existed: "Valerio understood that her fixed weekly salary was to be compensation for potentially fluctuating weekly hours." Further, the court noted that Valerio "also understood, and accepted at the time, that Putnam did not intend to provide overtime pay if she worked more than 40 hours

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("Deductions for absences for personal business or routine sickness generally may not be made from the salary of an employee paid on a fluctuating workweek basis."); Op. Letter of Wage & Hour Div., 1999 WL 1002399 (May 10, 1999) (but employers are permitted to make deductions from vacation or sick leave banks); *see* 29 C.F.R. § 778.114; Flood v. New Hanover County, 125 F.3d 249, 252 (4th Cir. 1997); Griffin v. Wake County, 142 F.3d 712, 715 (4th Cir. 1998); Condo v. Sysco Corp., 1 F.3d 599, 602 (7th Cir. 1993).

257. Courts have held that the overtime premiums must be paid contemporaneously with the employee's salary. *See, e.g.*, Rainey v. Am. Forest & Paper Ass'n, 26 F. Supp. 2d 82, 100 (D.D.C. 1998) ("contemporaneous payment of overtime compensation is a necessary prerequisite for application of the fluctuating workweek method").

258. DOL Opinion Letter FLSA 2009-3 (Jan. 14, 2009).

259. *See* Clements v. Serco, 530 F.3d 1224, 1230 (10th Cir. 2008); Valerio v. Putnam Assocs., Inc., 173 F.3d 35 (1st Cir. 1999).

260. *Valerio*, 173 F.3d at 40.

in a particular week."[261] The court rejected the proposition that the FWW required a mutual understanding as to *how* overtime wages would be calculated.[262]

Other courts, however, disagree with DOL Opinion Letter FLSA 2009-3 and have concluded that the FWW is a prospective method of paying overtime that should not be employed retroactively in misclassification cases.[263] In *Brown v. Nipper Auto Parts & Supplies, Inc.*, the district court held that the FWW method could not be used to calculate misclassification damages for two reasons. First, the court reasoned that if the employer believed the employee was exempt from compensation for overtime hours worked, "then it was not possible . . . to have had a clear mutual understanding . . . that [the employee] was subject to [a] calculation method applicable only to non-exempt employees who are entitled to overtime compensation."[264] Second, relying on cases applying the FWW method when overtime payments had been paid contemporaneously with the employee's salary, the court concluded that the employer, who would pay overtime premiums, if any, retroactively as a result of the lawsuit, had not satisfied the overtime payment requirement of 29 C.F.R. § 778.114.[265]

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261. *Id.* at 39.

262. *Id.* at 40 (citing Bailey v. County of Georgetown, 94 F.3d 152, 156–57 (4th Cir. 1996)).

263. Brown v. Nipper Auto Parts & Supplies, Inc., 2009 WL 1437836 (W.D. Va. May 21, 2009); Russell v. Wells Fargo & Co., 672 F. Supp. 2d 1008 (N.D. Cal. 2009); Rainey v. Am. Forest & Paper Ass'n, 26 F. Supp. 2d 82, 100–01 (D.D.C. 1998).

264. *Brown*, 2009 WL 1437836 at *6 (citing Cowan v. Treetop Enters., 163 F. Supp. 2d 930, 942 (M.D. Tenn. 2001)).

265. *Id*. at *7; Flood v. New Hanover County, 125 F.3d 249, 252 (4th Cir. 1997) (applying the FWW where the employer contemporaneously provided some form of overtime compensation); *see also Russell*, 672 F. Supp. 2d at 1013–14 (stating that, when an employee is treated as exempt, "there is neither a clear mutual understanding that overtime will be paid nor a contemporaneous payment of overtime"); *Rainey*, 26 F. Supp. 2d at 100–01 (holding that overtime payments must be paid contemporaneously, not retroactively, in order to satisfy 29 C.F.R. § 778.114); Monahan v. Emerald Performance Materials, LLC, 705 F. Supp. 2d 1206, 1217 (W.D. Wash. 2010) (defendant could not avail itself of the FWW method in the absence of a clear mutual understanding "at the outset of their employment relationship that the employee's fixed salary would compensate the employee for all hours worked," and where employer did not pay overtime contemporaneously); Black v. SettlePou, P.C., 732 F.3d 492, 503 (5th Cir. 2013) (denying application of the FWW for calculating

Interestingly, a third line of cases is emerging in determining whether the FWW can be applied retroactively. This line of cases relies on the logic of *Overnight Motors Transportation Co. v. Missel*,[266] rather than 29 C.F.R. § 778.114.[267]

§ 1:2.14 Commissions/Bonuses/Incentive Compensation Plans

[A] California

Employers utilizing a commission pay plan may not reconcile commissions on unidentified returns, meaning returns on transactions that cannot be tracked back to the particular selling associate.[268] In *Prachasaisoradej v. Ralphs Grocery Co.*,[269] the California Supreme Court addressed the legality of a profit-sharing plan established by Ralphs Grocery. Under the incentive compensation plan in *Ralphs*, certain employees were eligible to receive a bonus that was calculated based on the profitability of their particular store. "Profits" for purposes of this plan were determined by subtracting the store's expenses from the store's revenues. The expenses used to calculate the profits included the store's expenses for workers' compensation, cash shortages, damaged or lost merchandise, and tort claims by non-employees. The plaintiff claimed that reducing the incentive compensation by such expenses violated several California labor laws. The court rejected this argument and held that Ralphs' profit-sharing plan was legal.

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overtime premiums where plaintiff vocally and repeatedly demonstrated that "she did not agree that her fixed weekly salary was intended to compensate her for all of the hours she worked each week").

266. Overnight Motors Transp. Co. v. Missel, 316 U.S. 572 (1942).

267. *Cf.* Ransom v. M. Patel Enters., 734 F.3d 377 (5th Cir. 2013); Desmond v. PNGI Charles Town Gaming, LLC, 630 F.3d 351 (4th Cir. 2011); Urnikis-Negro v. Am. Family Prop. Servs., 616 F.3d 665 (7th Cir. 2010) (adopting the approach in *Overnight* despite acknowledgment that the plaintiff's weekly hours only routinely fluctuated *above* forty hours as ordinarily required to apply the FWW methodology); *but see* Boyce v. Indep. Brewers United Corp., 223 F. Supp. 3d 942, 947 (N.D. Cal. 2016) (disapproving the approach in *Overnight* and the adoption of the FWW method in the misclassification context generally).

268. *See* Hudgins v. Neiman Marcus, 41 Cal. Rptr. 2d 46 (Ct. App. 1995).

269. Prachasaisoradej v. Ralphs Grocery Co., 165 P.3d 133 (Cal. 2007).

[B] New York

Under New York law, a "commission salesperson" includes "any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions[,]" but excludes "an employee whose principal activity is of a supervisory, managerial, executive or administrative nature."[270] Section 191(1)(c) of the New York Labor Law requires that employment contracts for commission salespersons be in writing. It further provides that the written commission agreement include how the commission will be calculated, the frequency of reconciliation (if applicable), and any other information related to the payment of wages or commissions for that employee. The agreement must be signed by both the employer and the commission salesperson and be retained by the employer for at least three years.

A written commission agreement is also an important tool in defining when a commission becomes an "earned wage" under the New York Labor Law. In *Pachter v. Bernard Hodes Group, Inc.*,[271] the New York Court of Appeals made clear that employers are entitled to set terms of a commission or other contingent compensation structure and ensure that a commission is not an "earned wage" until the contingencies set forth in the program have been met. In so doing, the court approved the right of employers to craft programs that take into account any number of factors before determining that a commission had been earned by the employee, including receipt of payment from the customer or client and deductions for expenses. Specifically, the court concluded that because the parties to a commission agreement can include whatever terms to the agreement that they wish, "they may provide that the computation of a commission will include certain downward adjustments from gross sales, billings or receivables."[272] Clearly defining when a commission is earned pursuant to the commission plan is critical. Failing to fully pay all earned commissions is an impermissible wage deduction under New York Labor Law section 193, while adjusting commissions pursuant to the set contingencies set forth in a commission agreement or plan is a permissible adjustment under *Pachter*.

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270. N.Y. LAB. LAW § 190(6).
271. Pachter v. Bernard Hodes Grp., Inc., 10 N.Y.3d 609 (2008).
272. *Id*. at 617.

§ 1:2.15 Individual Liability

[A] FLSA

The FLSA provides that "any person acting directly or indirectly in the interest of an employer in relation to an employee" may be considered to be an employer for purposes of imposing liability.[273] This means that individuals may be personally liable for FLSA violations.

As a general matter, courts determining employer status under the FLSA follow *Goldberg v. Whitaker*[274] and look to the "economic reality" that defines an individual's relationship with the putative employer, as opposed to technical common-law concepts of agency. For example, in *Bonnette v. California Health & Welfare Agency*,[275] the Ninth Circuit endorsed a flexible four-part test to determine whether an individual should be treated as an employer under the FLSA. This test focused on whether the individual:

(1) ha[s] the power to hire and fire the employees,

(2) supervise[s] and control[s] employee work schedules or conditions of employment,

(3) determine[s] the rate and method of payment, and

(4) maintain[s] employment records.[276]

Courts in the Eleventh Circuit apply a slightly different "disjunctive test" to determine personal liability. Under this test, an individual must either be involved in the day-to-day operations of the

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273. 29 U.S.C. § 203(d).

274. Goldberg v. Whitaker, 366 U.S. 28, 33 (1961).

275. Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983).

276. *Id*. at 1470; *see also* Manning v. Bos. Med. Ctr. Corp., 725 F.3d 34 (1st Cir. 2013) (applying economic realities test; individual liability properly alleged against company CEO, but not human resources director); Gray v. Powers, 673 F.3d 352 (5th Cir. 2012) (applying economic realities test; no individual liability where member lacked operating control). *But see* Gil v. De Laune Drilling Serv., Ltd., 2016 WL 5394261, at *2 (S.D. Tex. Sept. 27, 2016) (distinguishing *Gray* and imposing individual liability where defendant "once asserted" complete operational control over the organization and exerted a continuing influence over employer-employee relationships vis à vis his relationship to the subsequent owner).

business, or have direct responsibility for the supervision of the plaintiff employee, in order to be considered an employer.[277]

In a similar fashion, courts in the Second Circuit focus on whether the individual possesses the power to control the workers in question when determining whether an individual should be held personally liable for FLSA violations.[278] Notably, courts generally do not require that an individual have any form of ownership interest in the employing business to be held personally liable. Indeed, an ownership interest without further involvement in the company's "employment of employees" is insufficient to establish that an individual is an "employer" within the meaning of the FLSA.[279]

[B] California

The California Supreme Court has affirmed that corporate officers, directors, managers, and other employees cannot be personally liable for unpaid wages under the Labor Code or in tort.[280] In *Reynolds v. Bement*, the plaintiff sought to hold his former employer and certain officers and directors of the company, including the company's president, personally liable for unpaid wages and other wage-and-hour violations. The California Supreme Court upheld the dismissal of these claims, reasoning that corporate agents cannot be held liable under common law for breach of a corporation's contract.

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277. *See, e.g.*, Berrocal v. Moody Petroleum, Inc., 2009 U.S. Dist. LEXIS 17138 (S.D. Fla. Feb. 22, 2009) (district court in the Eleventh Circuit applied the two-part "disjunctive test" to determine that the president and 50% owner of the gas station at which plaintiff worked could be held personally liable for alleged FLSA violations because he had "operational control" of the employing business).

278. *See* Irizarry v. Catsimatidis, 722 F.3d 99 (2d Cir. 2013) ("an individual's power over employees is an important and telling factor in the 'economic reality' test").

279. *Id*. at 111; *see also* Chao v. Hotel Oasis, Inc., 493 F.3d 26 (1st Cir. 2007); *cf.* Sai Qin Chen v. E. Mkt. Rest., Inc., 2015 WL 5730014, at *7 (S.D.N.Y. Sept. 30, 2015) (no individual liability where the power to control employees did not reside in a single individual, but was instead diffuse and exercised collectively).

280. Reynolds v. Bement, 112 P.3d 623 (Cal. 2005); *see also* Bradstreet v. Wong, 75 Cal. Rptr. 3d 253 (Ct. App. 2008) (applying common-law definition of "employer," owners, officer, and managers of bankrupt corporation were not employers and had no personal liability for the corporation's failure to pay wages).

Moreover, if the legislature had intended to extend liability to individuals, it would have stated so clearly.[281]

Further, the A Fair Day's Pay Act allows the Labor Commissioner to conduct hearings to determine whether a "person acting on behalf of an employer" should be held personally liable for an employer's violations. Under the law, the Labor Commissioner would also be able to levy those individuals' accounts or property to enforce a judgment.[282]

§ 1:2.16 Spread-of-Hours Pay (New York)

Pursuant to New York regulations, in addition to the basic minimum hourly wage rate, an employee is entitled to receive one hour's pay at the minimum hourly wage rate if the employee's workday, including any meal or break periods, exceeds ten hours (or is "split").[283] Generally, however, courts have interpreted this provision to only apply for employees making minimum wage.[284]

Indeed, the NY DOL has explained that "the 'spread of hours' regulation does not require all employees to be paid for an additional hour, but merely that the total wages paid be equal to or greater than the total due for all hours at the minimum wage plus one additional hour at the minimum wage."[285]

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281. *Reynolds*, 112 P.3d at 633.
282. *See* CAL. LAB. CODE § 690.020 *et seq.*
283. 12 N.Y. COMP. CODES R. & REGS. § 142-2.4.
284. *See, e.g.*, Juarez v. Precision Apparel, Inc., 2013 U.S. Dist. LEXIS 131418, at *33–34 (E.D.N.Y. Aug. 21, 2013) (noting the split among district courts but that the "majority of courts . . . have found that by its plain language, the spread-of-hours statute applies only to employees making minimum wage"); Ellis v. Common Wealth Worldwide Chauffeured Transp. of NY, LLC, 2012 U.S. Dist. LEXIS 40288 (S.D.N.Y. Mar. 23, 2012) (holding that the "spread of hours" statute applies only to employees making minimum wage); Sosnowy v. A. Perri Farms, Inc., 764 F. Supp. 2d 457, 473 (E.D.N.Y. 2011) (explaining that the majority of courts have held that the statute is limited to minimum wage workers); Zubair v. EnTech Eng'g P.C., 808 F. Supp. 2d 592, 601 (S.D.N.Y. 2011) ("[T]he Court finds that the explicit reference to 'minimum wage' in § 142-2.4 indicates that such a provision is properly limited to those employees who receive only the minimum compensation required by law."); Seenaraine v. Securitas Sec. Servs. USA, Inc., 830 N.Y.S.2d 728 (App. Div. 2d Dep't 2007) (same). *But see* Yang v. ACBL Corp., 427 F. Supp. 2d 327 (S.D.N.Y. 2005) (applying the "spread of hours" rule and awarding damages of one hour of minimum wage notwithstanding the fact that the employee's weekly wages exceeded the minimum wage).
285. NY DOL Opinion Letter, RO-08-0086 (Aug. 6, 2009).

§ 1:2.17 Equal Pay (California)

With Governor Brown's signature, California officially amended its equal pay legislation through the California Fair Pay Act (FPA) to include more employee-friendly provisions. The FPA became effective January 1, 2016, and created the nation's strongest equal pay protections. The FPA changes the standard from "equal pay for equal work" (the standard under the federal Equal Pay Act) to "equal pay for substantially similar work" based on the employee's skill, effort, and responsibility, and similar working conditions. The FPA also includes enhanced anti-retaliation provisions intended to improve transparency about employees' salaries. The FPA states that employers may not retaliate against employees who discuss their own wages, others' wages, or seek information about another employee's salary.

Along with the new legislation comes the potential for litigation over some of the murkier provisions in the law. Under the old version of the law, pay unequal to that of opposite-sex employees was justified if the pay was based on "a bona fide factor other than sex." Under the new law, employers must demonstrate that the factor relied upon is reasonably applied and accounts for the *entire* pay difference. Unfortunately, the act fails to define "reasonable" and it places the burden on the employer to demonstrate the factor is:

(1) not based on a sex-based differential in compensation;

(2) job-related to the position at issue; and

(3) consistent with a business necessity.

This raises questions about whether employers may pay premiums to hire or retain talented workers in high demand, or pay workers according to market conditions. In a litigation context, these factual disputes may make it more difficult for employers to succeed on summary judgment motions.

Similarly, the new law eliminates the requirement that the comparator wages be from "the same establishment." This could pose issues for employers with a statewide presence because they will now have to justify pay disparities despite differences in facility size or location. It is unclear if there will be any judicial limitations imposed on this analysis until the new standard is tested through litigation.

During 2016, California expanded on its FPA initiatives with two new amendments. First, the law now provides that an employee's prior salary cannot be the sole justification for a compensation disparity.

Further, the FPA now prohibits wage differentials based on an employee's race or ethnicity in addition to gender.[286] Both amendments took effect January 1, 2017.

§ 1:2.18 Leave Laws (California)

California has also started to pave the way for greater paid leave laws. In 2015, the California legislature created California's paid sick leave (PSL) obligations, which apply to most California employers. Some key provisions of the new PSL law include the following:

- In general terms, the law requires employers to provide and allow employees to use at least twenty-four hours or three days of paid sick leave per year.
- Employers adopting new policies to comply with the law may choose whether to have an "accrual" policy or a "no accrual/up front" policy.
- If an employer chooses to front load an employee's three days of sick leave, they are not required to give the three days on the first day of employment. Rather, the law is satisfied if the employer provides not less than three days (twenty-four hours) of leave available to the employee by the end of the 120th calendar day of employment.
- An employee must work for the same employer for thirty or more days within a year of the commencement of employment to be eligible to use PSL.
- Employers with unlimited or undefined leave banks may indicate "unlimited" on the employee's itemized wage statement.
- Employers generally must reinstate accrued but unused sick leave to employees whom they have rehired within one year of termination, unless the employer paid out unused sick leave at termination in the first place.

However, some local municipalities may also have sick leave laws beyond what the California PSL law requires. For example, in San Francisco, employees are entitled to accrue one hour of sick leave for every thirty hours worked, subject to a seventy-two-hour cap.

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286. CAL. LAB. CODE § 1197.5.

California also amended its Family-School Partnership Act and Kin Care Leave[287] to permit eligible employees to take protected time off to find, enroll, or reenroll a child in school or with a child care provider. The amendment also permits employees to use kin-care leave for the purposes provided in California's Paid Sick Leave Law, such as taking leave to care for grandparents, grandchildren, and siblings. Also, the amendment clarifies and expands the reasons an employee may take for leave. While the prior version covered "leave to attend to an illness," the new version covers: (1) the diagnosis, care, or treatment for an existing health condition, or for preventive care (prior law specified "illness" only); and (2) certain absences resulting from domestic violence, sexual assault, or stalking.

§ 1:2.19 *Suitable Seating (California)*

In two related federal appeals, the Ninth Circuit certified questions of law to the California Supreme Court, asking it to construe the requirements set forth under various California wage orders that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."[288] Specifically, the Ninth Circuit asked for guidance regarding the meaning of the terms "nature of the work" and "reasonably permits," and also asked if the actual availability of a seat for use by an employee was a factor to be considered.

The underlying cases involved customer service representatives working at CVS Pharmacy (Kilby), which implicated Wage Order No. 7-2001, and bank tellers working for various branches of JPMorgan Chase Bank (Henderson v. JPMorgan Chase Bank NA), which implicated Wage Order No. 4-2001. Both classes of employees had filed class actions to enforce these "suitable seating" provisions. With respect to the meaning of the term "nature of the work," the Supreme Court rejected the position advocated by the plaintiffs, which argued for a "task-by-task evaluation of whether a single task may feasibly be performed seated," meaning that employees would be entitled to seating for "any single task" that "could be performed while seated." Instead, the Court held that the "nature of the work" should "include an employee's actual or expected tasks." Furthermore, "[i]f tasks are

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287. S.B. 579 (Cal. 2015).

288. *See, e.g.*, Cal. Indus. Welfare Comm'n Wage Order Nos. 4-2001, 7-2001; CAL. CODE REGS. tit. 8, §§ 11040(14)(A), 11070(14)(a).

performed at a discrete location, those tasks should be considered together in evaluating whether work there reasonably permits a seat."

With regard to the term "[r]easonably permits," the Supreme Court adopted a "totality of the circumstances" inquiry that looks at "numerous factors, such as the frequency and duration of tasks, as well as the feasibility and practicability of providing seating." Specifically, the Court endorsed considering an employer's objective "business judgment" assessment regarding the need for standing versus sitting, as well as the "physical layout of a workplace," which the employers had advocated. However, the Court rejected the view that courts should consider the particular physical characteristics of individual employees when determining whether the totality of the circumstances warrants providing a suitable seat.

Lastly, the Supreme Court rejected the argument that employees have the burden of proving that "a suitable seat exists but was not provided." To the contrary, the Court held that where a seat has not been provided, this is the employer's burden.[289]

§ 1:2.20 *Payment of Final Wages*

[A] New York

New York law requires employers to pay a terminated employee his or her final wages by the next normal pay date for the pay period in which the employee is terminated.[290] The employer must mail the paycheck to the employee if so requested.

[B] California

California law requires employers to pay employees who quit with seventy-two hours of advance notice, or who are involuntarily terminated, all wages due immediately upon discharge. Employees who quit without advance notice must be paid within seventy-two hours of termination.[291] Since January 1, 2006, California employers have been permitted to pay final wages to an employee who quits or is terminated by direct deposit so long as the employee agrees. Labor Code section 203 provides the statute of limitation for recovering waiting time penalties for failure of an employer to promptly pay an employee's final wages.

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289. Kilby v. CVS Pharmacy, Inc., 63 Cal. 4th 1 (2016).
290. N.Y. LAB. LAW § 191(3).
291. CAL. LAB. CODE §§ 201–02.

The California Supreme Court has clarified that the three-year statute of limitations applies even where a plaintiff is seeking only waiting time penalties, and not the recovery of the actual wages themselves.[292]

The California Supreme Court examined the issue of termination pay in the context of temporary employment.[293] In *Smith v. Superior Court*, the court was required to resolve whether an employee is "discharged" pursuant to California Labor Code sections 201 and 203 when that employee is released following completion of a specific assignment or after the passage of the time for which the employee was hired to work. L'Oreal agreed to pay Smith $500 to work for one day as a model in a runway show. The court reasoned that the employer is able to control the duration of employment or execution of the assignment. The court found that even individuals employed for a fixed period are "discharged" when employment ends and are, therefore, entitled to immediate payment of their wages. Employers must be aware of the implications of *Smith* and be prepared to pay even temporary employees immediately upon termination of their employment. In addition, employers in California must pay out all accrued but unused vacation upon separation of employment. However, employers can force employees to use excess deferred vacation time to avoid cash payouts for that time.[294] Furthermore, employers are not required to list out accrued vacation/PTO on each paystub prior to termination.[295]

§ 1:3 Wage-and-Hour Collective Class Action Process and Procedures

Employers continue to face multiple-plaintiff actions under the FLSA and state law with great frequency. Because individual FLSA claims often involve relatively nominal damages, FLSA plaintiffs are increasingly filing collective actions. In light of the increased use of collective actions under the FLSA, employers should be aware of their unique nature and how they differ from class actions brought under Rule 23 of the Federal Rules of Civil Procedure.

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292. Pineda v. Bank of Am., 241 P.3d 870 (Cal. 2010).
293. Smith v. Superior Court (L'Oreal USA, Inc.), 137 P.3d 218, 220 (Cal. 2006).
294. Ass'n for L.A. Deputy Sheriffs v. County of Los Angeles, 65 Cal. Rptr. 3d 665 (Ct. App. 2007).
295. Soto v. Motel 6, LP, 4 Cal. App. 5th 385 (Ct. App. 2016).

§ 1:3.1 Collective Actions Under the FLSA

The FLSA affords a private right of action for employees to recover unpaid minimum wages and overtime compensation and to redress retaliatory discharge. An employee may bring a claim on the employee's own behalf and on behalf of any "similarly situated" employees. Specifically, section 216(b) of the FLSA provides, in pertinent part, that an action under the FLSA:

> may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and [on] behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[296]

[A] Potential Members Must Expressly "Opt In" to the Class

An employee who seeks to become a member of a collective action brought pursuant to the FLSA must "opt in" to the class by filing his/her written consent with the court where the action is filed.[297] This requirement is in contrast to class actions brought under Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), where the putative class members are generally bound by any judgment or settlement in the class action, unless they expressly "opt out" of the class.

The Eleventh Circuit has held that opt-in plaintiffs in an FLSA collective action do not need to "opt in" again after an additional claim has been added to a case.[298]

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296. 29 U.S.C. § 216(b). Under 29 U.S.C. § 216(c), the Secretary of Labor is authorized to bring a representative action on behalf of a class of employees. In actions brought by the Secretary, employee consent is not required. Reich v. Stewart, 121 F.3d 400 (8th Cir. 1997).

297. 29 U.S.C. § 216(b).

298. Prickett v. DeKalb County, 349 F.3d 1294 (11th Cir. 2003); *see also* Thind v. Healthfirst Mgmt. Servs., LLC, 2015 WL 4554252, at *4 (S.D.N.Y. July 29, 2015) (citing *Prickett* approvingly for the proposition that plaintiffs need not opt in twice where the inclusive language of the "initial consent to join form does not limit Plaintiff's consent to any particular collective" and plaintiffs' consent extended not to subsequent litigation but only to additional claims in the same action).

However, the Eleventh Circuit has also found that workers who agreed to join a collective action that was later dismissed did not consent to join subsequent lawsuits making substantially identical complaints.[299] In these connected cases, the court held that the FLSA collective action rules did not allow one consent to act as a "carryover consent" for future litigation where the attorneys launched virtually identical lawsuits against the same two employers.[300]

[B] Applicability of Requirements of Rule 23 to FLSA Collective Actions

Rule 23 contains the familiar "commonality," "typicality," "numerosity," and "adequacy of representation" requirements that must be satisfied before multi-plaintiff claims will be certified as a class action. Specifically, Rule 23 provides:

> One or more members of a class may sue or be sued as representatives of a group of individuals only if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

A majority of federal courts have held that FLSA collective actions need not comply with the requirements of Rule 23.[301]

Although most courts have held that the Rule 23 requirements do not govern FLSA collective actions, courts have looked to Rule 23 for guidance in deciding whether to certify an FLSA class.[302]

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299. Albritton v. Cagle's Inc., 508 F.3d 1012 (11th Cir. 2007); Abdullah v. Equity Grp.-Ga. Div., 508 F.3d 1012 (11th Cir. 2007).
300. *Id.* at 1016–17.
301. *See, e.g.*, Lachapelle v. Owens-Ill., Inc., 513 F.2d 286, 288 (5th Cir. 1975) ("[t]here is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b)").
302. *See, e.g.*, Chase v. Aimco Props., L.P., 374 F. Supp. 2d 196, 200 (D.D.C. 2005) ("it may simply be that what is 'similarly situated' enough for collective action treatment under the FLSA is a matter for the sound discretion of trial courts, guided mostly by Rule 23(b)(3)-like considerations of manageability and efficiency").

A few courts have concluded that plaintiffs seeking certification under section 216(b) must meet the prerequisites of Rule 23, to the extent that their claims do not conflict with section 216(b).[303]

In June 2011, the Supreme Court issued its opinion in *Wal-Mart Stores, Inc. v. Dukes*.[304] Courts are divided on whether *Wal-Mart*, which involved a Rule 23 class action, has any bearing on section 216(b) collective actions.[305]

The Court likewise applied Rule 23 principles in arriving at its decision in *Tyson Foods, Inc. v. Bouaphakeo*.[306] In *Tyson*, the Court considered whether a putative class could utilize representative statistical evidence to establish the "predominance of common questions of law or fact." *Tyson* differed from *Wal-Mart* in that the plaintiff class in the latter case had failed to reach the "predominance" prong because plaintiffs were not similarly situated. By contrast, *Tyson* plaintiffs worked in the same facility, performed the same work, and were paid under the same policy; consequently, each plaintiff could have introduced the same statistical study in an individual suit. While the opinion turned in part on the resolution of Rule 23 considerations, the Court noted that

> [t]he parties do not dispute that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure. This opinion assumes, without deciding, that this is correct. For purposes of this case then, if certification of respondents' class action under the Federal Rules was proper, certification of the collective action was proper as well.

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303. *See, e.g.*, Shushan v. Univ. of Colo., 132 F.R.D. 263, 265 (D. Colo. 1990); Camp v. Lockheed Martin Corp., 1998 WL 906915 (S.D. Tex. Apr. 23, 1998) (finding the *Shushan* standard is "more persuasive" and concluding that an ADEA class must satisfy the requirements of Rule 23 to the extent they do not conflict with section 216(b)).

304. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

305. *Compare* MacGregor v. Farmers Ins. Exch., 2011 U.S. Dist. LEXIS 80361 (D.S.C. July 22, 2011) (recognizing that section 216(b) collective actions are not subject to the requirements of Rule 23 but nevertheless turning to *Wal-Mart* at the first step of the ad hoc section 216(b) analysis), *with* Creely v. HCR ManorCare, Inc., 2011 U.S. Dist. LEXIS 77170, at *3 (N.D. Ohio July 1, 2011) (holding "the concerns expressed in [*Wal-Mart*] simply do not exist here").

306. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016).

Further, *Tyson* involved parallel state and federal claims, of which the state claim was indisputably governed by the Federal Rules of Civil Procedure.[307] The impact of the decision in determining whether and under what circumstances a Rule 23 analysis is appropriate in the context of an FLSA collective action is thus unclear.

[C] Class Certification Under the FLSA

[C][1] Overview

Generally, the class certification process for FLSA collective actions proceeds in two stages. The first (or "notice") stage occurs at the outset of the litigation when the named plaintiffs seek authorization to send notice of the lawsuit to putative class members. Because the named plaintiffs often do not possess information about the potential class (such as the names and addresses of potential class members), they often request preliminary, class-related discovery. At this stage, the court determines whether a conditional class should be certified and, if so, the scope of the class. The court will generally rule on whether, and to what extent, to permit class-related discovery and will rule on the appropriateness of the contents of the notice to be distributed to the putative class members.[308]

If the court certifies a conditional class for notice purposes, the process proceeds to the next stage, which occurs after class-related discovery is complete, notice has been distributed, and the time period for class members to opt in has expired. At this time, the court may be asked to reevaluate the appropriateness of the conditional class. At this point, courts generally apply a higher burden on plaintiffs and may decertify the action.[309]

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307. *Id*. at 1042.
308. *See, e.g.*, Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).
309. *See, e.g.*, Collins v. Dollar Tree Stores, Inc., 788 F. Supp. 2d 1328 (N.D. Ala. 2011) (decertified); Beauperthuy v. 24 Hour Fitness USA, Inc., 772 F. Supp. 2d 1111 (N.D. Cal. 2011) (same); Aquilino v. Home Depot, U.S.A., Inc., 2011 U.S. Dist. LEXIS 15759 (D.N.J. Feb. 15, 2011) (same).

[C][2] The Notice Stage: Plaintiffs Request Class Certification/Authorization to Send Notice to Putative Class Members; Courts Authorize Notice When Putative Members Are "Similarly Situated"

At the notice stage, plaintiffs seek conditional class certification and authorization from the court to send notice of the lawsuit to the potential class members. The issues of whether to certify a class, the scope of the certified class, and to whom to send class notice are intertwined. For example, plaintiffs often file a motion for distribution of class notice at the outset of the litigation. In deciding whether to authorize and to whom to send notice, the court must necessarily decide that the action may proceed as a collective action and must determine the scope of the class.

The FLSA does not provide standards courts should follow in determining whether notice should be sent to potential class members. However, the U.S. Supreme Court, in *Hoffmann-La Roche, Inc.*,[310] held that district courts have discretionary power to authorize the sending of notice to potential class members in a collective action. The Court explained that notice should issue if it "serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action."[311]

Under the express terms of section 216(b), a collective action may only proceed on behalf of "similarly situated" employees. In the absence of any statutory or regulatory guidance defining the term "similarly situated," courts have developed various tests to determine when notice may be distributed to putative class members.

Courts generally require that plaintiffs demonstrate that putative class members had similar job requirements and pay provisions and that they were victims of the same company policy or plan.[312] Another commonly cited criterion for the similarly situated analysis is whether a factual nexus exists between plaintiffs.

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310. Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 169 (1989).

311. *Id*. at 172.

312. *See, e.g.*, Harper v. Lovett's Buffet, Inc., 185 F.R.D. 358, 361–62 (M.D. Ala. 1999) ("The Eleventh Circuit requires a district court to satisfy itself that there are other employees of the department-employer who desire to opt in and who are similarly situated with respect to their job requirements and with regard to their pay provisions.") (internal quotations omitted).

The burden is on the plaintiff to establish that putative class members are similarly situated. Some courts have concluded that this is not a heavy burden and that it may be satisfied on the basis of the pleadings and allegations contained in affidavits.[313]

Other courts only require plaintiffs to set forth "substantial allegations" to satisfy the "similarly situated" requirement.[314] "Substantial allegations" require more than speculation, but plaintiffs need not provide highly detailed information in support of a claim.[315]

Notwithstanding the relatively light burden imposed on plaintiffs at this stage, courts have refused to authorize notice in a variety of circumstances. For example, courts have declined to authorize notice and conditionally certify a class where plaintiffs' allegations that a class exists are not adequately supported.[316]

Courts also have denied conditional certification and declined to authorize notice where individual defenses are found to predominate.[317] In other contexts, courts have relied on the lack of evidence

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313. *See, e.g.*, Pares v. Kendall Lakes Auto., LLC, 2013 U.S. Dist. LEXIS 90499 (S.D. Fla. June 27, 2013) (applying a "fairly lenient standard," but acknowledging plaintiff must offer more than counsel's unsupported assertions).

314. *See, e.g.*, Blancarte v. Provider Plus, Inc., 2012 WL 4442642 (D. Kan. Sept. 26, 2012) (conditional certification merely requires substantial allegations, but finding plaintiff failed to satisfy this burden).

315. *See, e.g.*, Sharp v. CGG Land (U.S.) Inc., 2015 WL 222486, at *3 (N.D. Okla. Jan. 14, 2015) (plaintiff's allegations were not merely speculative where based on personal conversations with other employees, "each of whom confirmed" that defendant had improperly calculated their rate of overtime pay in the same way).

316. *See, e.g.*, Fernandez v. Wells Fargo Bank, NA, 2013 U.S. Dist. LEXIS 124692 (S.D.N.Y. Aug. 28, 2013); Jenkins v. TJX Cos., 853 F. Supp. 2d 317 (E.D.N.Y. 2012) (denying without prejudice conditional certification where plaintiff relied on common classification, but failed to provide factual support that employees primarily performed non-exempt tasks); Holt v. Rite Aid Corp., 333 F. Supp. 2d 1265 (M.D. Ala. 2004) (common tasks were exempt and claim hinged on allegations of performance of non-exempt duties); Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 498 (D.N.J. 2000) (no showing plaintiffs each had same job responsibilities or that they each could be properly classified as non-exempt employees).

317. Dunn v. County of Muskegon, 1998 U.S. Dist. LEXIS 19032, at *25 (W.D. Mich. Nov. 5, 1998) (refusing to certify FLSA class where various collective bargaining agreements with differing terms must be applied and where "numerous proofs which vary as to each individual . . . will predominate over any common questions"); Cornn v. United Parcel Serv.,

of the existence of a company-wide policy to deny conditional certification/notice.[318] Further, courts also have denied certification where the proposed class is found to be temporally or geographically overbroad.[319]

[C][3] Stage Two—Defendant's Motion to Decertify

At the conclusion of discovery in a conditionally certified case, the court will generally revisit the issue of class certification, often upon a defendant's motion to decertify.[320] At this stage, courts will apply a "higher" standard to determine whether the employees are similarly situated, and they will consider such factors as "disparate factual and employment settings of the individuals, various defenses asserted against various individuals and other fairness and procedural issues."[321]

Inc., 2006 U.S. Dist. LEXIS 20095 (N.D. Cal. Apr. 3, 2006) (denying class certification for employees claiming off-the-clock work violations, on grounds that individualized inquiries were required and class action was inappropriate).

318. Harper v. Lovett's Buffet, Inc., 185 F.R.D. 358, 363 (M.D. Ala. 1999) (refusing to issue notice where plaintiffs failed to present any evidence to support their claim that a "uniform corporate practice discouraging overtime" existed or that "widespread wrongdoing" occurred); Fox v. Tyson Foods, Inc., 519 F.3d 1298, 1301–02 (11th Cir. 2008) (no company-wide policy where testimony regarding how the donning and doffing time was treated and manner in which the time was recorded varied among plants, departments, positions, and shifts); Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1048 (2016) (noting that, as a threshold issue for conditional certification, representative evidence could not be used as a means of overcoming the absence of a common corporate policy).

319. Tucker v. Labor Leasing, Inc., 155 F.R.D. 687, 689 (M.D. Fla. 1994) (denying plaintiffs' request for authorization to send nationwide notice, where plaintiffs failed to show that employees outside of the employer's Jacksonville, Florida terminal were allegedly owed unpaid overtime); Belcher v. Shoney's, Inc., 927 F. Supp. 249, 252 (M.D. Tenn. 1996) (restricting notice to individuals employed by the employer to the past three years, which is the statute of limitations for willful violations under the FLSA).

320. *See* Harper v. Lovett's Buffet, Inc., 185 F.R.D. 358, 365 (M.D. Ala. 1999) (after initially certifying a class for notice purposes, and recognizing that because subsequent discovery may reinforce or undermine the court's initial findings, the court concluded that the defendant would be permitted to move to decertify the class at the close of discovery).

321. *Spellman*, 1998 U.S. Dist. LEXIS 4298, at *7; *see also* Falcon v. Starbucks Corp., 580 F. Supp. 2d 528 (S.D. Tex. 2008). If the court is not convinced

Thus, if discovery reveals that individual questions of fact predominate in the action, the conditional class may be decertified.[322]

A decision by the Seventh Circuit affirming decertification of a Rule 23 class and FLSA collective action addressed the standard applied in the two types of actions.[323] Despite recognizing the difference that class action participants opt out whereas collective action participants opt in, the court went on to opine that "there isn't a good reason to have different standards for the certification of the two different types of action. . . ."[324] Analyzing decertification of the class and collective actions together, the court found that the determination of damages required an individualized analysis. Accordingly, the Seventh Circuit upheld the district court's decertification order.[325]

Defendants may even seek to decertify a class action post-trial where evidence presented at trial reveals a lack of similarity among class members.[326]

[D] FLSA Statute of Limitations

Employers often seek to narrow a proposed FLSA class on the grounds that the class contains claims that are time barred. The Portal-to-Portal Act, which sets forth the statutes of limitations for FLSA claims, provides, in pertinent part:

> [The cause of action] may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause

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that the plaintiffs are similarly situated, the class may be decertified. *Harper*, 185 F.R.D. at 365.

322. *See, e.g.*, Frye v. Baptist Mem'l Hosp., Inc., 195 F. App'x 669 (6th Cir. 2012) (decertifying class where evidence showed difference in employment setting overwhelming similarities); Zavala v. Wal Mart Stores, Inc., 691 F.3d 527 (3d Cir. 2012) (decertifying because of differences among class; considering whether plaintiffs are employed in same department/location, advance similar claims, seek same relief, have similar salaries/circumstances of employment, and existence of individualized defenses).

323. Espenscheid v. DirectSat USA, 705 F.3d 770 (7th Cir. 2013).

324. *Id*. at 772.

325. *But cf.* Monro v. FTS USA, LLC, 815 F.3d 1000, 1014–15 (6th Cir. 2016).

326. Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567 (E.D. La. 2008) (decertifying class after a one-week bench trial and holding that plaintiffs could proceed with individual actions).

> of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.[327]

The statute of limitations period continues to run with respect to each individual plaintiff until that plaintiff files a consent form with the court.[328] Some courts have held that for statute of limitations purposes, an employer's violations of the FLSA restart for each payday that follows an allegedly unlawful pay period.[329]

[E] Waiver of FLSA Claims

Absent supervision by a court or by the DOL, a court generally will not enforce a waiver of a minimum wage or overtime pay claim under the FLSA.[330]

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327. 29 U.S.C. § 255(a).

328. Cahill v. City of New Brunswick, 99 F. Supp. 2d 464, 479 (D.N.J. 2000) ("Until the non-named plaintiff[s] file the prerequisite written consents with this court, they are not considered joined to a collective action and the statute of limitations on their claims is not tolled."); Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1132 (D. Nev. 1999) ("action is not deemed commenced with respect to each individual plaintiff until his or her consent has been filed").

329. *See, e.g.*, Franklin v. N.Y. Law Publ'g Co., 1995 WL 408390, at *1 (S.D.N.Y. July 11, 1995) ("In FLSA cases involving overtime pay, a new cause of action accrues for purposes of § 255(a) at each regular payday immediately following the work period during which services were rendered and for which overtime compensation is claimed."); Acosta v. Yale Club, 1995 WL 600873, at *3 (S.D.N.Y. Oct. 12, 1995) (holding that continuing violation theory does not apply to FLSA claims).

330. D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945); Gaffers v. Kelly Servs., Inc., 2016 WL 4445428, at *9 (E.D. Mich. Aug. 24, 2016) (declining to enforce a waiver of FLSA claims and likening the right to collective action under the FLSA to the right to receive overtime compensation under the statute generally, indicating that the "the employer that absconds from collective litigation" secures for itself the same unfair competitive advantage as an employer who otherwise refuses to compensate employees at the required rates), *appeal filed*, Aug. 26, 2016 (No. 16-2210). However, bona fide disputes over hours may be compromised. Strand v. Garden Valley Tel. Co., 51 F. Supp. 898 (D. Minn. 1943); *see also* Coventry v. U.S. Steel Corp., 856 F.2d 514, 521–22 (3d Cir. 1988) (discussing FLSA exception to general recognition of waivers and comparing it with employee's ability to waive rights under ADEA).

Waiver of FLSA claims in the context of FLSA collective actions may entail particular scrutiny by courts. For example, in *Kakani v. Oracle Corp.*,[331] a district court rejected a proposed settlement of FLSA and other wage-and-hour claims. With regard to the waiver of FLSA rights, the court noted that the settlement's opt-out class violates the opt-in collective procedure authorized by the FLSA.

The Second Circuit recently concluded that FLSA claims fall within an exception to Federal Rule of Civil Procedure 41 ("Dismissal of Actions"), ruling that litigants must seek court or DOL approval before entering into stipulated settlements (which necessarily involves the waiver of FLSA claims).[332]

[F] Litigation Issues

[F][1] Burdens of Proof

As a general matter, employees asserting a wage-and-hour violation have the burden of proving such violation. However, in certain circumstances, such as overtime claims, employees need only demonstrate a prima facie wage claim in order to shift the burden of production to the employer. This shifting burden has been described as follows:

> [A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.[333]

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331. Kakani v. Oracle Corp., 2007 U.S. Dist. LEXIS 47515 (N.D. Cal. June 19, 2007).

332. Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015) (holding that parties must disclose the terms of a stipulated private settlement of FLSA claims and seek approval from the district court prior to the court granting motion for dismissal), *cert. denied*, 136 S. Ct. 824 (2016).

333. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687–88 (1946), *superseded by statute on other grounds*, IBP, Inc. v. Alvarez, 546 U.S. 21, 41 (2005).

An employer asserting that an employee seeking overtime compensation is an exempt employee bears the burden of proof to show that the exemption applies, and the exemption is narrowly construed against the employer.[334]

With regard to the components of an employee's prima facie wage claim, the employee must demonstrate the existence of an employment relationship, FLSA coverage, the employer's constructive or actual knowledge of overtime worked, and the performance of work for which the employee was not properly compensated.[335] As indicated by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, in demonstrating the performance of work for which the employee was not properly compensated, the employee is not required to compute FLSA damages with precision, but rather need only present evidence sufficient to estimate damages through a "just and reasonable inference."[336]

Once an employee has established his/her prima facie case, the burden of production then shifts to the employer to rebut the "reasonable inference" established by the employee. Should the employer fail to meet its burden of production, the court will award damages.[337] In so doing, courts have indicated willingness to award damages based on the employee's "reasonable inference," and unwillingness to allow an employer to complain about the speculative nature of damages when such speculation arises from the employer's own failure to retain records.[338] Nonetheless, even under this relaxed standard,

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334. *See, e.g.*, Hogan v. Allstate Ins. Co., 361 F.3d 621, 625 (11th Cir. 2004).

335. *See, e.g.*, Davis v. Food Lion, 792 F.2d 1274, 1276 (4th Cir. 1986) (employee must prove actual or constructive knowledge of overtime violation); Reed v. Johnson, 1995 U.S. Dist. LEXIS 17221, at *2 (E.D. La. Nov. 13, 1995) (employee must establish prima facie case that she was an "employee" engaged in commerce under FLSA, and she was not adequately paid overtime/minimum wage under FLSA).

336. *See Mt. Clemens*, 328 U.S. at 687–88.

337. *Id.*

338. *See id.; see also* Cowan v. Treetop Enters., 163 F. Supp. 2d 930 (M.D. Tenn. 2001) (applying computed class overtime average where records not kept for employees); Brown v. Family Dollar Stores of Ind. LP, 534 F.3d 593 (7th Cir. 2008) (employee not required to present evidence of days and hours overtime worked and unpaid where employee presented evidence employer unlawfully altered time records). *But see* Brown v. Scriptpro LLC, 700 F.3d 1222 (10th Cir. 2012) (refusing to apply relaxed burden where employee chose not to enter work hours in employer's timekeeping system).

the employee must still establish the existence of damages.[339] An employee's evidence need not, however, be precise or detailed to create a just and reasonable inference of damages.[340]

[F][2] Interaction of State and Federal Actions—Hybrid Actions

Plaintiffs often file FLSA collective action claims along with state-based wage-and-hour causes of action. These "hybrid" cases present unique challenges to litigants, particularly since the opt-in collective action procedures under the FLSA differ from the opt-out class procedures under Federal Rule of Civil Procedure 23.

Several circuit courts have held that a FLSA collective action and Rule 23 class action are not inherently incompatible.[341]

[G] Rule 68—Offers of Judgment

The U.S. Supreme Court previously held that a defendant may "pick off" plaintiffs in FLSA collective actions by offering complete relief.[342] In *Genesis Healthcare Corp. v. Symczyk*, the plaintiff filed a FLSA collective action. Simultaneously with answering the complaint and prior to any other individuals opting in to the action, the

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339. Carmody v. Kan. City Police Comm'rs, 713 F.3d 401 (8th Cir. 2013) (plaintiffs did not meet their threshold burden in failing to produce evidence of actual damages resulting from the defendant's practice of providing employees with flextime in lieu of paid overtime).

340. *See, e.g.*, Aponte v. Modern Furniture Mfg. Co., 2016 WL 5372799, at *12 (E.D.N.Y. Sept. 26, 2016) (general damage estimates based entirely on the employee's recollections were sufficient to shift the burden to defendants).

341. *See* Busk v. Integrity Staffing Sols., Inc., 713 F.3d 525 (9th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 513 (2014); Shahriav v. Smith & Wollensky Rest. Grp., 659 F.3d 234 (2d Cir. 2011); Knepper v. Rite Aid Corp., 675 F.3d 249 (3d Cir. 2012) (nothing in section 216(b) to prevent bringing Rule 23 claims); Ervin v. OS Rest. Servs., Inc., 632 F.3d 971 (7th Cir. 2011) (finding "ample evidence" that that a combined FLSA section 16(b) and Rule 23 action "is consistent with the regime Congress had established under the FLSA," as the opt-in requirement of the FLSA was designed to eliminate lawsuits initiated by third parties, like unions, on behalf of a disinterested employee who would not have otherwise participated in the litigation); Lindsay v. Gov't Emp.'s Ins. Co., 448 F.3d 416 (D.C. Cir. 2006) (FLSA's collective action statute did not include express language prohibiting supplemental jurisdiction over state law claims and thus exercise of supplemental jurisdiction was proper).

342. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

defendant served the plaintiff with a Rule 68 offer of judgment offering the plaintiff complete relief on her individual damages. Though the plaintiff did not accept the offer, the defendant then moved to dismiss the action as moot.

On review, the Supreme Court held that the plaintiff's action became moot when her individual claims became moot, and affirmed the dismissal of the action. In its analysis, the Court contrasted FLSA collective actions from Rule 23 actions, noting that a certified Rule 23 class acquires an independent legal status, whereas "[u]nder the FLSA, by contrast, 'conditional certification' does not produce a class with independent legal status, or join additional parties to the action."[343] The Court further rejected the argument that the claim was "inherently transitory" and would evade review, holding "a claim for damages cannot evade review; it remains alive until it is settled."[344]

Just three years later, however, the Supreme Court held that a Rule 68 offer does not, standing alone, render a plaintiff's claims moot.[345] The Court noted that, unlike the plaintiff in *Genesis*, the plaintiff in *Gomez* contested the mootness of the underlying claim on appeal. The *Gomez* Court therefore reached for the first time the question of whether an unaccepted offer of total relief renders moot the plaintiff's underlying claims. Guided by basic contract principles, the Court held that it does not. Consequently, defendants may not "pick off" individual claims prior to certification merely by extending an unaccepted offer of total relief to a named plaintiff.

§ 1:3.2 California Class Actions

California wage-and-hour litigants generally file class actions under the California Code of Civil Procedure, which, in its treatment of class actions, loosely resembles Rule 23 of the Federal Rules of Civil Procedure. In California, wage-and-hour class actions have included claims of off-the-clock work, misclassification of exempt positions or independent contractors, failure to pay overtime, failure to pay commissions or bonuses, meal and rest break violations, uniform violations, waiting-time penalties, paycheck stub violations,

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343. *Id*. at 1530.
344. *Id*. at 1531.
345. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016), *as rev'd* (Feb. 9, 2016).

claims for suitable seats, and tip-pooling violations.[346] In addition, plaintiffs invoke Business and Professions Code section 17200 *et seq.* ("section 17200") by claiming the wage-and-hour violation is an unfair business practice.

[A] Governing Authority

California Code of Civil Procedure section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. . . ."[347] Section 382 provides no guidance to potential class litigants regarding class action procedures. In 1970, however, the California Legislature passed the Consumers Legal Remedies Act (CLRA),[348] which contains a provision similar to Rule 23 of the Federal Rules of Civil Procedure.[349] The California Supreme Court has suggested that courts should look to section 1781 and Rule 23 as procedural guidelines to ensure fairness in class action lawsuits.[350] Additionally, the California Judicial Council has adopted a series of rules regarding management of class actions.[351]

[B] Requirements for Establishment of California Class Actions

Before a court certifies a class under California law, a class representative must prove (1) the existence of an ascertainable class, and (2) a well-defined community of interest among the class members.[352]

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346. In 2012, Governor Brown signed S.B. 1255, which amends the California Labor Code to make it easier for employees to show "actual injury" stemming from paystub violations. The law became effective on January 1, 2013.
347. CAL. CIV. PROC. CODE § 382.
348. CAL. CIV. CODE § 1750 *et seq*.
349. *See id*. § 1781.
350. *See, e.g.*, Wash. Mut. Bank v. Superior Court, 15 P.3d 1071 (Cal. 2001) (considering the CLRA and Rule 23 to determine standards for multi-state class action); Linder v. Thrifty Oil Co., 2 P.3d 27 (Cal. 2000) (reviewing the CLRA and Rule 23 to determine the necessity or propriety of inquiry into the legal merits of class claims during certification process).
351. *See* CAL. CT. R. 1850 *et seq*.
352. *See, e.g., Linder*, 23 Cal. 4th at 435 (2000) ("[a] party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members"); Richmond v. Dart Indus., Inc., 629 P.29 23 (Cal. 1981) (same).

Other relevant considerations include "the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing."[353]

[C] California Wage-and-Hour Class Actions

California courts have certified class actions alleging various violations of the applicable wage-and-hour laws. In *Jones v. Farmers Insurance Exchange*,[354] California's Second District Court of Appeal reversed the trial court's order denying certification to a class of insurance adjusters who had asserted claims for off-the-clock work prior to the start of their shifts. Likewise, in *Williams v. Superior Court*,[355] the Second District Court of Appeal reversed the trial court's denial of class certification, distinguishing *Dukes v. Wal-Mart* and holding that whether an employee was harmed by the allegedly common policy of required off-the-clock work was a question that went to individualized damages, not liability.

In *Ayala v. Antelope Valley Newspapers, Inc.*,[356] the California Supreme Court upheld the reversal of a trial court decision denying class certification to a group of newspaper carriers claiming they were improperly classified as independent contractors. The court explained that the proper test for evaluating a misclassification claim "is not how much control a hirer exercises, but how much control the hirer retains the right to exercise."[357] Therefore, at the class certification stage, the relevant inquiry is whether the hirer's right of control is sufficiently uniform to permit classwide assessment.[358] In this case, the standard contract with the carriers uniformly addressed the newspaper's control over aspects of the carriers' work, and therefore the trial court's focus on how the newspaper exercised that control from carrier to carrier was improper.

By contrast, denial of class certification regarding misclassification claims has also recently been upheld. In *Dailey v. Sears, Roebuck & Co.*,[359] plaintiffs were assistant store managers who claimed that

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353. *Linder*, 23 Cal. 4th at 435.
354. Jones v. Farmers Ins. Exch., 221 Cal. App. 4th 986 (2013).
355. Williams v. Superior Court, 221 Cal. App. 4th 1353 (2013).
356. Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522 (2014).
357. *Id*. at 533.
358. *Id*.
359. Dailey v. Sears, Roebuck & Co., 154 Cal. Rptr. 3d 480, 497–98 (Ct. App. 2013).

the existence of common policies, including allegedly standardized operations, justified class certification of misclassification claims. The court noted that the proper focus of the class certification analysis was "whether Sears has *implemented policies and practices* that *cause* these employees to spend most of their time engaging in nonexempt work."[360] (emphasis in original). Based on the varied evidence of how the assistant managers spent their time, the court of appeal upheld the trial court's conclusion that plaintiffs' theory of liability—that common policies existed—"was not susceptible of common proof at trial."[361]

The California Supreme Court held that considerations regarding individual issues weigh heavily in the manageability of class actions. In *Duran v. United States Bank National Association*,[362] the California Supreme Court upheld a court of appeal decision overturning a judgment in favor of a class of loan officers claiming they had been improperly classified as exempt "outside sales" employees. The trial court had implemented its own "seriously flawed" trial plan that included the testimony of nineteen randomly chosen class members and two of the named plaintiffs in order to determine liability. The Supreme Court affirmed the reversal of judgment by the court of appeal, holding that "a class action trial management plan must permit the litigation of relevant affirmative defenses, even when these defenses turn on individual questions."[363] As such, trial plans must account for the affirmative defenses that are presented regarding the claims of individual class members, even if they are not part of the sampled group. Here, the trial court's decision to base its liability determination on a small sample precluded the employer from presenting affirmative defenses applicable to individual class members. In order to certify a class, a court must "conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently."[364] Trial courts must pay special attention to issues of manageability when certifying a class, and have the obligation to decertify a class when individual issues prove unmanageable.[365]

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360. *Id*.
361. *Id*. at 500.
362. Duran v. U.S. Bank Nat'l Ass'n, 325 P.3d 916, 920 (Cal. 2014).
363. *Id*. at 929.
364. *Id*. at 931.
365. *Id*. at 931–32.

However, recently a California appellate court reinstated a class of security guards who alleged their employer did not provide them with adequate meal breaks. In reaching this decision, the court noted *Dukes* did not prohibit the use of statistical samples. Specifically, the court distinguished *Dukes*, which involved a potential class of 1.5 million employees and had used statistical sampling to calculate all damages without meeting evidentiary requirements for class certification, from the case before it, which involved a class of roughly 10,000 security guards and in which the plaintiffs were only using the evidence to calculate the frequency of already-established facts.[366]

[D] Procedural Issues in Class Action Lawsuits

[D][1] Opt-Out Requirement

Because California courts have essentially adopted the federal procedures for class actions, class members are generally bound by any judgment rendered in the lawsuit unless they opt out after receipt of notice of the action.[367] Additionally, any class member who does not request exclusion from the class upon receiving notice of the pendency of the action may enter an appearance in the action through his or her counsel.[368]

[D][2] Class Certification's Preclusive Effects

California courts have held that a denial of class certification can establish collateral estoppel against absent putative class members on issues that were actually decided in connection with the denial.[369]

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366. *See* Lubin v. Wackenhut Corp., 210 Cal. Rptr. 3d 215 (Ct. App. 2016).
367. CAL. CIV. CODE § 1781(e).
368. *Id*.
369. *See* Alvarez v. May Dep't Stores Co., 49 Cal. Rptr. 3d 892, 899–900 (Ct. App. 2d Dist. 2006) (finding principles of collateral estoppel ensure absent putative class members' interests were adequately represented in prior proceeding); Bufil v. Dollar Fin. Grp., Inc., 76 Cal. Rptr. 3d 804, 804–11 (Ct. App. 1st Dist. 2008) (same); *see also* Johnson v. GlaxoSmithKline, Inc., 83 Cal. Rptr. 3d 607, 617–20 (Ct. App. 2008) ("In cases . . . where a party had a full opportunity to present his or her claim and adequately represented the interests of a second party who seeks the same relief, principles of equity, public policy and the interests of litigants alike require that there be an end to litigation."). *But see* Bridgeford v. Pac. Health Corp., 135 Cal. Rptr. 3d 905 (Ct. App. 2012) (holding unnamed

[D][3] Statute of Limitations

Rule 23 of the Federal Rules of Civil Procedure provides that the timely filing of a class action suit tolls the statute of limitations for all members of the purported class until the final determination regarding the propriety of class certification. Courts have applied this rule to class actions brought under California law, as well.[370] Additionally, one court of appeal has held that the federal rule regarding tolling of the statute of limitations applies to a class member who opts out of the previously filed federal class action.[371]

[D][4] Settlement of California Class Actions

Parties may not settle a class action without the court's approval, and notice of any proposed settlement must be given to the class members in a manner directed by the court.[372] The trial court has broad powers to determine whether a proposed class action settlement is fair.[373]

The payment of wages and other benefits due and owing under state law may not be conditioned upon the employee's execution of a release.[374] However, the California Labor Code does not prohibit the release of a claim for unpaid wages where there is a bona fide dispute over whether any wages were owed.[375]

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members of putative class not certified cannot be precluded from pursuing their own class claims against defendant).

370. *See, e.g.*, Becker v. McMillan Constr. Co., 277 Cal. Rptr. 491, 226 Cal. App. 3d 1493, 1501 (Ct. App. 1991) (tolling is appropriate where "substantive class and individual claims [are] sufficiently similar to give [the defendant] notice of the litigation").

371. *See* S.F. Unified Sch. Dist. v. W.R. Grace & Co., 44 Cal. Rptr. 2d 305, 37 Cal. App. 4th 1318, 1336–40 (Ct. App. 1995) (statute of limitations on former class member's individual state law cause of action is tolled from date of filing until date that class member opts out of class action, whether class member opts out before or after class is certified).

372. CAL. CIV. CODE § 1781(f).

373. *See* Mallick v. Superior Court, 152 Cal. Rptr. 503, 89 Cal. App. 3d 434, 438 (1979) (trial court ordered to permit party to intervene in county's class action and to entertain motion to remove county as representative to effectuate settlement of action).

374. CAL. LAB. CODE § 206.5.

375. *See* Chindarah v. Pick Up Stix, 90 Cal. Rptr. 3d 175 (Ct. App.), *review denied*, 2009 Cal. LEXIS 6204 (Cal. June 16, 2009); Watkins v. Wachovia, 92 Cal. Rptr. 3d 239 (Ct. App. 2009).

California courts typically scrutinize and carefully evaluate the terms of proposed wage-and-hour class settlements to protect the interests of absent class members.[376] Courts may also consider the interests of the State of California and its Labor and Workforce Development Agency as stakeholders when the settlement contemplates an award for Private Attorneys General Act (PAGA) penalties (see section 1:3.4, below). Most recently, a federal district judge in California denied a settlement for Uber drivers in part because the parties agreed to settle the PAGA claims for 0.1% of the case's estimated full worth.[377]

§ 1:3.3 Representative Actions Under Business and Professions Code Section 17200

Wage-and-hour claims may also be brought under the Unfair Competition Law, codified at Business and Professions Code sections 17200 *et seq.* Unfair competition includes any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[378] Business and Professions Code section 17203 permits a court to issue an injunction or make other such orders or judgments as may be necessary to prevent the use or employment of any unfair competition practice, or as may be necessary to restore to any person an interest in money or property acquired by means of such unfair competition.[379]

[A] Applicability to Wage-and-Hour Law

In 2000, the California Supreme Court for the first time addressed the application of section 17200 to California's wage-and-hour laws.[380]

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376. *See, e.g.*, Clark v. Am. Res. Servs. LLC, 96 Cal. Rptr. 3d 441 (Ct. App. 2009) (approval of a class action settlement required the trial court to conduct an independent assessment of the merits of plaintiffs' case in order to determine whether any legitimate legal issue has a significant impact on the value of plaintiffs' claim); Kullar v. Foot Locker Retail, Inc., 85 Cal. Rptr. 3d 20 (Ct. App. 2008) (although many factors must be considered when determining the reasonableness of settlement terms, an informed evaluation cannot be made without an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation).
377. *See* O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2016).
378. CAL. BUS. & PROF. CODE § 17200.
379. *Id.* § 17203.
380. *See* Cortez v. Purolator Air Filtration Prods. Co., 99 P.2d 706 (Cal. 2000).

In *Cortez v. Purolator Air Filtration Products Co.*, the plaintiff alleged that her former employer violated the California Labor Code by failing to pay overtime wages to employees who worked an alternative 4/10 work schedule. Ms. Cortez claimed that the company's failure to pay overtime also constituted an unfair business practice under section 17200, thereby permitting her to file a "representative" action on her own behalf and on behalf of 175 other employees who also worked the 4/10 schedule. Although the company asserted that the employees had previously elected to work the alternative workweek schedule, it could not produce any documentation to support this contention.[381] In rendering its decision, which is discussed in more detail below, the Supreme Court confirmed that Labor Code violations may constitute unfair competition.[382]

A California court held that in certain actions arising under section 17200, state law opt-out class actions may proceed based on FLSA claims, provided that they are limited to restitution damages.[383] In its reasoning, the court posited that the legislature, when adopting the FLSA, intended to shield companies from being financially ruined when faced with class action lawsuits. By allowing a state opt-out claim based on the FLSA to proceed, the court suggested that section 17200 actions circumvent this concern by limiting recovery to restitution damages, and preventing windfall judgments to persons in the class.[384]

[B] Equitable Relief Versus Damages

Section 17200 permits only equitable relief, such as injunctions or restitution.[385] In the wage-and-hour context, the California Supreme

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381. *Id.* at 169.
382. *Id.*
383. *See* Harris v. Inv'r's Bus. Daily, Inc., 41 Cal. Rptr. 3d 108 (Ct. App. 2006).
384. *See also* Bahramipour v. Citigroup Glob. Mkts., Inc., 2006 U.S. Dist. LEXIS 9010 (N.D. Cal. Feb. 22, 2006) ("[b]y allowing 'opt-out' class actions and longer statute of limitations for Unfair Competition Law claims, California provides increased protections for its workers, furthering the central purpose of the FLSA").
385. *See, e.g.*, Vikco Ins. Servs., Inc. v. Ohio Indem. Co., 82 Cal. Rptr. 2d 442, 70 Cal. App. 4th 55, 67 (1999) (insurance agent is not entitled to recover unrealized commissions or general compensation damages because Unfair Business Practices Act provides only for injunctions and restitution).

Court in *Cortez* held that employers may be compelled to restore unpaid wages to employees and former employees because such wages constitute restitution. Although the court noted that unpaid earned wages constitute damages in some contexts, such wages may also be deemed a form of restitution because wages become the property of the employee once earned.[386]

The California Supreme Court has held that section 17200 actions brought by individuals do not provide for non-restitutionary disgorgement.[387]

[C] Statute of Limitations

Business and Professions Code section 17208 sets forth the applicable statute of limitations for unfair business practices:

> Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived on its enactment.[388]

The plaintiff in *Cortez* asserted that this statute provided the applicable statute of limitations, thereby requiring the employer to pay overtime for four years prior to initiation of the lawsuit. The defendant in *Cortez*, however, asserted that an employee must commence a civil action for unpaid wages within three years of accrual of the claim.[389] The Supreme Court rejected this assertion, holding that because the plaintiff was entitled to restitution pursuant to Business and Professions Code section 17203, the four-year statute of limitations of section 17208 was the applicable statute.[390] With virtually no analysis, the court held that the four-year limitation period applied to *all* UCL actions, including claims presented in violation of the California Labor Code.[391]

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386. *Cortez*, 23 Cal. 4th at 177–78.
387. Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1148–49 (2003).
388. CAL. BUS. & PROF. CODE § 17208.
389. *See* CAL. CODE CIV. PROC. § 338(a).
390. *Cortez*, 23 Cal. 4th at 178–79.
391. *Id.*

§ 1:3.4 California Labor Code Private Attorneys General Act

The California Labor Code Private Attorneys General Act permits individuals to bring private actions against an employer for civil penalties under specified sections of the Labor Code.[392] As adopted by the legislature, the stated goal of PAGA was to improve enforcement of existing Labor Code obligations. PAGA sought to permit an aggrieved employee, on behalf of himself and other current or former employees, to recover any civil penalties in the Labor Code formerly assessed and collected by the California Labor and Workforce Development Agency (LWDA). The statute also provides for a default civil penalty for all provisions of the Labor Code for which a civil penalty is not specifically provided.[393]

An aggrieved employee "means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."[394] The civil penalties recovered under PAGA are distributed 75% to the LWDA and 25% to the aggrieved employees.[395] Individuals who bring claims under PAGA must comply with the administrative procedures set forth in labor code section 2699.3, which includes giving written notice by mail to the LWDA and the employer that specifies the labor code provision that has been violated. The LWDA has sixty days to notify the employer and the aggrieved employee or representative that it does not intend to investigate the claim.[396] If no notice is provided within sixty-five calendar days of the postmark date of the notice given, the aggrieved employee may commence a civil action.[397] If the LWDA decides to investigate, it has 120 to issue any appropriate citation.[398] If the LWDA has not issued a citation within 158 days, then aggrieved employee may commence a civil action.[399]

In January 2016, California Governor Brown submitted a budget proposal that sought greater oversight of PAGA claims and amendments

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392. *See* CAL. LAB. CODE § 2699(a); *see also* Caliber Bodyworks, Inc. v. Superior Court, 134 Cal. App. 4th 365, 374–75 (2005).
393. CAL. LAB. CODE § 2699(f).
394. *Id*. § 2699(c).
395. *Id*. § 2699(i).
396. *Id*. § 2699.3(a)(2)(A).
397. *Id.*
398. *Id*. § 2699.3(a)(2)(B).
399. *Id.*

to the PAGA statute. On June 15, 2016, the California Legislature approved Governor Brown's budget proposal, which included significant amendments to PAGA (Labor Code sections 2698–2699.5). S.B. 836 went into effect on June 27, 2016 and provides the following:

- The LWDA now has sixty days to review a notice under Labor Code section 2699.3(a). Additionally, the time for the LWDA to investigate a claim is extended to 180 days (previously it was 120 days);
- A plaintiff cannot file a civil action until sixty-five days after sending notice to the LWDA (previously a plaintiff only had to wait thirty-three days);
- The LWDA must be provided with a copy of any proposed settlement of a PAGA action at the time it is submitted to the court;
- A copy of the court's judgment and any other order that awards or denies PAGA penalties must be provided to LWDA;
- All items that are required to be provided to the LWDA must be submitted online, including PAGA claim notices and employer cure notices or other responses;
- A $75 filing fee is required for a new PAGA claim notice and also for any initial employer response to a new PAGA claim notice. The filing fee may be waived if the party on whose behalf the notice or response is filed is entitled to in forma pauperis status; and
- When a plaintiff files a new PAGA lawsuit in court, a filed, stamped copy of the complaint must be provided to LWDA. This requirement only applies to cases in which the initial PAGA claim notice was filed on or after July 1, 2016.

A party bringing a civil action must plead compliance with the pre-filing notice and exhaustion requirements.[400]

Plaintiffs are not required to comply with class action requirements.[401] The *Arias* court explained its ruling:

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400. *See Caliber Bodyworks*, 134 Cal. App. 4th at 385.

401. *See* Arias v. Superior Court, 46 Cal. 4th 969, 975 (2009) (allowed an aggrieved employee, alleging PAGA violations, to bring a representative action without meeting class action requirements).

> [A] representative action brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 does not give rise to the due process concerns that defendants have expressed, because the judgment in such an action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.
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> * * *
>
> Because an aggrieved employee's action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.[402]

The civil penalties that a plaintiff seeks will determine the statute of limitations for a PAGA action. California Code of Civil Procedure section 340(a) imposes a one-year statute of limitations upon an action seeking a penalty or forfeiture, whereas section 338(a) applies a three-year statute if the action is for a statutorily created liability other than a penalty or forfeiture.

For purposes of removal to federal court under the Class Action Fairness Act (CAFA), an action under PAGA is not sufficiently similar to a Rule 23 class action, and federal courts do not have jurisdiction under CAFA to hear a case solely based on PAGA claims.[403] Further, PAGA penalties cannot be aggregated to meet the $75,000 amount-in-controversy requirement for diversity jurisdiction in federal court.[404]

The California Supreme Court has ruled that state-wide discovery of employee contact information is allowed even though the PAGA plaintiff has not yet provided any evidence to support individual claims or the existence of a company-wide policy.[405] The California Supreme Court has also ruled that arbitration agreements with class waivers are generally enforceable except in the case of representative claims brought under PAGA.[406] The court reasoned that a PAGA

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402. *Id*. at 985–86.
403. Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117 (9th Cir. 2014).
404. Urbino v. Orkin Servs. of Cal., 726 F.3d 1118, 1122 (9th Cir. 2013).
405. Williams v. Superior Ct., 398 P.3d 69 (Cal. 2017).
406. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129 (Cal. 2014).

representative action is more in the nature of a qui tam action in which the employee files suit as an agent of the state.[407] It would be against public policy to allow parties to waive the ability to bring representative PAGA actions because the legislature's purpose in enacting PAGA was to augment the state's limited enforcement capabilities regarding labor code violations.[408] The Ninth Circuit in *Sakkab v. Luxottica Retail North America, Inc.*[409] agreed with *Iskanian* that the FAA does not preempt the rule barring waiver of PAGA claims.

However, while no published California appellate decision has yet adjudicated the issue, several federal district courts have held that PAGA claims creating a multitude of individualized issues may be dismissed on manageability grounds.[410]

In *Young v. REMX, Inc.*,[411] the court ruled that an arbitration order that dismisses class claims and stays a representative PAGA action pending arbitration of a plaintiff's individual claims is non-appealable. The court's opinion concluded that the "death knell" doctrine traditionally used to justify interlocutory appeals of orders denying class certification was inapplicable to plaintiff's appeal. As the court noted, there was no formal judgment binding absent nonparties by virtue of the PAGA claim's continuation, which—unlike a dismissed class action—offered the plaintiff an adequate incentive to continue litigation through the potential recovery of significant penalties, fees, and costs. Similarly, the court found that the plaintiff's appeal was not suitable for writ review because the claims compelled to arbitration were not clearly beyond the scope of the parties' agreement and the plaintiff offered no evidence that her individual arbitration would be unduly time consuming or expensive.

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407. *Id*. at 146–47.
408. *Id*. at 148–49.
409. Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425 (9th Cir. 2015).
410. *See, e.g.*, Brown v. Am. Airlines, Inc., 2015 WL 6735217, at *5 (C.D. Cal. Oct. 5, 2015) (concluding there would be "too many individualized assessments to determine PAGA violations concerning overtime pay" but finding the allegations regarding inaccurate wage statements—which only dealt with two pay periods—were manageable); Ortiz v. CVS Caremark Corp., 2014 WL 1117614, at *4–5 (N.D. Cal. Mar. 19, 2014) (striking PAGA claim as unmanageable "because a multitude of individualized assessments would be necessary.").
411. Young v. REMX, Inc., 206 Cal. Rptr. 3d 711 (Ct. App. 2016).

§ 1:3.5 Shady Grove: *Federal Preemption of State Law Limits on Certification*

In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[412] the Supreme Court held that a New York state law prohibiting class actions for certain types of claims was preempted by Federal Rule of Civil Procedure 23. Thus, New York state law claims that are ineligible for class action treatment in state court could proceed in a class action brought in federal court.

Courts have applied the *Shady Grove* analysis to proposed state wage-and-hour classes in a variety of contexts. For example, in *Chenensky v. New York Life Insurance Co.*,[413] the court permitted plaintiffs to amend their complaints to seek liquidated damages in a proposed class action alleging impermissible wage deductions under the New York Labor Law. Specifically, while section 901 of the New York Civil Practice Law and Rules prohibited the plaintiffs from pursuing liquidated damages in a state class claim, the court concluded that *Shady Grove* permitted such amendment, rejecting the defendants' argument that *Shady Grove* was inapplicable when the court exercised supplemental rather than diversity jurisdiction.

In *Knepper v. Rite Aid Corp.*,[414] the Third Circuit rejected Rite Aid's contention that permitting an opt-out class action alleging violations of state wage and hour laws to proceed alongside a separately filed FLSA opt-in action would violate the Rules Enabling Act. Rather, the court concluded that pursuant to the *Shady Grove* plurality opinion, any supposed purpose underlying section 216(b) of the FLSA is irrelevant and the only required determination is whether Rule 23 regulates procedure, which the court concluded that it does.[415] As such, the Rule 23 class was permitted to proceed. By contrast, the U.S. District Court for the District of Columbia came to a different conclusion in applying *Shady Grove* to a purported FLSA collective action proceeding along with a state class action claim.[416] Specifically, the court considered whether the D.C. wage law opt-in provision confers substantive rights that application of Rule 23 would

412. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010).
413. Chenensky v. N.Y. Life Ins. Co., 2012 U.S. Dist. LEXIS 8986 (S.D.N.Y. Jan. 10, 2012).
414. Knepper v. Rite Aid Corp., 675 F.3d 249 (3d Cir. 2012).
415. *Id.* at 265.
416. Driscoll v. George Wash. Univ., 42 F. Supp. 3d 52 (D.D.C. 2012).

abridge in violation of the Rules Enabling Act. The court concluded that the local wage law's opt-in mechanism did in fact confer substantive rights such that Rule 23 was inapplicable.[417]

417. *See also* Harris v. Reliable Reports, Inc., 2014 WL 931070 (N.D. Ind. Mar. 10, 2014).