

MUCH ADO ABOUT SOMETHING:
RECENT CLARIFICATIONS AND UPDATES OF THE NEW FEDERAL WAGE
AND HOUR REGULATIONS

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I. INTRODUCTION

The Fair Labor Standards Act (“FLSA”) establishes a minimum wage and provides a mandatory scheme for overtime pay. The Washington state equivalent, the Washington Minimum Wage Act (“WMWA”) parallels the FLSA, also addressing wage and overtime requirements. Together, the two cause employers a great deal of concern, and for good reason.

Last year the Department of Labor’s (“DOL”) Wage and Hour Division (“WHD”) recovered over \$166 million in back wages for over 241,000 employees. While this is a four-year low, it is still 26% higher than collections in 2001. Of course, in addition to the DOL’s enforcement of the FLSA, employees are increasingly aware of their rights and increasingly willing to take action. Lawsuits brought under the FLSA increased 86 percent between 2000 and 2004. Brooke Masters and Amy Joyce, “Suits on Overtime Hitting Big Firms,” Washington Post (February 21, 2006). With the threat looming, employers are well advised to reevaluate their obligations under the FLSA and WMWA.

II. GENERAL FLSA AND WMWA CONCEPTS

A. Law Construed in Favor of the Employee

Courts construe the FLSA “liberally to apply to the furthest reaches consistent with congressional action.” Bowrin v. Catholic, 2006 U.S. Dist. LEXIS 6911, *17 (S.D.N.Y. Feb. 23, 2006). Washington courts use the FLSA as persuasive authority when interpreting the WMWA. However, at times the FLSA and the WMWA diverge. At such times, it is imperative that employers abide by whichever law would provide the most protection to the employee.

B. “Employer”: Are You a Joint Employer?

The FLSA defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organizations.” 29 U.S.C. § 203(d). While it sounds simple, whether an

employment relationship exists is often a difficult inquiry. In a pair of recent cases, Federal Express (“Fed Ex”) and Wal-Mart were surprised to learn they were joint employers of their contractor’s laborers.

Under certain circumstances, “[a] single individual may stand in the relation of an employee to two or more employers at the same time.” 29 C.F.R. § 791.2(a). In Tumulty v. Fedex Ground Packages, 2005 U.S. Dist. LEXIS 26215 (W.D. Wash. March 7, 2005), plaintiff delivery persons worked for independent contractors who had contracts with Fed Ex. Plaintiffs spent their working hours deliver packages for Fed Ex. When plaintiffs’ employment ended, they filed suit against both the contractors and against Fed Ex, alleging violations of the FLSA. To determine whether Fed Ex qualified as a “joint employer,” the court considered twelve factors:

- (1) Whether the alleged joint employer has the power to hire or fire employees;
- (2) Whether the alleged joint employer supervised or controlled employee work schedules and conditions of employment;
- (3) Whether the alleged joint employer determined the rate and method of payment;
- (4) Whether the alleged joint employer maintained employment records;
- (5) Whether the work was a “specialty job on the production line”;
- (6) Whether responsibility under the contracts between a labor contractor and the alleged joint employer passed from one labor contractor to another without material changes;
- (7) Whether the ‘premises and equipment’ of the alleged joint employer were used for work;
- (8) Whether the employees had a business organization that could or did shift as a unit from one worksite to the next;
- (9) Whether the work was piecework and did not require initiative, judgment or foresight;

- (10) Whether the employee had an opportunity for profit or loss depending upon her managerial skill;
- (11) Whether there was permanence in the working relationships; and
- (12) Whether the service rendered was an integral part of the alleged joint employer's business.

See Tumulty, 2005 U.S. Dist. LEXIS 26215, at *5-8 (W.D. Wash. 2005) (citing Bonnette v. Cal. Health & Welfare Agency, (9th Cir. 1983); Torres-Lopez v. May, (9th Cir. 1997)).

The court found that nearly every factor suggested Fed Ex was a joint employer. Most significantly, Fed Ex had the power to terminate the employees, held weekly meetings with the employees to evaluate their performance, and maintained daily records documenting the employees' deliveries. In addition, the employees started and ended their workdays at Fed Ex docks, worked under a standard industry contract, worked exclusively for Fed Ex, and performed a routine task essential to Fed Ex's operation. Accordingly the court held Fed Ex qualified as a joint employer.

Employers may be tempted to contract their way out of the joint employer problem. Such efforts are unlikely to succeed. In Zavala v. Wal-Mart, 393 F. Supp. 2d 295 (D.N.J. Oct. 7, 2005), Wal-Mart attempted to escape the joint-employment relationship by the terms of its contract with the maintenance contractor. The clause at issue provided that the maintenance contractor remained in sole control over its own employees and retained sole discretion to hire, fire, or otherwise modify their conditions of employment. Because Wal-Mart had contracted away its control of the employees, it argued it could not be a joint employer. However, the contract proved unavailing: "Contract disclaimers, which provide that a particular entity is/is not an employer or is/is not an independent contractor or employee, generally do not decide the issue. An employer's characterization of an employee is not controlling . . . for otherwise there

could be no enforcement of any minimum wage or overtime law.” Id. at 330. The actual relationships, rather than the contract, govern the issue of whether an employment relationship exists.

Rather than trying to contract their way out of the possibility of joint employment, employers are advised to re-evaluate their relationships with individuals they believe to be “non-employees.” Consider the degree of control the organization has over such individuals in light of the factors set forth above. If there are any doubts as to whether the company has FLSA obligations to an individual one would not normally perceive as an employee, consult an attorney. A good faith re-evaluation and consult early may save the company a painful surprise in the future.

C. Definition of “Employee”

The FLSA protects all workers “engaged in commerce or the production of goods for commerce, or employed in an enterprise engaged in commerce or the production of goods for commerce.” 29 U.S.C. § 207(a)(1). An “enterprise engaged in commerce or the production of goods for commerce” is any enterprise with more than \$500,000 in annual gross revenues. 29 U.S.C. § 203(s)(1)(A)(ii). Under that definition, most employees will qualify for coverage. But See Xelo v. Mavros, 2005 U.S. Dist. LEXIS 21588 (E.D.N.Y. Sept. 28, 2005) (holding employee not covered where not engaged in interstate commerce and employer’s annual sales did not meet \$500,000 threshold).

In practice, as Wal-Mart recently learned, courts are reticent to take a narrow view of the term “employee.” In Zavala, 393 F. Supp. 2d at 295, undocumented immigrants employed by Wal-Mart as janitors brought action against Wal-Mart claiming they had been denied minimum wage and overtime pay in violation of the FLSA. Wal-Mart moved to dismiss the FLSA claim, arguing that undocumented workers have no rights under the FLSA. The district court rejected

Wal-Mart's argument, noting that the FLSA's definition of an "employee" makes no reference to immigration or citizenship status. Instead, the FLSA's definition of "employee" is decisively broad and inclusive.

D. Payment of Wages and Record Keeping

Wages must be paid on an established pay day, and the pay period may not be more than one month in duration. The regular payroll system may withhold wages from up to seven days before pay from the pay period covered and included in the next pay period. WAC 296-126-023. Wages must be accompanied with statement as to hours or days worked, rate of pay, gross wages and any deductions. WAC 296-126-040; 296-131-015. When an employee is discharged or ceases to work, he or she must be paid wages owed at the end of the established pay period. RCW § 49.52.010; 49.48.010.

The FLSA and WMWA require that employers maintain records on wages, hours and other items. Employers are required to keep accurate records of the hours an employee works, including overtime. The DOL or the Washington Department of Labor & Industries ("L&I") may assess penalties against the employer for failing to maintain such records. 29 U.S.C. § 211(c); 29 C.F.R. § 516; RCW 49.46.070; WAC 296 126 050, 296 128 010 & 296 131 017. If the employer fails to keep records, the burden will be on the employer to prove the claimed hours were not worked. However, where an employer properly maintains records, the employee must first show that number of claimed hours were actually worked. MacSuga v. County of Spokane, 97 Wn. App. 435, 442, 446, 983 P.2d 1167 (1999). A prudent employer will maintain a complete record of hours worked and wages paid to protect itself from a claim.

III. IS YOUR EMPLOYEE EXEMPT?

A. Sources of Exemption

Section 13(a)(1) and 13(a)(17) of the Fair Labor Standards Act, as codified at 29 C.F.R. 541, provides that certain white-collar executive, administrative, professional, outside sales, and skilled computer employees may be exempt from the FLSA's minimum wage and overtime provisions. In late April of 2004, the United States Department of Labor issued final revisions to regulations implementing the "white-collar" exemptions to the Fair Labor Standards Act ("FLSA"). The regulations went into effect August 23, 2004.

The WMWA, RCW Ch. 49.46, and WAC 296-128, has its own exemptions and can be, and often is, more protective of employees than federal law. The WMWA did not change in accordance with the FLSA's changes, leading to increasing discrepancies between the two laws. Where the WMWA and the FLSA depart, employers are advised to follow the law which is most advantageous to the employee. An employer who claims an exemption under either act has the burden of showing that it applies. See Bowrin, 2006 U.S. Dist. LEXIS 6911, at *17. Exemptions are construed narrowly and applied only to situations which are plainly and unmistakably consistent with terms and spirit of the legislation. Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 301 (2000).

B. The Importance of Proper Classification

Mischaracterization of employees as "non-exempt" can be an expensive mistake. With the increase in the salary threshold for FLSA exemptions from \$155 to \$455 per week, the WHD's Overtime Security Task Force focused investigations on workers affected by the rate change. The WHD completed 165 such investigations resulting in \$217,000 in back wages for 285 employees. Of all the employers the WHD investigated, just over half were in compliance

with Overtime Security regulations. The WHD's initiatives for 2006 include further investigations regarding "off-the-clock" and overtime violations in low-wage industries.

Private actions present an even greater threat. Abercrombie & Fitch, Merrill Lynch, UBS, and Morgan Stanley, recently agreed to multi-million dollar settlements, rather than risking a jury verdict. Abercrombie & Fitch recently settled an exemption-related lawsuit for as much as \$2 million, Merrill Lynch paid \$37 million to over 3,000 California employees in August 2005, UBS agreed to give 25,000 employees \$89 million in February 2006 and, most recently, Morgan Stanley announced a settlement of \$42.5 million to 5,000 employees on March 3, 2006.

Becoming familiar the parameters of the exemptions may save your company from a similar fate.

C. Salary Minimum for Most Exemptions

1. FLSA

To qualify for most exemptions, employees must be paid by salary at set minimum level. The new FLSA regulations nearly triple the minimum salary requirement from \$155 to \$455 per week. Thus, all employees who earn a salary of less than \$23,600 per year must be paid overtime. This single salary level replaces the various "long" and "short" test salary levels.

2. WMWA

Under the WMWA, employees who earn a salary in excess of \$250 week are exempt. RCW 49.46.010(5); WAC 296-128-510; WAC 296-128-520; WAC 296-128-530. Thus, far more employees are exempt under the WMWA as compared to the FLSA. This is an unusual division between the WMWA and the FLSA, as, in terms of the salary requirement, the FLSA actually provides more protection to the employee than the WMWA. As employers must follow the law that provides greater employee protection, for purposes of determining whether an employee meets the salary requirement for exemptions employers must generally abide by the new salary requirement of the FLSA rather than that of the WMWA.

D. Types of Exemptions

As set forth above, the new \$455 per week federal salary requirement more protective than the state's \$250 per week requirement. Thus, in terms of salary requirement, employers are generally advised to look to the more protective federal requirement. However, after clearing the federal salary hurdle, employers must consider whether the remaining terms of the exemption at issue are more protective at the state or federal level. Where the terms of the state exemption, aside from salary, provide more employee protection than the federal exemption, employers must satisfy the terms of the state exemption to safely deem their Washington employee exempt. The following is an analysis of a few of the many exemptions available.

1. Executive Exemption

a. FLSA

(1) General Rule

To qualify for the executive exemption under the FLSA, an employee must:

- (1) be compensated at least \$455 per week;
- (2) be charged primarily with the tasks of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision;
- (3) customarily and regularly direct the work of two or more other employees; and
- (4) have the authority to hire or terminate other employees, or be in such a position that her recommendations as to hiring, firing or other changes to employment status of other employees are given particular weight.

See 29 C.F.R. 541.100.

Employers must recognize that requirements that these employees are primarily devoted to managerial tasks and “customarily and regularly” manage two or more employees are formidable hurdles. On March 3, 2006, a jury handed down a \$19.1 million verdict against Family Dollar Stores—a verdict that may well double to \$38.2 pursuant to the FLSA’s “double

damages” provision. Morgan v. Family Dollar Stores, No. 01-0303 (N.D. Ala. 2006). While Family Dollar Stores argued its managers qualified for the executive exemption, the employees demonstrated they spent only 10-20% of their time performing managerial tasks. To avoid a similar fate, employers are advised to carefully and honestly analyze whether management is indeed the employee’s primary task and whether the employee customarily and regularly manages two or more employees.

(2) “Customarily and Regularly” Supervise

A recent court opinion from the federal district court for the Northern District of Illinois provides guidance as to what it means to “customarily and regularly” supervise two or more employees under the third prong of the executive exemption test. In the class action, Perez v. Radioshack, 386 F. Supp. 2d 979 (N.D. Ill. 2005), plaintiff employees claimed Radioshack had errantly classified them as exempt pursuant to the executive exemption. Although plaintiffs frequently worked more than 8 hours per day and more than 40 hours per week, they were not paid overtime on the theory that they were exempt. The plaintiff managers were responsible for interviewing potential sales associates, reviewing productivity reports from Radioshack headquarters, reviewing time cards, making work assignments, and assigning work schedules.

To determine whether the managers had “customarily and regularly directs the work of two or more other employees” clause, the court recognized two distinct subparts to the requirements: (1) two or more employees; and (2) customarily and regularly. The first prong goes to how many employees the executive must manage and the second goes to how frequently the executive must meet that minimum requirement. Plaintiffs insisted that they would have to manage 80 hours of subordinate work per week (2 workers at 40 hours/week, or 4 workers at 20 hours/week, etc.), and must meet that standard at least 87% of the time. Radioshack insisted

that, in light of its policy that 32 hours is full time, the managers need only manage 64 hours of subordinate work per week, and need only meet that standard 60% of the time.

As to the “two or more employees” element, the court favored plaintiffs’ view, relying heavily on the DOL Field Operations Handbook which provides an 80 hour standard. In spite of Radioshack’s recognition of a full time employees at 32 hours, the court was unwilling to find that “an employer can manipulate its employees’ entitlement to FLSA protection through the simple expedient of adjusting its own definition of ‘full time employee.’” As to the “customarily and regularly” requirement, the court considered other courts’ opinions in which a frequency of 76% was deemed insufficient, but 98% was deemed sufficient. The court ultimately held that an “executive” must supervise 80 hours of subordinate work per week at least 80% of the time. Accordingly, the court ruled that any employees in the class of plaintiffs who did not satisfy the exemption were entitled to summary judgment.

b. WMWA

Like the FLSA, the WMWA provides that an executive employee is one who has the primary duty of managing the business, department, division or subdivision; manages two or more full time equivalent employees; and has the authority to hire or fire other employees. Contrary to the FLSA, the WMWA also requires that the employee customarily exercises discretionary powers and does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the work week to activities which are not directly and closely related to her tasks of managing, directing, hiring, firing and exercising discretionary authority. WAC 296-128-510.

2. Administrative

a. FLSA

(1) Generally

To qualify for the administrative exemption, employees exempt under the administrative exemption must:

- (1) be compensated by salary at a rate of at least \$455 per week;
- (2) primarily perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customer; and
- (3) exercise discretion and independent judgment on significant matters.

See 29 C.F.R. 541.200(a)

With the “directly related to the management or general business operations” prong, the regulation distinguishes employees helping to run the business from those who are on manufacturing lines or performing service roles. 29 C.F.R. 541.201(a). Under the rule an employee may satisfy the exemption by performing such a task for an employer's customer. For instance, an employee in a consulting firm who assists with the management and direction of the firm's customer may qualify for exemption. 29 C.F.R. 541.201(c).

To satisfy the “discretion” prong of the administrative exemption, the employee's task must involve room for judgment between multiple potential courses of conduct. 29 C.F.R.

541.202(a). Factors to consider include:

- (1) whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- (2) whether the employee carries out major assignments in conducting the operations of the business;
- (3) whether the employee performs work that affects the business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;

- (4) whether the employee has authority to commit the employer in matters that have significant financial impact;
- (5) whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- (6) whether the employee has authority to negotiate and bind the company on significant matters;
- (7) whether the employee provides consultation or expert advice to management;
- (8) whether the employee is involved in planning long- or short-term business objectives;
- (9) whether the employee investigates and resolves matters of significance on behalf of management; and
- (10) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b). Federal courts generally find that where an employee satisfies at least two or three of these criteria, the employee exercises sufficient discretion to qualify for the exemption. 69 Fed. Reg. 22122, 22143 (2004).

(2) Academic Administrative Exemption

Pursuant to 29 C.F.R. 541.204(a), employees exempt under the academic administrative exemption must (1) be compensated by salary at a rate of at least \$455 per week; and (2) perform administrative functions directly related to academic instruction or training in an educational establishment. “Educational establishments” include primary, secondary and higher education, as well as certain other educational institutions. 29 C.F.R. 204(b). Administrative work directly related to instruction includes the work of superintendents, assistants responsible for administration of the curriculum and testing, principals and vice principals, department heads in institutions of higher education, and academic counselors who administer school testing programs, assist students with academics, and advising students with regard to degree

requirements. 29 C.F.R. 541.204(c)(1). Social workers, psychologists, and building maintenance cannot qualify for the academic administrative exemption. 29 C.F.R. 204(c)(2).

In an October 2005 opinion letter, the DOL considered whether academic advisors at a community college qualify for the academic administrative exemption. The advisor assisted students with admissions, placement testing, registration, and course selection in light of degree requirements. The DOL determined the advisors' tasks fit the requirements of 29 C.F.R. 541.204(a) and the advisor was exempt from FLSA coverage.

(3) Applying the Rule

For most employers, the most difficult part of determining whether an employee qualifies for the administrative exemption will be determining whether she exercises sufficient discretion and independent judgment. While the regulations provide a lengthy list of factors to consider, applying those factors can be an ominous task. The DOL provided some guidance in a pair of October 2005 opinion letters considering a museum coordinator and a staffing manager for a temporary employment firm.

The curator developed new exhibits and coordinated displays, sought and evaluated additions to the museum's collection, developed educational curricula for presentation, assisted in fundraising and grant proposals, and supervised one full-time employee and several volunteers. The staffing manager independently evaluated the client's needs, recruited and interviewed the prospective employee, negotiated her wage, and continued to evaluate the employees' performance after hiring. While both employees qualified for the exemption, the DOL warned that the applicability of the exemption must be evaluated on a case by case basis. Many staffing managers, for instance would not exercise sufficient independent judgment qualify for the exemption. The employee must enjoy type of wide discretion demonstrated by this particular staffing manager and curator.

Even if the employee enjoys discretion, it is possible for an employee to be non-exempt by virtue of the type of work she performs. For instance, in an August 2005 opinion letter, the DOL determined an advocate for the disabled failed to satisfy the exemption. The DOL observed that the advocate's role was primarily to represent the desires of her client rather than participate in management or general business operation. Accordingly, she failed to satisfy the second prong of the administrative exemption. Employers should focus both on whether the employee primarily serves in management or general business operation and enjoys discretion in those tasks to determine whether the exemption applies.

(4) WMWA

The WMWA requires a greater showing than the FLSA in terms of establishing that someone is an "administrative employee." Under the WMWA, an administrative employee is one who:

- (1) primarily performs work management or business operations;
- (2) customarily and regularly exercises discretion and independent judgment; or
- (3) performs functions in the administration of a school system; and
 - (a) regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or
 - (b) who performs under only general supervision work along specialized; or technical lines requiring special training, experience or knowledge; or
 - (c) who executes under only general supervision special assignments and tasks; and
- (4) does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (3) of this section.

3. Professional Exemption

a. FLSA

(1) Generally

To qualify for the professional employee exemption, one must establish that the employee is:

- (1) Compensated on a salary or fee basis at a rate of at least \$455 per week; and
- (2) Primarily performs work which either
 - (a) requires knowledge of an advanced type in a field of learning customarily acquired by specialized instruction or
 - (b) requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. 541.300(a).

The regulations eliminate the requirement that employees engage in varied tasks which cannot be standardized and the regulations no longer list discretion and independent judgment as a primary duty, although they define “work requiring advanced knowledge” as including “work requiring the consistent exercise of discretion and judgment.” As with the “executive employee” exemption, the new regulations eliminate the percentage limitation on concurrent work activities which are not an “essential part of and necessarily incident to” professional work. Examples of exempt positions are registered or certified chefs, paralegals, athletic trainers and funeral directors or embalmers.

(2) Learned Professionals

(a) Rule

“Learned professionals” are those who have advanced knowledge in a field of science or learning customarily acquired by prolonged, specialized intellectual instruction and study. 29 C.F.R. 541.301(a). In order to qualify for the exception:

- (1) the employee must perform work which is predominantly intellectual in character and requires consistent exercise of discretion and judgment;
- (2) the advanced knowledge must be in a field of science or learning; and
- (3) the knowledge must be customarily acquired through a prolonged course of specialized instruction.

29 C.F.R. 541.301(a-b). The requirement that the knowledge ordinarily be obtained through specialized instruction restricts the exemption to jobs for which specialized academic training is a standard prerequisite. 29 C.F.R. 541.301(d). “The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.” Id.

(b) Similar Jobs Do Not Ensure Similar Results

A November 2005 DOL opinion letter provides an excellent example of how two similar jobs may result in different classifications under the learned professional rule. The DOL considered the employees of a social service agency providing counseling, education and advocacy to the general public. Among the positions at the agency were those of Social Worker and Caseworker. The Social Workers made independent decisions about the course of action most appropriate for their clients. They also diagnosed problems, created a treatment plan, and used various therapeutic approaches to assist their clients. Social Workers were required to have a masters degree in social work, education, counseling, psychology, education or criminal justice and at least two years of post-graduate experience. Another group of employees, called Caseworkers, facilitated services for foster children, provide support groups and training groups, conduct assessments and home studies, and provide counseling. All Caseworkers were required to have a bachelors degree in social sciences.

The DOL determined that because Social Workers were required to have a masters degree, and the resulting knowledge in a field of learning, they fit the learned professional exemption. However, Caseworkers did not qualify for the exemption because they were only

required to have a general social sciences degree. The DOL noted “the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field.” (citing 29 C.F.R. § 541.301(d)).

(3) Creative Professionals

(a) Rule

29 C.F.R. § 541.300 provides that to qualify for the creative professional exemption an employee must: (1) be compensated at least \$455 per week; and (2) have a primary duty requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 29 C.F.R. § 541.302(a) clarifies that the exception does not apply to those who perform routine mental, manual, mechanical or physical work.

(b) The Creativity in Question is That of the Employee Himself

The fact that a job is tangentially related to art does not ensure exemption under the creative professional rule. For instance, in an August 2005 opinion letter, the DOL considered an inquiry from a company specializing in graphic art wraps, which are advertisements printed on large sheets of a flexible vinyl with an adhesive back, then posted to buses or buildings. The employer sought confirmation that the creative professional exemption applied to a group of ten individuals charged with positioning and posted the wraps, after they wraps had already been created. The DOL determined the employees posting the wraps were instead skilled employees performing manual, physical work to install pre-existing art. Therefore, the employees did not qualify for the creative professional exemption. The DOL letter is a reminder that the key ingredient to the creative professional exemption is that the specific employee in question be primarily involved in a creative, imaginative task in a recognized artistic field.

b. WMWA

Again, the WMWA has a more rigorous duties test than the new regulations of the FLSA.

A professional employee is one who is an accountant, architect, attorney, nurse or other position involving scientific or specialized training. The professional must be engaged in:

- (1) original or creative efforts;
- (2) which are intellectual in nature;
- (3) constantly use discretion and judgment in the work; and
- (4) not may not devote more than 20 percent of his hours worked in the week to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1) through (3) of this section.

RCW 49.46.010(5); WAC 296-128-530.

4. Computer Employee Exemption

a. FLSA

(1) Rule

The FLSA sets forth an exemption for certain computer employees at 29 U.S.C.

§ 213(a)(17). To qualify for the Computer Employee exemption, the employee must be a systems analyst, programmer, software engineer, or other similarly skilled worker who earns at least \$455 per week or \$27.63 per hour and whose primary duty is:

- (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or
- (2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
- (3) the design, documentation, testing, creation, testing, or modification of computer systems or programs, related to machine operating systems; or
- (4) a combination of duties in the three above categories which requires the same level of skills.

See 29 C.F.R. 541.400. Regardless of title, the employee's primary duty must consist of work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering. 29 C.F.R. 541.3(a)(4). The new regulations dispose of the former requirement that the work require consistent exercise of discretion and judgment.

(2) Those Exempt Under Pre-2004 Rule Are Likely Exempt Under Current Rule

In Bergquist v. Fidelity Info. Servs., Inc., 299 F. Supp. 2d 1320 (M.D. Fla. Nov. 22, 2005), the employee-programmer at issue designed programs over a three year period, ending in October 2004, just two months after the regulations removed the requirement that a computer employee consistently exercise discretion to qualify for the exemption. During employment, the plaintiff designed programs, performing work he admitted was not routine. To design the programs, the employee would receive a business design from a business analyst, then develop a program to satisfy that design. Further, even in team settings, the employee was not supervised and was free to develop his piece of the design by himself. The court determined that the employee's work qualified him as exempt under the pre-2004 regulations. Furthermore, since the post-2004 regulations were even more inclusive than the pre-2004 regulations, he also qualified for exemption under the new regulations. C.f. Pellerin v. Xspedius Comm'n, LLC, 2005 U.S. Dist. LEXIS 33479 (W.D. La. 2005) (Applying pre-2004 regulations and finding the exemption inapplicable for lack of discretion and independent judgment); see also Bobadilla v. MDRC, 2005 U.S. Dist. LEXIS 18140 (S.D.N.Y. 2005) (Network administrator who configured a new network, tested and modified hardware and software, and tested network connectivity qualified for exemption).

b. WMWA

The WMWA requires that, in addition to the FLSA requirements:

- (1) the employee must possess a high degree of theoretical knowledge and understanding of computer system analysis, programming and software engineering;
- (2) the employee must have the ability to practically apply that theoretical knowledge and understanding to highly specialized computer fields;
- (3) the employee must generally attain the necessary level of expertise and skill to qualify for an exemption through a combination of education and experience in the field; and
- (4) the employee must consistently exercise discretion and judgment in the application of their special knowledge as opposed to performing purely mechanical or routine tasks; and
- (5) the employee must engage in work that is predominantly intellectual and inherently varied in character.

WAC 296-128-535.

5. Part Owners

a. FLSA

The regulations create an exemption for those employees:

- (1) who own at least a 20% interest in the business; and
- (2) are actively engaged in the management of the business.

If the employee meets this test they are exempt regardless of whether he/she meets the salary basis test.

b. WMWA

There is an exemption for an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which he is employed. RCW 49.46.010(5); WAC 296-128-510.

6. Highly Compensated Employee

a. FLSA

Under the new rules, a white collar employee earning more than \$100,000 per year is exempt from overtime rules, if the worker customarily and regularly (1) performs one or more exempt duties of an executive, administrative, or professional employee; and (2) performs primarily office or non-manual work. At least \$455 per week of those earnings must be by salary, while the remainder may be accomplished by discretionary bonuses or commission.

b. WMWA

The Washington Minimum Wage Act does not have an exemption for highly compensated employees. Therefore, Washington employers must abide by the more protective Washington rules and not find such a highly-paid employee to be exempt unless she fits the criteria of a different exemption.

7. Agricultural Exemption

29 C.F.R. 780.106 provides an FLSA exemption for employees engaged in direct farming operations. Similarly, RCW 49.46.130(2)(g) provides that one is exempt from WMWA coverage if she is: (1) employed on a farm for cultivating soil or “in connection with raising or harvesting any agricultural or horticultural commodity”; (2) employed to pack, grade, store or deliver any agricultural or horticultural commodity; or (3) employed in commercial canning or processing in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution or consumption. In Cerrillo v. Esparza, 126 Wn. App. 723, 109 P.2d 475 (May 19, 2005), employer Esparza ran a trucking business hauling agricultural products to fill contracts with food processing companies. When Esparza’s employees brought suit for overtime compensation under the WMWA, Esparza claimed the employees were exempt under Washington’s agricultural worker exemption. Adopting a narrow reading of the statute, the court

held that the agricultural exemption applies only to persons working for a farmer delivering farm products to market, not to those working for food processing plants.

8. Outside Sales Exemption

a. FLSA

Under the “duties” test, the regulations specify that solicitations by mail, phone, or the Internet are not “outside” sales unless directly related to calls on customers at their place of business or home. The new regulations also provide clarification regarding exempt sales employees who work at trade shows and drivers who sell during their route contact with customers. The regulations get rid of the “80%” requirement as long as the outside sales activities constitute the “primary duty” of the employee.

b. WMWA

The WMWA does not exclude solicitations by mail, phone, or the Internet from the definition of an outside salesperson. Instead, an outside salesperson is defined as one who is:

- (1) customarily and regularly engaged away from the employer’s place of business to make sales by obtaining orders or contracts for services or for the use of facilities; and whose
- (2) non-sales work does not exceed 20 percent of the workweek hour, PROVIDED that work performed incidental to and in conjunction with the employee’s own outside sales or solicitations, including incidental deliveries and collections, are not to be regarded as nonexempt work; and whose
- (3) compensation is composed of at least one-half commissions.

RCW 49.46.010(5)(c); WAC 296-128-540.

9. Interstate Trucking

a. FLSA

Section 13(b) of the FLSA provides an overtime exemption for truck drivers who are subject to the maximum-hour regulations of the secretary of transportation. Drivers are subject

to the regulations, and thus the exemption, if passengers, property or both are transported by a motor carrier between two different states. 49 U.S.C. § 13501. Intrastate may also qualify if they there is a “practical continuity of movement” rendering their transportation a “part of the stream of interstate commerce.” Recently the Third Circuit Court of Appeals ruled that bus drivers who made limited trips to the airport were not part of the stream of interstate commerce and not subject to the exemption. Packard v. Pittsburgh Transp. Co., 418 F.3d 246 (3d Cir. Aug. 15, 2005).

b. WMWA

Under the WMWA, truck drivers are not exempt from state overtime wage requirements. However, as the Washington Court of Appeals pointed out in Bostain v. Food Express, Inc., 127 Wn. App. 499, 111 P.3d 906 (May 17, 2005), employees who split their work weeks between states and never work more than 40 hours within the State of Washington are not entitled to overtime compensation under state law. Therefore, while truck drivers are not entitled to an exemption, they are not qualified for overtime pay if they do not work 40 hours per week in Washington.

E. Conversion to Non-Exempt Status Through Deductions

1. FLSA

To establish that an employee is salaried and thus qualified for a certain exemption, the employer must establish that the employee is paid the equivalent of \$455 on a regular basis without regard for the quality or quantity of work performed. 29 C.F.R. 541.602. While employers may offer additional compensation on an hourly or discretionary basis, at least \$455 per week must remain salaried. An employer who deviates from this standard may lose the salaried status of its employees and, thus, lose the exemption.

Lawful deductions may be made on certain select occasions, including: (1) full day absences, for personal reasons other than sickness or disability; (2) sickness or disability absences if the deduction is made in accordance with a bona fide plan providing compensation for the loss of salary caused by the sickness or disability; and (3) full-day suspensions imposed in good faith for infraction of workplace conduct rules according to a written policy applicable to all employees. See Clawson v. Grays Harbor College, 148 Wn.2d 528, 543, 61 P.3d 1130 (2003) (employer cannot deduct pay when the employee is sick and does not have available accrued leave benefits without losing the exemption). According to the DOL, such rules also include those governing sexual harassment, violence, alcohol and drug abuse and violation of state and federal laws. In addition, under the old regulations, a single partial-day deduction from salary could result in company-wide loss of exempt status for an entire classification of employees. Under the new regulations, an unlawful deduction results in the loss of the exemption only for employees in the same job classification and working for the same manager responsible for making the improper deduction, and only for the time period the unlawful deduction was in effect. The new regulation does away with the “subject to deductions” test and requires actual deductions for liability, rather than a “likelihood” of unlawful deductions.

Finally, the new regulations create a broader “safe harbor” versus the old “window of correction.” This new regulation allows an employer to avoid liability for improper deductions with a clearly communicated policy which:

- (1) prohibits improper pay deductions;
- (2) includes a complaint mechanism;
- (3) reimburses employees for any improper deduction; and
- (4) makes a good faith commitment to comply in the future.

The “best evidence” of such a policy is a written policy provided to employees when hired, published in a handbook, or available on the company’s website.

2. WMWA

Washington does not have its own definition of “salary” for purposes of the MWA and instead relies on the federal definition of salary. Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 300, 996 P.2d 582 (2000). However, Washington courts refuse to recognize the FLSA’s “window of correction.”

As the court demonstrated in Drinkwitz, Washington employers must be wary of practices which are inconsistent with salaried employees. Treating your exempt employee like an hourly employee may result in loss of the exemption. For instance, (1) setting schedules and rigid workweek hour requirements; (2) requiring employees to make up the difference between hours worked and an hourly quota and penalizing employees by salary deduction for failure to meet the quota; and (3) effecting unpaid suspensions of less than a full week are inconsistent with the salary requirement and may result in loss of exemption. Drinkwitz, 140 Wn.2d at 301-305.

IV. WHEN IS YOUR EMPLOYEE “WORKING”?:
COMPENSABLE TIME AND NEW DEVELOPMENTS IN THE PORTAL-TO-PORTAL ACT

The FLSA requires payment of a minimum wage and maximum 40 hour “workweek.” 29 U.S.C. § 207(A). For work above and beyond 40 hours in the “workweek,” an employee must receive at least 1½ times the regular wage. Id. Yet exactly what constitutes compensable “work” or a “workweek” is left undefined by statute, left to the courts to develop. Recent case law continues to define the boundaries of compensable work.

A. The Portal-to-Portal Act and New Developments in Donning and Doffing

1. Background: A brief history of the Portal-to-Portal Act

a. The Portal-to-Portal Act

Through decisions such as Tennessee Coal, Armor & Co. v. Wantock, 323 U.S. 126 (1944), and Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), the U.S. Supreme Court expanded the definition of work near the middle of the century. In 1945, Congress enacted the “Portal-to-Portal Act” to limit the effect of the Supreme Court’s determinations as to what activities constituted work. The Portal-to-Portal Act distinguishes between claims for wages that were already “existing” before the Act and “future claims” for wages. With respect to existing claims, employers were only liable for activity compensable by express contract or established custom. With respect to future claims, the Portal-to-Portal Act allows for liability beyond that compensable by contract or custom, but sets general limits on such liability. Specifically, the Portal-to-Portal Act provides that the following activities are not compensable:

- (1) 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; and
- (2) activities which are preliminary to or postliminary to said principal activity or activities . . .

Portal-to-Portal Act III, § 4(a)(1-2); 29 U.S.C. § 254(a).

(1) Travel to the Place of Performance and the Continuous Workday Rule

The Department of Labor later clarified the effect of the Portal-to-Portal Act with the “continuous workday rule.” The rule itself is logical: the workday continues from commencement to completion. Yet, in application, the rule significantly tempers the effect of the Portal-to-Portal Act. Despite the fact that walking to and from the actual place of performance on the employer’s premises is generally not compensable, under the continuous

workday rule such travel time is compensable if an employee begins work in one location on the employer's premises, then travels to a different location on the employer's premises. 29 C.F.R. 790.6 (2005). The work commenced before "traveling to and from" another place of actual performance on the employer's premises makes the subsequent travel time compensable.

(2) Preliminary and Postliminary Work Not Compensable

Under the Portal-to-Portal Act, the employer need not pay wages for activities which are preliminary or postliminary to the principal activity. For instance, the employer does not generally have to pay the employee from home to work travel. Anderson v. State of Washington, 2003 Wn. App. LEXIS 163. *5, 63 P.3d 134 (2003) (holding 40 minute ferry commute time to and from mainland to island prison was not compensable). However, once work begins, the employer is obligated to pay wages for travel time to and between work sites. 29 C.F.R. § 785.34 & .35; Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

In Steiner v. Mitchell, the U.S. Supreme Court considered whether workers in a battery plant should be compensated for time showering and changing before and after each shift. 350 U.S. 247, 248 (1956). Generally, time spent changing clothes or washing at the beginning or end of the work day is not considered hours worked. 29 C.F.R. § 785.9, .24 & .25. However, in Steiner, the workers were required to shower and change clothes at the beginning and end of each shift for safety reasons. Distinguishing this activity from the preliminary and postliminary activities excluded from compensation by the Portal-to-Portal Act, the Supreme Court reasoned that any activities which are "integral and indispensable" to the principal activity are necessarily a compensable part of the principal activity. Following Steiner, the court in Chao v. Akron Insulation & Supply, Inc., 2005 U.S. Dist. LEXIS 9331 (N.D. Ohio May 5, 2005) recently ruled that "shop time" in which employees met at a common location to gather materials before

heading off to primary job sites was compensable, as was the subsequent drive time to the job sites.

2. An Old Act Learns New Tricks: IBP v. Alvarez and Tum v. Barber Foods

In November 2005, in the first case in which newly-appointed Justice John G. Roberts participated, the Supreme Court analyzed the Portal-to-Portal Act in the context of the Continuous Workday Rule and Steiner. The Court considered two novel questions: (1) Is time walking to and from locker room for donning and doffing protective gear compensable; and (2) Is time spent waiting in line for protective gear compensable? A unanimous Court ruled that walking to and from a locker room for donning and doffing of protective gear is compensable, but waiting in line for such gear is not.

a. Donning and Doffing of Protective Gear is Compensable IBP v. Alvarez

In Alvarez, production workers in a meat plant were required to wear outer garments, hard hats, hairnets, earplugs, gloves, sleeves, aprons, leggings, boots, and additional protective equipment. IBP paid the workers four minutes' time for changing into and out of their protective gear, but otherwise started the compensable work day with the first piece of meat processed. That is, IBP did not pay workers for time spent traveling on IBP property between the locker room and the place principal activity, nor for time spent traveling from the principal activity back to changing out of their gear. Plaintiffs, a class of IBP workers, brought action to recover compensation for time spent traveling between changing in and out/principal activity.

IBP conceded that time spent "donning and doffing" protective equipment was compensable, but argued that time spent walking between the locker rooms and the principal place of work was excluded from the FLSA by § 4(a)(1) of the Portal-to-Portal Act. Essentially, IBP attempted to distinguish between activities which are "integral and dispensable" to the principal activity under Steiner and the "principal activity" itself. In IBP's eyes, the clock ran

while employees “donned and doffed” their protective gear, then stopped until the employees started the “principal activity.”

The Supreme Court rejected IBP’s argument, insisting that there can be no work “sufficiently ‘principal’ to be compensable, but not sufficiently principal commence the work day” and activate the Continuous Workday Rule. The Court held that “any activity that is ‘integral and indispensable’ to a ‘principal activity’ is itself a ‘principal activity’ under § 4(a) of the Portal-to-Portal Act.” Furthermore, pursuant to the Continuous Workday Rule, any work occurring after the beginning of the first principal activity and before the end of the last principal activity is compensable. In Alvarez, because the workday began with the donning and doffing of equipment, the workday continued while the employees traveled from the locker room to the principal activity.

The Court distinguished this case from cases in which employees punch a time clock and then walk to the place of principal activity. Time spent walking between the time clock and the principal activity is not compensable because it occurs before the workday and is, thus, a preliminary activity. Instead, just as walking from one principal activity to another is compensable time pursuant to 29 C.F.R. § 790.7(c), so too time walking between the locker room and the first principal activity. Where the workday begins with the donning and doffing of equipment “integral and indispensable” to the principal activity, post-donning and pre-doffing time on the employer’s premises is compensable.

b. Waiting in Line for Protective Gear is Not Compensable. Tum v. Barber Foods

Time spent waiting on the employer’s premises is generally considered to be work time, unless the employee is on premises for his own benefit. 29 C.F.R. § 785.14, .15 & .16. Whether waiting time is compensable or not often hinges on a question of whether the employee is

“engaged to wait” or “waiting to be engaged.” Chao, 2005 U.S. Dist. LEXIS 9331, at *25. To determine whether waiting time is compensable, courts consider (1) whether the wait time is predominantly for the employer’s benefit and (2) whether the employees could effectively use wait time for their own purpose. Id. (employees engaged to wait entitled to compensation, even while drinking coffee and socializing); see also Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944).

In Tum v. Barber Foods, the U.S. Supreme Court considered whether employees could be compensated for time spent waiting in line for protective gear. The defendant argued that such waiting time was a “preliminary” activity and thus barred by § 4(a)(2) of the Portal-to-Portal Act. The court explained that the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean those preshift activities are always “integral and indispensable” to the principal activity. For instance, the court set forth, time walking to and from a time clock from the principal activity is certainly necessary, but, at the same time, not integral and indispensable to the principal activity and, thus, not compensable. The Court held that § 4(a)(2) of the Portal-to-Portal Act excluded time spent waiting to don and doff protective gear from coverage by the FLSA.

3. The Effect of the Recent Rulings

In sum, where an activity is “integral and indispensable” to the principal activity, it is part and parcel of the principal activity. As a result, the time between the first and last “integral and indispensable” duty in a work day is compensable. However, it is possible for an activity, such as waiting in line, to be necessary for employees without being “integral and indispensable” to the job. Donning and doffing protective gear is integral and indispensable to the performance of certain jobs, but the time spent waiting for such gear is not generally integral and indispensable and thus is not compensable.

Some worry that the Court's ruling will lead to further broadening of the concept of working time, a trend made more troubling by technology allowing employees to perform more core work tasks from home. For instance, where an employee is required to perform some part of her job from home via telecommunications, then travels to work, the employee's drive time to work may be compensable. However, such a case would arguably be distinguishable from Alvarez because the drive-time in that case is drive time off the premises. In the IBP case the Supreme Court made clear that the narrow issue involved travel time between the locker room and place of principal activity on the premises.

B. Off-Site Travel Time to and From Work

Some aspects of off-site travel time are well defined by federal regulations. Employees who go directly to the work site are generally owed wages only for the time at the work site performing the principal activity. 29 C.F.R. § 785.35 & .38. Wages may be owed for travel from home to the initial work site and from the final site if employee is required to perform some service while traveling to and from the worksite such as transporting heavy tools, equipment or other workers. 29 C.F.R. § 785.38 & .41; WAC 356-15-040. However, traveling with one's briefcase is not sufficient to trigger the start of the workday. A New York federal court considered whether brief-case-toting city fire alarm inspectors were eligible for compensation for travel time to the first inspection site of each work day. Singh v. City of New York, 2005 U.S. Dist. LEXIS 30123, at *21-22 (S.D.N.Y. Nov. 29, 2005). While the inspectors argued the time was compensable because they were required to transport brief cases, the court disagreed and found the time was not compensable. Drawing upon the Supreme Court's ruling in Tum, the court reasoned that even if carrying the brief cases was necessary to perform the job, "that fact without more does not make [carrying a brief case] 'integral and indispensable' to the principal activity."

Travel time to distant work locations involving non-exempt employees has some special rules. Time traveling on special, one-day, out of town trips (except for travel between home and terminal) is compensable. 29 C.F.R. § 785.37; see Mendez v. The Radec Corp., 232 F.R.D. 78, 88 (W.D.N.Y. Nov. 22, 2005). For overnight stays, the travel time during the normal work hours is compensable even though the travel may occur on a non-normal workday. 29 C.F.R. § 785.39. Travel that does not occur within the normal work hours is not required to be compensated, if it is on common carriers or as a passenger. Id. If the employee is driving a motor vehicle, all travel time is compensable. 29 C.F.R. § 785.39. The employer must pay for any work actually performed while traveling. 29 C.F.R. § 785.41. Recent federal regulations provide that an employee's commuter travel in an employer's vehicle to the job site and incidental activities is not compensable if there is an agreement between the employer and the employee, or the employee's representative, on the use of the vehicle for commuting, and the travel is within the normal commuting area. 29 C.F.R. § 254(a).

C. Resident and On-Call Employees

1. On-Call Employees

An employee is considered working and must be paid if he or she is required to remain on or so close to the employer's premises that the time cannot effectively be used by the employee for his or her own purposes. RCW 49.46.010(5)(j); 29 C.F.R. § 785.1 & .17. Courts consider the parties' agreement, whether the employees are required to remain on the premises or at any particular place during the on-call time, the degree to which the employee is permitted to engage in his or her own activities during on-call time, and if the employee's availability during on-call time is predominantly for the employer's or the employee's benefit. Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 293, 745 P.2d 1 (1987). Wages need not be paid even though the employee is on-call as long as he or she does not have to remain on

the employer's premises and is permitted to leave work with the employer or at home as to how he or she may be reached and may use that time for his or her own purposes. Goff v. City of Airway Heights, 46 Wn. App. 163, 166, 73 P.2d 691 (1986).

2. Resident Employees

RCW 49.46.010(5)(j) excludes certain resident and "on call" employees from coverage under the WMWA:

(5) "Employee" includes an individual employed by an employer but shall not include:

...

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties.

In Berrocal v. Fernandez, 155 Wn.2d 585 (Wash. October 13, 2005), two shepherds in a temporary foreign worker program lived on a ranch twenty four hours per day, seven days a week, feeding and guarding sheep. The plaintiff shepherds were paid \$650 per month. The shepherds brought action under the MWA, claiming they were entitled to pay for lost wages. Resisting the action, defendants relied upon RCW 49.46.010(5)(j), insisting the provision excludes resident employees from coverage.

At trial, plaintiffs insisted the statute contains two separate requirements that must be met: (1) the employee must reside at the place of employment; and (2) spend a substantial portion of her time not engaged in the performance of active duties. Defendants, on the other hand, insisted that the statute recognizes two distinct types of employees not covered by the FLSA: (1) those who reside or sleep at their place of employment; and (2) those who otherwise spend a substantial portion of work time not actively engaged in work.

The Washington Supreme Court rejected plaintiffs' reading of the statute, insisting that the syntax of the statute required that the statute be read as two separate types of employees not covered by the WMWA. The Washington Supreme Court ruled that, under the statute, (1) those who reside or sleep at their place of employment; and (2) those who otherwise spend a substantial portion of work time subject to call, but not engaged in the performance of active duties do not qualify as employees for purposes of the WMWA.

D. No Work Off the Clock Policy

An employer must pay for work performed for its benefit whether authorized or not if it knows or has reason to believe that it is being done. 29 C.F.R. § 785.11-13; RCW 49.46.010(3). Employers should issue and enforce a policy that forbids nonexempt employees working beyond forty hours in a work week without pre-approval. Employers must strictly enforce this policy. If an employer allows a dedicated nonexempt employee to work "a few extra hours on my own time" to get a project done, or to put in the extra "team" effort, wages are owed whether the employee wants them or not. Employers may not avoid the obligation by simply reminding the employee of the policy. Once known or apprised, the employer is obligated to pay. Therefore, it may be necessary to enforce the "no work off the clock" policy through disciplinary action.

E. Rest and Meal Periods

Under the FLSA, bona fide meal periods in which an employee is completely relieved from duty for the purposes of eating regular meals do not count as work time for purposes of overtime. 29 C.F.R. § 785.19. An employer is not required to pay wages for "bona fide" meal periods if: (1) the meal period is at least 30 minutes; (2) the employee is completely relieved from all duties during the period; and (3) the employee is free to leave the duty post. 29 C.F.R. § 785.19. If an employee is required to eat at the desk, he or she is working and owed wages for that meal period. Summers v. Howard University, 127 F. Supp. 2d 27 (D.C.D.C. 2000) (during

meal break, employees were required to remain in uniform, remain on campus unless they checked in their weapons and equipment on their own time which could consume up to 15 minutes of the 30-minute lunch break, respond to emergencies and crimes committed in their presence, and respond to public inquiries); but see Mendez, 232 F.R.D. at 83 (“not every interruption of an employee’s lunch break renders the entire period compensable”).

While the FLSA itself does not require the provision of rest or meal periods, Washington regulations require a thirty minute meal period within two to five hours after starting, which does not have to be paid unless the employee is required to be on duty or at the work site for the benefit of the employer. WAC 296-126-092. Paid rest periods of at least ten minutes for each four hours of working time are also required. WAC 296-126-092. If an employer does not provide a paid 10-minute break at least every 3 hours, the employee will have a wage claim under RCW § 49.52.020. Wingert v. Yellow Freight Systems, Inc., 146 Wn.2d 841, 849, 50 P.3d 256 (2002) (holding Washington’s policy of protecting the health and welfare of its employees by requiring rest periods could not be abrogated by collective bargaining agreements).

Under the WMWA, an employer may satisfy its meal and rest break requirements even if it requires the employees to be “on call” during such breaks, provided that the “on call” breaks are fully compensated and the employee’s break meets the required period of time . White v. Salvation Army, 118 Wn. App. 272, 75 P.3d 990 (2003). The Washington Court of Appeals reasons that where an employer compensates its on call workers for all breaks without deduction, it has satisfied its duties. To somehow penalize the employer for such a break because it is “on call” would be duplicative recovery for the employee.

F. Compensatory Time

The FLSA does not currently permit the use of compensatory time for non-exempt private employees. Public employer may require public employees to use compensatory time in lieu of cash overtime pay. Public employer may require public employees to use compensatory time in lieu of cash overtime pay. Christensen v. Harris County, 529 U.S. 576 (2000). On other hand, WMWA allows compensatory time for all employees, but only if the employee requests compensatory time in lieu of overtime pay. RCW 49.46.130; WAC 296-128-560. It cannot be forced upon the employee. It is a better practice to obtain a written agreement selecting such compensatory time in lieu of cash. Compensatory time is accrued at one and one-half times the amount of overtime worked. 29 U.S.C. § 207(o). Compensatory time must be used and/or paid every 30 days or upon request by the employee. See ES-300 of the Interpretive Guidelines for Washington Dep't of Labor & Industries Employment Standards.

Under FLSA, Compensatory time is only for non-exempt employees because exempt employees are compensated for the work, not for the time involved. If the employer provides compensatory time to exempt employees especially on a strict hour for hour basis, courts may consider such treatment as evidence against exempt status. Abshire v. Country Kern, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991). In Washington, payment of additional compensation will not be considered a factor in determining the employee's exempt status. Drinkwitz v. Alliant Tech., Inc., 140 Wn.2d 291, 303, 996 P.2d 582 (2000); WAC 296-128-532.

V. CALCULATING OVERTIME COMPENSATION

Both the FLSA and the WMWA require employers to pay non-exempt employees 1½ times the employee's regular rate for hours worked in excess of 40 hours in a work week. 29 U.S.C. § 207(a)(2)(C); RCW 49.46.130(1).

A. General Rule

The workweek for calculating overtime is a consecutive seven day (168 hour) period. An employer may establish different workweeks for different jobs. 29 C.F.R. § 778.105; WAC 296 128 015. The workweek may be changed from time to time so long as it is not in an effort to avoid the effects of the law. Truck drivers may be paid a mileage rate as long as there is a premium mileage rate for hours worked in excess of 40 in a workweek. WAC 296-128-011 & 012; Schneider v. U.S. Bakery, Inc., 2003 Wn. App. LEXIS 210, *10-12 (2003).

The regular rate of pay is defined as an hourly rate which is “all remuneration for employment paid to, or on behalf of, the employee” with certain exceptions. 29 U.S.C. § 207(3). Computation of the regular rate of pay involves two steps: a review of the compensation paid and the monies properly included in that rate, and then an expression of that amount as an hourly rate. 29 C.F.R. § 778.108 & 109. The regular rate calculation does not include payments for time not worked such as holiday, vacation, or sick leave, premium payments for Saturday, Sunday or holiday work and discretionary bonuses, but it does include commissions, shift premiums and non-discretionary bonuses. 29 U.S.C. § 207(e)(6).

A bonus or commission is earned according to the terms of an agreement between the employer and employee is non-discretionary and must be included in the regular rate. Poggi v. Tool Research & Engineering Corp., 75 Wn.2d 356, 365-67, 451 P.2d 296 (1969); Willis v. Champlain Cable Corp., 109 Wn.2d 747, 751 & 755-57, 748 P.2d 621 (1988). However, discretionary bonuses are not included in computation of the regular rate. 29 U.S.C. § 207(e)(3); Lillig v. Becton-Dickinson, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986); Byrne v. Courtesy Ford, Inc., 108 Wn. App. 683, 690-91, 32 P.2d 307 (2001). If an employer employs a sick leave buy-back program, that buy-back may be characterized as a non-discretionary bonus which must be included in the regular rate of pay. Acton v. City of Columbia, 2006 U.S. App. LEXIS 3005 (8th

Cir. Mo., Feb. 8, 2006). A court may imply a contract to pay a bonus as a part of earned compensation when an employer has paid a bonus for several years without any negotiation and such bonus represents a substantial portion of the employee's compensation. Simon v. Riblet Tramway Co., 8 Wn. App. 289, 293, 505 P.2d 1291, rev. denied, 82 Wn.2d 1004, cert. denied, 414 U.S. 975 (1973) (employee who had received an annual bonus for ten straight years which was independent of profits and represented 68% of his annual compensation entitled to bonus upon termination). Annual payments over a course of years may constitute a course of dealing sufficient to constitute an implied contract that the employee should be compensated in addition to his regular salary by an adjustment at the end of the year so that each year's total salary would at least equal the preceding total annual salary. Powell v. Republic Creosoting Co., 172 Wash. 155, 157-58, 19 P.2d 919 (1933).

B. Exception: The Fluctuating Workweek

Where an employee paid on a salary basis has hours which vary week to week, the employee's overtime may be measurable by the "fluctuating workweek" method. In order for the fluctuating workweek method to apply, (1) there must be a clear mutual understanding between the employer and employee that the fixed salary is compensation for the hours worked each week, regardless of how many hours that may be and (2) the salary must be sufficient to compensate the employee at minimum wage for each hour worked in those workweeks in which the greatest number of hours are worked. Tumulty v. Fedex Ground Package Sys., 2005 U.S. Dist. LEXIS 25997, *12-13 (W.D. Wash. Aug. 16, 2005); 29 C.F.R. 778.114; WAC 296-128-550. The rule applies regardless of whether the parties understand the employee will be paid overtime and regardless of whether the overtime payment is contemporaneous with the work performed. Tumulty, 2005 U.S. Dist. LEXIS at 25997, *16-17. The parties need not understand that the employee will be paid overtime. If the fluctuating method is applied, the regular rate for

purposes of overtime calculation is determined by dividing the number of hours worked in any given workweek into the amount of the salary.

C. Point of Clarification: Bonuses & Incentive plans -- a trap for the unwary employer

1. Incentive Bonuses

A February, 2005 guidance letter issued by the Department of Labor's Wage and Hour Division found that a bonus plan providing an additional \$3/hr as an incentive for meeting production quotas violated the FLSA because the incentive was not added to the base pay when calculating overtime. Under the plan, an employee received \$9 per hour, but was offered a \$3 per hour bonus if the employee's work group met production goals. The work group could still receive a portion of the bonus if it reached levels above a base production, but did not reach the ultimate production goal.

The problem with the plan, DOL said, is that FLSA requires that the percentage of the straight time and the overtime be the same in calculating overtime with bonuses. Paying \$3/hr (or any straight dollar amount) for both the straight time and the overtime results in a smaller percentage of the overtime being paid than the percentage of the straight time," DOL said.

Thus, for incentive plan payments to be exempt from overtime, they must be paid without prior contract, promise or announcement and the amount of the bonus should be determined at the end of the pay period, not at the beginning.

2. Piece Rate Bonus

In the same February 2005 Opinion Letter, DOL addressed the scenario of an employer who paid workers either a piece rate or a guaranteed \$6/hr, whichever was higher in a two-week period. If the hourly rate was higher, overtime was based on the \$6 rate. If the piece rate was higher, overtime was still calculated at the \$6 rate and the employer would perform a calculation

using straight and overtime pay based on \$6, then provide a “bonus” made up of the excess created by the piece rate.

DOL said that overtime must be calculated using “all forms of remuneration” and the procedure was the same whether an employee was paid by piece rate or with a minimum hourly guarantee. The, the employer must include the amount of the piece rate “bonus” when determining the employee’s regular rate for the calculation of overtime.

3. Lump-Sum Overtime Incentive Bonus

Also in its February 2005 Opinion Letter, DOL considered an employer who paid a guaranteed salary of \$600/wk, but offered a bonus to employees who made more deliveries and worked overtime. The bonus varied based on the volume of deliveries.

DOL said the bonus scheme ran afoul of the FLSA because if an employer is going to pay overtime, that overtime needed to be calculated at a rate of one-and-a-half times the base salary. In the case of the bonus, the overtime due under FLSA could be more than the bonus, thus denying the employee proper compensation.

D. Point of Clarification: Computing Overtime for Two Jobs

The Department of Labor issued an opinion letter on February 14, 2005 which states that an employee doing two jobs can be paid overtime based on two separate rates as long as the worker and the employer have reached an agreement permitting such an arrangement. The DOL said that although an employer is usually required to pay the average aggregate wage when an employee works two jobs at different pay levels, employers who take affirmative action to prove the pay scheme is not designed to shortchange the worker and evade following the FLSA can pay overtime based on two separate wages.

VI. DAMAGES FOR VIOLATION OF WMWA AND FLSA

A. Types of Damages

An employee may recover unpaid wages, salary or commissions, liquidated double damages, prejudgment interest and reasonable attorneys' fees and costs as determined by a court for violation of the WMWA and FLSA. RCW §§ 49.48.030 & 49.52.070; 29 U.S.C. § 216; McConnell v. Mothers Work, Inc., 2006 Wn. App. LEXIS 161 (Feb. 7, 2006). Punitive damages are not available under either the WMWA or the FLSA, at least in the Ninth Circuit. See Tumulty, 2005 U.S. Dist. LEXIS 25997, at *34 (acknowledging a circuit split on the issue, but declining to adopt punitive damages in case of first impression in Ninth Circuit). The term "double damages" refers to the FLSA's requirement that the employee generally receive as liquidated damages an amount duplicating the unpaid overtime compensation. Double damages are the norm, rather than the exception. Tumulty, 2005 U.S. Dist. LEXIS 25997, at *17. However, a court may refuse to double awards where it determines the employer acted in subjective good faith and had objectively reasonable grounds for believing its conduct did not violate the FLSA. Id. (citing 29 U.S.C. § 260). To establish "good faith," an employer must demonstrate it had an honest intention to ascertain what the FLSA required and to abide by it. An employer may satisfy the good faith requirement by seeking legal advice. Id. at *18.

An employee's right to damages may be limited in certain circumstances. For instance, an employee cannot recover double damages or attorneys fees where she knowingly permits the failure to pay wages. RCW § 49.52.050; Chelius v. Questar Microsystems, Inc., 107 Wn. App. 678, 682-84, 27 P.3d 681 (2001) (dot.com start up managers who continued to work without wages because they were promised full payment when additional financing was obtained did not "knowingly submit" to non-payment). Further, a plaintiff cannot recover attorneys' fees if the amount of recovery is equal to the amount admitted by the employer. RCW § 49.48.030.

However, defendants hoping to take advantage of the ability to admit an amount before trial to take advantage of the rule must carefully consider all potential sources of damages in determining their offer. Last month in McConnell v. Mothers Work, Inc., the Washington Court of Appeals considered a case in which the defendant-employer offered \$125,000 before trial, and sought refuge from attorneys fees when the jury awarded only \$106,000. 2006 Wn. App. Lexis 161 (Feb. 7, 2006). However, the court included prejudgment interest of \$33,053.68 to increase the overall award above the \$125,000, resulting in defendant's obligation to pay plaintiffs' attorneys fees. Id. at *10-11.

B. Personal Liability

An owner, officer, vice principal or any agent of the employer can be personally liable for unpaid wages as a principal. RCW § 49.52.050(2). A responsible vice principal is one who exercises direct control over the payment of wages and acts pursuant to that authority. Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 521-22, 22 P.3d 795 (2001) (company's business manager who was not authorized to sign checks was not responsible for unpaid wages of failed printing company because she did not have the authority to pay wages). An agent must have the power and authority to make decisions regarding the payment of wages. Id. at 522-23. Thus, an owner, chief financial officer or even human resources manager may have personal liability for overtime or other unpaid wages. Again, this ability to assert personal liability attracts plaintiff lawyers to assert wage and hour claims against unsuspecting employers and their management. Civil and criminal penalties may also be assessed against these same individuals. RCW 49.52.050; RCW 49.46.100; 29 U.S.C. § 216(a).

VII. CLASS ACTIONS OR COLLECTIVE ACTIONS

Many lawsuits are now being brought on a class wide basis. The FLSA permits a court to issue notice to "similarly situated" employees who may "opt in" or chose to be part of the

collective action lawsuit. 29 U.S.C. § 216(b). The WMWA, however, applying the more traditional class action, requires each potential class member to “opt out” or chose not to be part of the litigation. Miller v. Farmer Bros. Co., 2003 Wn. App. LEXIS 271 (2003) (employees brought a class action for route drivers claiming they were improperly categorized as exempt outside salespersons).

A. Class Action Fairness Act

Pursuant to the recently enacted Class Action Fairness Act of 2005 (“CAFA”), a federal court may exercise jurisdiction over a class action where: (1) at least one member of a prospective class consisting of at least 100 members is diverse from and defendant; and (2) the aggregated claims of all class members exceeds \$5,000,000. Rodgers v. Central Locating Serv., Ltd., 2006 U.S. Dist. LEXIS 6255 (W.D. Wash. Feb. 1, 2006). In Rodgers, plaintiffs, a class of 300 “locators” employed by Central Locating Service (“CLS”) in Washington filed suit in state court for unpaid wages and overtime compensation. When defendant CLS removed the case to federal court, plaintiffs immediately moved to remand the case to state court, insisting the case failed to meet the \$5,000,000 minimum requirement in CAFA. CLS argued that plaintiff should bear the burden of proof in establishing plaintiffs’ claims would be less than \$5,000,000.

However, the federal district court disagreed, relying on a longstanding rule that the defendant removing the case to federal court bears the burden of proof. Because CLS could not prove the claims would be worth more that \$5,000,000, the federal court remanded the case to state court.

B. FLSA Collective Actions

Under the FLSA, an employee or group of employees may bring claims on behalf of themselves and others “similarly situated” (29 U.S.C. § 216(b)). Such suits are known as FLSA collective actions. Collective actions are distinct from traditional “representative” class actions, because, among other things, a plaintiff interested in joining an FLSA collective action must

specifically “opt in” to the case by filing with the applicable court a written consent to join the suit.

The new class action law involves not just class actions but other group actions – specifically “mass actions.” Mass actions are defined as actions in which 100 or more plaintiffs seek money damages and their claims involve “common questions of law or fact.” Certain FLSA collective actions, provided they involve at least 100 plaintiffs, may fall under this definition of “mass actions,” because such cases involve a group of plaintiffs seeking monetary relief under the same law, often having similar circumstances of employment. Thus, under the new law, certain mass actions should be brought in federal court rather than in state court, meaning FLSA collective actions that meet all the new law’s criteria arguably should be brought there as well.

C. State Wage and Hour Class Actions

The new law will also impact state wage and hour claims brought in conjunction with FLSA collective actions. Prior to enactment of the new law, it was not uncommon for plaintiffs to bring “hybrid” lawsuits that combined FLSA claims (under the FLSA’s collective action provision) and state class action wage and hour claims. Such state wage and hour class actions, even if brought with an FLSA collective action, are subject to the provisions of the new law. Thus, where the act’s requirements are met, such class actions should be brought in federal court, even if they involve only a few plaintiffs rather than the 100-plus people specified for mass actions.

D. Class Members Must Have Commonality

Among other requirements for a class action, class members must have commonality. The following summaries demonstrate the various ways in which courts have dealt with the initial consideration of whether a class has established common questions of law or fact.

1. Home Depot

When thousands of Home Depot “mechanizing assistant store managers” brought action under the FLSA, the defendant sought an exemption. Home Depot Overtime Cases, 2006 Extra LEXIS 10 (Cal. Super. Feb 2, 2006). However, the judge determined it was not appropriate to certify a class until the court knew whether the managers spent 50.1 percent of their time performing exempt work. The judge worried that if the jury ultimately found that most of the workers were properly classified, it would be forced to find for the defendant, even if a substantial majority had been improperly classified. The result would be to deprive the improperly classified minority from relief.

2. Wal-Mart

In Braun v. Wal-Mart Stores, Inc., 2005 Phila Ct. Comm. Pl. LEXIS 551 (Dec. 27, 2005), an expert statistician and a psychologist (statistical quantification of measurement operations) established that Wal-Mart, as a rule, would only allow employees one 15-minute paid rest break during a three-hour shift, and two 15-minute paid breaks and one 30 minute unpaid meal break during a three-hour shift. The statistician concluded 64.4% of the employees in 12 Pennsylvania stores suffered deficiencies in the length of breaks and 40% did not receive an adequate number of breaks.

To confirm the commonality, the court consulted Wal-Mart’s own records. Ultimately the Court found that Wal-Mart’s records revealed more inadequacies in breaks allowed than plaintiff’s experts. Wal-Mart attempted to distance themselves from their own records by arguing they records were too unreliable to be used. Displeased and not persuaded, the judge declared: “Without question, a party opponent’s business records may be offered against their creator, are prima facie proof of their contents, and may even constitute opposing party admissions against pecuniary interests.”

3. UPS

In Corn v. UPS, 1005 U.S. Dist. LEXIS 30419 (N.D. Cal. Aug. 25, 2005), UPS employees claimed UPS failed to compensate them for work performed before the start of the business day. Under UPS policy, paid working hours begin at “punch in.” If an employee punches in prior to his scheduled work time, the employee will not be paid for time prior to the scheduled work time. Plaintiff UPS drivers alleged they spend time between punching in and the scheduled start time changing into their uniforms, shining their shoes, gathering supplies, verifying information in their handheld computers, and loading and sorting packages on to cars.

Evaluating the evidence, the court found that the practices of UPS varied by region and by individual office. Several offices maintain a policy that employees are forbidden to work prior to their scheduled start times. In addition, many employees testified that they did not perform work prior to their scheduled start times. Ultimately, the judge found that the issue of whether the workers were performing early morning work could only be decided on an individual, rather than class, basis. Because “individualized inquiries . . . predominate” the issue, class certification was inappropriate.

E. Class Action Waiver Agreements

Employers may wish to consider an arbitration agreement as a means to avoid class action lawsuits. While the precise issue of whether an employment arbitration agreement with a class action waiver is enforceable has not been considered in Washington, a court of appeal in California recently considered the issue. In Gentry v. Superior Court, 2006 Cal. App. LEXIS 260 (January 19, 2006), Circuit City provided employees a “Dispute Resolution Rules and Procedures” packet, which included an arbitration agreement for employment-related disputes. By electing arbitration, employees agreed that the arbitrator would not “have the power to hear

arbitration as a class action.” The packet further provided that if the employee did not opt-out of the arbitration agreement within 30 days, he would be bound.

Gentry did not opt out of the agreement. When Gentry brought action against Circuit City, Circuit City successfully petitioned for arbitration based on the agreement. Considering whether the class action waiver included in the arbitration agreement was enforceable, the California court noted that Circuit City had not made the provision a condition of employment, had provided the employee with a straight-forward explanation of the agreement, and had provided the employee ample time and opportunity to opt out of the arbitration agreement. Under such circumstances, the court held the waiver agreement was enforceable.

Washington courts favor arbitration in the context of employment. Adler v. Fred Lind Manor, 153 Wn.2d 331 (2004). So long as the arbitration agreement is not offered under threat of termination and is not otherwise unconscionable, it will be enforceable. However, whether a Washington court would reach the same result as the Gentry court as to the inclusion of a class action waiver clause remains to be seen.

VIII. RETALIATION OR DISCRIMINATION CLAIMS

Both the WMLA and the FLSA proscribe discharging or otherwise discriminating against an employee for filing a complaint or instituting proceedings in retaliation. 29 U.S.C. § 215(a)(3); RCW 49.46.100(2); Stein v. Rousseau, 2006 U.S. Dist. LEXIS 6020, at *5-6 (E.D. Wash. Jan 30, 2006); Hayes v. Trulock, 51 Wn. App. 795, 800, 755 P.2d 830, review denied, 111 Wn.2d 1015 (1988) (unlawful to fire employee for complaining about employer’s refusal to pay overtime)). To establish a prima facie case for retaliation, a plaintiff employee must prove: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action. Tumulty, 2005 U.S. Dist. LEXIS 25997, at *24. Courts construe “protected activity” broadly. Employers who engage in

such retaliation are also liable for wrongful termination in violation of public policy. Hume v. American Disposal Co., 124 Wn.2d 656, 662, 880 P.2d 988 (1994). Undocumented aliens may assert retaliation claim for employer contacting INS after FLSA claim made. Singh v. Jutla, (N.D. Cal. 2002).

A recent retaliation case demonstrates the danger of this claim: six former account executives for the Seattle supersonics were fired after filing complaints with defendant about their wages and working hours. Plaintiffs were compensated under an overtime scheme that violated the FLSA. After their overtime claims were settled, plaintiffs were fired. They then brought a retaliation action. After a three-week trial, the jury returned a verdict for the plaintiffs and awarded \$697,000 for lost wages, \$75,000 to each plaintiff for emotional distress, and \$12 million in punitive damages. The district court remitted the punitive damages award to \$4,182,000 and also awarded the plaintiffs \$389,117.50 in attorneys' fees and an additional \$44,075 in supplemental fees connected to post-trial motions. Defendant appealed on the grounds that the awards were excessive and unsupported by evidence. The appellate court found that the damage awards were supported by substantial evidence and defendant had acted with reckless disregard for plaintiffs' rights. Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999).

IX. STATUTE OF LIMITATIONS

Generally, FLSA claims are restricted to a two-year statute of limitations. However, where the employer's violation of the FLSA is willful, a three year statute of limitations applies. To determine whether an employer's violation of the FLSA was willful, courts consider whether it knew its conduct violated the FLSA or whether it recklessly disregarded its obligations under the FLSA. Thus, the three-year statute of limitations may arise even where the employer is not aware it violated the FLSA: "the three-year term can apply where an employer disregarded the very possibility that it was violating the statute." Tumulty, 2005 U.S. Dist. LEXIS 25997, at *22

(quoting Chao v. A-One Med Serv., Inc., 346 F.3d 908, 914 (9th Cir. 2003)). Under the WMWA, the statute of limitations is three years in all cases without regard to employer intent. Professional Engineering Employees Association v. Boeing, 139 Wn.2d 824, 837, 991 P.2d 1126, 1 P.3d 578 (2000).

X. CONCLUSION AND TIPS FOR COMPLIANCE

- A. Maintain Accurate Time and Compensation Records
- B. Re-evaluate Relationships with “Non-Employees” to Avoid Check Current Exemptions Against the Increased Salary Basis Test
- C. Review and Revise Job Duties and Descriptions in Light of the New FLSA Regulations
- D. Consider Increasing Salaries to Reach New Salary Levels or to Qualify Employees as “Highly Compensated Workers”
- E. Ensure You are Compensating Employees for Continuous Workday, Starting at First Integral and Indispensable Activity
- F. Take Advantage of the New “Safe Harbor” Rule By, at the Every Least, Authoring a Written Policy Prohibiting Improper Deductions from Salaries of Exempt Employees
- G. Reevaluate any Pay Practice Developed With Respect to Expected Work Hours for Exempt Employees – Do Not Dock an Employee’s Vacation Bank to Make Up for Partial Days Off
- H. Strictly Enforce “No Work Off the Clock” Policy
- I. In the Event of Misclassifications, Engage in a Self-Audit and Correct the Mistakes Where Uncertain, Consult an Attorney and Make Good Faith Efforts to Comply to Avoid Prospect of Double Damages