COMPLEX WAGE AND HOUR ISSUES

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John C. Fox*
Jay J. Wang**
Alexa L. Morgan***

* John C. Fox, Esq. is the President, a founder and a Senior Partner of Fox, Wang & Morgan P.C., headquartered in San Jose, California in the heart of the Silicon Valley. Mr. Fox is an across-the-board employment lawyer who leads large and complex litigation matters in state and federal courts, in cases involving trade secrets, wage-hour and discrimination class actions, employee misclassification, wrongful termination, corporate investigations, OFCCP audits and the use of statistics in employment matters. He also provides business and strategic advice for a wide range of companies nationwide relating to their employment practices and helps build employment systems in a way designed to minimize legal risk. Mr. Fox was previously Executive Assistant to the Director of OFCCP, where he was in charge of all policy and enforcement matters.

** Jay J. Wang, Esq., is a founder of Fox, Wang & Morgan P.C. Mr. Wang is a graduate of the Georgetown University Law Center. Mr. Wang’s practice focuses on employment counseling and litigation, including civil claims involving wrongful termination, harassment, wage-hour issues, and trade secret misappropriation. Mr. Wang is a lecturer on employment law matters for various organizations, including the National Employment Law Institute, the Santa Clara County Bar Association, and the California Employer Advisory Council. Mr. Wang previously served on the Santa Clara County Bar Association’s Board of Trustees, and previously served as Chairman of the Santa Clara County Bar Association’s Labor & Employment Executive Committee, as well as Chairman of the Santa Clara County Bar Association’s Professionalism Committee.

*** Alexa L. Morgan, Esq. is a founder and Partner of Fox, Wang & Morgan P.C. Her practice focuses on employment litigation that includes civil claims involving wage and hour issues, wrongful termination, harassment, discrimination, and OFCCP audits. She also counsels clients on a broad variety of human resources issues. Ms. Morgan is also active in the pro bono community, having successfully represented clients in employment, guardianship, unlawful detainer, and education-related matters. Prior to founding Fox, Wang & Morgan, Ms. Morgan was an Associate at Manatt, Phelps & Phillips, LLP and at Gibson, Dunn & Crutcher LLP.

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>II. WHAT IS WORK?</td>
<td>2</td>
</tr>
<tr>
<td>A. Reporting Time</td>
<td>5</td>
</tr>
<tr>
<td>B. Call-Back Time</td>
<td>5</td>
</tr>
<tr>
<td>C. On-Call Time</td>
<td>6</td>
</tr>
<tr>
<td>D. Compensatory Time</td>
<td>6</td>
</tr>
<tr>
<td>2. Public Sector Employers</td>
<td>7</td>
</tr>
<tr>
<td>E. Charitable Time (Volunteers)</td>
<td>8</td>
</tr>
<tr>
<td>F. Donning and Doffing Time</td>
<td>8</td>
</tr>
<tr>
<td>G. De Minimis Time</td>
<td>11</td>
</tr>
<tr>
<td>H. OSHA Inspection Time</td>
<td>12</td>
</tr>
<tr>
<td>I. Training Time</td>
<td>12</td>
</tr>
<tr>
<td>J. Internships</td>
<td>13</td>
</tr>
<tr>
<td>K. Commute and Travel Time</td>
<td>14</td>
</tr>
<tr>
<td>III. THE OLD “STANDBYS”</td>
<td>17</td>
</tr>
<tr>
<td>A. Overtime Exemptions</td>
<td>17</td>
</tr>
<tr>
<td>B. Regular Rate of Pay</td>
<td>54</td>
</tr>
<tr>
<td>IV. WAGE-HOUR CLASS LITIGATION POST–DUKES</td>
<td>61</td>
</tr>
<tr>
<td>A. What Dukes Meant for Wage-Hour Class Actions</td>
<td>62</td>
</tr>
<tr>
<td>B. FLSA Collective Actions</td>
<td>65</td>
</tr>
<tr>
<td>C. Class Action Waivers in Arbitration Agreements</td>
<td>69</td>
</tr>
<tr>
<td>V. DOL’S INCREASED ENFORCEMENT OF “HOT GOODS” PROVISION</td>
<td>72</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

These materials are not comprehensive of all topics pertaining to wage-hour law. We have drafted these written materials to “rifle shot” coverage of only several selected topics related to the Fair Labor Standards Act (the “FLSA”). Even though the number of settlements in wage and hour cases, as well as the aggregate settlement amount, decreased in 2013 in comparison to 2012, the median settlement amount rose to the highest total since 2008 (approximately $2.8 million).\(^1\) In other words, the issues involving substantive, legitimate wage-hour claims are becoming more expensive in value. In terms of risk management, the number one compliance issue of 2014 continues to be the manner and method by which employers compensate their employees.

Also, we are seeing four large-scale trends. First, many Plaintiffs are failing to certify their wage-hour classes in the wake of the requirement for a “rigorous analysis” of Federal Rules of Civil Procedure Rule 23 class certification requirements set out in the Supreme Court’s decision in *Wal-Mart Stores, Inc.* Moreover, a “sleeper” holding in the *Wal-Mart* case decision (now haunting many settlement discussions) is the Due Process right of the defendant employer to confront its accuser, and hence raising the difficult “real world” problem for Plaintiffs as to how they are going to find and transport to trial all class members to prove up common application to the claimant of the at-issue wage practice (failure to pay overtime, for example, or off-the-clock work) and to testify about their individual resulting damages.

Second, many class action certifications are failing as a result of the United States Supreme Court’s follow-on decision In *Comcast v. Behrend*, 133 S.Ct. 1426 (2013). The *Comcast* decision applied the *Wal-Mart v. Dukes* “rigorous analysis” principle broadly and completely across all Rule 23 procedural issues, seemingly regardless whether the issue is certifying a class or settling a certified class or trying to determine if individualized damages might defeat class certification. (A collateral result of the holding in *Behrend* is that not only are courts now engaging the merits of class certification at point of preliminary approval of the class (and thus obviating the old “two-step”: preliminary (almost routine) certification (followed by extensive/expensive discovery) and then followed by a final certification order…almost guaranteeing a forced settlement) but class certification hearings are becoming mini-trials on the merits complete with expert witnesses and *Daubert* motions.) Front end costs to defend class and collective actions thus are increasing, even while discovery costs are shrinking, being delayed or being obviated.

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Third, more wage-hour class actions are being avoided from the outset due to employers strategically using arbitration agreements to first compel arbitration and then prohibit class claims in arbitration, a practice the United States Supreme Court approved in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

Fourth, we seeing increasingly larger geographic variances in the filings of Wage-Hour class actions. As California wage-hour class actions wane (virtually every major company of any size/note has been sued in at least one round if not several rounds of class litigation), Texas FLSA collective actions rise, for example. East Coast litigation seems to only now be percolating to the intensity California employers experienced perhaps 5 years ago.

Today’s seminar seeks to address the following specific issues:

- A brief overview of what is compensable time under the FLSA and recent decisions related thereto;
- The latest regarding the old “standby” issues related to overtime exemptions and calculating the regular rate of pay (indeed, the NERA report referenced above shows that overtime misclassification remains the most common wage-hour allegation);
- A brief status report concerning wage-hour class action litigation, including collective actions under the FLSA, applicability of *Dukes* to certification issues with collective actions and recent rulings related to class action waivers in arbitration agreements; and
- The DOL’s recent emphasis upon the “Hot Goods” provision under the FLSA as part of its investigative efforts.

II. WHAT IS WORK?

Before we may discuss wages and the determination of appropriate compensation, it is necessary to define what “time worked” the employer must compensate with wages. Generally, compensable working time, or hours worked, is that period in which an employee either “suffers or is permitted” to work, even if the employer does not so instruct the employee. If the employer knows or has reason to believe that the employee is performing work, the employer must provide compensation. An employer may not “suffer or permit” work to occur without appropriate compensation. However, where an employee performs work beyond the employer’s knowledge, and without reporting such time pursuant to appropriate and comprehensive timekeeping
obligations, the employer may escape liability should the employee fail to establish the amount of unpaid overtime by justifiable or reasonable inference.\footnote{Brown v. Scriptpro, 2012 U.S. App. LEXIS 24364 (10th Cir. 2012) [failure by employee to comply with ScriptPro’s timekeeping system was fatal to his later claim of off-the-clock work since there was insufficient evidence to support his claim of overtime, especially given his ability to access the time reporting system even remotely from home].} In other words, the evidentiary standard becomes much more difficult for an employee who fails to comply with timekeeping policies and requirements.\footnote{White v. Baptist Memorial Health Care Corp., 2012 U.S. App. LEXIS 22752 (6th Cir. 2012) [if an employer establishes a reasonable process for an employee to report work performed during unpaid breaks, the employer is not liable for non-payment of wages if the employee fails to report the work performed through the established process].}

The FLSA does not define “work” or “workweek.” Rather, to determine whether time is compensable under federal law, it is necessary to review decisions interpreting these terms.

Whether time is compensable depends on whether the employee’s time is spent primarily for the benefit of the employer. In other words, activity the employer controls or requires and which employees pursue necessarily and primarily for the benefit of the employer and its business constitutes work the employer must compensate.\footnote{Tennessee Coal, Iron & RR. Co. v. Muscoda Local 123, 321 U.S. 590, 598 (1944).} As a general rule, this includes all time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workplace and all time during which an employer suffers or permits an employee to work, whether or not the employer requires the employee to do so.\footnote{29 C.F.R. § 778.223; see also Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) ; Ketchum v. City of Vallejo, 523 F. Supp. 2d 1150, 1162 (2007) (off-duty time police officers spent training their horses for the purpose of patrolling special events on horseback was compensable work under the FLSA because it was primarily for the benefit of the employer).}

Furthermore, “work” does not require “exertion” or physical activity.\footnote{Armour & Co. v. Wantock, 323 U.S. 125 (1944); De Ascencio v. Tyson Foods, Inc, 2007 U.S. LEXIS 21289 (3d Cir. 2007) [It was error for trial judge to instruct jurors to consider whether protective equipment was cumbersome, heavy or required concentration to don an doff to determine whether “donning and doffing” this equipment was “work.”]} Rather, activities as simple as reviewing schedules, turning on lights, or distributing material to employee work stations qualify as work for the benefit of the employer that is compensable.\footnote{Keller v. Summit Seating Inc., 2011 U.S. App. LEXIS 24745 (7th Cir. 2011).} In Keller, the court considered such activities integral and indispensable to her job as sewing manager. Accordingly, activities the employee performed before the official start of her shift was compensable time. Summit Seating was able to avoid liability, however, because it lacked knowledge that the sewing manager performed any work during her early arrival for the workday.
As to what constitutes a “workweek,” the FLSA permits employers to designate the workweek period for their specific business, so long as it remains a fixed and regularly recurring period of 168 hours (seven consecutive 24-hour periods). The latitude extended to employers in setting a “workweek” also allows employers to make permanent changes to the designation, even for the stated purpose of reducing its payroll given the accumulation of overtime pay employees may incur.8

Some general rules:

- Walking, riding or traveling to/from the actual place of performance of the “principal activity” or activities of the job is not compensable work, but only because of The Portal to Portal Act (which amended the FLSA in 1947). This is because such actions constitute activities “preliminary” or “postliminary” to performance of the employee’s “principal activities” in a workday.

- Time spent traveling in vehicles the employer provides for transporting workers from a “reporting” site to the jobsite is compensable (since “reporting” to a location is something the employer requires to enable the employee to commence work...thus, his/her first “principal activity” of the day). However, the time an employee spends traveling to his/her jobsite is generally not compensable absent the obligation to first report in elsewhere.

- Time spent on an activity that is an “integral and indispensable part” of the principal activities is also compensable, since such integral and indispensable activities are also principal activities.9

An important concept to wage-hour law is the so-called “continuous work rule.” Once work starts, it continues until ended. Accordingly, activities after the employee’s first “principal activity” and before the last principal activity of the workday constitute compensable work.10 Thus, the donning and doffing of protective equipment, and time spent walking between the changing area and production area, is compensable since the equipment is an integral part of

8 Abshire v. Redland Energy Services, LLC, 695 F.3d 792 (8th Cir. 2012); see also Parth v. Pomona Valley Hospital Medical Center, 630 F.3d 794 (9th Cir. 2011) [an employer may change its shift schedule and reduce the employees’ pay rate to accommodate its employees’ scheduling desires, so long as the rate reduction was not designed to circumvent the FLSA].

9 Steiner v. Mitchell, 76 S. Ct. 330 (1956) [time spent changing clothes and showering to wash off toxic materials after end of shift in battery plant compensable because shower was indispensable to safe performance of work]; Perez v. Mountaire Farms, 650 F.3d 350 (4th Cir. 2011) [donning and doffing protective gear integral to chicken processing duties].

10 Kuebel v. Black & Decker Inc., 643 F.3d 352 (2d Cir. 2011) [former employee not entitled to overtime compensation for commute time because performance of certain administrative tasks for work immediately before and/or immediately after commute did not make non-compensable commute part of continuous workday].
performing the principal activity of the position, even if waiting at the beginning of the day before work begins to receive work equipment is not compensable (because not an integral and indispensable part of the principal activity of meat cutting).\textsuperscript{11}

\textbf{A. Reporting Time}

“Reporting time pay” is partial compensation for employees who report to work expecting to work a specified number of hours and who are deprived of that work time because the employer inadequately scheduled work or failed to properly notify the employee not to report for work. The FLSA does not currently require the payment of reporting-time pay merely for showing up to work. However, if an employer causes an employee to suffer or wait for work after the regular shift was scheduled to begin, the time spent waiting between the scheduled commencement of the shift and the time the employees starts work or the employer sends the employee home counts as compensable working time.

29 C.F.R. § 778.220 does provide that an employer may agree to pay an employee a “minimum of a specified number of hours’ pay at the applicable straight time or overtime rate on infrequent and sporadic occasions when, after reporting to work at his scheduled starting time on a regular work day or on another day on which he has been scheduled to work, he is not provided with the expected amount of work.” Such amounts may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due the employee.

\textbf{B. Call-Back Time}

29 C.F.R. § 785.44 defines “call back” time by noting, “There may be instances when travel from home to work is work time. For example, if an employee who has gone home after completing his day’s work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer’s customers (emphasis added), all time spent on such travel is working time. The Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.”

“Call back” pay typically “consists of a specified number of hours of pay” in compensation for responding to calls from their employer to perform extra work.\textsuperscript{12} The value of call back pay is not dependent on the number of hours worked, but rather compensates the employee for showing up to a call-out. According to the Department of Labor, this type of


\textsuperscript{12}Jonites v. Exelon Corp., 2007 U.S. Dist. LEXIS 55400 at p. 34 (N.D.Ill. 2007).
compensation is excludable from the regular rate of pay because “Call back” payments, for merely showing up, and not for hours worked, are a premium and not payments for work.

C. On-Call Time

Special considerations apply to employees who employers ask to stand ready to perform after normal working hours or reside on the employer’s premises on a permanent basis or for extended periods of time (twenty-four hours or more) and who do not perform duties during the entire time that they are on the premises. As a general matter, time spent engaging in normal private pursuits such as eating, sleeping, entertaining, and other periods of complete freedom from all duties is not work time. Because of the difficulty of determining the exact hours worked under these circumstances, the federal regulations provide that “any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.” 29 C.F.R. § 785.23 (2001); see also Rousseau v. Teledyne Movible Offshore, Inc., 805 F.2d 1245, 1248-49 (5th Cir. 1986) (employees required by agreement to remain on barges for seven full days but only compensated for time spent in active physical labor were not entitled to compensation for off-duty time which could be spent sleeping, eating, watching television, etc.); Service Employees Int’l Union, Local 102 v. County of San Diego, 60 F.3d 1346, 1355 (9th Cir. 1995); see also Lee v. U.S. Sec. Assocs., 2008 U.S. Dist. LEXIS 28578 at pp. 21-22 (W.D. Tx. – A.D. 2008) [whether on call time is compensable working time depends on the working agreement between the parties governing on call work and the degree to which the employee is permitted or free to engage in personal activities during periods of idleness when he is subject to call].

D. Compensatory Time

According to the U.S. Office of Personnel Management, compensatory time off (“comp time”) is time off with regular pay in lieu of overtime pay for irregular or occasional overtime work.

As a legal matter, “comp time” essentially does not exist in America for private sector employees. As a practical matter, employees and employers coast to coast engage in widespread informal “comp time” arrangements. The lack of legal recognition of “comp time” is one of the leading examples to support the national criticism that our wage laws are anachronistic and do not reflect the modern realities of the workplace. Oddly, too, this is one of the few areas of wage-hour law in which California law makes more sense and is more generous to employees and employers than federal law. But, the absence of federal law’s recognition of “comp time”

nullifies California’s permissions other than as to those (very) few very small California employers not subject to the federal FLSA.

1. **Private Sector Employers**

The FLSA continues to require that private employers pay overtime to workers subject to the Act and covered by its overtime provisions. However, the U.S. Department of Labor has exercised its prosecution discretion not to prosecute those employers which allow employees to take time off in lieu of overtime pay if the time off is taken in the same pay period in which the overtime occurred. See Wage & Hour Division, Field Operations Handbook § 32j16b (2000). Also, the DOL requires that:

- An employer pay the at-issue employee on an hourly basis at a fixed rate of pay or on a regular salaried basis for a fixed number of hours per week (i.e. this practice cannot apply, however, to nonexempt salaried employees paid a fixed salary regardless of hours worked);
- The pay period must be longer than a week;
- Time off adjustments of one and one-half hours for each overtime hour worked must occur within the same pay period as when the overtime was taken; and
- An employer must compute compensation for hours worked at an established hourly rate and paid to employees at the end of each period.

See Wage & Hour Opinion Letter No. 389 (September 1, 1965).

2. **Public Sector Employers**

Ironically, the FLSA and federal regulations allow public entities to provide compensatory time off to their employees. At the request of an employee, the head of an agency (or its designee) may grant compensatory time off from an employee’s tour of duty instead of payment for an equal amount of irregular or occasional overtime work.

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15 5 C.F.R. § 550.114(a); *Doe v. United States*, 513 F.3d 1348, 1359 (Fed. Cir. 2008) (holding that compensatory time may be granted to federal employees for overtime work on an hour-for-hour basis).
E. Charitable Time (Volunteers)

This issue may arise in two different contexts: incumbent employees and non-employee workers who offer their services to a company or institution. For non-employees, the worker may provide free services if there is no express or implied compensation agreement, and the individual provides such time to a religious, charitable, civic, humanitarian or similar non-profit organization as a public service.\(^{16}\)

For employee volunteers, the potential for coercion precludes employees from volunteering to perform the same services for their employers that make up the principal activities of their position.\(^{17}\) This is because it is otherwise difficult to determine whether the employee really “volunteered,” or whether the employer merely coerced the employee. Indeed, the Code of Federal Regulations and California Wage-Hour Opinion Letters preclude employees from “volunteering” the same type of services they are employed to perform.\(^{18}\) Additionally, under federal law, the court must "look at the objective facts surrounding the services performed to determine whether the totality of the circumstances supports a holding that, under the statute and under the regulations, the non-paid regulars are “volunteers.”"\(^{19}\)

29 C.F.R. § 553.101 identifies these objective facts courts must consider to determine whether the individual is a volunteer, including whether the individual: (1) submits to the work voluntarily, without any coercion; (2) performs the service, at least in part, for humanitarian reasons; (3) may only receive nominal fees and/or reimbursement for service provided; and (4) may not volunteer for the same type of work in which he or she is otherwise employed.\(^{20}\) However, if the employee voluntarily spends time on charitable activities outside the employee’s normal working hours, such time is not “hours worked” subject to compensation.\(^{21}\)

F. Donning and Doffing Time

The United States Supreme Court has held that the “principal activity” of work includes those activities which are an “integral and indispensable part of the principal activities for which

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\(^{16}\) *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) [Interpreting FLSA.]

\(^{17}\) *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) [Volunteer services limited to those individuals who help to minister to the comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with retarded or disadvantaged youth; ordinary commercial activities of eleemosynary, religious, or educational organizations will be treated under the FLSA the same as if an ordinary business enterprise had performed them].


\(^{19}\) DLSE Opinion Letter to Christian Science Committee on Publication for Southern California (October 27, 1988); 29 C.F.R. § 553.101(b)-(d).


\(^{21}\) 29 C.F.R. § 785.44.
covered workmen are employed.”  

In other words, the duties for which the employee is paid are “principal activities,” and those activities necessary to perform those duties are “integral and indispensable parts” for which an employee should also receive compensation. Thus, the time necessary to don (put on) and doff (take off) safety equipment necessary to perform a job is compensable time, since the performance of the principal activities cannot occur without using that equipment. This includes the donning or doffing of not just specialized safety equipment or clothing, but standard equipment or clothing as well. This also includes time spent sanitizing and cleaning protective clothing. However, the time waiting to don safety equipment before the shift begins is not compensable because it is not an “activity” integral to the work to be performed.

Furthermore, the time spent “changing clothes” or washing at the beginning or end of each workday is not compensable time under the FSLA. In addition, however, the FSLA allows unionized employers to bargain about and exclude any time spent “changing clothes or washing at the beginning or end of each workday.” Recently, the U.S. Supreme Court clarified whether the FLSA’s permission for unionized employers to negotiate the length of time spent “changing clothes” was sufficiently broad to allow the parties to exclude from compensable work donning 12 kinds of protective equipment U.S. Steel and U.S. OSHA required. See Sandifer, et al. v. U.S. Steel Corp., 2014 U.S. LEXIS 799 (January 27, 2014). In Sandifer, Justice Scalia, for a unanimous court, held that the time unionized employees (U.S. Steel workers) spent donning and doffing protective gear was not compensable since changing protective gear was “changing clothes”. The parties had excluded it from compensation time in their collective bargaining agreement relying on 29 U.S.C. § 203(o). In so ruling, the Court declined the invitation of the parties to address whether the time spent donning and doffing this particular clothing was “De Minimis” or not. The Court begged off this invitation, however, noting that it was precisely this kind of minute-by-minute counting the Congress sought to exclude from the purview of federal courts by passing the 203(o) exemption. Relying upon the traditional definition of “clothes” found in the dictionary, Justice Scalia found that clothes denoted items designed and used to cover the body, and that Section 203(o) allowed for collective bargaining as to time spent changing clothes integral and indispensable to the principal activities for which covered workmen are employed. Since the protective gear at issue was the only clothing integral and indispensable to the employees’ work, such items could be collectively bargained by the parties.

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28 Id. at p. 18.
since 9 out of the 12 items were “clothes,” and thus a majority of the time spent changing clothes is sufficient to find for applicability of Section 203(o).

A change of clothes on the employer's premises which the law, the rules of the employer, or the nature of the work requires, is integral and indispensable to the principal activities of the work. Typically time spent donning and doffing a uniform or safety gear at home is not compensable work under the FLSA because such an activity is not part of the continuous workday and is not integral and indispensable to the principal activities of the employee.

In De Ascencio, the Third Circuit Court of Appeals concluded that it was error for the court to instruct the jury to consider whether employee protective gear Tyson required its meat processing personnel to don, was cumbersome, heavy, or required concentration to don and doff to determine whether the activity was “work” pursuant to the FLSA. Rather, the Court ruled that compensable “work” under the FLSA in terms of donning and doffing activities relate to whether the activity is “integral and indispensable” to an employee’s principal activity, not whether the employee expends any level of physical or mental exertion or that the activity is cumbersome or difficult.

Moreover, during a continuous workday, the FLSA will treat as “work” any donning and/or doffing that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity. Under Alvarez, then, the key factual issues underlying plaintiffs' claims are whether standard protective clothing and gear are "integral and indispensable" to the work performed by production employees and what compensable activities define the last principal activity of the workday.

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29 Id. at pp. 27-28 (“The question for courts is whether the period at issue can, on the whole, be fairly characterized as ‘time spent in changing clothes or washing.’ If an employee devotes the vast majority of the time in question to putting on and off equipment or other non-clothes items (perhaps a diver’s suit and tank) the entire period would not qualify as ‘time spent in changing clothes’ under § 203(o), even if some clothes items were donned and doffed as well. But if the vast majority of the time is spent in donning and doffing ‘clothes’ as we have defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted”).

30 De Ascencio v. Tyson Foods, Inc., 2007 U.S. LEXIS 21289 at p. 29 (3d. Cir. 2007) (quoting Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 910 (9th Cir. 2004)).

31 DOL Field Operations Handbook §31b13; Abbe v. City of San Diego, 2007 U.S. Dist. LEXIS 87501 (S.D. Cal. Nov. 9, 2007); Bamonte v. City of Mesa, 2008 U.S. Dist. LEXIS 31121 (D. Az. 2008) (holding time spent by police officers donning and doffing their police uniform and safety gear was not compensable because neither law nor workplace policy mandated that the officers dress at work); Wage & Hour Adv. Mem. No. 2006-2 (May 31, 2006) (“Donning and doffing of required gear is within the continuous workday only when the employer or the nature of the job mandates that it take place on the employer's premises.”); but see Lemmon v. City of San Leandro, 538 F. Supp. 2d 1200, 1206 (N.D. Cal. 2007) (donning and doffing) (disagreeing with the location limitation used by other courts, and holding that the donning and doffing of a police officer's uniform and equipment may be compensable even if performed off the employer's premises).

32 Id. at p. 32.

33 Garcia, supra, 474 F. Supp.2d. at 1245.
G. De Minimis Time

The Court of Appeals for the Ninth Circuit has held that, “in determining whether otherwise compensable time is de minimis, we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.”\(^34\) Alternatively, in determining whether de minimis time is actually compensable time, the Second Circuit Court of Appeals looks to: (1) the capability of the employer’s payroll system to record the additional time; (2) the burden of implementing a system if the flow of small overtime vouchers increased dramatically; (3) the frequency with which such overtime occurs; (4) how often it is recorded; and (5) the aggregate of time actually worked and uncompensated.\(^35\)

“When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours . . . such trifles may be disregarded[,] for split-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA].”\(^36\) In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.\(^37\) The courts have held that such trifles are “de minimis.” This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes’ duration, and where the failure to count such time is due to considerations justified by industrial realities. For example, the legal standard most courts appear to rely on believe that anything less than ten minutes worth of time would be considered de minimis, and thus no subject to compensation.\(^38\) Thus, courts routinely reject arguments from employers relating to any amount of time over ten minutes, including claims relating to exactly ten minutes of time.\(^39\) An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.\(^40\)

\(^{34}\) *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).
\(^{37}\) *Kellar v. Summit Seating, Inc.*, supra, 2011 U.S. App. LEXIS 24745 at p. 14 (courts typically consider the amount of time spent on the extra work, the practical administrative difficulties of recording additional time, the regularity with which the additional work is performed, and the aggregate amount of compensable time. Thus, because pre-shift duties were consistent most days and exceeded more than 10 to 15 minutes, duties were not de minimis).
\(^{38}\) *Lacy v. Reddy Elec. Co.*, 2013 U.S. Dist. LEXIS 97718 at p. 20 (S.D. Ohio 2013) [Although there is no bright line rule, generally “daily periods of approximately ten minutes” are considered de minimis (quoting *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984)).
\(^{39}\) See *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1333 (10th Cir. 1998) [donning and doffing time of ten minutes not de minimis]; see also *Gomez v. Tyson Foods, Inc.*, 2013 U.S. Dist. LEXIS 24916 (D. Neb. 2013) [donning and doffing activities resulting in loss of minutes during meal periods and at start and end of work shift not de minimis].
\(^{40}\) 29 C.F.R. § 785.47.
H. OSHA Inspection Time

The time an employee spends accompanying an OSHA investigator on a “walk around” during an inspection is not considered hours worked.\(^{41}\) However, where there is no authorized employee representative, any time the OSHA investigator spends consulting with employees concerning the safety and health at their workplace is “hours worked.” DOL Field Operations Handbook § 31b16. Significantly, Section 8(e) of OSHA does not require an employee representative to accompany the investigator on OSHA “walk arounds,” nor does it impose a duty on the employer to require an employee to accompany the investigator.

I. Training Time

Employers often require their employees to attend conferences or seminars intended to benefit the employer. Federal law mirrors California state law as to training time. Both laws require the employer to compensate an employee for attending such training. However, the federal regulations establish that attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all of the following criteria are met:

- **Attendance is outside of the employee’s regular working hours**;
- **Attendance is in fact voluntary**;
- **The course, lecture, or meeting is not directly related to the employee’s job**; and
- **The employee does not perform any productive work while attending.**\(^{42}\)

The question whether an employer must compensate its employee usually rests with the second element related to “voluntary” attendance. Federal regulations are clear that attendance at training is not voluntary if the employee is led to believe that his or her working conditions or continuance of employment would be adversely affected by non-attendance.\(^{43}\) In other words, it is improper for an employer to threaten disciplinary action if the employee does not subscribe to the training.

Several federal courts look to the employee’s state of mind at the time of his or her initial decision to attend the course to determine whether attendance was voluntary.\(^{44}\) However, where

\(^{41}\) Chamber of Commerce of United States v. OSHA, 636 F.2d 464, 467 (D.C. Cir. 1980).

\(^{42}\) 29 C.F.R. § 785.27.

\(^{43}\) 29 C.F.R. § 785.28; see also Fowler v. Incor, 2008 U.S. App. LEXIS 10213 at pp. 25-26 (10th Cir. 2008).

\(^{44}\) DeBraska v. City of Milwaukee, 189 F.3d 650, 652-653 (7th Cir. 1999); Price v. Tampa Elec. Co., 806 F.2d 1551 (11th Cir. 1987); Seever v. Carrols Corp., 528 F. Supp. 2d 159, 168 (W.D.N.Y. 2007) (time spent attending training, [Footnote continued on next page])
the employer explicitly requires the training, it is unnecessary to proceed to this level of investigation, since requiring the training negates any pretense of volunteerism.45

FLSA regulations define training as “directly related” (Factor 3, above) if it is designed to make the employee handle his or her job more effectively (as distinguished from training him or her for another job).46 The fact that the training relates to a principal activity of the employee supports a finding that the employer must compensate the employee’s training. Specifically, case law establishes when statutes require an employee to be knowledgeable in certain types of activities, training of employees in these activities is compensable since knowledge is a requirement of the position.47

J. Internships

There is also an exception from the otherwise obligation of the employer to pay for training time for employees who establish, for the benefit of their employees, a program of instruction corresponding to courses which independent bona fide institutions of learning offer, either through an “apprenticeship” program or through “internships.”48 Rather than force employees out to find classes at, perhaps, a local college or university, federal law is sufficiently flexible to allow the employer to offer the course “in-house” without also triggering overtime requirements.

To qualify as uncompensable “internship” time, the DOL applies a six factor test:

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainees or students;
- The trainees or students do not displace regular employees, but work under their close observation;

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[Footnote continued from previous page]

orientation, and manager's meetings not compensable because employer never suggested that employee would be fired if she refused to go, even though employer did pressure and encourage employees to attend).

45 Chao v. Tradesmen Int’l., 310 F.3d 904 (6th Cir. 2002).
46 29 C.F.R. § 785.29.
48 29 C.F.R. § 785.31.
• The employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion operations may actually be impeded;

• The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

• The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

DOL Field Operations Manual § 10b11. Using the six factor test above, the DOL concentrates on the fact that the benefit to the trainee or student greatly outweighs the benefit to the business; in fact, the more impediment or loss of profit to the business the more likely the DOL would identify a true internship situation. For example, of particular interest to attorneys, the Office of the Solicitor for the U.S. Department of Labor recently concluded that internships at law firms exist only in instances where the trainee or student is working on non-billable matters (i.e. pro bono projects or other assignments that do not generate income for the law firm).49 A law student working on fee generating matters or law school graduates would both be employees subject to being compensated for work performed.

Individuals participating in an organized program as part of an apprenticeship are subject to a special enforcement policy the federal Wage and Hour Division deploys pursuant to the FLSA. Specifically, an employer may exclude an apprentice’s training time in the absence of a contrary written agreement if: (1) the employer employs the apprentice under a written apprenticeship agreement or program in substantial compliance with the standards of the Bureau of Apprenticeship and Training within the U.S. Department of Labor; and (2) the apprentice’s time does not involve productive work or performance of the apprentice’s normal duties.50

K. Commute and Travel Time

“When does work begin” issues seamlessly merge into employee travel and commute requirements. This issue includes not only commuting travel necessary to arrive at work, but travel to the place where the individual’s principal duties occur, and travel that may be part of his or her duties.

The Portal to Portal Act of 1947 amended the federal Fair Labor Standards Act. It provides that no employer shall be subject to any liability or punishment for time an employee spends walking, riding, or traveling to and from the actual place of performance of the “principal

activity” the employee performs. Thus, walking and commute time before work begins and after work ends is not compensable time, unless by express contract or by custom or practice not inconsistent with an express contract.

Thus, normal travel time to and from work from home is not considered hours worked for purposes of the FLSA. This was made clear by the Employment Commute Flexibility Act, which amended the Portal to Portal Act to allow the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting as not being part of the employee's principal activities (and thus not compensable work) if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee. Relying on such law, the Fifth Circuit Court of Appeals refused to change the nature of ordinary home to work travel by finding that employers are not liable for time employees spend using employer-owned trucks to commute to and from jobsites at the start and end of each workday.51 Since the at-issue commute was within the normal commuting area for the employer’s business and use of the company vehicle was subject to an agreement on the part of the employer and its employees, the travel at the start and end of each workday was incidental to the use of such vehicle.

Further, employees required to perform some de minimus job-related duty during their commute will not be compensated for their commute time unless the employer's restrictions hinder the employee's ability to use their commuting time as they otherwise would have had there been no work-related restrictions.52 However, federal regulations have established several exceptions to the general statutory presumption that travel is not compensable work time:

- Where an employer calls an employee who has returned home after the workday to travel a substantial distance to perform an emergency job for a customer. 29 C.F.R. § 785.36.

- Special one-day work assignment in a separate city allows for compensation for time from point of departure or arrival to the location of the special assignment. 29 C.F.R. § 785.37.

52 Singh v. City of New York, 2008 U.S. App. LEXIS 9228 (2d Cir. Apr. 29, 2008) (holding that the mere carrying of inspection documents without any other active employment-related responsibilities while commuting was not work under the FLSA, even though it benefited the employer and resulted in a slight increase in the employee's commute time).
Travel as part of an employee’s principal activity (i.e., traveling from jobsite to jobsite during the work day). 29 C.F.R. § 785.38.

Travel that keeps an employee away from home overnight when it cuts across an employee’s regular workday and corresponding hours on non-working days (though as an enforcement policy, the U.S. Department of Labor will not consider as work those hours an employee spends as a passenger on public transportation). 29 C.F.R. §§ 785.39, 785.40.

Work the employee is required to perform while traveling. 29 C.F.R. § 785.41.

These exceptions arise given their relation to the performance of the employee’s duties. Specifically, because these activities described in the regulations are so closely related to an individual’s principal activities, they must be considered travel done for the benefit of the employer rather than the employee.53 The question then is “what is a principal activity that can give rise to compensable time for travel?”

One factor to help determine whether the travel is related to the employee’s principal activity is the ability of the employer to maintain records of the time expended.54 If there is no ability for the employer to properly maintain records of the time, it would be prejudicial to impose liability on the employer for that time. This is because an employer’s inability to track such time demonstrates the employer lacks control over the employee. Thus, federal courts have recently held that travel time was not compensable based on its conclusions that the plaintiffs' travel time was not integral and indispensable to the plaintiffs' principal activities and that the plaintiffs' travel time did not otherwise fall within the continuous workday.55

Thus, normal travel time to and from work from the employee’s home is not considered hours worked for purposes of the F.L.S.A. regardless of whether the employee works at a fixed location or at different jobsites, even if the employer agrees to pay for the time.56 29 C.F.R. § 785.34 and § 785.35. Travel need not occur frequently to be “normal” or “ordinary.” E.g., Irrzada v. City of Hercules, 138 F.3d 1294, 1297 (9th Cir. 1998) (travel to mandatory off-site

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53 Reich v. New York City Transit Authority, 45 F.3d 646, 650 (2d Cir. 1995)(the more the preliminary (or postliminary) activity is undertaken for the employer’s benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable. Commuting and similar activities are generally not compensable).

54 Reich, supra, 45 F.3d at 650.

55 Smith v. Aztec Well Servicing, Inc., 462 F.3d 1274 (10th Cir. 2006).

56 Colesla v. City of New York, 2013 U.S. Dist. LEXIS 171687 (S.D.N.Y. 2013) [employees of the New York Fire Department’s Building Maintenance Division could not recover wages under the FLSA for time spent commuting or time spent inspecting their vehicles, even though employees traveled in assigned Fire Department vehicles, since such commute fell within the auspices of the Employer Commuter Flexibility Act of 1996].
training occurring only a few times a year is non-compensable home-to-work travel, even though that time exceeds the employee’s regular commute). Rather, “normal” or “ordinary” travel represents a subjective standard, defined by what is usual within the confines of a particular employment relationship.57

There is an exception to the general rule that travel time between home and work is not hours worked if an employer calls an employee who has returned home after his or her work day to travel a substantial distance to perform an emergency job for one of the employer’s customers. However, the D.O.L. has elected not to take a position on whether travel to and from work by an employee who receives an emergency call outside of regular hours to report back to his or her regular place of business constitutes hours worked. 29 C.F.R. § 785.36 (2001).

III. THE OLD “STANDBYS”

A. Overtime Exemptions

1. Background: Architecture Of The State And Federal Wage-Hour Laws

Employers with “employees”58 in California must comply simultaneously with both California state and federal wage-hour laws. Said another way, employers of California employees must comply with whatever law is “worse” for them.

State and federal wage-hour laws apply only to employees, and do not apply to “independent contractors.” Whether a worker is an “employee” subject to the wage-hour laws or an “independent contractor” is beyond the scope of this paper. Nevertheless, suffice it to say that a worker is an “employee” under federal law (only) if s/he is “economically dependent” on the employer. California has recently rejected its prior reliance on the “Economic Realities Test” and now applies the Common Law Test as described more fully below.

The FLSA’s “Economic Realities Test” is usually determined by reference to six roughly equal factors:

(a) The extent to which services in question are part of the company’s business;

(b) The amount of the individual’s investment in the company’s facilities and equipment;

57 Id. at 1287.
58 The United States Court of Appeals for the Fourth Circuit held in 2011 that disappointed job applicants could not lodge a retaliation claim pursuant to the FLSA since the statute protects only “employees.” Dellinger v. Science Applications Int’l Corp., 649 F.3d 226 (4th Cir. 2011), cert. denied 132 S. Ct. 1542 (U.S. 2012).
(c) The nature and degree of control management retains;

(d) Individual opportunity for profit or loss;

(e) The amount of initiative, skill or judgment required; and

(f) The permanency and duration of the relationship.\(^{59}\)

It is also well established that litigants cannot consider these factors in isolation. Rather, all circumstances with a work activity must be taken into account. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), *reh’g den.*, 332 U.S. 785 (1947).

See also *Donovan v. Sure Way Cleaners*, 656 F.2d 1368 (9th Cir. 1981) (Dry cleaner’s “agents” were “employees” based on: (1) lack of control over pricing or location; (2) absence of investment; and (3) absence of sharing of business profits or losses. Their jobs also required little skill).

The California Supreme Court rejected application of the “Economic Realities Test” in *Reynolds v. Bement*, 32 Cal. Rptr. 3d 483, 492-93 (Sept. 7, 2005) while interpreting California Labor Code section 1194 (allowing employees to recover unpaid wages and overtime):

“In this circumstance—a statute referring to employees without defining the term—courts have generally applied the common law test of employment.” (citation omitted).

All wage-hour laws *presume* employees are not exempt from overtime compensation. The employer then carries both burdens of proof to demonstrate to critics that the employee is “exempt” from the obligation to pay overtime compensation. Those burdens of proof are that the employer must:

“Go forward with evidence” sufficient to prove up each element of the claimed exemption from overtime; and

“Carry the burden of persuasion” to convince the decision-maker of the claimed exemption. Said another way, the exemption from overtime will fail if the employer goes forward with no evidence of the exemption or goes forward with only unpersuasive evidence.

Said another way, the exemption from overtime will fail if the employer goes forward with no evidence of the exemption or goes forward with only unpersuasive evidence. Moreover, the courts construe the exemptions narrowly against the employer.\(^{60}\)

All wage-hour exemptions divide into two areas of proof, as to a so-called:

- “Duties” test; and
- “Salary” test

That is to say, the employer’s proof of exemption must go forward with persuasive evidence the employee is undertaking work duties appropriate to the claimed exemption from overtime and that the employer pays the employee a “salary” (or pays as appropriate to the Computer Professional Exemption).

The essential work functions, \textit{as performed}, govern the exemption analyses and not a contrary job description.

Multiple exemptions may simultaneously apply to a single employee. For example, as to Computer Professionals, it is possible the Computer Professional Exemption may attach, and/or the Administrative Exemption and/or the Executive Exemption. Also, the exemption is personal to each employee (i.e., employers should not assume that all employees in a common job title are similarly exempt unless the employer can show that all employees in the work unit perform the same or very similar work).\(^{61}\)

Federal and California wage-hour regulations impose a duty on the employer to maintain records of employee overtime. Case decisions also then create an evidentiary presumption in favor of the employee’s testimony about time worked or the employee’s private records of hours worked if available, in the absence of employer records of the actual time the employee worked. NOTE: Because the context often is that the employer proceeds in the belief that the employee is exempt from overtime, the employer keeps no records of compensable “overtime.” Accordingly, this evidentiary presumption becomes quite important in the real world as to damages calculations that many employers feel are exaggerated by an employee’s (often) aged recollections of time worked. \textit{See Anderson v. Mt. Clemens Pottery Co.}, 328 U.S. 680, 687 (1945) (FLSA); \textit{Hernandez v. Mendoza}, 199 Cal. 3d 721 (1988) (California law). In reality, the absence of employer records of hours worked operates to cause the courts to credit just about any


\(^{61}\) “The employer must show that each employee meets every requirement of the claimed exemption.” \textit{See Pezzillo, et al. v. GTE Information Systems, Inc.}, 414 F. Supp. 1257, 1268 (D. Tenn. 1976) (in denying a “class exemption” for all at-issue computer programmers and analysts working closely on a common computer platform conversion).
reasonable claim of time worked the employee advances.

Under federal law, an employer must record (for both exempt and non-exempt personnel) the day and hour the workweek begins, the total wages paid for each pay period, and date of payment and period covered. See 29 C.F.R § 516.3. For non-exempt employees, an employer must also maintain additional records that include the employee’s regular hourly rate of pay, the basis on which wages are paid, any regular rate exclusions, hours worked each workday and workweek, total daily or weekly straight-time earnings, total premium pay for overtime hours, and total additions to or deductions from wages for each pay period. See 29 C.F.R. § 516.2.

California Labor Code section 226 requires employers to maintain for three years records pertaining to hours worked and overtime hours. See California Labor Code § 1174(d). California Labor Code section 1174(a) also requires employers to maintain such records for review should California’s Division of Labor Standards Enforcement (“DLSE”) undertake a wage-hour investigation.

2. The Executive Exemption

Federal Law

An employee employed in a “bona fide executive capacity” is an individual:

- “Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;”

- “Customarily and regularly directs the work of two or more other employees;”

- “Has the authority to hire or fire employees or whose suggestions and recommendations regarding a change of status of other employees are given particular weight;” and

- “Is paid on a salary basis at a rate not less than $455/week.”

California Law

California law follows the federal regulation with three noticeable exceptions:

62 29 C.F.R. § 541.100.
The individual must earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment;

California state law specifically incorporates the requirement that the employee customarily and regularly exercise discretion and independent judgment; and

The employee must spend more than half of his/her time engaged in exempt activities.63

Here is a short summary of the federal and California “duties” requirements for employees to qualify for the Executive Exemption:

<table>
<thead>
<tr>
<th>FLSA Regulations</th>
<th>California Wage Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary duty64 is the management65 of the enterprise or of a customarily recognized department or subdivision66;</td>
<td>Duties and responsibilities involve the management67 of the enterprise or of a customarily recognized department or subdivision;</td>
</tr>
<tr>
<td>Primarily68 engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116.</td>
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</tbody>
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63 Industrial Welfare Commission Wage Order No. 4-2001; see also Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 802-03 (1999) (in determining whether an individual employee is exempt, the first and foremost factor is the work actually performed by the employee and the amounts of time the employee spends on exempt and nonexempt work).

64 “Primary duty,” under federal law, means the employee has an “important” function to perform, even if that important function(s) does not occupy 51% or more of the employee’s time.

65 A list of activities considered “management” activities can be found at 29 CFR section 541.102.

66 Such a department or subdivision “must have permanent status and a continuing function.” 29 CFR § 541.103.

67 California follows federal law: 29 CFR § 541.102. 8 CCR §11040(1)(A)(1)(e).

68 In California, “primarily” means 51% or more of the employee’s time is spent on exempt administrative work. This is a “quantitative” test.
<table>
<thead>
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<tr>
<td>Customarily and regularly directs the work of two or more other employees; and</td>
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<td>Employer must pay employee a “salary.”</td>
<td>Customarily and regularly exercises discretion and independent judgment; and</td>
</tr>
<tr>
<td>Has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.</td>
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</tr>
</tbody>
</table>

This subtlety in application of very similar language in the FLSA and in California Wage Order law has caught many employers from outside of California by surprise when doing business in California. Accordingly, even though an employee may be an exempt Executive in the other 49 states because his/her “primary duty” (i.e. “important” duties) is to manage employees (even though s/he does so, perhaps, only 10% of the workday), that same employee in California is not exempt because his/her exempt work does not occupy more than 50% of his/her work time. Satisfaction of the appropriate standard will establish the existence of an employee

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69 Merely assisting a manager in supervising does not constitute “customarily and regularly” directing work. 29 CFR § 541.104(c).
70 “Two or more employees” means “two full-time employees or their equivalent.” 29 CFR § 541.104(a). For example, one full-time employee and two half-time employees would be equivalent to two full-time employees. The hours of supervised employees cannot be credited to more than one executive. 29 CFR § 541.104(d).
71 The phrase “customarily and regularly” means the same under the California regulations as it does under 29 CFR § 541.104(c). 8 CCR § 11040(1)(A)(1)(e).
73 A list of factors to consider to determine whether an employee’s suggestions and recommendations are given “particular weight” can be found at 29 CFR section 541.105.
74 California regulations follow 29 CFR section 541.105 in defining what constitutes “particular weight.” Id.
75 Donovan v. Burger King Corp., 675 F.2d 516, 518-19 (2nd Cir. 1982) (affirming trial court order finding that assistant managers earning more than $250/week were exempt as their “primary duty” was management, and they [Footnote continued on next page]
exempt from the overtime payment requirements of the Fair Labor Standards Act and/or the California Labor Code respectively.\textsuperscript{76}

Management: Both federal and state wage-hour laws delineate a list of activities which constitute exempt Executive work:\textsuperscript{77}

- Interviewing, selecting, and training of employees;
- Setting and adjusting rates of pay and hours of work;
- Directing work of employees;
- Maintaining employee production or sales records for use in supervision and control;
- Appraising productivity and efficiency of employees for changes in status;
- Handling employee complaints and grievances;
- Disciplining of employees;
- Planning the work;
- Determining techniques to be used;
- Apportioning work among employees;
- Determining type of materials, supplies, machinery or tools to be used;
- Determining merchandise to be bought, stocked and sold;
- Controlling the flow and distribution of materials or supplies; and
- Providing for the safety of the employees and the property.\textsuperscript{78}

While the federal standard requires only that such activities represent the “primary duty” of the employee, as noted above, California state law requires that the employer bear the burden to demonstrate that the employee spend more than 50% of his/her time on such activities for the

\begin{footnotes}
\footnotetext{76}{The Federal District Court for the District of Connecticut upheld a jury verdict finding a class of Level One “field managers” of New England Telephone in Connecticut to be exempt “Executives” where their primary duty was “management” as evidenced by the fact that they regularly directed the work of 2 or more employees, had authority to hire or fire employees or to make recommendations that would change the work status of employees. \textit{Perkins v. S. New England Tel. Co.}, No. 07-00967 (D. Conn, Feb 14, 2012).}
\footnotetext{77}{29 C.F.R. § 541.102; California Code of Regulations, Title 8, § 11040(1)(A)(1).}
\footnotetext{78}{Reversing the District Court’s grant of Judgment following a jury verdict for the City of New York, the United States Court of Appeals for the Second Circuit held in August 2011 that New York City’s almost 4,300 police Sergeants were not exempt pursuant to the FLSA’s exemption for “Executives” because their primary duty was “law enforcement in the field” and not “management”. \textit{Mullins, et al. v. City of New York}, 653 F.3d 104 (2d Cir. N.Y. 2011), \textit{cert den}, 132 S. Ct. 1744 (2012).}
\end{footnotes}
exemption to apply. Federal courts refuse to adopt such a purely *quantitative* analysis. Rather, federal law requires consideration of the relative importance of the managerial duties as compared to nonexempt duties, the frequency with which the employee exercises discretionary powers, the employee’s relative freedom from supervision, and the relationship between the salary and wages paid other employees for the kind of nonexempt work performed by the purported executive.

In exercising these managerial functions, California has also written directly into Wage Order 4 that individuals exempt as Executives must exercise discretion and independent judgment. Courts describe this term as involving the comparison of possible courses of conduct, and acting after considering various possibilities. The term also implies that the employee has the power to make an independent choice free from immediate supervision and with respect to matters of significance. However, an employee’s recommendation to his/her supervisor for review and final decision-making does not rebut a finding that the employee made an independent choice free from immediate supervision. Such discretion is necessary to demonstrate that the employee has sufficient authority to warrant exemption from overtime pay, and that the discretion is substantive in nature.

What qualifies as a Department or Subdivision: A department or subdivision must have a permanent status and a continuing function, as opposed to a collection of employees assigned from time to time to a specific job or series of jobs. As such, management of a team of employees temporarily assigned to complete one job would not qualify under the Executive Exemption (i.e. foreman of a temporary road crew for a job with a definite timeline). Where there is more than one establishment, the employee in charge of each establishment may be in charge of a recognized subdivision, though the individuals still must fulfill the other requirements.

Customarily and Regularly Directs Work of Two or More Employees: The so-called “two or more employees standard” requires only the equivalent of two full-time employees. Thus, if an individual regularly directs the work of four half-time employees, this would satisfy the two or more employees standard. However, in adding up the hours of the supervised employees on whose work the individual supervises, the two or more employees standard is satisfied.

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79 See Ramirez v. Yosemite Water Co., 20 Cal.4th 785, 802-03 (1999) (“the first and foremost factor is the work actually performed by the employee; the amounts of time the employee spends on exempt and nonexempt work, together with the employer’s realistic expectations and the realistic requirements of the job, must be considered”).
80 Vela v. City of Houston, 276 F.3d 659, 677 (5th Cir. 2001) (no record of job functions of paramedics and EMTs such as to justify finding of existence of Executive Exemption); see also Dept. of Labor v. City of Sapulpa, 30 F.3d 1285, 1287 (10th Cir. 1994).
82 Id.
employees, the employer cannot credit an individual’s hours more than once for different Executives. For example, where a Human Resources Department has two heads of the department, the employer cannot count an individual reporting to both heads toward the “body count” of the second, at-issue manager.

Additionally, the term “customarily and regularly” requires only that the supervision by the purported exempt employee must be greater than occasional, but can be less than constant.\(^8\) In other words, if the individual does not supervise the two employees all the time, the exemption still may apply.

**Authority to hire and fire:** Employers and Courts that review litigation involving the Executive Exemption must consider several factors in determining whether an employee’s suggestions and recommendations regarding hiring, firing, or disciplining employees carry any particular weight:

- Whether it is part of the employee’s job duties to make such suggestions and recommendations;
- Frequency with which such suggestions and recommendations are made or requested;
- Frequency with which the employer relies upon the suggestions and recommendations made by the individual.

Not only does California’s requirement that the exempt employee exercise discretion and independent judgment in relation to management, but the manager must exercise his/her discretion and independent judgment in terms of personnel decisions.\(^8\)

**Salary Rate:** Federal law provides that compensation for an exempt Executive be at a rate not less than $455/week exclusive of board, lodging or other facilities. California regulations increase the salary component to no less than two (2) times the state minimum wage for full-time monthly employment (thus, to be exempt, currently, that figure is $2,560/month).

Most importantly, compensation for the individuals requires payment on a “salary basis” as opposed to an hourly wage.\(^8\) Since case law defines salary as a predetermined amount of wages regardless of hours worked, an individual’s compensation cannot be subject to reduction

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\(^8\) Murray v. Stuckey’s, Inc., 50 F.3d 564, 568 (8th Cir. 1995) (store managers that supervised at least two or more employees 98.2% of the time sufficient to establish “customarily and regularly” standard).

\(^8\) Murphy v. Kenneth Cole Productions, Inc., 134 Cal. App. 4th 728, 734 (store manager unable to hire, fire, or discipline employees without obtaining approval from district manager not exempt Executive).

\(^8\) Powell v. Morton Plant Mease Health Care, Inc., 2006 U.S. App. LEXIS 8137 (11th Cir. 2006) (to be considered salaried, statute requires that the employee receive a predetermined amount of wages without regard to the number of days or hours worked).
based on the quality or quantity of the work performed. 29 C.F.R. § 541.118(a). This necessarily precludes deduction of wages due to any lack of work that may exist.\(^{87}\)

Where an employer inadvertently makes a deduction, federal regulations provide a “window of correction” during which an employer may reimburse the employee for the deduction and promise to comply in the future to maintain the exempt status.\(^{88}\) However, the window of opportunity is only available when an employer has demonstrated an objective intention to pay its employees on a salaried basis. In other words, an employer cannot use the window of correction as a retroactive means of covering an employer’s intent to refuse salaried payment until caught.\(^{89}\)

Additionally, deductions from vacation leave (not wages) for partial-day absences of exempt employees are proper, and do not result in making such employees non-exempt.\(^{90}\)

### 3. The Administrative Exemption

Employers frequently put themselves at risk classifying employees as exempt pursuant to the “Administrative Exemption” simply because they have an administrative job title such as, Secretaries, Administrative Assistants, Receptionists and Clerks, etc. While some employees in those job titles, including Computer Professionals, could qualify for the Administrative Exemption, in fact not many meet the technical tests of exemption.

The three biggest limits to exemption pursuant to the Administrative Exemption are:

- The so-called “Production Worker Dichotomy;”\(^{91}\)
- The need for the employer to demonstrate the employee exercises

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\(^{87}\) *Moore v. Hannon Food Service, Inc.*, 317 F.3d 489, 493 (5th Cir. 2003) (plain language of the regulation sets out inadvertence and made for reasons other than lack of work as alternative grounds permitting corrective action).

\(^{88}\) 29 C.F.R. § 541.118(a)(6).

\(^{89}\) *Moore*, *supra*, 317 F.3d at 495-96 (employer properly changed policy of deducting cash register shortages from salaries and reimbursed employees with interest during the window of opportunity, thus workers maintained exempt status).


\(^{91}\) Recently, for example, the United States District Court for the Eastern District of New York held that highly paid “Mortgage Loan Officers” were not exempt “administrative employees” within the meaning of the FLSA because they were “production workers” whose “primary duty” was to produce the company’s product (i.e. loans) by selling various lending products and processing loan applications. *Daniels v. Premium Capital Funding, LLC*, Case No. 08-4736 (E.D.N.Y. 2011). The Wage and Hour Administration of the U.S. Department of Labor also has “jumped on the bandwagon” to disqualify loan officers from exemption pursuant to the FLSA’s Administrative Exemption by using a new Wage-Hour Administrator’s interpretation (NOTE: not “opinion”) No. 2010-1 stating that employees who perform the “typical” duties of mortgage loan officers do not qualify for the Administrative Exemption pursuant to FLSA section 13(a)1. Moreover, Interpretation No. 2010-1 specifically withdrew the Wage-Hour Administrator’s 2006 “Opinion Letter” which had concluded that certain (most) mortgage loan officers were exempt Administrative employees.
“discretion and independent judgment;” and

- The need for the California employer to demonstrate the employee engages in exempt work more than 50% of the time.

The United States Department of Labor regulations implementing the FLSA, and updated in 2004, look to three primary tests to identify employees subject to the Administrative Exemption:

- Payment of salary or fee of not less than $455/week;
- The employee’s primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- The exercise of “discretion and independent judgment” with respect to matters of significance.

California’s Administrative Exemption, distinguishing itself from other exemptions where California has a different standard than federal law, appears to parallel the federal requirements. However, not only does California law require the employee must earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment for 40 hours per week (thus, to be exempt, currently, that figure is $2,560/month), the California Supreme Court recently interpreted the production worker dichotomy differently than how the federal courts have applied the standard.

According to the FLSA rule, the activities pertaining to the “administrative operations of the business” must be of “substantial importance” to the management or operation of the business of the employer or the employer’s customers. But the California Supreme Court in Harris v. Superior Court rejected the FLSA position that only employees operating at the policy-making level qualified for the Administrative Exemption because otherwise engaged in only “production work.” Rather, the Court expressed concern that the production worker dichotomy was “ill-suited for the modern workplace.” As such, the Court rejected the use of the administrative/production dichotomy as a dispositive tool unless the language of the statutes and wages orders at issue fail to provide adequate guidance. In other words, the Court asserted that

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92 The issue involving the so-called “Production Worker Dichotomy” arises from the underscored language.
93 29 C.F.R. § 200.
94 The employee must be “primarily engaged in duties which meet the test of the exemption” and “exempt and non-exempt work shall be construed in the same manner as such terms are construed under the Fair Labor Standards Act....” Industrial Welfare Commission Order No. 4-2001 (Updated January 1, 2006).
95 Harris v. Superior Court, 53 Cal. 4th 170 (December 29, 2011).
Resolving whether work qualifies as “administrative” requires consideration of the particular facts of the case and application of the language of the at-issue statutes and wage orders.\textsuperscript{96}

California courts will thus analyze the administrative exemption under California law.\textsuperscript{97}

Here is a short summary of the federal and California “duties” requirements for employees to qualify for the Administrative Exemption:

<table>
<thead>
<tr>
<th>FLSA Regulations</th>
<th>California Wage Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Primary duty</strong>\textsuperscript{98} is the performance of office or non-manual work of substantial importance directly related to the management or general business operations\textsuperscript{99} of the employer or the employer’s customers at the level of policy or general operations; and</td>
<td>Duties and responsibilities involve the performance of office or non-manual work of substantial importance directly related to the management policies or general business operations\textsuperscript{100} of the employer or the employer’s customers by providing service through advising management, planning, negotiating, and representing the company;\textsuperscript{101} and</td>
</tr>
<tr>
<td>Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.</td>
<td>Customarily and regularly exercises discretion and independent judgment; and</td>
</tr>
<tr>
<td></td>
<td>Regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or</td>
</tr>
<tr>
<td></td>
<td>Performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or</td>
</tr>
<tr>
<td></td>
<td>Executes under only general supervision special assignments and tasks; and</td>
</tr>
</tbody>
</table>

\textsuperscript{96} Id. at 190.
\textsuperscript{98} “Primary duty,” under federal law, means the employee has an “important” function to perform, even if that important function(s) does not occupy 51% or more of the employee’s time. (This is a “qualitative” test).
\textsuperscript{99} Management or general business operations means administrative services as to the business as a whole. If the at-issue employee makes the widgets of the company, s/he is a “production worker” and not engaged in “management or general business operations” of the employer. This is the source of the so-called “production worker dichotomy.”
\textsuperscript{100} This is California’s source of the “production worker dichotomy.”
\textsuperscript{101} Harris, supra, 53 Cal.4\textsuperscript{th} at 188.
<table>
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<tr>
<th>FLSA Regulations</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Employer must pay employee a “salary.”</td>
<td>Primarily\textsuperscript{102} engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as in 29 C.F.R. sections 541.201-205, 541.207-208, 541.210, and 541.215.</td>
</tr>
</tbody>
</table>

\textsuperscript{102} In California, “primarily” means 51% or more of the employee’s time is spent on exempt administrative work. This is a “quantitative” test.
Typical examples of employees who may qualify for the Administrative Exemption:

- Executive Assistants/Administrative Assistants – these employees generally report to the highest level executives of an organization who may delegate significant and discretionary duties to them.
- Experts and Consultants – These employees frequently head up one-person departments such as HR, credit risk, purchasing. Alternatively, they may provide advice on a range of matters such as insurance, tax or real estate. Critical to the determination of whether these persons are administrative exempt will be the extent to which they are allowed to exercise discretionary powers.
- Special Assignment – stock brokers, account executives, field representatives and motion picture “location managers” typify this category.

The Production Worker Dichotomy

The so-called “Production Worker Dichotomy” addresses the issue whether the employee’s work is “directly related” “to the management” or “general business operations” of the employer (or to the “management” or “general business operations” of the employer’s customers). So, for example, writing computer code to run a financial spreadsheet for the company would be exempt work, while creating the same financial spreadsheet for the company to sell to customers would not qualify for the Administrative Exemption (since the employee is merely producing the company’s product: i.e., s/he is a “production worker”).

Insurance adjusters in San Francisco filed the lead California case addressing the production worker dichotomy when pursuing overtime claims against Farmers Insurance Company (“Farmers”). Farmers provided evidence that its employees’ duties included administrative functions and professional decision making including “determining liability, setting and/or recommending reserves, recommending coverage, estimating damage or loss, providing risk advice, identifying subrogation rights, detecting potential fraud, determining whether reservation of rights letters should be sent, and representing the company at mediations, arbitrations and settlement conferences.” However, the Court of Appeal concluded that while

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103 Dalheim v. KDFW-TV, 918 F.2d 1220, 1230 (5th Cir. 1990) (rejection of argument that production dichotomy applies only to manufacturing employees and finding that news producers were production employees of a television station); Martin v. Cooper Elec. Supply Co., 940 F.2d 896 (3d Cir. 1991) (inside salespersons are production workers).
104 Bell, supra, at 825.
the employees may have had some of those duties, on occasion, the plaintiffs were “fully engaged in performing the day-to-day activities” of adjusting claims, an important component of the insurance business.\textsuperscript{105} Moreover, the Court placed even greater importance on Farmer’s manual that described these employees’ role in the organization as “\textit{routine and unimportant}.” The same manual stated that all “\textit{questions of importance}” must be decided by the branch claims manager, and at a higher level” to conclude that the adjusters were “in the sphere of rank and file production workers...outside the category of administrative workers.”\textsuperscript{106}

In the \textit{Bell v. Farmers Insurance Exchange}\textsuperscript{107} decision, the California Court of Appeal clarified what “directly related to management policies or general business operations” means. Specifically, an employee satisfies the “directly related” requirement under the Administrative Exemption if the employee is “engage[d] in running the business itself or determining its overall course or policies, not just in the day-to-day carrying out of the business’ affairs.”\textsuperscript{108} Relying on this explanation, the Second Appellate District of the California Court of Appeals found that insurance claims adjusters did not qualify for the Administrative Exemption as the type of planning, advising, negotiating, and representation undertaken did not rise to the level of policy or general operations of the business, but rather the day-to-day tasks involved in adjusting individual claims.

The Fourth Appellate Court of Appeals in Los Angeles recently supplied the first ray of hope for employers as to the production worker dichotomy in \textit{Combs v. Skyriver Communications, Inc.}, 159 Cal. App.4th 1242 (2008). There, the Court held that it was not necessary to apply the administrative/production worker dichotomy in every Administrative Exemption case and that Mr. Combs, the at-issue employee, qualified for the Administrative Exemption without regard to the production worker dichotomy. In practical effect, the Court read the \textit{Bell v. Farmers} case decision narrowly to hold that the production worker dichotomy applied only when the at-issue employee's job duties were "routine" and lacked the exercise of independent discretion and decision-making.

The Skyriver company is a high-speed wireless broadband internet service provider. Combs worked first for Skyriver as Manager of Capacity Planning, and then as its Director of Network Operations. Combs' resume admitted he was responsible for high-level functions such as project management, budgeting, vendor management, purchasing, forecasting, employee management, management of overseas deployment of wireless data network, management of the integration and standardization of three networks into the Skyriver architecture, and the

\textsuperscript{105} \textit{Id.} at 826.
\textsuperscript{106} \textit{Id.} at 828 (emphases added).
\textsuperscript{107} 115 Cal. App. 4\textsuperscript{th} 715 (2004)
overseeing of day to day network operations. Combs testified at trial that he spent 60-70% of his
time on his “core” responsibility of maintaining Skyriver’s network. This responsibility included
high-level problem solving and “troubleshooting,” as well as planning to integrate acquired
networks into Skyriver’s network. Combs also prepared reports for Skyriver’s Board of
Directors and conducted lease negotiations, bought equipment and purchased supplies. Federal
regulations published pursuant to the FLSA's Administrative Exemption, and which California
recently incorporated into Wage Order 4, specifically identify many of these tasks as ones
susceptible to the Administrative Exemption.

Combs is an important case since my experience with California Superior Court Judges is
that they have been entirely attentive to the Bell case decision and have been unwilling to seek to
distinguish it, even while harboring misgivings that it was wrongly decided. The Combs decision
provides the opportunity to allow Superior Court Judges to be more open-minded and reject
Bell’s rigid application of the production worker dichotomy to find the employee not exempt if
s/he does more than a modicum of production work for the company.

Thus, critical to a court’s evaluation of whether employees, including Computer
Professionals, will be considered non-exempt production workers, is the importance of the
employees’ work to the business. If the work is routine, the Courts will not even need to
consider other factors such as (a) independence of decision-making and (b) level of discretion of
the employee. If a company’s computer professionals apply formulas to obtain or determine
results, it is unlikely that Courts will agree that their job is exempt, and will likely find that those
jobs are within the production worker dichotomy.109 Where the employees have more discretion
and exercise important judgment, Court’s will move past the dichotomy to determine compliance
with the other elements needed to prove up the administrative exemption.110

Administrative Exemption case decisions involving computer related professions
around the country

In the past quarter century, there are only a dozen or so cases from around the country
that have addressed the question of whether specific employees in computer-related fields are
considered exempt under the Administrative Exemption. That said, these cases paint a fairly
clear picture of jobs the courts will consider exempt pursuant to the Administrative Exemption.

110 Renfro v. Indiana Michigan Power Co., 2007 U.S. App. LEXIS 16990 (6th Cir. 2007) (technical writers were
administrative employees pursuant to FLSA exempt from overtime since they exhibited discretion and independent
judgment by working without constant supervision, selected the best method to maintain the plant’s equipment, and
drafted manuals as guidelines on how to develop a procedure from which a writer is free to judge what checks and
issues to consider).
Employees (computer operators, analysts, system designers and even data processors) that have significant independence, discretion and decision-making about significant aspects of the employer’s business will be the most likely to satisfy the Administrative Exemption. Critical factors unifying these cases are employees with discretion and decision making to diagnose, fix, upgrade and administer their employer’s computer systems.

To the contrary, where computer related professionals are not exempt, they basically follow their supervisor’s or other’s directions to accomplish their tasks, and fix specific problems that are brought to the employee’s attention by the supervisors.

The Administrative Exemption is fraught with peril for employers. Employers will always have the burden of proof to show the employee on whose behalf the employer proceeds has the requisite amount of discretionary or decision-making authority that is significant. For computer professionals with more routine or formulaic responsibilities, employers should look elsewhere to avoid being subject to overtime pay requirements.

In the famous and early Pezzillo decision, the court described the needed discretion and independent judgment in the specific context of the then federal FLSA regulations at 29 C.F.R. section 541.207 and as applied to computer programmers and analysts:

“In general, the exercise of discretion and independent judgment involves the

111 Bagwell v. Florida Broadband, LLC, 385 F. Supp. 2d 1316 (S.D. Fla. 2005) (Administrative Exemption pursuant to FLSA applies to employee who exercised independent judgment and discretion with respect to his primary duty to develop, improve and make employer’s computer system function reliably); Koppinger v. American Interiors, Inc., 295 F. Supp. 2d 797 (ND Ohio 2003) (IT employee’s position satisfied Administrative Exemption pursuant to FLSA since it primarily related to upgrading, maintaining and administering employer’s entire computer system); Martin v. Gateway Press, Inc., 1992 US Dist. LEXIS 21186, aff’d on these grounds, reversed in part on other grounds 13 F.3d 685 (3d Cir. 1992) (employee exempt pursuant to FLSA because he integrated three separate computer systems to maximize efficiency); Horne v. Singer Business Machines, Inc., 413 F. Supp. 52 (WD Tenn. 1976); see also Smith v. Batchelor, 879 Pac. 2d 1364 (Utah 1994) (employee hired for legal and computer work was not exempt pursuant to FLSA because compensated on an hourly basis).

12 Turner v. Human Genome Science, Inc., 292 F. Supp. 2d 738 (D. Md. 2003) (technicians who maintained computer system did not qualify for the FLSA’s Administrative Exemption even though failure to do their job could substantially impact management or operation of business); Martin v. Indiana Michigan Power Co., 381 F.3d 574 (6th Cir. 2004) (IT specialist was not exempt pursuant to FLSA as there was no showing that his work directly related to business operations, management or customers); Pezzillo v. GTE Information Systems, Inc., 414 F. Supp. 1257, aff’d 572 F.2d 1189 (6th Cir. 1976) (systems analysts who actually provided system and used their skills to place the programs on the computer were not exempt pursuant to FLSA); Lang v. Midwest Advanced Computer Services, Inc., 506 F. Supp. 595 (E.D. Mich. 1981) (employee not exempt pursuant to the FLSA because he had no authority to affect changes in the design of program, only to test new system and bring problems to the attention of programmers and his superiors); Brennan v. Carl Roessler, 361 F. Supp. 229 (D.C. Conn. 1973) (“Data processing manager” who operated relatively uncomplicated equipment and performed other routine and manual chores did not qualify for the FLSA’s Administrative Exemption).

13 Pezzillo, et al, supra at 1267-68.
comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in Subpart A of this part, moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following: (1) Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and (2) misapplication of the term to employees making decisions relating to matters of little consequence.”

Perhaps the most frequent cause of misapplication of the term ‘discretion and independent judgment’ is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of 29 C.F.R. section 541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

In the data processing field, a systems analyst is exercising discretion and independent judgment when s/he develops methods to process, for example, accounting, inventory, sales, and other business information by using electronic computers. S/He also exercises discretion and independent judgment when he determines the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed. Whether a computer programmer is exercising discretion and independent judgment depends on the facts in each particular case. Every problem processed in a computer first must be carefully analyzed so that exact and logical steps for its solution can be worked out. When this preliminary work is done by a computer programmer he is exercising discretion and independent. A computer programmer would also be using discretion and independent judgment when he determines exactly what information must be used to prepare the necessary documents and by ascertaining the exact form in which the information is to be presented. Examples of work not requiring the level of discretion and judgment contemplated by the regulations are highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, and the debugging of a program. It is clear that the duties of
data processing employees such as tape librarians, keypunch operators, computer operators, junior programmers and programmer trainees are so closely supervised as to preclude the use of the required discretion and independent judgment.

4. **Professional Exemption**

Both federal and California state wage-hour regulations exempt from overtime payment employees who are "professionals." Federal law separates the computer exemption (which is discussed in detail in Section E below) into its own regulation, separate from the learned professional and creative (or artistic) professional described in the regulations related to the professional exemption (separate as well from those regulations exempting specific professions from overtime requirements). California law, however, subsumes the computer professional exemption within the professional exemption located in various California Wage Orders. Thus, while employers need only look to the applicable Wage Order section regarding the professional exemption to determine the various elements, in federal law the employer must look to the separate regulations to capture all the professional exemptions that exist. 114

As with the exemptions previously discussed, both federal and California state law rely on two factors to determine whether an employee is exempt pursuant to the Professional Exemption. The first factor concerns the duties of the position; the second factor is the salary earned by the employee in the position. These are known as the "duties test" and the "salary test."

Specifically, federal law will find exempt an employee retained in a bona fide professional capacity and "whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor; and who is compensated on a salary or fee basis at a rate of not less than $455 per week, exclusive of board, lodging, or other facilities. 115

It is important to note that this first "duties" requirement is not listed in the conjunctive. This is because the exemption broadly contemplates four separate categories of professional employees under 29 C.P.R. § 541.300: (a) certain listed professionals116; (b) the learned professional, (c) the artistic (or creative) professional and (d) computer professionals.

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114 The federal professional exemption for learned or creative professionals is found at 29 C.F.R. section 541.300, while the federal computer professional exemption is found at 29 C.F.R. section 541.400. Under California law, all applicable professional exemptions (specific professions, learned, creative, and computer) are under subsection (A)(3) of the applicable Wage Order.

115 29 C.F.R. § 541.300

116 Individuals employed in the legal or medical profession are exempted under 29 C.F.R. section 541.304, and teachers are exempted under 29 C.F.R. section 541.303. Additionally, subsections within 29 C.F.R. section 541.301 [Footnote continued on next page]
By contrast, California law (through Wage Order 4) identifies four categories of professionals who may qualify for exemption in addition to the computer professional exemption described below:

- Those professionals employed in one of the professions the Wage Order specifically references;¹¹⁷
- The learned professional;
- The artistic (or creative) professional; and
- The computer professional.

California Wage Order 4 follows the federal regulation with three noticeable differences:

- Addition of the requirement that the employee customarily and regularly exercise discretion and independent judgment;
- The salary requirement; and
- That the employee must spend more than half of his/her time engaged in activities defined to be exempt.

Satisfaction of the appropriate standard will establish exemption from the overtime payment requirements of the Fair Labor Standards Act and the California Labor Code.

The Learned Professional

Under federal law, a Learned Professional is an individual "whose primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction."¹¹⁸

In performing these duties, federal law looks to what the employee's "primary duty" is, regardless of the amount of time dedicated to such function.¹¹⁹ California Wage Order 4 creates

¹¹⁷ Similar to federal law, the California Wage Orders list specific professions that qualify as exempt professional employees. Section 3, subsection (a) of the applicable wage orders list the following professions that meet the exemption: law, medicine, dentistry, optometry, architecture, engineering, teaching, and, accounting, and if the state has properly licensed or certified them.

¹¹⁸ 29 C.F.R. § 541.301.
the additional requirement that the employee "customarily and regularly exercises discretion and independent judgment" in the performance of work requiring advanced knowledge.120

Identification of exempt work also rests on the following definitions:

a. Knowledge of an Advanced Type: Federal regulations interpret work requiring "advanced knowledge" to be work which is predominantly "intellectual" in character.121 This includes work requiring the consistent exercise of "discretion and judgment," as distinguished from performance of routine mental, manual, mechanical or physical work. Such discretion and judgment is generally used to analyze, interpret or make deductions from varying facts or circumstances.122 While the exemption does not require the at-issue employee to attain any particular level of educational achievement or degree, federal law requires more than a high-school diploma or its equivalent.

The California DLSE interprets the term "knowledge of an advanced type" to mean the employee must have an advanced degree.123 Additionally, California courts recognize that intellectually advanced work is varied in character.124 The California Wage Order itself considers work intellectual and varied in character if, among other things, the output produced or the result accomplished cannot be standardized in relation to a given period of time.125

[Footnote continued from previous page]

119 See, Donovan v. Burger King (Burger King II), 675 F.2d 516 (2nd Cir. 1982) (Assistant managers at fast food chain restaurant qualified as exempt executive employees (outside of California) despite working more than half their time preparing food since an employee who does not spend more than 50 percent of his or her time on managerial duties might nevertheless have management as his or her "primary duty" where, for example, the worker has broad responsibilities similar to those of the owner or manager of the establishment). Contrary to federal law, which qualitatively concentrates on the primary function, California quantitatively defines "primary duties" of a position. In other words, an individual's "primary" duty is that which takes up at least 50% or more of an employee's time. See, Ramirez v. Yosemite Water Co., 20 Cal. 4th 785 (1999).
120 California Wage Order 4-2001, subsection (c).
121 29 C.F.R. § 541.301.
122 Stevins v. Provident Construction Co., 137 Fed. Appx. 198, 199-200 (11th Cir. 2005) (though an unpublished opinion, the Court held that as a construction superintendent, the employee deviated from design plans without seeking approval, could order materials without approval, and determined answers to subcontractors' questions. As a result, the individual exercised sufficient discretion and independent judgment to be an exempt professional).
124 White v. Digex, Inc., 149 Fed. Appx. 655,657 (9th Cir. 2005)(unpublished opinion) (routine application of technical skill would not qualify as intellectual or creative since no variance to work; as such, employee not exempt as professional employee).
125 California Wage Order 4-2001 (b)(iii).
Both federal and state laws expect employees performing work that is of an advanced type to consistently exercise discretion and independent judgment. California courts have defined Wage Order No. 4’s requirement of discretion and independent judgment to call for comparing and evaluating possible courses of conduct, and acting or making a decision after considering various possibilities.\textsuperscript{126} Also, decisions a professional employee makes are not independent unless free from immediate supervision. However, an employee's recommendation to his/her supervisor for review and final decision-making does not evidence a lack of independence or discretion.

Furthermore, decision-making must be with respect to matters of significance to be considered worthy of discretionary input. The mere application or use of acquired skill in applying techniques, procedures, or specific standards is insufficient to qualify as discretion or independent judgment.\textsuperscript{127}

The lack of discretion and independent judgment on the part of an employee doomed the defense concerning a computer analyst whose duty was to troubleshoot the company's website problems in \textit{White v. Digex, Inc.} In \textit{White}, the Ninth Circuit Court of Appeals found that no discretion or independent judgment was exercised by the employee given that the troubleshooting the employee engaged in was merely a result of applying routine technical skill. There was no avenue by which the employee could engage in original thought.

\textbf{b. Field of Science and Learning:} Federal regulations identify specific occupations that have a recognized professional status, as does the California Wage Order establishing the professional exemption. Mechanical arts or skilled trades are specifically precluded from inclusion based on the fact that while the knowledge required is of a fairly advanced type, such occupations are not in a field of science or learning.

\textbf{c. Prolonged Course of Specialized Instruction:} This requirement restricts the professional exemption to professions where specialized academic training is

\textsuperscript{126} Nordquist v. McGraw-Hill Broadcasting Co., Inc., 32 Cal. App.4th 555, 564 (1995) (television sports anchor's duties entailed collection of news stories and summarizing them for viewers, thus could not be considered exempt professional since no commentary allowed or ability to select stories to report).

\textsuperscript{127} Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1129 (9th Cir. 2002) (mere performance far removed from supervisor does not establish use of discretion and independent judgment by employee as to warrant finding of exempt status; record failed to show whether actions of employee were discretionary or mere use of skill in applying techniques).
a standard prerequisite for entrance into the profession. However, inclusion of the expansive term "customarily" within the federal law extends the exemption to those employees who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.\textsuperscript{128} While this allows for work experience to make up for a deficient amount of intellectual instruction, it is not meant to replace intellectual instruction completely.\textsuperscript{129} California has not gone so far as to allow work experience to make up for a deficiency in intellectual instruction.\textsuperscript{130} However, two courts have recently held that unlicensed professionals are exempt under the Learned Professional Exemption.\textsuperscript{131}

d. **Salary Test:** Federal law provides that compensation for an individual attempting to qualify as a learned professional under the professional exemption be at a rate not less than $455/week exclusive of board, lodging or other facilities. California regulations increase the salary component to no less than two (2) times the state minimum wage for full-time monthly employment (thus, to be exempt, currently, that figure is $2,160/month).

Most importantly, compensation for the at-issue individual requires payment on a salary basis as opposed to an hourly wage.\textsuperscript{132} Since case law defines salary as a predetermined amount of wages regardless of hours worked, the employer may not subject an individual's compensation to reduction based on the quality or quantity of the work performed. 29 C.F.R. § 541.118(a). This

\textsuperscript{128} 29 C.F.R. § S41.301(d).
\textsuperscript{129} See *Young v. Cooper Cameron Corp.*, 586 F.3d 201 (2d Cir. 2009) (holding that 20 years of “engineering-type experience” will not satisfy professional exemption since the job required no advanced educational training and no other employees in plaintiff’s position had more than a high school education).
\textsuperscript{130} DLSE Opinion Letter dated August 14, 2002 (to qualify for the learned professional exemption, an employee must have an advanced degree).
\textsuperscript{131} *Campbell v. PricewaterhouseCoopers*, 642 F.3d 820 (9th Cir. 2011) (overturning a lower court’s grant of partial summary judgment in favor of a class of approximately 2,000 unlicensed junior accountants, and holding that that the learned professional or administrative exemption could apply to unlicensed accountants depending on their “actual job duties and responsibilities”); *Zelasko-Barrett v. Brayton-Purcell, LLP*, 198 Cal. App.582 (2011) (holding that a law clerk, who has not yet passed the bar but has graduated from law school, is exempt from state and federal overtime provisions).
\textsuperscript{132} *Powell v. Morton Plant Mease Health Care, Inc.*, 2006 U.S. App. LEXIS 8137 (11th Cir. 2006) (to be considered salaried, statute requires that the employee receive a predetermined amount of wages without regard to the number of days or hours worked).
necessarily precludes deduction of wages due to any lack of work that may exist.\textsuperscript{133}

Where an employer inadvertently makes a deduction, federal regulations provide a "window of correction" during which an employer may reimburse the employee for the deduction and promises to comply in the future to maintain the exempt status.\textsuperscript{134} However, the window of opportunity is only available when an employer has demonstrated an objective intention to pay its employees on a salaried basis. In other words, an employer cannot use the window of correction as a retroactive means to cover an employer's intent to refuse salaried payment until caught.\textsuperscript{135} Additionally, deductions from vacation leave (not wages) for partial-day absences of exempt employees are proper, and do not result in making such employees nonexempt.\textsuperscript{136}

\textbf{The Artistic (Or Creative) Professional}

The second category of professionals federal and California state law recognizes is the Artistic Professional group. Defined pursuant to 29 C.F.R. § 541.302 and California Wage Order 4-2001 (b)(ii) and (iii), the Artistic Professional is an employee who is "primarily engaged" in the performance of work that is original and creative in character, and is the result of imagination, invention, originality or talent in a recognized field of artistic or creative endeavor.

a. Original and Creative Work: California follows the restrictive nature of the federal law by concluding that relatively few individuals qualify for exemption as members of artistic impression since most who have sufficient

\textsuperscript{133} Moore \textit{v. Hannon Food Service, Inc.}, 317 F.3d 489, 493 (5th Cir. 2003) (deducting from weekly salaries amounts for recurrent cash register shortages precludes finding of professional exemption due to improper deductions).

\textsuperscript{134} 29 C.F.R. § 541.118(a)(6). See, \textit{Auer v. Robbins}, 519 U.S. 452, 463-64 (1997) (noting that the U.S. Department of Labor does not interpret the timing for reimbursement to require immediate payment. Rather, case law has interpreted the "window of correction" not in terms of quantitative time, but rather in demonstrable evidence that the employer exhibits an "objective intention" to pay its employees on a salaried basis. \textit{Klem v. County of Santa Clara}, 208 F.3d 1085, 1091 (9th Cir. 2000) ("Thus, so long as the employer shows it is correcting itself, or has in fact corrected itself, the employer is still within the "window of correction.".). However, one factor that may determine the applicability of the "window of correction" is case law that suggests it is ambiguous as to whether the "window of correction" exists where there is evidence of a pattern or practice of violations demonstrating an intention not to pay an employee on a salaried basis. \textit{Id.} at 1094-96; see also \textit{Whetsel v. Network Prop. Servs.}, 246 F.3d 897, 904 (7th Cir. 2001); see also \textit{Takacs v. Hahn Auto. Corp.}, 246 F.3d 776, 782-83 (6th Cir. 2001).

\textsuperscript{135} Moore, supra, 317 F.3d at 495-96 (employer properly changed policy of deducting cash register shortages from salaries and reimbursed employees with interest during the window of opportunity, thus workers maintained exempt status).

control or discretion over the nature of their work are self-employed. One thing California looks for to determine whether imagination or invention is used is whether the skill and expertise the individual developed came from specialized intellectual instruction as opposed to knowledge gained from on-the-job training.

b. **Invention and Imagination:** One must make the determination whether the employee provided invention, imagination, originality or talent on a case-by-case basis. Routine mental, manual, mechanical or physical work does not qualify as having required the use of invention or imagination. Individuals who create marketing materials or training manuals that rely on third-party information, for example, are not considered artistic professionals, as there is no originality in the work but rather a "reporting" of information obtained through skill or physical labor. Furthermore, since imagination and invention must be made in a recognized field of artistic or creative endeavor, very few professions qualify. So, while the actors, musicians, composers and conductors fit within the artistic field, those who prepare these individuals may not.

In *Bohn v. Park City Group, Inc.*, 94 F.3d 1457 (10th Cir. 1996), the Tenth Circuit Court of Appeals rejected the employer's assertion that a technical writer and documenter in the software department qualified as an "artistic professional." The Court of Appeals found that plaintiff's duties did not require any special imagination or skill, and that the employee performed his work within a well-defined framework of management policies and editorial convention.

5. **The Computer Professional Exemption**

Many employers believe that if an employee is a computer programmer or computer engineer engaged in highly technical work, the employee automatically qualifies for the "Computer Professional Exemption." This is not the case. Due to the complex "duties" requirements necessary to qualify for the exemption, few California Computer Professionals actually qualify for the Computer Professional Exemption.

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137 Nordquist, 32 Cal. App.4th at 562 (work of television sports anchor not original or creative since only summarized news collected from other sources, thus anchor not an exempt employee).
138 Id. at 572.
139 29 C.P.R. § 541.302(c).
The popular press has characterized previous changes to federal wage-hour regulations for the Computer Professional Exemption (to make it more accessible to Computer Professionals) to be “liberalizing” (i.e., better for the employer). However, these reforms have primarily addressed the “salary” requirements (not the “duties” requirements) of the exemption and now make clear that Computer Professionals paid on an hourly basis (if sufficiently highly paid) will nonetheless qualify for the exemption (if otherwise exempt).

In particular, many Computer Professionals spend the vast majority of their time debugging code or undertaking ministerial tasks and thus do not successfully qualify for the exemption.

Similar to the Administrative, Executive, and Professional Exemptions, we recommend an overtime audit (under attorney-client privilege) to carefully analyze the duties in which computer programmers and Computer Professionals engage.

**Computer Professional Exemption: Federal Requirements**

Federal law provides a specific exemption from federal overtime requirements for certain kinds of computer workers (see definition, below). 29 U.S.C. § 213(a)(17). Federal law provides this exemption in addition to the generally available Executive, Administrative, and Professional Exemptions. In other words, even if the employee does not qualify for this exemption, he or she may qualify for the Executive, Administrative, or Professional Exemptions. 29 U.S.C. § 213(a)(17). However, this seeming opportunity is often only a mirage.140

The federal computer workers exemption applies to “any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is:

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

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140 If the computer professional fails the Computer Professional Exemption because of the “duties” test, resort to these other exemptions will not provide additional opportunity to qualify for the exemption since they will require proof of the same “duties” and the computer professional will already have had the benefit, through the Computer Professional Exemption, of the most generous salary requirement. This is because the duties tests under all four exemptions are the same and the Computer Professional Exemption provides only a more flexible (to the employer) “salary” test.
(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; \(^{141}\)

(C) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(D) A combination of the aforementioned duties, the performance of which requires the same level of skills.”


Also, if the employer compensates the employee on an hourly basis, the employer must compensate the employee at a rate of not less than $27.63 per hour. \(\text{Id.} \) (But, see California state law compensation requirements, below).

Statutory requirements (A) - (D) are the same as those U.S. Department of Labor regulations provide to determine whether a computer worker qualifies as an exempt professional. See 29 C.F.R. § 541.303(b). So, under federal law, what difference does the specific computer worker exemption make? The answer is this: the federal computer worker exemption allows computer workers to qualify for the exemption even though they are paid on an hourly (and not on a “salary”) basis. \(^{142}\) Furthermore, the computer worker exemption allows coverage of workers with a limited educational background whereas the Professional Exemption requires a prolonged course of study. \(^{143}\)

Computer Professional Exemption: California Requirements

In California, the Computer Professional Exemption was previously part of the “Professional Exemption” (federal law, too, creates a separate exemption for Computer Professionals) found in the Industrial Welfare Commission (“IWC”) Wage Orders. Furthermore, the Legislature has now amended the California Labor Code to provide both salary requirements and hourly pay minimums for employees who employers seek to qualify pursuant to the

\(^{141}\) Young v. Cerner Corp., 2007 U.S. Dist. LEXIS 63566 (W.D. Mo. 2007) (software engineer engaged in defect resolution and transformation of data, along with testing of own solutions, qualified as a computer professional exempt from overtime requirements under FLSA).

\(^{142}\) The federal Administrative and Professional Exemptions apply only to employees compensated on a “salary basis” or “fee basis.” 29 C.F.R. § 541.2(e)(1); 29 C.F.R. § 541.3(e). The federal Executive Exemption applies only to those compensated on a salary basis. 29 C.F.R. § 541.1(f).

\(^{143}\) Bobadilla v. MDRC, 2005 U.S. Dist. LEXIS 18140 (S.D.N.Y. 2005) (Exemption in section 213(a)(17) eliminated any reference to educational requirements for qualification under the exemption).
Computer Professional Exemption. California law has allowed employers, since January 1, 2006, to pay exempt “Computer Professional” employees on an hourly basis (as long as they receive, as of January 1, 2014, at least $40.38 per each hour worked, a monthly salary of not less than $7,010.88, or an annual salary of not less than $84,130.53 for full-time employment) without jeopardizing the employees’ exempt status. (This $40.38 per hour figure is a small increase from the $39.90 per hour rate in place for 2013).

The annual salary figure came about when on September 23, 2008, California Governor Arnold Schwarzenegger signed into law Assembly Bill 10 (“AB 10”) related to the Computer Professional Exemption to amend California Labor Code section 515.5. AB 10 made two major changes to the Computer Professional Exemption via changes to section 515.5, effective September 23, 2008—the day Governor Schwarzenegger signed the budget bill into law:

- Changed the “salary test” to permit compensation other than on an hourly basis.
- Changed the "duties test" by amending section 515.5(a)(3) to delete the conjunctive word "and." Instead, the amendment now inserts the word "or" into the litany of job tasks a Computer Professional may perform to make it clear that s/he may perform only one of the litany and must not perform all of the litany of listed tasks to qualify for exemption:

  "The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and or software engineering." (emphasis added)

Following the change to the "salary test," you may now expect Computer Professionals in California to be paid a salary (undoubtedly in the amount of at least $84,130.53), in addition to whatever Restricted Stock and bonuses might otherwise also be available to the Computer Professional in his/her total compensation package.

Note: AB 10 did not interfere with the existing legal right of California employers to pay Computer Professionals on an hourly basis without defeating their exempt status. Accordingly, if a California employer paid its computer professional $40.38 per hour, for all hours worked, (and the employee otherwise satisfied the duties test), s/he would be exempt from overtime.

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144 There are no reported case decisions interpreting the California Computer Professional Exemption to determine whether an employee is exempt or not exempt within the meaning of the exemption. There are two federal case decisions interpreting the exemption but not addressing either the “duties” or “salary” tests. (One case decision addresses “pay docking” and the other remands an employer’s successful Summary Judgment Motion for trial on the merits because there were disputed facts in the Summary Judgment record.)
AB10 assigned the Division of Labor Statistics and Research to adjust both the hourly pay rate and the salary level on October 1 of each year to be effective on January 1 of the following year by “an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.” The bill makes no mention of whether the Division would have authority to or be required to lower the hourly rate of pay or the salary figure in the event the California Consumer Price Index were to decrease. The new hourly and salary rates discussed above were set in October 2013 to go into effect as of January 1, 2014.

Other than the change to the word “and” in section 515.5(a)(3), the statutory language in California Labor Code section 515.5 parrots verbatim the “duties test” currently set out in the California Wage Orders. Specifically, the Computer Professional exemption only applies to computer professionals who perform certain types of sophisticated duties. To prove that an employee is exempt, an employer must demonstrate that:

“(1) The employee is primarily engaged in work that is intellectual or 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, or software engineering.”

Cal. Labor Code § 515.5(a) (emphases added).

These requirements of the state law are very similar to the requirements of the federal exemption for computer workers. There is, however, an odd difference between the California and federal laws. Unlike federal law, the California Labor Code states that it applies only to employees “in the computer software field.” It remains to case law determination whether this reference to “software” reflects a mere oversight, or an intentional and limiting narrowing of federal law. The difference seems most likely to be a legislative drafting error because the law
specifically refers in other places to certain duties related to computer “hardware” as being exempt. Cal. Labor Code § 515.5(a) (1)(A), (C).

AB 10 (amending section 515.5) and the Wage Orders specifically state that the Computer Professional Exemption does not apply where:

“(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;

(5) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for onscreen 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; [or]

(6) The employee is engaged in any of the activities set forth in subdivision (a) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.”

(emphases added).

Like federal law, California law does not require an employer to pay a computer worker on an hourly basis to qualify for the Computer Professional Exemption. Those computer professionals seeking to qualify for exemption pursuant to the Administrative or Professional Exemptions (which are separate and distinct from these specific exemptions for computer workers) must meet the requirements of those exemptions, including that the employer pays a salary.
6. **Highly Compensated Employee Exemption**

**Federal Law**

Section 13(a)(1) of the FLSA contains an exemption for “highly-compensated” workers who are paid total annual compensation of $100,000 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:

1. The employee earns total annual compensation of $100,000 or more, which includes at least $455 per week paid on a salary basis;\(^{145}\)
2. The employee’s primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly\(^{146}\) performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

29 C.F.R. § 541.601(a).

So, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements under the Executive Exemption.

If an employee's total annual compensation does not total at least $100,000 by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. 29 C.F.R. § 541.601(b)(2).

The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. 29 C.F.R. § 541.601(b)(4).

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\(^{145}\) The required total annual compensation of $100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include credit for board, lodging or other facilities; payments for medical or life insurance; or contributions to retirement plans or fringe benefits. 29 C.F.R. § 541.601(b)(1).

\(^{146}\) “Customarily and regularly” means greater than occasional but may be less than constant, and includes work normally and recurrently performed every workweek but does not include isolated or one-time tasks. US. DOL Factsheet #17H.
California Law

There is no equivalent to the Highly Compensated Employee Exemption under California law.

7. The Retail Employee Exemption

Federal Law

The retail employee exemption under the FLSA is very narrowly applied. Under the FLSA, a commissioned retail employee is exempt from payment of overtime compensation only if: (1) the regular rate of pay of the employee is in excess of one and one half times the minimum wage; and (2) more than half of the employee’s compensation for a representative period of not less than one month is made up of commissions earned on the sale of goods or services. Most importantly, federal regulations limit application of the retail employee exemption to those individuals employed in a “retail or service establishment,” which is limited to those businesses traditionally operating under a “retail concept,” such as department stores, drug stores, grocery stores, and barber shops.147 Businesses such as banks, insurance companies, accounting firms, law firms, or other companies that arguably provide services or products that are not per se retail establishments cannot use the exemption.148 The practical rule appears to be that the exemption only applies to employees of a business that relies upon the public’s open and unfettered access to its business establishment.149

California Law

Section 3 of various California Wage Orders recognizes an exemption from overtime requirements for “Inside Salespeople.” Under the Wage Orders, to be a “commissioned” employee, the employee must be principally involved in selling a product or service and must have earnings that exceed one and one-half times the minimum wage150 (with more than half of

147 29 C.R.F. § 779.317.
149 See 29 C.F.R. § 779.318(a) (“Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization . . . Such an establishment . . . provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living.”).
150 The Ninth Circuit recently certified the following question to be answered by the Supreme Court of California: “May an employer, consistent with California's compensation requirements, allocate an employee's commission payments to the pay periods for which they were earned?” Peabody v. Time Warner Cable, Inc., 689 F.3d 1134 (9th Cir.) [Footnote continued on next page]
the earnings coming from commissions).\textsuperscript{151} To be a commissioned employee, the employee must be principally involved in selling a product or service, and the amount of compensation received as commission must be based on a percentage of the sale price of the product or service.\textsuperscript{152}

The question then becomes whether an employee whose commission rate is based on a “percentage of the profit” an employer derives from a sale (as opposed to a “percentage of the sale price”) would still qualify as a “commission wage” so as to apply the commissioned employee exemption (provided all other factors are satisfied). Case law is unclear as to this point. Both Keyes and Ramirez concentrate primarily on the first element of the definition; specifically, proving that the primary duty the employee was engaged in was the selling of a product or service.

But, in Blenn v. En Pointe Technologies, Inc., 2003 Cal. App. Unpub. LEXIS 1154 (2003), two former employees brought a claim for unpaid wages related to overtime compensation based on a theory that they did not receive a true commission, since the commissions were a percentage of En Pointe’s “profits” rather than a percentage of the “price” of the product En Pointe sold, (computers and computer-related products and services). En Pointe did not dispute that the commission rate formula represented a percentage of profits on a sale rather than the actual gross price of the product. While it is an unpublished opinion, and thus of no persuasive authority to a court, the Sixth Appellate District of the California Court of Appeal held that commissions based on a “gross margin dollars” formula representing a percentage of the employer’s profits still qualified as a commission since they were based “proportionately upon the amount or value thereof.” \textit{Id.} at 15. The court noted that the former salespeople in Blenn cited no cases that stood for the proposition that commissions cannot be computed on the basis of the net price of a product rather than its gross price.

Furthermore, the issue whether an employer may calculate commissions on a measure other than the gross sales price was also addressed in Hudgins v. Neiman Marcus Group, Inc., 34

\[\text{Footnote continued from previous page}\]

Cir. 2012) (Plaintiff alleges that her earnings did not exceed one and one-half times the minimum wage because she received commission payments only every four or five weeks).

\textsuperscript{151} Commissions are defined under California Labor Code section 204.1 (“Commission wages are compensation paid to any person for services rendered in the sale of such employer’s property or services and based proportionately upon the amount or value thereof.”). While the statute applies only to vehicle dealers, California courts have adopted the definition of commissions contained in the statute to apply to all employers, regardless of industry. See Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 803 (1999) (California Supreme Court accepted the argument of both parties that Labor Code section 204.1’s definition of “commissions” is more generally applicable than to just vehicle dealers).

Though *Hudgins* is a wage deduction case involving improper deductions from commissions, the Court of Appeal noted no issue with the employer basing its commissions on the “net price” of the product as opposed to the “gross price.” *Id.* In fact, the only aspect of the commission plan the Court struck down related to deductions for unidentified returns constituting an employer’s attempt to have its employees ensure the employer’s losses.

Additionally, in a Division of Labor Standards Enforcement (“DLSE”) Opinion Letter dated June 13, 2002, the DLSE refused to find improper a provision in an employer’s commission plan calculating commissions to be “15% of the gross profit” (instead finding the plan improper for imposing a deduction on employees by holding them 50% liable for a consumer’s default in payment).

Finally, just recently, the California Court of Appeals finally addressed the issue of whether commissions could include payments based on a formula other than a straight percentage of profits. Specifically, the Fourth Appellate District of the California Court of Appeal found that the definition of “commissions” included formulas that took into account cost-related factors as well as price. Specifically, neither *Ramirez* nor *Keyes* had any occasion to address the issue of whether commissions could be based on any formula other than a straight percentage of the price charged to the customer since both cases used “straight percentage” formulas, and thus neither intended to preclude employers from calculating commissions based on anything other than a straight percentage of profits. Where an employee has an impact on both the revenue and the costs an employer received and incurred, inclusion of both into the commission calculation is permissible, if the parties detail this understanding in the employment or compensation agreement.

8. **The Outside Salesperson Exemption**

**Federal Law**

Under 29 C.F.R. section 541.500, an outside salesperson exempt from overtime is an employee:

- Whose primary duty is (i) making sales within the meaning of section 3(k) of the FLSA, or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or

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153 *Muldrow v. Surrex Solutions Corp.*, Case Nos. D057955 and D058958 (Fourth Appellate California Court of Appeal, Division One, January 24, 2012).

154 “Primary duty” bears the same definition as under the other federal exemptions (i.e. a “qualitative” test).
customer; and

- Who is customarily and regularly engaged away from the employer’s place or places of business to perform such primary duty.

The language under 29 C.F.R. § 541.500, which went into effect August 23, 2004, removed the former requirement under the FLSA that, to be exempt under the outside salesperson exemption, an employee’s hours performing job duties other than selling or obtaining orders not exceed 20 percent of the hours non-exempt employees spend performing nonexempt duties in the workweek. More importantly, the new language clarifies that incidental duties to the sale of goods or services should still be considered exempt work. This includes promotional functions an employee performs on behalf of the employer, as well as application of the exemption to employee drivers whose primary duty is to engage in selling activity.

The U.S. Department of Labor recently attempted to define a “sale” for purpose of the outside sales exemption as an event which “requires a consummated transaction directly involving the employee for whom the exemption is sought.” Rejecting the U.S. Department of Labor’s interpretation, the U.S. District Court for Arizona found that such position was inconsistent with the statutory definition and previous interpretations that broadly defined the

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155 29 C.F.R. § 541.501 defines “making sales or obtaining orders” as: (b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that ‘sale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition; (c) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer (“Obtaining orders for the use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies); or (d) selling or taking orders for a service, which may be performed for the customer by someone other than the person taking the order. See Gregory v. First Title of America, Inc., 555 F.3d 1300, 1303 (11th Cir. 2009).

156 This requirement does not require an employee be away from the office a majority of the time; it requires only that an employee be away from the office when conducting his or her primary duties, which in this case are his or her sales activities. Schmidt v. Eagle Waste & Recycling, Inc., 598 F. Supp. 2d 928, 937 (W.D. Wisc. 2009).

157 In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work as well, including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences. 29 C.F.R. § 541.500(b).

158 Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. See Christopher v. SmithKlein Beecham Corp., 132 S.Ct. 2156 (2012) (pharmaceutical sales representatives are exempt outside salespeople despite only pitching the product and not ever consummating the sale given that federal regulations prohibit the direct sale of pharmaceuticals to an end-user and given that the sales reps nonetheless host meals and meetings, and make presentations necessary to the physicians’ eventual purchase of pharmaceuticals). On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. 29 C.F.R. § 541.503.

159 29 C.F.R. § 541.504.

outside sales exemption, which provided that a “sale” included not only a “sale” as that term is traditionally defined, but also “other disposition.” Such a position is consistent with the intent of the regulations given the expansive definition of “sales” discussed above in the various regulatory sections involving incidental duties associated with the sale of goods, as well as 29 C.F.R. § 541.501(d), which defines sales as also involving selling services that may be performed by someone other than the person taking the order.

California Law

Under Section 2 of the various Wage Orders (the “Definitions” section), the Industrial Welfare Commission defines an outside salesperson as “any person, 18 years of age or over, who customarily and regularly works more than half 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.” Contrary to the federal regulation, the California Wage Orders place a quantitative limitation on the amount of time the employee must work outside of the business establishment.

9. Domestic Companion Exemption

Federal Law

The FLSA also exempts from overtime pay requirements those individuals engaged in providing domestic companionship services to the aged or infirm in private residences. 29 U.S.C. § 213(a)(15) provides that overtime compensation under the FLSA do not apply to “any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).” Since enactment of the exemption, employees were exempt from overtime pay provided the individual did not spend more than 20% of their work time on “general household work” considered incidental services (such as bathing, driving, feeding, grooming, or performing housekeeping work). In other words, the exemption applied to those individuals who were retained clearly for “companionship services,” such as playing cards, conversing, or taking walks with the aged or infirm individual.

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161 Id. at 5.
162 This exemption is different than the “enterprise” coverage the FLSA provides pursuant to 29 U.S.C. Section 203(r)(2)(A) for an “institution primarily engaged in the care of the sick, the aged, mentally ill or defective who reside on the premises of such institution”. See Probert, et al. v. Family Centered Services of Alaska, Inc. et al, 651 F.3d 1007 (9th Cir. 2011) (Private homes in Alaska housing up to 5 “severely emotionally disturbed” children and employing “House Parents” not covered because (a) not “primarily engaged” in providing “care” (meaning “treatment”) and (b) because primarily providing a residence and not an “institution” (like a medical care facility) of the type the FLSA covers).
Even domestic companion workers employed by third-party providers instead of the private individual or his/her family could qualify for the exemption.\textsuperscript{163}

However, on September 17, 2013, the U.S. Department of Labor issued a Final Rule updating its regulations at 29 C.F.R. Part 552 to narrow the companionship exemption to the FLSA. Beginning January 1, 2015, the FLSA’s minimum wage and overtime protections will become applicable to approximately two million in-home health care workers currently not subject to the FLSA. The DOL achieves this expansion of coverage by revising the definitions used to apply the companionship exemption, and prohibiting application of the exemption to individuals employed by third-party agencies or businesses.

Currently, the FLSA exempts domestic service employees employed to provide companionship services for individuals who are unable to care for themselves due to age or infirmity from minimum wage and overtime requirements under the FLSA.\textsuperscript{164} “Companionship services” means those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs, and includes household work “related to the care of the aged or infirm person,” such as meal preparation, bed making, clothes washing, or other similar services.\textsuperscript{165} Such domestic service worker may also provide general household work, provided that such work does not exceed 20 percent of the total weekly hours worked. Additionally, domestic service employees that reside in the employer’s household are currently exempt from overtime requirements established under the FLSA, and individuals employed by an employer or agency other than the family or household using such services are exempt from the FLSA’s minimum wage and overtime pay requirements.

However, with the new Final Rule, the DOL eliminates the exemption available to domestic care workers employed by an employer or agency other than the family or household using such services. Furthermore, the 20 percent limitation on household work relates not only to general household work, but the services related to the care of the aged or infirm individual (whereas before such services related to the care of the individual was outside the 20 percent limitation). Going forward, exemption from the minimum wage and overtime requirements under the FLSA will apply only to those individuals who spend at least 80 percent of their time providing true fellowship, such as conversing, playing cards, reading, or accompanying the individual on walks or errands.

\textsuperscript{163} Long Island Care at Home, Ltd. V. Coke, 551 U.S. 158 (2007).
\textsuperscript{164} 29 C.F.R. § 552.2(b)(2).
\textsuperscript{165} 29 C.F.R. § 552.6.
Finally, employers of live-in domestic service workers are now required to maintain an accurate record of hours worked.

California Law

The Final, but not yet legally effective, federal regulations would actually make the federal domestic companion exemption more narrow than California’s own companionship exemption standard. Pursuant to IWC Wage Order 15, California exempts “personal attendants” from overtime and minimum wage requirements provided the employee is a “person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision.” In other words, employees of third-party companionship businesses are still exempt so long as they work in the aged or infirm individual’s private household (rather than in a residential care facility). Similar to the federal standard, workers providing companionship services qualify for the exemption so long as less than 20% of their time is spent on general household services.

B. Regular Rate of Pay

An employer who requires or permits an employee to work overtime (more than 40 hours in a workweek\(^{166}\)) is generally required to pay the employee premium pay for such overtime work pursuant to the Fair Labor Standards Act (“FLSA”). This overtime pay is calculated based on the “regular rate of pay.”\(^{167}\) That is, an employer must pay non-exempt employees for overtime at a rate that is not less than one and one-half times the employee’s regular rate of pay.\(^{168}\)

Regardless of how an employee is compensated (e.g., hourly, salary, commission, piecework, etc.) the regular rate is always calculated as an hourly rate. As discussed in more detail below, this hourly rate is typically calculated by dividing the employee’s total “remuneration”\(^{169}\) in a given workweek (other than any statutory exclusions) by the total number of hours the employee worked during that workweek. Depending on the employment arrangement, the regular rate for a particular employee may vary from week to week.

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\(^{166}\) An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. The workweek need not coincide with a calendar week; rather, it can begin on any day and at any hour of the day. 29 C.F.R. § 778.105

\(^{167}\) F.L.S.A. §§ 7(a)(1) and (e).

\(^{168}\) 29 U.S.C. § 207(a).

\(^{169}\) “Remuneration” includes all hourly wages, salary, piecework earnings, commissions, bonuses, and the value of meals and lodging, unless excluded pursuant to statute. 29 U.S.C. § 207.
As discussed in more detail below, payments which are not part of the regular rate include 1) pay for expenses incurred on the employer's behalf (e.g., reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer’s interests and properly reimbursable); 2) premium payments for overtime work; 3) true premiums paid for work on Saturdays, Sundays, holidays and/or call-back time; 4) discretionary bonuses; 5) gifts and payments in the nature of gifts on special occasions; 6) and payments for occasional periods when no work is performed due to vacation, holidays, or illness.170

1. **Hourly Employees**

The regular rate of pay for an hourly employee who receives only his or her hourly compensation is the employee’s hourly rate.171 For example, the regular rate of pay for an employee who is paid $15 per hour, and who receives no other remuneration, is $15. If, however, the employee also receives other forms of non-excluded compensation (e.g., commissions and non-discretionary bonuses), the regular rate of pay is calculated by adding together the employee’s total compensation for the workweek and dividing it by the total number of hours the employee worked in that week.172 So, for example, the hourly rate calculation for an employee who works 48 hours in a workweek, is paid an hourly rate of $15.00 per hour, and receives $250.00 in commissions would be as follows:

\[
48 \text{ hours} \times \$15.00 = \$720.00
\]
\[
\$720.00 + \$250.00 \text{ in commissions} = \$970.00
\]
\[
\$970.00 \div 48 \text{ hours} = \text{regular rate of } \$20.21.
\]

Therefore, the employee’s overtime rate would be calculated by multiplying one-half of the regular rate by the eight hours of overtime the employee worked ($10.11 \times 8 = \$80.88$). The employee’s total compensation for the week would, thus, be $1,050.88 ($720.00 + $250.00 + $80.88).173

2. **Non-Exempt Salaried Employees**

Overtime for non-exempt salaried employees is computed by dividing the salary by the number of hours which the salary is intended to compensate.174 If, however, a non-exempt

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171 29 C.F.R. § 778.110(a).
172 29 C.F.R. § 778.110(b).
173 Id.
174 29 C.F.R. § 778.113(a).
employee is paid a salary based on a period that is longer than a workweek (e.g., a month), the employer must calculate the weekly equivalent before calculating the regular rate. See also, Section 11 below, regarding fluctuating hours for non-exempt salaried employees.

3. Commissioned Employees

Commissions are considered remuneration and must be included when calculating the employee’s regular rate of pay. A non-exempt commissioned employee’s regular rate of pay is, therefore, calculated by dividing the employee’s total commissions for the workweek by the number of hours the employee worked during that week. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis. Likewise, it does not matter whether the commission earnings are computed and/or paid daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The employer must include these amounts in the employee's regular rate.

4. Pieceworkers

Employees who are paid a specified sum for each completed task or procedure are piece-rate workers. Employees who are compensated on a piece-rate basis must be paid an overtime premium based on their regular rate of pay for overtime hours worked (i.e., hours in excess of 40 in a workweek under federal law).

A pieceworker’s regular rate of pay is calculated in one of two ways:

(1) The most common method is to calculate the rate by dividing the pieceworker’s total earnings for the workweek by the number of hours worked during the workweek.

(2) The second and less frequently used method, is to pay the employee at a rate not less than one and one-half times the piece rate for each piece produced during the overtime hours. The employee, however, must agree to this calculation method in advance of the performance of the work.

175 Keep in mind, however, many employees who receive commission are exempt under the Retail Sales Exemption or the Outside Sales Exemption.
176 29 C.F.R. § 778.117
177 29 C.F.R. § 778.418
5. **Non-Cash Payments**

An employee’s wages may take the form of board, lodging or other facilities. Pursuant to the FLSA, an employer must consider such wages when computing an employee’s regular rate of pay, unless they are excluded from wages under a collective bargaining agreement. So, for example, if an employer provides meals and lodging to its employee in addition to cash wages, the “reasonable cost” of the meals and lodging must be included when calculating the employee’s regular rate of pay. The “reasonable cost” of the non-cash wages cannot be greater than the lesser of 1) the actual cost of the board, lodging, or other facilities, or 2) the fair rental value of the lodging or fair price of the meals. The cost of furnishing “facilities” that are primarily for the benefit or convenience of the employer are not be recognized as reasonable and, therefore, are not included in computing wages. The regulations provide the following examples of facilities that are for the benefit or convenience of the employer: (i) tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; and (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

6. **Bonuses**

Whether bonuses are included in calculating the regular rate of pay is dependent on the type of bonus. Specifically, “discretionary bonuses” are not included in the calculation of an employee’s regular rate of pay. A bonus is discretionary if both the fact that the payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of a given period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. So, for example, a Christmas bonus that is purely a gift for past services and is not based on the employee’s hours worked,

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178 “Other facilities” are wages akin to board and lodging. The regulations state that the following fall within the meaning of the term: “Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment. . . . “Shares of capital stock in an employer company, representing only a contingent proprietary right to participate in profits and losses or in the assets of the company at some future dissolution date, do not appear to be ‘facilities’ within the meaning of the section.” 29 C.F.R. § 531.32(a) and (b).
179 F.L.S.A. § 3(m); 29 C.F.R. Part 531.
180 29 C.F.R. § 531.3.
181 Id.
182 Id.
183 29 C.F.R. § 778.211
production, or efficiency is a discretionary bonus.\textsuperscript{184} Likewise, an end of year bonus that is based on performance and has no guaranteed amount is also discretionary.

In contrast, a bonuses that an employer pays based on production, efficiency, accuracy, attendance, time served with the company, as well as signing bonuses, are non-discretionary bonuses and are included in calculating the regular rate of pay.\textsuperscript{185} Thus, if an employer promises to give its employee a $1,000.00 bonus if the employee sells 100 widgets by a certain date, the bonus is non-discretionary. Likewise, a bonus that an employer promises to an employee to encourage the employee to stay with the company is also non-discretionary.

If a non-discretionary bonus covers only one weekly pay period, the bonus amount is simply added to the employee’s other non-excludable wages for the week, and then divided by the hours worked, to calculate the regular rate of pay. Non-discretionary bonuses, however, are more commonly meant to cover a period of time that is longer than a workweek. In this situation, the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until then, the employer may pay the employee compensation for overtime at one and one-half times the hourly rate, exclusive of the bonus. When the amount of the bonus can be ascertained, the employer must apportion the bonus back over the workweeks of the period during which it was “earned.” The employee then is entitled to receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.\textsuperscript{186}

If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, the regulations permit adoption of some other reasonable and equitable method of allocation. For example, it might be reasonable and equitable to assume that the employee earned an equal amount of bonus each week or each hour of the period to which the bonus relates.\textsuperscript{187}

In some instances, the contract or bonus plan may also provide for the simultaneous payment of overtime compensation due on the bonus. For example, a contract made prior to the

\textsuperscript{184} This is true even though the bonus is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. Therefore, a Christmas bonus paid (not pursuant to contract) in the amount of two weeks’ salary to all employees and an equal additional amount for each five years of service with the firm would be excludable from the regular rate under this category. \textit{Id.}

\textsuperscript{185} 29 C.F.R. § 778.211(c)

\textsuperscript{186} 29 C.F.R. § 779.209 (a)

\textsuperscript{187} 29 C.F.R. § 779.209 (b)
performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. This is often referred to as a “percentage of total earnings bonus.” In this circumstance, payments according to the contract will satisfy in full the overtime provisions of the FLSA and no additional overtime will be required. In other words, these bonuses are excluded from the regular rate of pay. This is not true, however, where this form of payment is used as a device to evade the overtime requirements of the FLSA rather than to provide actual overtime compensation.188

7. Gifts

Section 7(e)(1) of the FLSA states that the regular rate need not include “sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency . . . .”

To qualify for exclusion under section 7(e)(1), the bonus must be actually a gift or in the nature of a gift. As discussed above, if the bonus is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. In addition, if the payment is so substantial that one can assume that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Likewise, if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.189

8. Shift Differentials

A “shift differential” is a premium paid to an employee for working an undesirable shift (e.g., a graveyard shift), or for performing arduous, hazardous, or dirty work. An employer must include these differentials in calculating the regular rate of pay.190

9. Retroactive Pay Increases

If an employer retroactively increases an employee’s pay, the employer must go back in time and adjust the employee’s regular rate of pay for each workweek in which the employee worked overtime during the period that the retroactive pay increase covers.191 For employees

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188 29 C.F.R. § 779.210  
189 29 C.F.R. § 779.212; see also, supra, fn. 18.; 29 USC § 207(E)(1)  
190 29 C.F.R. § 778.207(b)  
191 29 C.F.R. §§ 778.303 and 778.106
who work a substantial amount of overtime, the employer may want to consider whether a retroactive increase is appropriate in light of the retroactive overtime liability.

10. **Employees Paid Two or More Regular Rates of Pay**

There are two methods for calculating the regular rate of pay for employees who are paid different straight time rates of pay (perhaps for different kinds of work) during the work week:

1) **Weighted Average Method.** This method automatically applies, unless the conditions in the second method (discussed below) are satisfied. Using the weighted average method, the employee’s straight time wages for the workweek at all applicable rates of pay are divided by her total hours worked during the workweek at all jobs. So, for example, if an employee works 38 hours during a workweek at $10.00 per hour and 6 hours at $12.00 hour, her regular rate of pay (or weighted average pay) is $10.27. This is calculated by adding together her straight time pay for the week ((38 hours x $10.00) + (6 hours x $12.00) = $452.00) and then dividing that figure by the total number of hours she worked during the workweek (44). The employee is, therefore, entitled to one half of the weighted rate of $10.27 as an overtime premium ($5.14) for the four overtime hours she worked. [Note: in this example, the employee has already been paid straight time for her overtime hours.]

2) **Rate-In-Effect Method.** Alternatively, employers can agree with the employee to compensate overtime work at the rate of time and one-half the bona fide rate applicable to the work when it is performed during non-overtime hours. This method can only be used if the employee and the employer have a prior agreement to compute overtime in this manner, and when the employee is performing two or more different types of work. Several other conditions, which are explained in detail in the regulations, must also be satisfied for an employer to utilize this method.

11. **Fluctuating Hours**

A non-exempt employee may have hours that fluctuate from week to week. An employer may pay these employees a salary pursuant to a clear, mutual understanding that the employee will receive a fixed amount of straight-time pay regardless of the number of hours the employees works in a workweek. Under these circumstances, the regular rate varies from week to week depending on the number of hours the employee works. Such an arrangement is permissible under the F.L.S.A. so long as (a) the amount of the salary is sufficient to provide compensation

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192 FLSA § 7(g)(2); 29 C.F.R. §§ 778.415 – 778.421.
193 *Id.*
to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of the hours work is greatest, and (b) the employee receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than **one-half** the employee’s regular rate of pay.\(^{194}\) (emphasis added).

So, for example, if the employer pays a non-exempt employee a salary of $1,000.00 per week as straight-time pay for a position that fluctuates between 40-55 hours of work per week, such arrangement is permissible under the F.L.S.A. since the regular rate of pay during the week the employee works the greatest ($1,000 weekly salary divided by 55 hours of work = $18.18 per hour) exceeds the minimum wage rate set by the F.L.S.A. In calculating overtime, the employer must use the regular rate for that particular week to determine the one-half figure to add in compensation for overtime. So, for the week the employee worked 55 hours, the employee’s regular rate of $18.18 per hour is used to calculate how much compensation the employer owes for the 15 hours of overtime above 40 hours:

\[
\text{\$9.09} \text{ (which is one-half the regular rate since the employer already paid the regular rate for the hours from the set salary)} \times 15 \text{ hours overtime} = \text{\$136.35 in overtime compensation.}
\]

Where the same employee only worked 46 hours in the week, the calculation would be:

\[
\frac{\$1,000}{46 \text{ hours}} = \$10.87 \text{x 6 hours overtime = \$65.22 in overtime compensation}
\]

Note the bolded language above. While the typical overtime rate is one and one-half times the regular rate, that is not the case when a non-exempt employee is paid a fixed salary for fluctuating hours. “Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate under the salary arrangement.”\(^{195}\)

**IV. WAGE-HOUR CLASS LITIGATION POST–DUKES**

In recent years, employers have obtained little relief from the onslaught of federal and state wage-hour claims Plaintiffs have brought in various forms of class litigation. These claims also routinely “blackboard” large damage settlements and verdicts/judgments given back pay remedies, liquidated damages, statutory penalties, (typically prejudgment) interest calculated (typically) over many years, and attorneys’ fees.

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\(^{194}\) 29 C.F.R. § 778.114

\(^{195}\) Id
With the U.S. Supreme Court’s ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast v. Behrend*, 133 S.Ct. 1426 (2013), however, the employer community as a whole has finally found relief from the large volume of class action wage-hour lawsuits even while continuing to suffer settlements and judgments for those class action cases which survive. Despite the jubilation the *Dukes* decision elicited from employers, companies must nonetheless remain “eternally vigilant” in the wage-hour arena since many employers (a) have not completely obviated class action claims by adopting arbitration agreements not providing for class action claims, and (b) still use a variety of uniformly applied compensation policies which will satisfy the *Dukes*’ stringent commonality requirement (the lack of which is otherwise the almost lone stumbling block to wage-hour class certifications). Moreover, the courts continue to certify “Collective Actions,” which the FLSA authorizes outside of Rule 23 of the Federal Civil Rules of Procedure (FRCP), and currently largely still do so applying a lesser standard than the *Dukes*’ “rigorous analysis” standard. Indeed, legal battles are currently unfolding in the courts, discussed below, as to whether FLSA collective actions, too, should be reigned in and subject to the “rigorous analysis” the *Dukes* and *Comcast* case decisions require in purported Rule 23 class actions.\(^{196}\)

A. What *Dukes* Meant for Wage-Hour Class Actions

The *Dukes* decision had an immediate and significant impact on wage-hour class actions by causing most of them to now fail class certification. Nonetheless, while plaintiffs face more stringent commonality proof standards, the facts of wage-hour claims often survive the rigorous analysis *Dukes* demands. Thus, the true effect of *Dukes* appears to affect primarily the type of evidence plaintiffs must now provide to establish commonality.

1. Evidentiary Hurdles Regarding Commonality Following *Dukes*

The “rigorous analysis” standard the U.S. Supreme Court established in *Dukes* now holds those urging certification to a stringent evidentiary standard to satisfy Rule 23(a)(2)’s “commonality” requirement. As previously noted, plaintiffs must now put forward evidence of facts common to resolution of “an issue that is central to the validity of each one of the claims in one stroke.”\(^{197}\) Proof of commonality now requires plaintiffs urging class certification to show that purported class members suffered the same harm, rather than to merely proffer only “representative evidence” of what some class members experienced, as had commonly been

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\(^{196}\) Section 216(b) of the FLSA provides that employees may maintain an action (known as a “collective action”) for a minimum wage violation or unpaid overtime on behalf of themselves and others who are “similarly situated.” Those employees may, upon receiving notice, opt into a case by filing a written consent with the court.  

\(^{197}\) *Wal-Mart Stores, Inc. v. Dukes*, at 2551.
Plaintiff’s wont in the past 30 years. In other words, plaintiffs must now establish an unlawful corporate policy or practice common to all putative class members rather than just an unrepresentative sampling of the company’s treatment of some of the allegedly affected employees (as many courts had allowed before the Dukes decision).

This new requirement has already led to the decertification or denial of class certification in numerous pending wage-hour cases. Companies have been very successful in citing to the Dukes decision to cause the courts to deny class action certification or to decertify existing class certification orders in cases in which plaintiffs relied upon sample evidence the Plaintiff employees have claimed was representative of the larger putative class. Reliance upon testimony or affidavits of a small sample of putative class members that they were similarly situated and suffered a common harm may not only precipitate only individualized inquiry, but that reliance will typically preclude class treatment because there is no common explanation which satisfies each individual’s claim. Even apart from a rigorous review of whether claims supporting liability attached to the class in a common way, post-Duke case decisions have damned and dismissed the use of “Trial by Formula,” the previously popular approach using an algorithmic formula to identify common damages. These dismissals are largely due to the shortcomings in many Plaintiff statistical damages analyses which fail to provide a complete description of all potential variables explaining why any disparities exist, or failing to account for instances of error within the putative class.

198 See, for example, Cortez v. Best Buy Stores, LP, 2012 U.S. Dist. LEXIS 15190 (C.D. Cal. January 25, 2012) [denial of Motion for Class Certification based on plaintiffs’ claims relying upon one-on-one oral statements about local managers denying overtime or meal and rest periods that applied at most to a store as opposed to an overall state-wide policy. Furthermore, facts relating to the company’s alleged falsification of time records allegedly to avoid overtime payments could stem from legitimate reasons determinable only on a case-by-case basis]; Ginsburg v. Comcast Cable Communications Mgmt. LLC, 2013 U.S. Dist. LEXIS 139873 (W.D. Wash. 2013) [plaintiffs’ decision to use “representative evidence” as to individualized questions about off-the-clock work insufficient to warrant reconsideration of denial of class certification]; Farmer v. DirectSat USA, LLC, 2013 U.S. Dist. LEXIS 79825 (N.D. Ill. 2013) [plaintiffs’ representative evidence insufficient to cure variances in commonality, warranting decertification of the class].

199 Hughes v. Winco Foods, 2012 U.S. Dist. LEXIS 2469 (C.D. Cal. January , 2012) [claims for missed meal and rest periods not subject to class certification since the issue of management approval necessarily relies upon the decision-making process of each individual manager and reliance on factors unique between stores, departments, and each employee’s job functions. The only true uniform policy in place at the company was management discretion, which the Dukes decision expressly rejected to establish commonality]; McKeen-Chaplin v. Provident Sav. Bank, FSB, 2013 U.S. Dist. LEXIS 155869 (E.D. Ca. 2013) [deposition testimony and declarations of three individuals insufficient to demonstrate that the referenced hours worked are similar to the hours underwriters worked at other offices]; Smith v. Family Video Movie Club, Inc., 2013 U.S. Dist. LEXIS 54512 (N.D. Ill. 2013) [testimony and declarations from nine putative class members insufficient to demonstrate by a preponderance of the evidence that claims are common to the proposed class and capable of class-wide resolution].

Corporate attacks on the seemingly inevitable plaintiff employee attempt in previous and still pending wage-hour litigation to use so-called “representative sampling” techniques rest on a theory that the company’s due process rights are violated by preventing the defendant company to raise affirmative defenses as to each individual claim. Post-*Dukes*, these corporate “due process denial” claims attack the plaintiff employee’s sample as not drawn in a scientifically appropriate way (and thus the sample is not truly “representative”) or attack the sample volume the plaintiff employee drew as insufficient to make a “statistically significant” showing.\(^\text{201}\)

Indeed, the “due process” holding of the *Dukes* case raises profound questions in any class action litigation as to whether courts may entertain use of so-called “pro rata formula relief” damages calculations at trial. (Indeed, almost all class action lawsuits have historically been settled using a damages formula the parties agree upon and then apply uncritically to the entire class as though each member of the class were a victim of the same injury and suffered the same damages in the very same way: i.e. every employee who worked off the clock will be paid X-many dollars for each day payroll records show they were at work—even though one employee may have worked no off-the clock work on one Monday or another might have worked 15 minutes off-the-clock on that Monday and another might have worked 30 minutes off-clock…or, race/sex failure-to-hire case settlements typically provide the same dollar award to class members regardless of their post-rejection experience to mitigate their damages by obtaining alternative employment—even though some might have been already employed and suffered scant financial damages while others may have been unemployed at time of application/rejection and might have remained unemployed for many months post-rejection). Not only have plaintiff employees and government prosecutors widely relied on “pro-rata formula relief,” but also most corporate defendants warmly embrace formula relief as a practical tool to relieve the cost and time burden of otherwise so-called “Phase II” damages hearings in which every member of a certified class must come to the witness stand and prove up his/her individualized damages. Such Phase II damages hearings are EXCEEDINGLY rare in the history of class action litigation and settlements in America.

However, those plaintiffs able to attack a *uniformly applied* corporate “wooden rule” operating as either a written policy or unwritten (but uniformly applied) practice are able to maintain class action claims against the employer. In the wage-hour context, algorithmic compensation plans are susceptible to class treatment because of their universal application free

\(^{201}\) *Id.* (Trial by Formula, in which a sample set of the class members would be selected as to whom liability for sex discrimination and any resulting back pay would be determined and applied across the entire remaining class, is impermissible as it fails to allow for individualized proceedings on affirmative defenses available to the employer to each claim).
from manager discretion.\textsuperscript{202} Thus, as previously suggested, the impact of \textit{Dukes} in terms of any raised evidentiary standard establishing “commonality” is muted by the existence of such policies. As such, \textit{Dukes} has not precluded a finding of class claims as to wage allegations where the evidence tends to rely less on representative testimony or sampling, and more on pay plans or compensation packages universal in application, without discretion and across all similarly situated employees.\textsuperscript{203} Additionally, circumstances surrounding salary or wage requirements applicable to overtime exemptions could warrant class certification if the at-issue employees performed the same or similar services. So, if an employer has uniform corporate-training programs for individuals in a certain position, along with uniform job descriptions, training, and responsibilities, conditional class certification will occur.\textsuperscript{204}

\textbf{B. FLSA Collective Actions}

With some early success, companies have recently begun to attack FLSA Collective Actions by seeking to cause the courts to subject them to the same kind of “rigorous analysis” \textit{Dukes} now requires of purported FRCP 23 class actions.

FLSA collective actions are unique and distinct from Rule 23 class actions. While FLSA collective actions are similar in that a named plaintiff (or plaintiffs) files suit on behalf of himself and other similarly situated employees, FLSA collective actions are the only avenue by which a party may assert wage and hour claims under the FLSA (in other words, Rule 23 class actions cannot be used to assert wage and hour claims brought under the FLSA but are rather used to pursue wage and hour claims under state laws arising in federal court).\textsuperscript{205}

\begin{itemize}
  \item \textsuperscript{202} \textit{Jones v. Farmers Ins. Exchange}, 221 Cal. App.4th 986 (2013) [common issues did predominate and class certification would provide substantial benefits to litigants and the court where plaintiffs’ theory of recovery relied upon employer’s application of a uniform policy denying compensation for work performed at home before the beginning of a scheduled shift].
  \item \textsuperscript{203} \textit{See Ross v. RBS Citizens}, 2012 U.S. App. LEXIS 1478 at pp. 22-24 (7th Cir. 2012) [Class certification upheld given existence of company-wide policy compelling performance of work duties without payment of overtime which established “common fact” or issue explaining claim for overtime wages]; \textit{McKee v. Petsmart, Inc.}, 2013 U.S. Dist. LEXIS 174123 (D. Del. 2013) [uniform job descriptions established the requisite “modest factual showing” sufficient to conditionally certify FLSA collective action of purported class of current and former pet store operations managers ]; \textit{Petrone v. Werner Enterprises}, 2013 U.S. Dist. LEXIS 96375 (Neb. 2013) [class certification granted as to wage-hour claims based on common injury to class members resulting from uniform logging of time, uniform calculation of pay based on time logs, and calculation being in violation of Nebraska statutes].
  \item \textsuperscript{204} \textit{McKee v. Petsmart, Inc.}, 2013 U.S. Dist. LEXIS 174123 (D. Del. 2013) [class of current and former pet store operations managers conditionally certified as to FLSA collective action based on uniform job descriptions establishing sufficient “modest factual showing” for conditional certification].
  \item \textsuperscript{205} \textit{Knepper v. Rite Aid Corp.}, 675 F.3d 249, 257 (3d Cir. 2012) [“the plain language of this provision bars opt-out class actions to enforce the provisions of the FLSA under the well-established principle that, where Congress has provided a detailed remedy, other remedies are unavailable”].
\end{itemize}
Additionally, the certification process for FLSA Collective Actions has historically differed in at least three major ways from Rule 23 class actions. First, while Rule 23 class actions do not require the consent of the putative class members to be included in the class (allowing for similarly situated employees to “passively” join the litigation by doing nothing), FLSA collective actions require an individual to actively “opt-in” to be included in the litigation.\footnote{206}{See 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party [to an FLSA action] and such consent is filed in the court in which such action is brought”).}

Secondly, while many courts have applied a reduced legal standard when certifying FLSA Collective Actions relative to the requirements of FRCP 23, following the \textit{Dukes} case decision the door is now open to the argument that the \textit{Dukes} “rigorous analysis” standard for “commonality” should be applied to the question whether employees are “similarly situated” for class certification purposes in FLSA Collective Actions.\footnote{207}{Hipp v. Liberty National Life Insurance Co., 252 F.3d 1208 (11th Cir. 2001) [held that the similarly situated requirement is more elastic and less stringent than FRCP 23 governing the joinder of plaintiffs]; Smith v. Sovereign Bancorp, Inc., 2003 U.S. Dist. LEXIS 21010 (E.D.Pa. Nov. 13, 2003) [\textit{Dukes} did not affect initial certification of a class as a “collective action”]; Bosley v. Chubb Corp., No. 04–4598, 2005 U.S. Dist. LEXIS 10974, at *7–9 (E.D.Pa. Jun. 3, 2005) [to determine whether the proposed group of plaintiffs is “similarly situated,” and therefore qualified to proceed as a conditional collective action, a district court applies a two-step test. In the first step, which is assessed early in the litigation process, the plaintiff at most must make only a “modest factual showing” that the similarly situated requirement is satisfied]; Harris v. Healthcare Servs. Grp., Inc., No. 06–2903, 2007 U.S. Dist. LEXIS 55221, at *2 (E.D.Pa. Jul. 31, 2007) [the second step of the collective action certification process will be conducted at the close of class-related discovery, at which time this Court will conduct “a specific factual analysis of each employee’s claim to ensure that each proposed plaintiff is an appropriate party”].}

A secondary question for those courts willing to apply the \textit{Dukes} “rigorously analysis” standard to FLSA collective actions is whether they should do so at the time the Plaintiff first seeks “conditional recognition” that the case is a collective action (i.e. “first stage”). Alternatively, should the court only apply the \textit{Dukes} “rigorously analysis” standard at the so-called “second stage” (after discovery has been had and the full facts of the case may come before the court).

Finally, Plaintiffs’ counsel must be aware that while a Rule 23 class action tolls the statute of limitations for all class members upon the filing of a complaint by a putative class representative, a FLSA collective action does not toll the statute of limitations. Rather, the statute of limitations continues to run until such time an employee files his or her “opt-in” consent with the court in the underlying action.\footnote{208}{29 U.S.C. § 256; see also Redman v. U.S. West Bus. Resources, Inc., 153 F.3d 691 (8th Cir. 1998).}

Even though there are such differences between a Rule 23 class action (looking for “commonality”) and a FLSA collective action (looking for “similarly situated” employees),
almost every circuit has exercised judicial discretion to hold that there is no “inherent incompatibility” to allow a matter to proceed simultaneously with both Rule 23 claims and FLSA collective action allegations. 209 Indeed, as recently as April 2013 the Ninth Circuit Court of Appeals affirmed its position that there is no inherent incompatibility in maintaining both a Rule 23 class action and a FLSA collective action in the same case. 210 In reviewing the intent of the FLSA, the Ninth Circuit held that the FLSA’s plain text does not suggest that a district court must dismiss a state law claim that would be certified using an opt-out procedure since the opt-in requirement extends only to FLSA claims, and the FLSA expressly permits more protective state labor laws to co-exist. 211 In other words, the fact that Rule 23 class actions use an opt-out mechanism while FLSA collective actions use an opt-in mechanism does not create a conflict warranting dismissal of the state law claims.

1. Split in Authority as to Whether the Standard in Dukes Regarding Proving Commonality Applies to FLSA Collective Actions

In recent federal cases considering FLSA collective action class certifications, several courts have denied certification where proof was lacking that plaintiffs’ alleged injuries resulted from a single, unified corporate pay policy or practice. In other words, the absence of facts showing a “common” uniform policy or practice applicable to all claimants did not warrant certification of the at-issue FLSA collective action. These case decisions thus signal a possible historic harmonic convergence of FLSA collective action certification law with the law applicable to FRCP 23. However, the majority of courts currently remain committed to applying a less-stringent standard than Dukes to determine initial certification of a FLSA collective action. For these courts, the procedural mechanism for certification of FLSA collective actions does not require a “rigorous analysis” when the court conducts “a specific factual analysis of each employee’s claim to ensure that each proposed plaintiff is an appropriate party.” 212 When rejecting the “rigorous analysis” standard Dukes put forward, courts often rely upon prior case law precedent to hold that FLSA collective actions require a far less rigorous standard than Dukes established (and often referred to as a mere “modest factual showing”) to conditionally certify a purported FLSA collective class, especially at the initial, conditional certification

210 Busk v. Integrity Staffing Solutions, Inc., 713 F.3d 525 (9th Cir. 2013).
211 Id. at pp. 528-529.
stage.213 Within the Ninth Circuit, at least one district court has specifically rejected application of the *Dukes* standard to grant certification of a FLSA collective action since it would be “contrary to the weight of authority holding that the FLSA’s ‘similarly situated’ requirement is less stringent than Rule 23’s standard for class certification.”214

2. **Decisions Using the Dukes Standard to Deny Conditional Certification**

None of the collective action decisions rejecting application of the *Dukes* standard to FLSA actions, however, address whether the *Dukes* standard is inappropriate to apply at the “second stage” of the process in which an employer can seek to decertify a conditionally certified FLSA collective action class. Indeed, several decisions rejecting application of *Dukes* clearly state that the reasoning rests upon the lenient standard available at the conditional certification stage only, and explicitly do not reject use of the *Dukes*’ evidentiary standard as to the second stage of FLSA collective action class certifications.215

Furthermore, several district courts have applied the *Dukes* rigorous analysis standard to deny conditional certification of FLSA collective actions. Common to each of these case decisions were company policies that relied upon management discretion to individually implement pay decisions. This fact then caused these courts to cite *Dukes* in support of their conclusion that individualized decision-making was inappropriate for class certification in the final (or “second stage”) analysis.216

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213 Amador v. Morgan Stanley & Co. LLC, 2013 U.S. Dist. LEXIS 19103 at pp. 23-24 (S.D.N.Y. 2013) [“[t]he weight of authority rejects the argument that *Dukes* bars certification in wage and hour cases . . . Thus, to make a modest factual showing that they were subject to a common policy or plan that violated the law, [P]laintiffs need not demonstrate that they meet the commonality requirement of Rule 23 as articulated in *Dukes*”]; see also Ware v. T-Mobile USA, 828 F. Supp.2d 948, 955-956 (M.D. Tenn. 2011) [“The Sixth Circuit has distinguished Rule 23’s more stringent criteria for class certification from the FLSA’s requirement that opt-in plaintiffs only be similarly situated and declined to apply those criteria to FLSA claims”]; Myles v. Prosperity Mortgage Co., 2012 U.S. Dist. LEXIS 75371 (D. Md. 2012) [court rejected argument that the principles announced in *Dukes* applied to FLSA collective actions since courts have generally not applied Rule 23 analysis to FLSA collective actions].


215 See Robinson v. Ryla Teleservices, Inc. 2011 U.S. Dist. LEXIS 147027 at p. 16 (S.D. Ala. 2011) [“if applicable at all, *Dukes* is not applicable at the first step of the two-step collective action certification process”]. (Emphasis added). See also Spellman v. American Eagle Express, No. 10-1764, slip op. (E.D. Pa. July 21, 2011) [“AEX may argue that *Dukes*’ analysis of what constitutes a ‘common question’ is persuasive to this Court’s analysis of whether a FLSA collective action should be certified” at the second stage of certification].

216 See Dinkel v. Medstar Health, Inc., 880 F. Supp.2d 49 (D.D.C. 2012) [since the case would ultimately turn on the way in which individual supervisors and managers exercised discretion in managing meal breaks, conditional certification would be inappropriate]; Blaney v. Charlotte-Mecklenburg Hospital Authority, 2011 U.S. Dist. LEXIS 105302 (W.D.N.C. 2011) [citing *Dukes*, court held that where management discretion exists without a company-wide policy, collective action is not appropriate under the FLSA]; Adams v. Hy-Vee, Inc., 2012 U.S. Dist. LEXIS 98590 (W.D. Mo. 2012) [where no evidence that a common policy or scheme existed, the *Dukes* decision is “illuminating” in denying conditional certification due to individualized questions of fact predominating].
More importantly, the Seventh Circuit Court of Appeals, in a decision by Judge Richard Posner, applied the *Dukes* “rigorous analysis” standard wholesale to FLSA collective actions. Specifically, Judge Posner wrote that the differences between FLSA collective actions and Rule 23 class actions are so minimal that no good reason exists to have different standards for the certification of the two different types of action.\(^{217}\) In *Espenscheid v. DirectSat USA LLC*, over 2,000 satellite technicians brought a hybrid action involving both FLSA claims and state wage-hour allegations as to alleged non-payment of off-the-clock work they performed. Finding that the remedy sought was solely backpay damages, the Seventh Circuit held that determination of such damages would require 2,341 separate evidentiary hearings. Furthermore, plaintiffs’ assertion that representative evidence would be sufficient to establish such damages was purely speculative, given that no evidence existed that the 42 representatives plaintiffs offered were in fact representative of the class as a whole, or that any statistical methodology was used to select the individual representatives.\(^{218}\) Thus, Judge Posner relied upon the *Dukes* court’s holding that plaintiffs must now establish facts common to the resolution of “an issue that is central to the validity of each one of the claims in one stroke.”\(^{219}\) In other words, Judge Posner imported the proof of commonality requirement in Rule 23 class actions into the FLSA collective action in *Espenscheid*. Thus, under *Espenschied*, those urging class certification must now show that purported class members suffered the same harm rather than to merely offer evidence representative only of the harm some class members experienced.

It thus appears that the weight of the case law is that the *Dukes* “rigorous analysis” standard will not apply at the initial class certification stage in FLSA collective actions. Nonetheless, defendant corporations would be foolish to fail to put the argument forward during this period of time when the courts are struggling with the issue and adopting different conclusions. At the same time, the weight of the (thus far relatively scant) case law is that the *Dukes* “rigorous analysis” standard will more likely than not apply at the very least at the second stage of the certification process in FLSA collective actions.

**C. Class Action Waivers in Arbitration Agreements**

Besides application of the evidentiary threshold established in *Dukes*, employers have found another avenue by which to avoid class remedies through recent court rulings upholding arbitration agreements either containing class action waivers or not specifying the availability, in arbitration, of class claims. Employers thus have at their disposal a new weapon to forestall class employment claims.

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\(^{217}\) *Espenscheid v. DirectSat USA LLC*, 705 F.3d 770, 772 (3d Cir. 2013).
\(^{218}\) Id. at 774.
\(^{219}\) *Wal-Mart Stores, Inc. v. Dukes*, supra, 131 S. Ct. at 2551.
Since the decisions of the U.S. Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l. Corp.*, 130 S. Ct. 1758 (2010) and thereafter in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), there have been a spate of case decisions denying the availability of class claims in arbitration. In *Stolt-Nielsen*, the Supreme Court held that an arbitration agreement which did not specifically allow for class claims did not allow for class claims. Accordingly, arbitration agreements which are silent as to class claims do not authorize class claims. Said another way, arbitration agreements need not specifically state that class claims are not cognizable pursuant to the arbitration agreement to be banned. Rather the absence of specific written allowance for class claims in the arbitration agreement subsequently dooms any attempt to bring class claims in arbitration.

In *AT&T*, the United States Supreme Court voiced again its strong endorsement of arbitration as a favored form of alternative dispute resolution by holding that the Federal Arbitration Act ("FAA") preempted California case law decisions holding collective and class action waivers unconscionable. The Court found that the overarching purpose of the FAA was to ensure enforcement of arbitration agreements according to their terms so as to foster arbitral proceedings. Even the often wayward Ninth Circuit Court of Appeals has recently confirmed that the FAA overrides state laws that would otherwise exclude claims from arbitration. In *Kilgore v. KeyBank Nat’l. Ass’n.*, 673 F.3d 947 (9th Cir. 2012) [affirmed by *Kilgore v. KeyBank Nat’l. Ass’n.*, 2013 U.S. App. LEXIS 7312 (9th Cir. 2013)], the Court found that in light of the AT&T decision, the FAA preempted a California common law rule established by the California Supreme Court in the case of *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), which prohibited arbitration of claims for public injunctive relief.

Nor have the Courts been sensitive to plaintiff employee concerns that the cost to put forward an individual claim would prove prohibitively high and would thus doom, as a practical matter, the ability of plaintiffs to attack and to remedy widespread, but individually minor, economic injuries. In *American Express Corp. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Supreme Court specifically rejected this argument, noting that the fact that pursuing individual litigation may be prohibitively costly in comparison to the remedy available is insufficient to suggest a person’s ability to pursue a remedy had actually been eliminated. Relying on this very same reasoning, the Second Circuit Court of Appeals recently upheld

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220 See also, *Kinecta Alternative Financial Solutions Inc. v. Superior Court*, 205 Cal. App.4th 506 (2012) [class arbitration rights may not be implied in an arbitration agreement; a party to an arbitration agreement that neither authorized nor prohibited class arbitration of claims could not be compelled to arbitrate class claims].

221 *AT&T Mobility LLC v. Concepcion*, supra, 131 S. Ct. at 1748.

222 *Kilgore v. KeyBank Nat’l. Ass’n*, supra, 673 F.3d at 960.

223 *American Express Corp. v. Italian Colors Restaurant*, supra, 133 S. Ct. at 2309-2310.
waivers of class remedies in arbitration agreements as to employee wage claims. Specifically, the Second Circuit Court of Appeals held that there was nothing to preclude such waivers and that employees could thus waive their otherwise statutory right to bring collective actions by signing arbitration agreements which did not provide for class claims.

- The *D.R. Horton* Wobble

Following a recent National Labor Relations Board case decision holding that mandatory binding arbitration provisions violate Section 8(a)(1) of the National Labor Relations Act (“NLRA”) as a matter of law, employers have to momentarily pause to consider their appetite for risk before uncritically adopting mandatory arbitration agreements with employees. See, *D.R. Horton, Inc. & Michael Cuda*, No. 12-CA-25764, 357 NLRB No. 184 (January 3, 2012).” The union-dominated Obama NLRB is currently on a well-publicized crusade to use 8(a)(1) as the sledgehammer to attempt to smash all restrictions on employees which union leaders don’t like and to also seek to make the NLRA again relevant by seeking to broaden its protections for non-unionized employees now that the unionized population among private sector employers has dwindled to an almost irrelevant approximately 7 percent of American workers. 8(a)(1) provides, of course, unionized and non-unionized employees the right to engage in “concerted action for mutual aid or protection”. Specifically, the Board, distinguishing *Concepcion* as a decision merely re-asserting the pre-eminence of federal law over conflicting state law, concluded that employers could not compel employees to waive their NLRA right to collectively pursue litigation of all potential employment claims in all forums, whether arbitral or judicial. However, many courts have declined to follow the NLRB’s *D. R. Horton* ruling.

For example, the United States Court of Appeals for the Fifth Circuit held in *D.R. Horton*’s appeal of the NLRB’s ruling against it, that the savings clause under the National Labor Relations Act was not a sufficient basis for the Board to invalidate the waiver of class procedures in a mutually agreed arbitration agreement. The Fifth Circuit reasoned that requiring a class mechanism in arbitration agreements violated the Federal Arbitration Act, the FAA did not

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225 See *D.R. Horton, Inc. & Michael Cuda*, supra, at p. 55.

exempt the NLRA from its reach and that courts must enforce arbitration agreements according to their terms.\textsuperscript{227}

V. DOL’S INCREASED ENFORCEMENT OF THE FLSA’s “HOT GOODS” PROVISION

In late Summer 2012, the Department of Labor issued “hot goods” orders to various blueberry farmers in the state of Oregon prohibiting the production or shipment of harvested blueberries based on the DOL’s determination of recordkeeping and minimum wage violations at various farms.\textsuperscript{228} The DOL indicated that it would be willing to lift the hot goods orders if farms paid “a fine and back wages, signed a consent judgment admitting wrongdoing and agreed not to contest the order even if subsequent information were to exonerate the farms.”\textsuperscript{229} In other words, the DOL has begun using the hot goods provision found in the Fair Labor Standards Act as a first step cure of wage-hour violations in its investigative and compliance process rather than to seek injunctive relief in an eventual and proper judicial proceeding.

Many employers are not willing to ship product in derogation of the DOL’s informal administrative “orders” not to ship, in our experience, even in the absence of a court-ordered injunction. This reluctance to defy the WHD investigators occurs, in our experience, because the employers either fear the expense to defend a temporary restraining order hearing (if they force the DOL to seek to obtain a hot goods injunction) and/or they are uneasy about adverse publicity surrounding the lawsuit or the merits of the wage dispute (typically because the likelihood of success on the merits is “gray”).

Such proactive restrictions on the shipment of goods during the investigative audit stage gives rise to profound substantive due process concerns for employers. Indeed, in response to the DOL’s actions, the Oregon Department of Agriculture sent a letter to the DOL on behalf of its farmers, raising serious concerns related to perceived “bullying tactics that leave growers with little option other than to consent to the demands of the department.” The state of Oregon was also sufficiently appalled at the DOL’s heavy-handedness that it additionally wrote DOL investigators stating that the State and its growers expected the DOL to conduct investigations “with professionalism and adherence to fair compliance standards and provide growers the

\textsuperscript{227} D.R. Horton v. National Labor Relations Board, 737 F.3d 344 (5th Cir. 2013)
\textsuperscript{229} Id.
ability to remedy apparent violations in a manner that is not threatening and has due process.”

The FLSA’s “Hot Goods” provision (found at 29 U.S.C. section 215(a)) makes it unlawful for any person to “transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of Section 206 or Section 207 of this title. . .”. The only entities exempted from the FLSA’s hot goods provision are the “innocent” purchaser or shipper which can establish good faith reliance upon written assurance from the producer that the goods were produced in compliance with the requirements of the FLSA. “Good faith” requires not only written affirmation that the product was produced in compliance with the FLSA, but reasonable efforts to investigate further when there is a suspicion of violations by the producer or manufacturer.

The DOL’s Wage and Hour Division uses this statutory authority to restrain the shipment of goods manufactured in violation of the FLSA. Manufacturing products using substandard labor conditions are a violation of the hot goods provision of the FLSA. The remedy for a violation is an injunction. In deciding whether to grant an injunction, the court may consider the defendant’s previous conduct and the dependability of its promises of future compliance. Neither present compliance with the FLSA nor a lack of knowledge that goods shipped were produced in violation of the FLSA’s minimum wage and overtime provisions shields a defendant from injunctive relief. The prohibition against manufacturing, producing, or shipping a good produced by a workforce not paying minimum wages and/or overtime pay may only be lifted after the business agrees to rectify all alleged violations.

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230 Doug Krahmer, Chair of the Oregon State Board of Agriculture, to Hilda L. Solis, Secretary, U.S. Department of Labor, October 10, 2012.
231 See 29 U.S.C. § 215(a) (“no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful.”).
232 See Wirtz v. Lone Star Steel Co., 405 F.2d 668, 670 (5th Cir. 1968) (“Good faith” under the act does not include ignoring the obvious; a good faith effort to comply with the FLSA would have included checking records and any further investigation necessary to ascertain the facts).
233 Jurisdiction to enforce the DOL’s injunctive powers under § 215(a) rests with 29 U.S.C. section 217, which specifically allocates authority to the United States District Courts to restrain violation of section 215.
236 Id. (quoting Herman v. Fashion Headquarters, Inc., 992 F. Supp. 677, 679 (S.D.N.Y. 1998)).
However, as evidenced by the plight of the Oregon blueberry farmers referenced above, rather than seek injunctions through the district courts as provided in 29 U.S.C. section 217, the DOL has recently begun merely taking it upon itself to issue hot goods orders (in the form of letters on WHD stationary). These Wage-Hour Division “hot goods” cease and desist letters ostensibly prohibit the shipment of any product upon the DOL’s investigative determination that a violation of the FLSA’s minimum wage and/or overtime requirements most likely exists.

The DOL believes that its aggressive action is appropriate given the purpose of the hot goods provision to protect core requirements of the FLSA (minimum wages and the right to overtime pay). Specifically, the hot goods provision was meant to effectuate the policy of 29 U.S.C. section 202 to correct, as rapidly as practicable, substandard labor conditions. As the U.S. Supreme Court noted, “Congressional intent was to make the ‘hot goods’ provision applicable to all persons. . . Exclusion from interstate commerce of goods produced under substandard conditions is not simply a means to enforce other statutory goals; it is itself a central purpose of the FLSA.” Without the hot goods order prior to judicial intervention, the provision would be ineffectual since goods would continue to flow into the stream of interstate commerce and compete inappropriately against goods made in conformity with the FLSA.

However, serious procedural due process concerns arising under the Fifth Amendment spring up where the DOL threatens to use its legal authority to seek injunctions in the courts but stops short of doing so if the employer “voluntarily” agrees to confess to a violation and stops the goods from shipping until the parties can sign a Consent Judgment. 29 U.S.C. section 217 rests the power to enjoin the shipment or production of “hot goods” within the jurisdiction of the United States District Courts, of course, and not in the DOL or the WHD. What the DOL has done, as a practical matter in the Obama administration, is to usurp the procedural rights section 217 affords of a due process hearing in federal District Court by exercising administrative “power” (not authority) to force its will on vulnerable employers in an ostensible attempt to protect the individual employees’ interest at stake.

The options available to businesses under investigation are not enticing. When the DOL determines that a violation of minimum wage and/or overtime requirements under the FLSA most likely exist, a business can either agree to issue backpay damages and enter into a Consent Decree agreeing to comply with the FLSA in the future, or the company may choose to ship the

239 See Chao v. Hospital Staffing Services, Inc., 270 F.3d 374, 387 (6th Cir. 2001) (“Interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce”).
goods before DOL can get a Temporary Restraining Order (“TRO”) from the federal District Court (if the Court is in fact willing to issue such an order). Alternatively, if the WHD fashions a forceful letter to the employer and threatens an injunction, the employer may be able to file a declaratory relief Complaint and Motion for TRO in the federal District Court to attempt to clarify matters before either missing a shipping deadline or being forced to knuckle under to the WHD’s heavy-handed pressure to quickly settle the at-issue wage claims.

J.C.F.

J.J.W.

A.L.M.
TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>Cases</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abshire v. Redland Energy Services, LLC, 695 F.3d 792 (9th Cir. 2012)</td>
<td>4</td>
</tr>
<tr>
<td>American Express Corp. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)</td>
<td>70</td>
</tr>
<tr>
<td>American Express Corp. v. Italian Colors Restaurant, supra, 133 S. Ct. at 2309-2310</td>
<td>70</td>
</tr>
<tr>
<td>Armour &amp; Co. v. Wantock, 323 U.S. 125 (1944)</td>
<td>3</td>
</tr>
<tr>
<td>AT&amp;T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)</td>
<td>2, 70</td>
</tr>
<tr>
<td>Auer v. Robbins, 519 U.S. 452, 463-64 (1997)</td>
<td>40</td>
</tr>
<tr>
<td>Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 910 (9th Cir. 2004)</td>
<td>10</td>
</tr>
<tr>
<td>Blaney v. Charlotte-Mecklenburg Hospital Authority, 2011 U.S. Dist. LEXIS 105302 (W.D.N.C. 2011)</td>
<td>68</td>
</tr>
<tr>
<td>Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1129 (9th Cir. 2002)</td>
<td>38</td>
</tr>
<tr>
<td>Brock v. Rusco Industries, Inc., 842 F.2d 270, 272 (11th Cir. 1988)</td>
<td>73</td>
</tr>
<tr>
<td>Busk v. Integrity Staffing Solutions, Inc., 713 F.3d 525 (9th Cir. 2013)</td>
<td>67</td>
</tr>
<tr>
<td>Chamber of Commerce of United States v. OSHA, 636 F.2d 464, 467 (D.C. Cir. 1980)</td>
<td>12</td>
</tr>
<tr>
<td>Chambers v. Sears Roebuck &amp; Co., 428 Fed. Appx. 400 (5th Cir. 2011)</td>
<td>15</td>
</tr>
<tr>
<td>Chao v. Hospital Staffing Services, Inc., 270 F.3d 374, 387 (6th Cir. 2001)</td>
<td>74</td>
</tr>
<tr>
<td>Chao v. Tradesmen Int’l., 310 F.3d 904 (6th Cir. 2002)</td>
<td>13</td>
</tr>
<tr>
<td>Comcast v. Behrend, 133 S.Ct. 1426 (2013)</td>
<td>1</td>
</tr>
<tr>
<td>D.R. Horton, Inc. &amp; Michael Cuda, No. 12-CA-25764, 357 NLRB No. 184 (January 3, 2012)</td>
<td>71</td>
</tr>
<tr>
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</tr>
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<td>3, 10</td>
</tr>
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</tr>
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(Continued)

<table>
<thead>
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</tr>
</thead>
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<td>24</td>
</tr>
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<td>67</td>
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<td>69</td>
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</tr>
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</tr>
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(Continued)

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</tr>
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</tr>
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</tr>
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TABLE OF AUTHORITIES

(Continued)

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Singh v. City of New York, 2008 U.S. App. LEXIS 9228 (2d Cir. Apr. 29, 2008)......................................................... 15
Smith v. Aztec Well Servicing, Inc., 462 F.3d 1274 (10th Cir. 2006)........................................................................ 76
Smith v. Batchelor, 879 Pac.2d 1364 (Utah 1994)........................................................................................................... 33
Steiner v. Mitchell, 350 U.S. 247 (1956).................................................................................................................. 4, 9
Stevins v. Provident Construction Co., 137 Fed. Appx. 198, 199-200 (11th Cir. 2005)................................................. 37
Sutherland v. Ernst & Young, 726 F.3d 290 (2d Cir. 2013)..................................................................................... 71
Takacs v. Hahn Auto. Corp., 246 F.3d 776, 782-83 (6th Cir. 2001)........................................................................ 41
Tennessee Coal, Iron & RR. Co. v. Muscoda Local 123, 321 U.S. 590, 598 (1944) ................................................. 3
Thomas v. Connor Group, 2008 U.S. Dist. LEXIS 35384 (S.D. Ind. – Indiannapolis Division)......................... 6
Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985).................................................... 8
Usery v. Pilgrim Co., Inc., 527 F.2d 1308, 1311 (5th Cir.), cert. den., 429 U.S. 826 (1976).......................... 18
Vela v. City of Houston, 276 F.3d 659, 677 (5th Cir. 2001).................................................................................. 24
Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)...................................................................................... 2, 62, 63, 65
Wal-Mart Stores, Inc., supra, 131 S. Ct. at 2548.............................................................................................................. 69
Ware v. T-Mobile USA, 828 F. Supp.2d 948, 955-956 (M.D. Tenn. 2011).................................................. 68
Whetsel v. Network Prop. Servs., 246 F.3d 897, 904 (7th Cir. 2001).............................................................. 40
White v. Digex, Inc., 149 Fed. Appx. 655,657 (9th Cir. 2005)........................................................................... 37, 38
Wilson v. County of Santa Clara, 68 Cal. App.3d 78 (1977)............................................................................. 13
Wirtz v. Lone Star Steel Co., 405 F.2d 668, 670 (5th Cir. 1968).......................................................................... 73
Young v. Cerner Corp., 2007 U.S. Dist. LEXIS 63566 (W.D.Mo. 2007).............................................................. 43

Statutes
29 C.F.R. § 552.2(b)(2).......................................................................................................................................... 23
29 C.F.R. § 552.6.............................................................................................................................................. 23
29 C.F.R. § 553.101........................................................................................................................................... 7
29 C.F.R. § 778.220........................................................................................................................................... 4
29 C.F.R. § 778.223........................................................................................................................................... 2
29 C.F.R. § 785.23............................................................................................................................................. 4
29 C.F.R. § 785.28............................................................................................................................................. 10
29 C.F.R. § 785.29............................................................................................................................................. 11
29 C.F.R. § 785.31............................................................................................................................................. 11
29 C.F.R. § 785.32............................................................................................................................................. 12
### TABLE OF AUTHORITIES

(Continued)

<table>
<thead>
<tr>
<th>Authority</th>
<th>Page</th>
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</thead>
<tbody>
<tr>
<td>29 C.F.R. § 785.34</td>
<td>14</td>
</tr>
<tr>
<td>29 C.F.R. § 785.35</td>
<td>14</td>
</tr>
<tr>
<td>29 C.F.R. § 785.36</td>
<td>13, 15</td>
</tr>
<tr>
<td>29 C.F.R. § 785.37</td>
<td>13</td>
</tr>
<tr>
<td>29 C.F.R. § 785.38</td>
<td>13</td>
</tr>
<tr>
<td>29 C.F.R. § 785.39</td>
<td>14</td>
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<tr>
<td>29 C.F.R. § 785.40</td>
<td>14</td>
</tr>
<tr>
<td>29 C.F.R. § 785.41</td>
<td>14</td>
</tr>
<tr>
<td>29 C.F.R. § 785.44</td>
<td>4, 7</td>
</tr>
<tr>
<td>29 C.F.R. § 785.47</td>
<td>9</td>
</tr>
<tr>
<td>29 U.S.C. § 203(o)</td>
<td>8</td>
</tr>
<tr>
<td>29 U.S.C. § 207(o)</td>
<td>6</td>
</tr>
<tr>
<td>29 U.S.C. § 215(a)</td>
<td>24</td>
</tr>
<tr>
<td>29 U.S.C. § 216(b)</td>
<td>15</td>
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- DOL Field Operations Handbook §31b13 ................................................................. 8
- DOL Field Operations Manual § 10b11 ................................................................. 12
- Wage & Hour Division, Field Operations Handbook § 32j16b ................................................................. 5
- Wage & Hour Opinion Letter No. 389 (September 1, 1965) ................................................................. 6