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Judges' Deskbook for the Fair Labor Standards Act (FLSA) including child labor provisions (CLA)

The Fair Labor Standards Act (FLSA or Act) was enacted in 1938 for the purpose of eliminating labor conditions detrimental to a minimum standard of living required for the general well-being of workers engaged in commerce or in production of goods for commerce. ***Overnight Motor Transp. Co. v. Missel, U.S. Md.1942***, 316 U.S. 572, ***reh'g. denied***, 317 U.S. 706 (1942). Section 216(e) of the Act contains provisions prohibiting the use of oppressive child labor. The Act applies under the following circumstances: (1) a true employer/employee relationship exists; (2) the requirements for individual or enterprise coverage are met; and (3) the work is performed in the United States or a territory of the United States. Pursuant to 29 C.F.R. § 580.13, any party dissatisfied with the decision of the ALJ may file an appeal within 30 days to the Administrative Review Board. Otherwise, the ALJ's decision becomes the final agency decision. Captions for these cases are: *Administrator, Wage and Hour Division, U.S. Department of Labor, Plaintiff v. _____, Respondent. See* 29 C.F.R. § 580.10.

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STATUTORY AND REGULATORY AUTHORITY

A. CHILD LABOR PROVISIONS
1. CODIFIED AT 29 U.S.C. § 213(E)[1]
2. 29 C.F.R. PARTS 516, 570, 575, 579, AND 580.

B. FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED
1. ENACTED IN 1938 AND CODIFIED AT 29 U.S.C. §§ 201 *ET SEQ.*
2. 29 C.F.R. PARTS 516, 531, 536, 541, 547-553, 578, AND 580.

THE RULES OF PRACTICE AND PROCEDURE TO BE APPLIED IN CASES ARISING UNDER THE FLSA ARE LOCATED AT 29 C.F.R. §§ 580.7 - 580.18.

CHILD LABOR PROVISIONS

I. GENERALLY

A. PURPOSE

The child labor provisions of the FLSA were enacted to protect working children from physical harm and to limit their working hours to prevent interference with their schooling. ***Administrator, Wage and Hour Division v. Thirsty's Inc.***, 1994-CLA-65 (ARB, May 14, 1997). *See also* ***Administrator, Wage and Hour Division v. Lynnville Transport, Inc.***, 1999-CLA-18 (ALJ, Aug. 29, 2000), *aff'd. sub. nom.,* 316 F. Supp.2d 790 (S.D. Ia. 2004) (citing to 29 C.F.R. § 570.101, the purpose of the child labor provisions are to protect the "safety, health, well-being and opportunities for schooling of youthful workers"); ***Administrator, Wage and Hour Division v. Tacoma Dodge, Inc.***, 1994-CLA-80, 88, 91, 112 (ALJ on remand, Dec. 15, 1999).

B. "OPPRESSIVE CHILD LABOR" DEFINED

The phrase "oppressive child labor" is defined at Section 3(1) of the Act as including the employment of a minor under 14 years of age, employment of minors of ages 14 and 15 in an occupation involving transportation where work is performed during precluded time periods, and the employment of minors ages 14 through 18 in any occupation in which the Secretary of Labor has found to be particularly hazardous or detrimental to their health and well-being. *See* ***Administrator, Wage and Hour Division v. Lynnville Transport, Inc.***, 1999-CLA-18 (ALJ, Aug. 29, 2000), *aff'd. sub. nom.*, 316 F.Supp.2d 790 (S.D. Ia. 2004).

C. EXEMPT FROM AUTOMATIC STAY PROVISIONS OF THE BANKRUPTCY ACT

In ***In re James H. Crockett***, Case No. 96-13449FM (Jan. 27, 1997), the bankruptcy court held that an administrative proceeding under the Fair Labor Standards Act before an

ALJ with the Department of Labor constitutes an exercise of police or regulatory powers", which places the proceeding within the exemptions to the automatic stay provisions of the Bankruptcy Code at 11 U.S.C. §§ 362(b)(4) and (b)(5).

D. PORTAL-TO-PORTAL ACT INAPPLICABLE

In ***Administrator, Wage and Hour Division v. Fisherman's Fleet, Inc.***, ARB Case No. 03-025, 2001-CLA-034 (ARB, June 30, 2004), the Board held that the Portal-to-Portal Act, by its own terms, is only applicable to "enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act"; it does not apply to actions against an employer for alleged violations of the child labor laws.

In ***United States v. Fisherman's Fleet, Inc.***, 2007 WL 4365356 (D. Mass. Dec. 12, 2007) (unpub.), when Respondent failed to pay $132,575.00 in civil money penalties awarded by the administrative law judge and affirmed by the Administrative Review Board, the Department of Labor commenced an enforcement action in federal district court. Respondent asserted that the enforcement action was time-barred by the two year statute of limitations contained at 28 U.S.C. § 2462 of the Portal-to-Portal Act. To the contrary, the district court agreed with the Department of Labor and concluded:

> Because the 'civil penalty' assessed under § 216(e) does not constitute 'liquidated damages,' the limitations period set forth in § 255 is inapplicable. In the absence of a particularized limitations period, 28 U.S.C. § 2462 provides the governing statute of limitations. Under that section, any action 'for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within *five years* from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.' (emphasis added). Because this action was filed within five years of the Administrative Review Board's Final Decision and Order, it is timely.

II. JURISDICTION

[*See also* Fair Labor Standards Act, topic VIII]

A. APPEAL TO THE ARB

1. UNTIMELY APPEAL ACCEPTED; UNIQUE CIRCUMSTANCES

In ***Administrator, Wage and Hour Division v. Lamplighter Tavern***, 1992-CLA-21 (Sec'y. May 11, 1994), the Secretary accepted an appeal under "very unusual circumstances" where no prejudice to the Administrator was established. In particular, the ALJ issued his decision on August 10, 1992. Pursuant to 29 C.F.R. §§ 580.13 and 580.14(c), the Secretary noted that an appeal must be received by him within thirty days, *i.e.*, on or before September 9, 1992. Respondent's notice of appeal was postmarked on September 8, 1992 and date-stamped as being received by the Secretary on September 10, 1992. The Secretary accepted the appeal and stated the following:

> We are essentially dealing with an appeal document that was at most a half a day late in arriving at OAA. The rule does not specifically state that OAA's date stamp shall be determinative of the time a document was actually received. It is a common practice among members of the local bar to serve time sensitive documents on OAA personally and to ask for a date stamped copy to establish timely filing. Respondent's attorney did not have that luxury, [illegible] Pennsylvania. Moreover, it cannot be [illegible] appeal did not arrive in the offices of OAA until the morning of September 10. I am reluctant to deny appeal rights to a party under these very unusual circumstances, especially when no prejudice to the Administrator has been shown. Therefore, I decline to dismiss the appeal as untimely filed. However, this should not be read as an invitation to flout the time period established in 29 C.F.R. § 580.14(c) (1993).

Slip op. at 2.

2. UNTIMELY APPEAL NOT ACCEPTED

In ***Atlantic Adjustment Co. v. U.S. Dep't. of Labor***, 2000 WL 298920 (E.D. Pa. Mar. 14, 2000) (unpub.), Plaintiff pursued a mandamus action under 28 U.S.C. § 1361 requesting that the district court accept its appeal of a civil monetary penalty assessment under the child labor provisions at 29 C.F.R. §§ 580.6(a) and 580.8(c). The Department filed a motion to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) to state that Plaintiff's appeal of the Administrator's decision was untimely filed. Under the facts of the case, a civil monetary penalty assessment was delivered to Plaintiff on September 29 and, according to the Department, the 15 day deadline for filing exceptions to the assessment was October 14. The court noted the following:

> The Plaintiff concedes that its appeal was filed late. Nonetheless, it seeks to be excused from missing the deadline because it properly relied on and complied with the representation of . . . an official in the Department of Labor. In effect, Plaintiff is invoking the doctrine of equitable estoppel against the government.

Slip op. at 2.

The district court cited to ***Heckler v. Community Health Services***, 467 U.S. 51 (1984) and ***OPM v. Richmond***, 496 U.S. 51 (1990) to find that the Supreme Court has severely limited application of equitable estoppel against the federal government. The court concluded that equitable estoppel could not be applied in the case before it:

> Plaintiff does not allege that the investigator made any false or ambiguous representations. On the contrary, he provided Plaintiff with a copy of the regulations which properly explained the time requirements for any appeal. Any incorrect information came from Mr. Salvatore of OSHA, not from the Wage and Hour Division.
>
> Even if Mr. Salvatore were deemed to be speaking for the Wage and Hour Division, Plaintiff could not under the case law have reasonably or justifiably relied on what he said. Mr. Salvatore's comments were oral, not in writing. By the time his comments were made, Plaintiff had received a copy of the regulations accurately stating the deadline for an appeal. Most significantly, Plaintiff was represented by counsel before the deadline passed.

As a result, the district court dismissed Plaintiff's complaint.

3. ALJ WITHOUT JURISDICTION DURING PENDENCY OF INTERLOCUTORY APPEAL

In ***Administrator, Wage and Hour Division v. Albertson's, Inc.***, ARB Case No. 99-106, 1999-CLA-2 (ARB, Oct. 29, 1999), the ALJ had ruled that the "informer's privilege" did not bar the production of un-redacted statements and hand-written questionnaires of 24 potential witnesses. The ALJ determined that, because the 24 potential witnesses who might testify regarding alleged child labor violations had been identified, the informer's privilege was no longer applicable. An interlocutory appeal was taken by the Administrator. Subsequently, the Administrator filed a motion for remand stating that the parties had reached a settlement and had submitted their consent findings to the ALJ for approval. The ARB remanded the case because the ALJ lacked authority to rule on the consent findings while the case was pending before the ARB.

B. JURISDICTION OF THE DISTRICT COURT

NO JUDICIAL REVIEW OF ADMINISTRATOR'S DECISION

In ***Acura of Bellevue v. Reich***, 90 F.3d 1403 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 945 (1997), the circuit court held that the Administrator's findings (that an automobile dealership violated the child labor laws) constituted an interim determination, which was not ripe for judicial review. The court held that the findings first must be reviewed by an ALJ. The dealership alleged financial hardship, which the circuit court found to be insufficient to circumvent the administrative hearing process. Consequently, it declined to assert jurisdiction over the case.

C. NO NEW HEARING PERMITTED AFTER RECORD CLOSED

In ***Administrator, Wage and Hour Division v. Merle J. Elderkin***, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB, Oct. 21, 2003), the ARB denied Respondent's request for a new hearing, which was filed three years after the ARB affirmed a civil money penalty assessment against it. Citing to 29 C.F.R. §§ 18.34(c) and 18.54(a) as well as Fed.R.Civ.P. Rule 59(a), the ARB reasoned that Respondent had "not made any showing that the material he wishe(d) to introduce at the requested new trial was not readily available prior to the closing of the record in this case."

III. STANDARD OF REVIEW

A. BY THE ALJ

The ALJ's review of the Administrator's findings is *de novo*. The regulatory provisions at 29 C.F.R. § 580.12(b) and (c) provide the following:

> (b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent committed a violation of section 12, or a repeated or willful violation of section 6 or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.
>
> (c) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented in the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.

29 C.F.R. § 580.12(b) and (c).

In ***Administrator, Wage and Hour Division v. Thirsty's Inc.***, 1994-CLA-65, slip op. at 6 (ARB, May 14, 1997), the ARB held that "[a]n increased penalty [found on ALJ review] is not a punishment levied on an employer for seeking a hearing and review, but rather a possible outcome of an adjudicator looking anew at a situation where violations of child labor laws occurred and determining that the violations were of greater gravity than the Compliance Officer and Administrator determined."

B. BY THE ARB

The Secretary's standard of review of an ALJ's decision in a Fair Labor Standards Act case is *de novo*. See 5 U.S.C. §§ 554, 557(b); 29 U.S.C. § 216(e). *See* ***Administrator, Wage and Hour Division v. Elderkin Farm***, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB, June 30, 2000) (*de novo* review is conducted by the ARB except that the ALJ's credibility determinations of a witness are entitled to deference). Where the ALJ's findings of fact are supported by ample evidence, the Secretary will adopt those findings. ***Administrator, Wage and Hour Division v. D.D. & D., Inc.***, 1990-CLA-35 (Sec'y., Apr. 3, 1995). *See also* ***Administrator, Wage and Hour Division v. Ahn's Market, Inc.***, ARB Case No. 99-024, 1997-CLA-33 (ARB, July 28, 2000) (the ARB held that it has authority to conduct a *de novo* review of the penalty assessed to determine its appropriateness); ***Administrator, Wage & Hour Division v. Ronald and Debbie Halsey***, ARB Case No. 04-061, 2003-CLA-5 (ARB, Sept. 29, 2005), *aff'd.*, 2007 WL 4106268 (D. Ak., Nov. 16, 2007)(unpub.) (the Board held that an ALJ's "grant of summary decision is also reviewed *de novo*, *i.e.*, under the same standard the ALJs employ").

IV. EVIDENCE

A. BURDEN OF PROOF

1. "Occasional and incidental" Driving

In ***Administrator, Wage and Hour Division v. Tacoma Dodge, Inc.,*** 1994-CLA-80, 88, 91, 112 (ALJ on remand, Dec. 15, 1999), the ALJ held that Respondent had the burden of proving that an exception to the child labor prohibitions applied. Specifically, in ***Takoma Dodge***, it was incumbent upon Respondent to prove that "the driving by the minors met the exception to the hazardous order in that it was both 'occasional and incidental' under the definition applicable at the time" of the ALJ's decision.

2. Determination of age

In ***Administrator, Wage and Hour Division v. Henderson***, 1991-CLA-83 (Sec'y., Apr. 18, 1995), the Secretary held that, in establishing the age of a worker, the "burden should fall upon the employer, who is required to maintain records of employees birth dates, to submit evidence challenging the accuracy of the investigator's report, if the employer believes the report to be inaccurate." *See also* ***Acting Administrator, Wage and Hour Division v. Ahn's Market, Inc.***, 1997-CLA-23 (ALJ, Nov. 6, 1998) (the government established a *prima facie* case of a violation where the minor testified that he wrongly stated his date of birth on the employment application).

B. Hearsay

1. Public records exception

Determination of age, Wage and Hour Form 103 admissible

In ***Administrator, Wage and Hour Division v. Henderson***, 1991-CLA-83 (Sec'y., Apr. 18, 1995), the Secretary held that the ALJ erred in ruling that the investigator's Wage and Hour Form 103, which contained the results of the compliance officer's investigation, was hearsay and not sufficient to establish the age of the minors in question. The Secretary cited 29 C.F.R. § 18.803(a)(8)(ii) and (iii) and Federal Rules of Evidence 803(8), which is the public records exception to the hearsay rule and the Secretary held that the evidence was admissible as "matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . .or . . . factual findings resulting from an investigation made pursuant to authority granted by law. . .." The Secretary noted that the burden of demonstrating the untrustworthiness of the report fell on the employer, who was required to maintain records of employees' birth dates. Because Respondent did not challenge this evidence, it should have been considered. The Secretary also advised that 29 C.F.R. § 580.7(b), a regulation governing civil money penalties in Fair Labor Standards Act proceedings, provides that "testimony of . . . Department of Labor employees concerning information obtained in the course of investigations and conclusions thereon . . . shall be admissible. . .." Thus, the Secretary reinstated the civil money penalties for the violations the ALJ concluded had not been proven due to the lack of evidence of the employees' ages.

2. Investigator's testimony admissible

[a] Based on notes of conversations with minors

In ***Administrator, Wage and Hour Division v. Salyer***, 1993-CLA-18, 22, and 23 (ALJ, Nov. 30, 1995), Respondents contended that a large portion of the compliance officer's testimony -- largely based on notes of his conversations with minors during the investigation -- should have been excluded as inadmissible hearsay because, in addition to the normal infirmities of hearsay, the testimony of minors is traditionally subjected to heightened judicial review. The ALJ rejected this argument noting that 29 C.F.R. § 580.7 provides that, notwithstanding the hearsay rule of 29 C.F.R. § 18.802, the testimony of current or former departmental employees concerning information obtained in the course of investigations and conclusions thereon was admissible in child labor proceedings. *See also* ***Administrator, Wage and Hour Division v. Lamplighter Tavern***, 1992-CLA-21 (Sec'y., May 11, 1994) (it was proper for the ALJ to assess a penalty based upon the investigator's testimony regarding the employment of minors).

[b] Not based on excluded evidence

In ***Administrator, Wage and Hour Division v. Ahn's Market, Inc.***, ARB Case No. 99-024, 1997-CLA-33 (ARB, July 28, 2000), the ARB upheld the ALJ's admission of the investigator's testimony regarding what the minors told her, despite the fact that the ALJ excluded the written questionnaires that were answered and signed by the minors as well as

the investigator's written notes regarding what she was told over the telephone by certain minors. The ARB noted that the documentary evidence was excluded by the ALJ because of the Administrator's failure to comply with the ALJ's pre-trial discovery order. The ALJ had prohibited the investigator from testifying regarding the contents of these documents which, in turn, "eliminated all record evidence of some of the alleged violations which . . . required dismissal of the charges and penalty assessments that were based exclusively on the answered questions." The ARB concluded that:

> Although the investigator would not have been free to testify as to the contents of the excluded memos, she nevertheless was entitled, as the ALJ correctly held, to testify as to her independent recollection of what the minors told her over the telephone. The investigator's testimony was itself evidence of the violations independent of the memos and admissible pursuant to 29 C.F.R. § 580.7(b) even if it was hearsay.

C. Relevance

Post-investigation memorandum irrelevant

In ***Administrator, Wage and Hour Division v. Blackhawk State Bank***, 1993-CLA-82 (Sec'y., Nov. 20, 1995), the government introduced, in its petition for review of the ALJ's decision, an interpretative memorandum from the Wage and Hour Administrator to the Regional Wage and Hour Administrators which purported to clarify and interpret a term in dispute in the case. The Secretary found the interpretation to be irrelevant because it was not in existence at the time the matter was investigated.

V. Discovery

A. Sanctions; failure to comply

1. Dismissal

In ***Adminstrator, Wage and Hour Division v. Vinton D. Erickson Farms***, 1991-CLA-76 (Sec'y., July 13, 1995), Respondent was found to have repeatedly and intentionally failed to comply with the ALJ's discovery order. Under such circumstances, the ALJ properly applied the sanction of dismissal. The Secretary found that, since the remedies for failure to comply with an order to compel discovery are not expressly stated in the Rules of Practice and Procedure for Administrative Hearings, 29 C.F.R. Part 18, it was proper to invoke Rule 37(b)(2) of the Federal Rules of Civil Procedure, which expressly establishes the appropriateness of sanctions against parties who fail to obey an order to provide discovery. *See also* 29 C.F.R. § 18.6. The Secretary noted that the purpose of Fed.R.Civ.P. 37 is to

allow the presiding judge to fashion sanctions that are appropriate for the offense being sanctioned.

2. Default judgment

In ***U.S. Dep't. of Labor v. Chips Restaurant, Inc.***, 1998-CLA-5 (ALJ, Jan. 13, 1999), Respondent failed to comply with the Notice of Docketing, which required that the parties exchange and submit evidence in support of their respective positions. An order to show cause was issued and no response was received. As a result, pursuant to 29 C.F.R. § 18.6(d)(2)(v), the ALJ found Respondent in violation of Section 12 of the Act and assessed civil money penalties against Respondent in the amount of $9,900.

In ***U.S. Dep't. of Labor v. Fox Chapel Yacht Club, Inc.***, 1992-CLA-151 (Sec'y. Sept. 12, 1995), the Secretary agreed that Respondents demonstrated recalcitrance in the pre-hearing stage of the administrative hearing. It was noted that the Department filed a motion for an order to show cause why a default judgment should not be entered, the ALJ entered such an order, and Respondents did not file a timely response to the order. It was further noted that Respondents failed to respond to the notice of docketing, or to the Department's pre-hearing exchange. As a result, the Secretary determined that Respondents had subjected themselves to the discretionary powers of the ALJ and those powers included a full range of sanctions pursuant to 29 C.F.R. § 18.6. The Secretary concluded that the ALJ's entry of a default judgment was clearly authorized and it was adopted on appeal.

3. Ruling against interests

In ***Administrator, Wage and Hour Division v. Elderkin Farm***, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB, June 30, 2000), the Chief Administrative Law Judge ordered a sanction less severe than default judgment for Respondent's repeated failure to comply with multiple discovery requests. The ARB recited the language of the Chief Administrative Law Judge's order as follows:

> [I]t shall be inferred that the admissions, testimony, documents or other evidence that should have been produced are adverse to Respondent, . . . that matters concerning which the Order [to Show Cause] was issued are taken as established adversely to Respondent, . . . that Respondent may not introduce into evidence or otherwise rely upon testimony in support of or in opposition to any claim or defense that was the subject of these discovery requests at issue, . . . and that Respondent may not object to the introduction and use of secondary evidence to show what the withheld admissions, testimony, documents or other evidence would have shown . . ..

Slip op. at 3. The ALJ who presided over the hearing then adopted the Administrator's Findings of Fact in accordance with the Chief Administrative Law Judge's directive. In footnote 5 of its decision on appeal, the ARB stated that an ALJ "has broad discretion to exact penalties for failure to abide by discovery orders" under 29 C.F.R. § 18.6(d) and it

found no abuse of discretion where Respondent failed to comply with the multiple orders issued by the Chief Administrative Law Judge.

4. Exclusion of evidence; independent recollection

In ***Administrator, Wage and Hour Division v. Ahn's Market, Inc.***, ARB Case No. 99-024, 1997-CLA-33 (ARB, July 28, 2000), the ARB upheld the admission of the investigator's testimony regarding what the minors told her, despite the fact that the ALJ excluded the written questionnaires that were answered and signed by the minors as well as the investigator's written notes regarding what she was told over the telephone by certain minors. The ARB noted that the documentary evidence was excluded by the ALJ because of the Administrator's failure to comply with the ALJ's pre-trial discovery order. The ALJ "prohibited the investigator from testifying regarding the contents of these documents which, in turn, eliminated all record evidence of some of the alleged violations which . . . required dismissal of the charges and penalty assessments that were based exclusively on the answered questions." The ARB concluded that:

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B. Privileges

The "informant's privilege"

In ***Administrator, Wage and Hour Division v. Albertson's, Inc.***, ARB Case No. 99-106, 1999-CLA-2 (ARB, Oct. 29, 1999), the ALJ ruled that the "informer's privilege" did not bar the production of un-redacted statements and hand-written questionnaires of 24 potential witnesses. In support of this holding, the ALJ determined that, because the 24 potential witnesses who might testify regarding alleged child labor violations had been identified, the informer's privilege was no longer applicable. An interlocutory appeal was taken by the Administrator. Subsequently, however, the Administrator filed a motion for remand stating that the parties reached a settlement and had submitted their consent findings to the ALJ for approval. The ARB remanded the case because the ALJ lacked authority to rule on the consent findings while the case was pending before the ARB.

C. Witness testimony

Credibility unaffected by discord between minors and employer

In ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999), the ALJ held that the mere fact that there existed disagreement between the minors and their employer, and that their departure from the company was "under less than happy circumstances" did not render the testimony of the minors of little weight. The ALJ stated the following:

> However, presuming for argument's sake, that the complaints triggering the subject DOL investigation filed by these minors, were motivated by some animus, such motive need not, and here does not, materially negatively affect the credibility of these witnesses relative to the operative facts testified to by them. Indeed, many of these facts testified to were corroborated time and again in this record.

Slip op. at 9.

VI. Employer/Employee relationship

A. The "economic realities" test, generally

In child labor cases, an employer will often argue that the minors are "independent contractors" and not employees, thus removing the conditions of their employment from the scope of the FSLA.

In ***Administrator, Wage and Hour Division v. Horizon Publishers & Distributors***, 1990-CLA-29 (Sec'y., May 11, 1994), the Secretary held that the test for determining whether an employer-employee relationship exists under the FLSA is more expansive than that used in common law. As a result, the Secretary rejected arguments by the employer that tests developed by the Internal Revenue Service, National Labor Relations Authority, and state courts should be utilized. Rather, the Secretary noted that the Supreme Court, in ***United States v. Silk***, 331 U.S. 704, 723 (1947), set forth six factors in applying the "economic realities" test to FLSA cases: (1) degree of control exerted by the employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) permanence of the working relationship; and (5) the degree of skill required to perform the work. Moreover, some courts have also considered the extent to which the work was an integral part of the employer's business. *See also* ***Administrator, Wage & Hour Division v. Ronald and Debbie Halsey***, ARB Case No. 04-061, 2003-CLA-5 (ARB, Sept. 29, 2003), *aff'd.*, 2007 WL 4106268 (D. Ak., Nov. 16, 2007) (unpub.); ***Reich v. Baystate Alternative Staffing, Inc***., 1994-FLS-22 (ARB, Dec. 19, 1996); ***Administrator, Wage and Hour Division v. Circulation Promoters, Inc.***, 1992-CLA-5, 1992-CLA-83 (Sec'y., Jan. 18, 1995).

B. Employer-employee relationship exists

1. Job service agencies; joint employment

In ***Reich v. Baystate Alternative Staffing, Inc***., 1994-FLS-22 (ARB, Dec. 19, 1996), the ARB found that day workers, *i.e.* individuals who reported to an agency in the morning and were assigned work according to the needs of employers calling that day, were not independent contractors because the employers for which they performed services had complete control over the manner in which the work was performed, the workers had no opportunity for profit or loss, they did not provide any material, equipment, or helpers, and they were unskilled workers who exercised little or no initiative in completing their assigned tasks.

In addition, the ARB stated that the factors for determining whether joint employment exists are: 1) the nature and degree of control of the workers; 2) the degree of supervision, direct or indirect, of the work; 3) the power to determine the pay rates or the methods of payment of the workers; 4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and 5) preparation of payroll and the payment of wages. The ARB noted that the determination of the employment relationship does not depend on isolated factors, but on the circumstances of the whole activity; the ultimate issue is whether, as a matter of "economic reality," the particular worker is an employee of the business or organization in question.

2. Trainees

In ***Reich v. Shiloh True Light Church of Christ***, Case No. 95-2765, 1996 U.S. App. LEXIS 10427 (4th Cir. May 7, 1996), the circuit court held that the general test used to determine whether a trainee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainee's labor. The court of appeals affirmed the district court's finding that the employer, Shiloh Vocational Training Program (Shiloh), was the primary beneficiary of the labor of the workers under the age of 16 years such that the FLSA applied. Shiloh did not pay wages to the trainees who were under age 16 years, nor did Respondent charge fees for their labor. The children did, on some occasions, receive lump sum payments, which Shiloh characterized as "gifts." The children also earned "imaginary" wages and raises, which were then used as a mechanism for determining their actual wage when they turned 16 years old, and they performed the same tasks as individuals over 16 years of age. The court found that the underage workers were employees covered by the FLSA where Shiloh derived a substantial benefit from the projects in which the children participated without incurring any costs in wages.

3. Stuffing envelopes for publishing company

In ***Administrator, Wage and Hour Division v. Horizon Publishers & Distributors***, 1990-CLA-29 (Sec'y., May 11, 1994), the Secretary held that an employer-employee relationship existed between a mail order company and the minors who stuffed envelopes for it. Specifically, the children were instructed on procedures for stuffing the envelopes as set forth by the employer, the children did not have an opportunity for profit or loss and had no input in company decisions, none of the children held any investment in the company, and no skills were required for the job performed by the minors. The Secretary also found that the minors performed work that was integral to the company as

"Horizon is a mail-order business [and] sending solicitations for purchases and of advertising material is certainly integral to its business." Thus, although there was no degree of permanence to the children's work for the employer, *i.e.* one child worked only 2.1 hours for the company, and although the working relationship was somewhat informal, the Secretary concluded that, on balance, the ALJ properly found the existence of an employer-employee relationship.

4. Crew leaders for minors canvassing to sell newspapers

In ***Administrator, Wage and Hour Division v. Circulation Promoters, Inc.***, 1992-CLA-5, 1992-CLA-83 (Sec'y., Jan. 18, 1995), the ALJ utilized the "economic realities" test in assessing whether "crew leaders were employees of CPI or independent contractors." Under the facts of the case, Circulation Promoters Incorporated (CPI) "used crews of school age children to canvass homes door-to-door in targeted areas to induce homeowners to subscribe to a client newspaper." An adult was the crew leader and this person was charged with "logistics of the operation" and recruitment of crew members. The Secretary noted that, "[g]iven the remedial purpose of the FLSA, Federal courts have adopted an expansive interpretation of the definition relating to employment status that goes beyond traditional common law applications."

From this, the Secretary upheld the ALJ's findings that the crew leaders were CPI's employees based upon the following factors: (1) contractual terms between CPI and the crew leaders required that the leader "keep his crew canvassing for four hours a day, six days a week"; (2) minors worked four hours a day, from 4:00 p.m. to 8:00 p.m., and were returned home by 9:00 p.m.; (3) the crew leader had "complete economic dependence upon the company"; (4) aside from the nominal purchase of canvass bags used to carry the newspapers, the crew leader did not have significant out-of-pocket expenses; (5) minimal skills and training were required of crew leaders; and (6) there was no evidence to indicate that the vehicles used to transport the minors could not also be used for personal purposes. The Secretary further held that the designation of the crew leader in CPI's contract as an "independent contractor" was not determinative and neither was the fact that a Form 1099 was filed with the Internal Revenue Service as opposed to a W-2 Form.

5. Minor working in agriculture

In ***Administrator, Wage and Hour Division v. Elderkin Farm***, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB, June 30, 2000), Respondent argued that a minor working on his farm was not an employee because "he did not punch a time card, file any reports on his employment, or work at any specific time." Moreover, Respondent alleged that he did not pay the minor, "did not direct him to do work, and was not aware of any work that (the minor) performed on the farm." The ARB disagreed. Initially, it noted that the Supreme Court held that the definition of an "employee" under the FLSA is the broadest under any federal statute. ***United States v. Rosenwasser***, 323 U.S. 360, 363 n. 3 (1945). The ARB found that the minor operated a tractor on the farm, assisted with the operation of farm equipment with Respondent's knowledge and for the Respondent's benefit, worked in an area occupied by a bull, and worked inside a manure pit in violation of

29 C.F.R. § 570.71. Further, the ARB noted that the minor had been working on the farm on the day of his accident, when his clothes got caught in a feeder wagon that "pulled" him in and cut off his right arm. The ARB then analyzed the case under the "economic reality" test to conclude that the minor was not an independent contractor. It stated the following in finding a direct employer-employee relationship existed:

> While there is no evidence that Elderkin directly contolled the tasks performed by Peter Gage on that day, all of these tasks--feeding the calves, scraping manure from the barn, helping to rig a feed mixer machine, and reading the gauge on the feed wagon . . . were integral to Elderkin's business. Peter obviously had no opportunity for profit or loss, but rather was paid or given credit toward the cost of the broken windows. It is clear he had no investment in the farm's facilities. There was no particular skill required for the tasks he performed. Although the relationship between Elderkin and Peter was an informal one, it is clear that Elderkin was aware that Peter was working on his farm.

On balance, the ARB held that the minor was not an independent contractor.

6. IRS tax regulations not controlling

In ***Administrator, Wage & Hour Division v. Ronald and Debbie Halsey***, ARB Case No. 04-061, 2003-CLA-5 (ARB, Sept. 29, 2005), *aff'd.*, 2007 WL 4106268 (D. Ak., Nov. 16, 2007) (unpub.), a 14 year old drowned while working for Respondents' salmon fishing business. Respondents cited to IRS tax regulations to argue that the minor was a self-employed independent contractor. The tax regulations provide, *inter alia*, that a person who is engaged in commercial fishing and is paid based on a share of the proceeds from the boat's catch, as in this case, then the person is deemed a self-employed independent contractor. The Board rejected the IRS tax regulations as controlling under the child labor provisions of the FLSA.

To the contrary, the Board noted that "courts have adopted an expansive interpretation of the definitions of 'employee' and 'employer' under the FLSA, to effectuate the Act's broad remedial purposes." Consequently, the Board applied the "economic reality" test to determine that an employer-employee relationship existed between Respondents and the minor for purposes of the FLSA. In so holding, the Board upheld the ALJ's rejection of Respondents' contention that the work was seasonal such that there was no employment relationship under the Act. The Board held that "the child labor provisions preclude permanent employment." It concluded that the ALJ properly noted that the minor worked for Respondents for consecutive summers, which supported a finding of an "ongoing working relationship."

C. No employer-employee relationship exists

In ***Brock v. Bremco Industries, Inc.***, 1986-CLA-7 (ALJ, June 18, 1987), two minors were injured when a propane tank, on which they were working, exploded. The ALJ

held that no employment relationship existed between the minors and Respondent to support coverage under the CLA. Respondent was a gas and oil equipment manufacturer and, under the facts of the case, a field service technician for Respondent took his son and nephew, both of whom were minors, on some service calls. Generally, the minors sat in a truck while the technician conducted his work in the field. Respondent did not know that the technician brought the minors with him on business. In particular, the technician did not advise Respondent or seek permission. On one occasion, however, the minors assisted the technician in removing 48 half-inch bolts from ten propane tanks. One of the tanks exploded and the minors were injured. The ALJ noted the following regarding the accident:

> Of the nine previous tanks that had been serviced, none of those tanks had been hooked-up. However, the tenth tank which was being worked on by the boys had been hooked-up by the owner. Steve Mohler (the technician) began to cut a six-inch hole in the backside of the last tank with an acetylene torch not realizing that it was hooked-up. Gas vapors entrapped in the tank caused it to explode injuring both boys.

Slip op. at 3 (citation to transcript references omitted). Applying the "economic reality" test as set forth in ***Rutherford Food Corp. v. McComb***, 331 U.S. 722, 730 (1947) as well as the Sixth Circuit's decision in ***Western Union Telegraph Co. v. McComb***, 165 F.2d 65 (6th Cir. 1947), *cert. denied*, 333 U.S. 862 (1948)[1], the ALJ determined that Respondent's "operation as a whole must be considered in determining whether a person is an employee." The ALJ concluded that, given the circumstances presented, "the work activity performed by the two boys was strictly an aberration . . .." He stated that there was no evidence to suggest that the technician could not have completed his work without the assistance of the minors. The ALJ found the technician credible and found that "the boys were taken along in order to allow him to spend time with his son."

The ALJ further noted that Respondent had (1) no control over the minors, (2) no opportunity for profit of loss with the minors, (3) received minimal benefit, if any, from the work of the minors, (4) utilized no particular skill of the minors who removed the bolts, and (5) had no permanency of relationship with the minors as the minors never performed work for the technician previously and they were not paid and did not expect payment. The ALJ also found that the minors "made no investment in equipment used to remove the bolts and covers." Finally, the ALJ reiterated that Respondent had no knowledge that the minors accompanied its technician on service trips and "work was performed distant from where management would have observed its occurrence." As a result, Respondent was not liable for a civil money penalty.

In ***Martin v. Heron Lopez d/b/a Rio Fresh***, 1990-CLA-10 (ALJ, Oct. 1, 1992), the Administrator found that minors were improperly harvesting crops for a grower of onions and charged Rio Fresh with the civil money penalty. Rio Fresh served as a packing and distribution company for growers of various food crops. The record evidenced that the field men for Rio Fresh were to check the progress of the harvesting activity and to advise the growers:

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[1] The case fell under the jurisdiction of the Sixth Circuit Court of Appeals.

> Mr. Cuellar (one of Respondent's field men) basically acted as an advisor to the grower and to Rio Fresh so that the packing house would know what produce was arriving in order to sell it and be prepared to process it. He also acted as an advisor to the farm labor contractor for purposes of determining the produce to be picked, but he was strictly an advisor since the grower made the final decision as to the crops. Mr. Cueller did not intercede in problems with individual laborers. Rio Fresh has instructed Mr. Cueller in the law as it relates to children being permitted to perform farm labor. The growers make all the final decisions concerning the growing and harvesting of the crops. Rio Fresh and its field men act as advisors only to the growers.

Slip op. at 4. The issue before the ALJ was whether Rio Fresh was a "joint employer" (along with the growers) of the minors working in the fields. The ALJ determined that Rio Fresh was not such an employer and, as a result, he concluded that the company was not liable for any civil money penalties. The record demonstrated that there was no legal relationship between Respondent and the grower. Respondent did not hire the employees to harvest the crop; rather, the grower hired the employees and paid their compensation. Moreover, Respondent did not have the authority to hire and fire the grower's employees and Respondent's equipment, with the exception of one "portable john", was not used by the grower to harvest the crop. In addition, Respondent did not (1) maintain any of the grower's financial and employment books, (2) transport harvesters to the job site, or (3) cultivate or harvest the crops. In sum, Respondent had no control over the grower's operations and the harvesting activities required by the grower required little or no skill by laborers. From this, the ALJ declined to assess a civil money penalty against Rio Fresh.

VII. Relief

A. Determination of appropriate civil money penalty, generally

In determining an appropriate penalty under the child labor provisions of the Fair Labor Standards Act, 29 C.F.R. § 579.5 specifies the factors to be considered, such as the gravity of the offense, age of the minors, the size of Respondent's company, any history of prior similar violations, precautions taken to avoid the violations, the number of underage workers, duration of the employment, the hazards to which the minors were exposed while so employed, and the occurrences of any injuries.

In ***Administrator, Wage and Hour Division v. Elderkin Farm***, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB, June 30, 2000), the ARB held that "once a CMP has been challenged before an ALJ, the issue is not whether the penalty assessed by the Administrator comports with the formula and matrix contained in Form WH-266," but "the question is whether the assessed penalty complies with the statutory provision regarding the CMP and the CMP regulations." *See also* ***Administrator, Wage and Hour Division v. Keystone Floor Refinishing Co.***, ARB Case Nos. 03-056 and 03-067, 2002-CLA-017 (ARB, Nov. 29, 2004) (under the statute, the maximum penalty that may be assessed for each employee is $10,000).

B. All factors must be considered

Assessment of the penalty amount requires that the size of the business and the gravity of the violation be taken into consideration. 29 C.F.R. § 579.5(a) and (b). A determination of the gravity of the violation requires that the ALJ consider the history of any prior violations, the number of minors involved, the lack of precautions or willingness to avoid violations by the employer, whether proper records, such as proof of age, are maintained, exposure of the minors to hazards and any resulting injuries, duration of the illegal employment, and hours of the day during which the employment occurred. In addition, two alternatives at §§ 579.5(d)(1) (for *de minimus* violations) and (d)(2) (inadvertent error) permit a lessening of the penalty, or a finding of no penalty, if all the listed criteria are satisfied. ***Keesling v. Supermarkets General Corp.***, 1990-CLA-34 (Sec'y., Jan. 13, 1993).

In ***U.S. Dep't. of Labor v. Thirsty's Inc.***, 1994-CLA-65 (ALJ, May 16, 1996), *aff'd. in part and rev'd. in part*, ***Administrator, Wage and Hour Division v. Thirsty's Inc.***, 1994-CLA-65 (ARB, May 14, 1997), the ALJ found that the Administrator did not assess the appropriate civil money penalty for hours violations of the child labor provisions of the Fair Labor Standards Act when consideration was not given to all the available evidence as required by 29 C.F.R. § 579.5; rather, the penalty was determined by using Form WH-266, which has pre-assigned dollar values for each violation. The ALJ reduced the penalty assessment pursuant to § 579.5(d)(2) and noted that the penalty imposed by the Wage and Hour Division amounted to ten to twenty percent of Respondent's annual profit, which did not effectuate the purpose of the Act "to correct . . . and to eliminate the conditions . . . [of] oppressive child labor" without substantially curtailing employment or earning power. *See* 29 U.S.C. §§ 202(b) and 203(1).

1. The WH-266 schedule of penalties may be used (changed to WH-103)

In ***Administrator, Wage and Hour Division v. Thirsty's Inc.***, 1994-CLA-65 (ARB, May 14, 1997), the ARB found that "[t]he grid and matrix schedule incorporated in form WH-266 is an appropriate tool to be used by a field Compliance Officer to recommend penalties through the enumeration and determination of the gravity of factual violations." Slip op. at 5. The ALJ found that the use of Form WH-266 violated the regulatory scheme found that 29 C.F.R. § 579.5(b) and (c), which provide that certain factors shall be considered in determining the appropriateness of an assessed penalty. The ALJ found that the Administrator only considered one of the regulatory factors, and characterized the form as a "numbers game" that eliminated the regulatory procedure to determine a penalty only after all the evidence was considered in light of the factors delineated in the regulations.

The Administrator argued before the ARB that the "standardized penalty schedule permitted the enforcement of child labor laws in a consistent and uniform manner, free from subjective appraisals and is allowable within statutory and regulatory criteria . . .." The Administrator conceded that the "standardized penalty schedule may result in certain imprecision in determining a penalty in a specific case," but argued that "this imprecision is preferable to the subjective appraisals of the employer's culpability by a Compliance Officer." Slip op. at 4.

The ARB granted deference to the Administrator's interpretation, "although the penalty schedule did not reference each criterion of the regulatory guidelines, nevertheless it is a reasonable interpretation of those guidelines and with the broad authority granted an agency charged with implementing those regulations." Slip op. at 4 (citation omitted). The Board supported this conclusion by noting that the regulations did not provide guidance as the weight or import of any particular factor and, since the schedule penalty was reduced based on the size of the business, any error in not considering the other factors was harmless. The Secretary approved of the ALJ's reduction of the civil money penalty where mitigating factors were present.

The ARB further held that Respondent's due process rights were not violated because the Administrator's recommended determination was subject to review by an ALJ and, when Congress increased the maximum civil money penalties, it did not raise the issue of the well-established practice of using a schedule of penalties. The ARB reaffirmed that an ALJ has authority to change the Administrator's assessments of civil monetary penalties, but it reversed the ALJ's finding in the instant case that the schedule of penalties is in violation of the regulations or of an employer's right to due process. *See also* ***Lynnville Transport, Inc. v. Chao***, 316 F.Supp.2d 790 (S.D. Ia. 2004); ***Administrator, Wage and Hour Division v. Ahn's Market, Inc.***, ARB Case No. 99-024, 1997-CLA-33 (ARB, July 28, 2000) (the Form WH-266 schedule is properly used by field compliance officers and is "merely a starting point"); ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999).

In ***Administrator, Wage and Hour Division v. Schronk Road Markets, Inc.***, 2001-CLA-73 (ALJ, May 19, 2003), the ALJ determined that the Administrator's penalty assessment using the WH-103 was proper for the 18 supported violations where Respondent employed minors in excess of regulatory allowances. 29 C.F.R. § 570.35(a)(4) and (a)(6).

2. The WH-266 (changed to WH-103) not include all factors at 29 C.F.R.

§ 579.5; final determination of penalty made after APA hearing

Although agreeing for the most part with the Administrator's determinations regarding the computation of a civil money penalty for child labor violations, the ALJ, in ***Administrator, Wage and Hour Division v. Salyer***, 1993-CLA-18, 22 and 23 (ALJ, Nov. 30, 1995), found that a Child Labor Civil Money Penalty Form (Form WH-266) used by the Administrator did not include all of the factors required to be considered by 29 C.F.R. § 579.5. Consequently, the ALJ considered the Administrator's recommendation of penalties, but noted that the regulations require that the final determination of the penalty to be made following an APA hearing. 29 C.F.R. § 579.5(f); 5 U.S.C. § 554. *See also* ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999) (the Form WH-266 may be properly used to assess civil monetary penalties but the "adjudicatory process . . ., in reviewing the appropriateness of the penalties, is acknowledged in preservation of the due process rights of employers").

In ***Administrator, Wage and Hour Division v. Thirsty's Inc.***, 1994-CLA-65, slip op. at 6 (ARB, May 14, 1997), the ARB held that "[a]n increased penalty [found on ALJ

review] is not a punishment levied on an employer for seeking a hearing and review, but rather a possible outcome of an adjudicator looking anew at a situation where violations of child labor laws occurred and determining that the violations were of greater gravity than the Compliance Officer and Administrator determined." *See also* ***Administrator, Wage and Hour Division v. Ahn's Market, Inc.***, ARB Case No. 99-024, 1997-CLA-33 (ARB, July 28, 2000) (the ARB held that it has authority to conduct a *de novo* review of the penalty assessed to determine its appropriateness); ***Administrator, Wage and Hour Division v. Elderkin Farm***, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB, June 30, 2000) (the ARB must review findings *de novo* and may, therefore, substitute its judgment for that of the ALJ).

3. Amended schedule; penalty maximum

In ***Administrator, Wage and Hour Division v. Zukiewicz, Inc.***, 1991-CLA-66 (Sec'y., Jan. 31, 1996), the Secretary held that the ALJ improperly prohibited a reduction of the civil money penalty where the penalty assessed exceeded the $1,000.00 statutory maximum per child. The Secretary further noted, however, that the civil money penalty per child was raised from $1,000 to $10,000, for violations occurring after Section 16(e) of the FLSA was amended by the Omnibus Reconciliation Act of 1990, effective November 5, 1990. Pub. L. No. 101-508, 104 Stat. 1388-29 (1990).

In ***Administrator, Wage and Hour Division v. Elderkin Farm***, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB, June 30, 2000), the ARB cited to the legislative history supporting an increase in the maximum civil money penalty from $1,000 to $10,000:

> Several factors led to this change in the law: investigations of child labor violations had soared; there was evidence that employer's often considered the lower penalties as a cost of doing business; inflation had devalued the sting of the $1,000 maximum penalty; and the actual penalty ultimately paid often was just a fraction of the maximum amounts permitted.

Slip op. at 15.

In ***Administrator, Wage and Hour Division v. Sayler***, 1993-CLA-18, -22, -23 (ARB, Sept. 27, 1996), the ALJ had decreased the civil money penalty assessed by the Administrator of the Wage and Hour Division for the violations that occurred subsequent to the November 5, 1990 amendments to the Fair Labor Standards Act, which increased the maximum allowable penalty from $1,000.00 to $10,000.00 for each violation. See the Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-29 (1990), amending 29 U.S.C. § 216(e). The Administrator argued that the ALJ's Decision was inconsistent with ***Acting Administrator, Wage and Hour Division v. Chism Trail, Inc.***, 1992-CLA-45, slip op. at 9 (Sec'y., June 30, 1993). In that case, the Secretary noted that "the legislative history of the increased [civil money penalty] provision as well as the Department's own regulatory history establishes that the substantial increase in the [civil money penalty] maximum was to have an impact on penalty sizes -- even in cases which do not represent the most egregious violations." The ARB held that the legislative history of the amendments clearly provides for more vigorous enforcement of the child labor restrictions

and that the ALJ's reduction in the civil money penalties was contrary to the congressional purpose. Slip op. at 3. As a result, the Administrator's original assessment of $23,500.00 was reinstated.

C. Propriety of reduction of civil monetary penalty

1. Appropriate

[a] No prior violations; cooperation with investigation no injuries; assurances of future compliance

In ***Administrator, Wage and Hour Division v. D.D. & D., Inc.***, 1990-CLA-35 (Sec'y., Apr. 3, 1995), the Secretary appears to have approved the ALJ's consideration of whether a less rigorous penalty than that imposed by the Administrator will still achieve the objective of the child labor provisions in accordance with 29 C.F.R. § 579.5. Although the Secretary modified some aspects of the ALJ's reduction of the penalty, he found that factors, such as Respondent's cooperation with the investigation, a lack of prior violations, the fact that no minors suffered injuries, and Respondent's credible assurance of future compliance, supported a reduction in the original assessment of penalties by 40 percent.

[b] Minor cleaning already disassembled/harmless parts of a slicer

In ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999), the ALJ noted that 29 C.F.R. § 570.61(a)(4) prohibits the cleaning of hazardous machines. However, he noted the following:

> A meat slicing machine used in a retail delicatessen is specifically cited as an example of such a machine. However, the already disassembled harmless guard and carrier of a meat slicing machine cannot rationally be considered a machine at all! The regulation prohibits only the cleaning of a machine. The evidence simply does not establish that (the minor) cleaned a slicing machine in violation of the regulations.
>
> . . .
>
> Also, that (the minor) once cut his finger while voluntarily removing a piece of meat from the slicing machine, adds nothing to the propriety/validity of the making of this invalid (cleaning) fine.

Slip op. at 5-6.

However, it is noted that, in ***Administrator, Wage and Hour Division v. Maelal, Inc.***, 1992-CLA-43 (Sec'y., Apr. 14, 1995), the Secretary held that it was error for the ALJ to vacate a civil money penalty on the grounds that the minors cleaned an assembled meat slicer that was unplugged. The ALJ had reasoned that cleaning the meat slicer under these circumstances was less hazardous than operating it. The Secretary disagreed and held that "the ALJ was without discretion under Hazardous Order No. 10 to distinguish between the

hazards posed by operating a meat slicer and cleaning a meat slicer, or the hazards posed by various cleaning methods."

2. Not appropriate

[a] Minors operating dangerous machinery

i. Generally

Most often, it is inappropriate to reduce the civil money penalty where a minor has operated dangerous machinery in contravention of the Secretary's Hazardous Occupations (HO) orders under the Act and its implementing regulations. In ***U.S. Dep't. of Labor v. Jerral D. Parris***, 1995-CLA-8, slip op. at 10 (ALJ, May 24, 1996), *aff'd. in part and rev'd. in part,* (ARB, Mar. 27, 1997), the ALJ found that the facts did not support a reduction of the penalty assessed by the Wage and Hour Division. The violations were of a severe nature, involving minors operating dangerous machinery. Respondents had a history of prior violations, and the duration of the illegal employment was significant, encompassing over two years. Considering Respondent's lack of cooperation and disdain for the administrative proceeding, the civil money penalty was necessary to achieve the purposes of the Act.

Moreover, the Secretary held, in ***Administrator, Wage and Hour Division v. D.D. & D., Inc***., 1990-CLA-35 (Sec'y., Apr. 3, 1995), that it was error for the ALJ to re-categorize violations involving minors under the age of 16 from HO 10 to Reg. 3, based on the same spilt of opinion and HO 10's lack of reference to employees under age 16. The Secretary concluded that 29 C.F.R. § 570.33(e) expressly makes the Hazardous Occupations Order applicable to those under the age of 16 years.

However, in ***Administrator, Wage and Hour Division v. Triton Industries***, 2006-CLA-2 (ALJ, May 3, 2006), the ALJ found that mitigating circumstances compelled a reduction of the civil money penalty from $2,400.00 to $200.00. Under the facts of the case, Respondent employed a minor for 16 weeks at the request of his father, who was also an employee of Respondent. For eight weeks, the minor spent time cutting grass and babysitting for Respondent. For the remaining eight weeks, he worked at Respondent's shop "sweeping, moving hoses, and picking up parts." The ALJ found it undisputed that, without Respondent's owner's knowledge, the minor's father and the shop foreman had the minor drive a forklift to move pallets on occasion. The ALJ determined:

> While classified as dangerous activities, the minor here had a valid driver's license at the time he drove the vehicles and knew to wear a seat belt. As to the forklift, he testified that the equipment had roll cages, that he never lifted anything more than a foot off the ground and on the few occasions he operated the machines no accidents ever occurred. (citation omitted). These details coupled with the fact that the minor totally worked at the shop no more than 8 days during which time he, for the most part, simply swept and cleaned up the area, that neither of [Respondent's owners] knew of his operating company vehicles and equipment nor had [the Respondent] ever before or since been charged with such violations, causes me to find it is far

more appropriate that a de minimus civil penalty of $100.00 for each violation be imposed.

ii. Meat slicers

Hazardous Occupations Order No. 10 ("HO 10"), relating to use, disassembly, cleaning and/or reassembly, of a power driven meat slicer, has been subject to a split of opinion among ALJs as to whether it applies to restaurants as opposed to meat processing plants. The Secretary of Labor's position, however, is that HO 10 also applies to restaurants. *See* ***Dole v. Stanek, Inc.***, 116 Lab. Cas. (CCH) 35,372 (N.D. Iowa 1990); ***Administrator, Wage and Hour Division v. D.D. & D., Inc.,*** 1990-CLA-35 (Sec'y., Apr. 3, 1995) (HO 10 applies to restaurants such that a reduction in the amount of the civil money penalty should not have been granted); ***Administrator, Wage and Hour Division v. Henderson***, 1991-CLA-83 (Sec'y., Apr. 18, 1995) (operation of a meat slicer at the Piggly Wiggly Supermarket covered by HO 10).

In ***Administrator, Wage and Hour Division v. Maelal, Inc.***, 1992-CLA-43 (Sec'y., Apr. 14, 1995), the Secretary held that it was error for the ALJ to vacate a civil money penalty on grounds that the minors cleaned an assembled meat slicer that was unplugged. The ALJ had reasoned that cleaning the meat slicer under these circumstances was less hazardous than operating it. The Secretary disagreed and held that "the ALJ was without discretion under Hazardous Order No. 10 to distinguish between the hazards posed by operating a meat slicer and cleaning a meat slicer, or the hazards posed by various cleaning methods."

It is noted that HO 10 was amended in 1997 to provide that certain occupations in or about slaughtering or meat packing establishments, rendering plants, or wholesale, retail, or service establishments are prohibited for minors between 16 and 18 years of age. *See* 20 C.F.R. § 570.61 (1997). In ***Administrator, Wage and Hour Division v. Starvin' Sam's Minimart #3, Inc.***, 1999-CLA-30 (ALJ, June 30, 2000), the ALJ applied the 1997 amended version of HO 10 to find that its prohibition applied to a minor's operation of a power-driven meat slicer at Respondent's delicatessen.

In ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999), the ALJ held that a minor suffered a "serious" injury to her thumb while operating a meat slicer. The injury required nine stitches and she testified that she continues to experience numbness in her thumb. As a result, the ALJ upheld the imposition of increased civil monetary penalties on this ground. *But see* ***U.S. Dep't. of Labor v. Ed Hudson and Janice Hudson d/b/a CJs Country Market & Pizza Pro***, 2001-CLA-24 (ALJ Jan. 7, 2003) (16 year old's injury to finger while operating meat slicer requiring eight stitches was not "serious" to support increased penalty because minor did not miss work, "the finger fully healed in three months and although she suffered a decrease in sensation, she had no loss of motion"; also Employer did not display open "contempt" for child labor laws unlike in ***Chrislin***).

iii. Paper balers

In ***Administrator, Wage and Hour Division v. Zukiewicz, Inc.***, 1991-CLA-66 (Sec'y., Jan. 31, 1996), the Secretary held that even under pre-1991 amendments to HO 12, the use of a paper baler for recycling (as opposed to the purpose of producing a final product), was a covered activity. The Secretary reasoned that use of a baler for recycling falls within the meaning of "re-manufacturing" under 29 C.F.R. § 570.63. Moreover, in reviewing the penalty assessment, the Secretary took into account that Respondent was a repeat offender and had been cited for the same violation several years earlier. *See also* ***Administrator, Wage and Hour Division v. Ahn's Market, Inc.***, ARB Case No. 99-024, 1997-CLA-33 (ARB, July 28, 2000) (loading and operating a baler at a market in violation of HO 12; 11 minors between the ages of 16 and 18 years were involved; and the size of the employer's business, where the annual gross volume of sales was $1.7 million, did not warrant a reduction in the civil money penalty amount of $7,200); ***Administrator, Wage and Hour Division v. Henderson***, 1991-CLA-83 (Sec'y., Apr. 18, 1995) (loading and unloading a paper baler at the Piggly Wiggly Supermarket); ***Acting Administrator, Wage and Hour Division v. Supermarkets General Corp.***, 1990-CLA-34 (Sec'y., Jan. 13, 1993) (loading and unloading paper baler violated HO 12).

In ***Administrator, Wage and Hour Division v. Ahn's Market, Inc.***, ARB Case No. 99-024, 1997-CLA-33 (ARB, July 28, 2000), the ARB noted that the employer testified that its policy was not to permit any minor under 18 years of age to operate a baler. Signs were openly displayed on the baler to this effect and monthly meetings were held by the night manager during which the policy was discussed. The company's owner as well as the night manager testified that minors were permitted to load the baler. Citing to ***Administrator, Wage and Hour Division v. Chism Trail, Inc.***, 1992-CLA-45 (Sec'y., June 30, 1993), a case involving similar facts, the ARB found that the company committed violations of the version of the HO 12 which was in effect during the time the violations were being committed. In so holding, the ARB held that the subsequent amendments to the FLSA, which permitted 16 and 17 year old minors to load a baler (but not operate or unload it), could not be retroactively applied. As a result, the civil money penalty assessed against the company was upheld.

iv. Skid loader

In ***Administrator, Wage and Hour Division v. Lynnville Transport, Inc.***, 1999-CLA-18 (ALJ, Aug. 29, 2000), the ALJ concluded that minors' operation of a skid loader violated the Secretary of Labor's Hazardous Order 7, located at §§ 570.58(a)(1) and (b)(5). He noted that the regulatory language at § 570.58(a)(1) provided that occupations involving the operation of an elevator, crane, derrick, hoist or high-lift truck are particularly hazardous for minors between the ages of 16 and 18 years. Moreover, subsection (b)(5) prohibits the operation of industrial trucks by minors. Respondent argued that the minors did not use the loader in any manner prohibited by the regulations. The ALJ stated the following:

> The evidence regarding the minors' use of the skid loader is quite simple. They used the skid loader in such a manner as was necessary to clean the respondent's trailers and surrounding loading sites. They pushed or pulled manure or other materials around by lowering the shovel of the skid loader to

> its lowest level so that the shovel was on the floor or they manipulated the shovel by levers so that the shovel could transport the materials at a low level to a dumping site. The parties agree that the minors were not required to raise the shovel of the skid loader to a high level at any time during the performance of their work-related duties.
>
> I find it is the mere use of the skid loader by minors that is precluded by Section 570.58(a)(1). How the minors used the equipment, which is clearly covered by Hazardous Order 7, is not important to the resolution of this case. I recognize that Section 570.58(b)(5) indicates that the use of a low-lift truck for the transportation of material is not intended to be covered by the Hazardous Order, but Lynnville's employees were not using a low-lift truck. They clearly were using a high-lift truck, which is contrary to Hazardous Order 7, and the operation of such a truck by minors is precluded by the hazardous order even if the minors' use of the equipment was consistent with that normally performed by low-lift trucks.

Slip op. at 9. The ALJ's decision was upheld by the United States District Court in ***Lynnville Transport, Inc. v. Chao***, 316 F.Supp.2d 790 (S.D. Ia. 2004).

v. Fork lift operator

In ***Secretary of Labor v. Fisherman's Fleet, Inc.***, 2001-CLA-34 (ALJ, Oct. 24, 2002), the ALJ assessed a $99,431.25 penalty against Employer on grounds that Employer permitted 17 minors to operate a forklift (which resulted in the death of one of the minors) in contravention of Hazardous Order 7, permitted minors to work in excess of hours permitted under the regulations, and failed to maintain accurate birth records for four minors.

On appeal, in ***Administrator, Wage and Hour Division v. Fisherman's Fleet, Inc.***, ARB Case No. 03-025, 2001-CLA-34 (ARB, June 30, 2004), the Board affirmed the ALJ's findings of violations under the Act, but held that the $99,431.25 penalty assessed against Employer was too low. The Board noted that the ALJ reduced the penalty amount by 25 percent. However, the Board determined that the fact that Employer was a closely held business of only 10 to 12 regular employees and annual gross sales of $3.5 million supported a finding that the company was a medium-sized business, not a small business:

> Given its yearly multimillion dollar sales and its ample facilities and equipment, FFI is clearly a medium-sized company. Because workforce size is only one of the factors to be considered, the relatively small FFI workforce does not compel a different conclusion.

Slip op. at 7. Moreover, the Board concluded that the fact that the company did not have a history of violations did not warrant reducing the penalty as the "number of minors illegally employed and the ages at the time of employment are factors that accentuate the gravity of the company's violation." *Slip op.* at 7. *See also* ***U.S. Dep't. of Labor v. J. Rental, Inc.***

d/b/a Hank Parker's Rental, 2006-CLA-17 (ALJ, June 6, 2007) (Employer violated HO 7 at 29 C.F.R. § 570.58 by requiring minors to drive forklifts as part of their job duties).

vi. Commercial deep sea fishing

In ***Administrator, Wage & Hour Division v. Ronald and Debbie Halsey***, 2003-CLA-5 (ALJ Feb. 2, 2004), *aff'd.,* ARB Case No. 04-061 (ARB, Sept. 29, 2005), *aff'd.*, 2007 WL 4106268 (D. Ak., Nov. 16, 2007) (unpub.), the ALJ upheld the Administrator's imposition of a maximum penalty of $11,700 where a 14 year old drowned in a capsized boat while assisting Respondents with their net salmon fishing business. Although Respondents did not have a history of repeat violations, they professed ignorance of the child labor laws and maintained that the penalty would nearly offset their gross receipts. The ALJ nevertheless upheld the maximum penalty based on the inherently hazardous work of the minor and its tragic consequences in this case. On appeal, the ARB and the U.S. District Court of Alaska agreed. Citing to 29 C.F.R. §§ 570.33(f)(1) and 570.119(f)(1), the ARB noted that the FLSA specifically prohibits employment of minors between 14 and 16 years of age in occupations involving the "[t]ransportation of property . . . by water."

vii. Power-driven woodworking machines

In ***Administrator, Wage and Hour Division v. Keystone Floor Refinishing Co.***, ARB Case Nos. 03-056 and 03-067, 2002-CLA-017 (ARB, Nov. 29, 2004), the Board upheld imposition of a civil money penalty where a 17 year old operated a miter saw and nail gun for a floor finishing business in violation of Hazardous Order No. 5 found at 29 C.F.R. § 570.55

viii. Saws and shears

In ***Administrator, Wage and Hour Division v. Keystone Floor Refinishing Co.***, ARB Case Nos. 03-056 and 03-067, 2002-CLA-017 (ARB, Nov. 29, 2004), a civil money penalty was properly imposed where a 17 year old employee operated a miter saw to refinish floors in violation of Hazardous Order No. 14 found at 29 C.F.R. § 570.65.

[b] Failure to cooperate; disdain for administrative proceeding

In ***U.S. Dep't. of Labor v. Jerral D. Parris***, 1995-CLA-8, slip op. at 10 (ALJ, May 24, 1996), *aff'd in part and rev'd in part,* (ARB, Mar. 27, 1997), the ALJ found that the facts did not support a reduction of the penalty assessed by the Wage and Hour Division. The violations were of a severe nature, involving minors operating dangerous machinery. Respondents had a history of prior violations, and the duration of the illegal employment was significant, encompassing more than two years. Considering Respondent's lack of cooperation and disdain for the administrative proceeding, the civil money penalty was necessary to achieve the purposes of the Act. *See also* ***Administrator, Wage and Hour Division v. Lamplighter Tavern***, 1992-CLA-21 (Sec'y., May 11, 1994) (civil monetary

penalty upheld because "investigation history of this case is one of non-cooperation and general evasiveness").

[c] Extensive or repeat violations

May 14, 1997), the Wage and Hour Compliance Officer uncovered approximately 400 specific violations, with varying ranges of severity of noncompliance with work periods for children under the age of 16 -- with some children being subjected to multiple violations over a period of months -- the violations could not be considered *de minimus* pursuant to 29 C.F.R. § 579.5(d)(1). *See also* ***Administrator, Wage and Hour Division v. Shronk Road Markets, Inc.***, 2001-CLA-73 (ALJ, May 19, 2003) (many minors were employed in violation of the Act more than once "and the ease with which Respondent could have discovered these violations constitutes a reckless disregard for compliance with the Act"; violations occurred over a two year period of time; lack of prior violations and non-hazardous nature of the minors' work not sufficient to mitigate penalty amount); ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999) ("the circumstances surrounding these violations support a finding of heedless exposure of minors to an obvious hazard (meat slicer), and the continued and persistent occurrence of not inadvertent violations").

In ***Reich v. Baystate Alternative Staffing, Inc.***, 1994-FLS-22 (ARB, Dec. 19, 1996), the ARB affirmed the assessment of a $150,000 civil money penalty where the violations involved hundreds of employees over a period of several years, where the underpayment of wages was almost equal to the proposed penalty, and where Respondent's profit for that period of time was almost $3,000,000.

In ***Administrator, Wage and Hour Division v. Lamplighter Tavern***, 1992-CLA-21 (Sec'y., May 11, 1994), the Secretary noted that there was no instructive case law as to what constituted *de minimus* violations under § 579.5(d)(1). However, he concluded that the violations at issue in the case at bar were not *de minimus*:

> Here we have multiple violations regarding each child: age, records, and hours violations with regard to three of the four children; age and records violations regarding the fourth child.

Slip op. at 5. *See also* ***Administrator, Wage and Hour Division v. Circulation Promoters, Inc.***, 1992-CLA-83 (Sec'y., Jan. 18, 1995) (total penalty was only two percent of employer's gross dollar volume during the years of violations; fact that penalty for prior violations was set for one-half of the original amount requested irrelevant; most children were under 14 years of age and many were under 12 years old; violations were willful as the employer knew of the restrictions on the employment of minors but took no precautions to prevent abuses from reoccurring which, in turn, supported use of multiplier).

In ***Acting Administrator, Wage and Hour Division v. Supermarkets General Corp.***, 1990-CLA-34 (Sec'y., Jan. 13, 1993), the Secretary noted that numerous minors operated a paper baler in violation of HO 12 and the employer's conduct was willful "given the large number and routine nature of these violations." The Secretary was also

unimpressed with the fact that the employer told the minors not to operate the paper baler as such did not "constitute taking reasonable precautions to avoid violations." In this vein, the Secretary cited to ***Donovon v. ELSA of New Hampshire, Inc.***, 615 F. Supp. 106, 108 (D.N.H. 1984) wherein the district court held that it was insufficient for central management to tell branch managers to not violate labor laws. The Secretary also determined that the employer's history of prior violations under the FSLA detracted from its credibility in assuring future compliance.

[d] Minors engaged in more than incidental or occasional driving of a vehicle

In ***Administrator, Wage and Hour Division v. Blackhawk State Bank***, 1993-CLA-82 (Sec'y., Nov. 20, 1995), a 17 year old cooperative education student worked as a bookkeeping trainee, and drove bank-owned vehicles on at least 107 separate occasions. Driving duties ceased when the student was transferred from the bookkeeping department to the teller trainee program. The issue was whether the student's driving was occasional. Because the issue involved an exception to a remedial statute, the exception is to be narrowly construed, and Respondent bears the burden of proving entitlement to the exemption by a preponderance of the evidence. The Secretary concluded that the ALJ erred in finding the driving to be "occasional" because it was only a very small percentage of the student's total employment history with the bank. The Secretary noted that it is a basic tenet of the Department's enforcement law that an employer's compliance must be measured on a workweek-by-workweek basis. In the instant case, where the student's employment was considered to include only the relevant period, the driving could not be found to have been occasional. *See also* ***U.S. Dep't. of Labor v. J. Rental, Inc. d/b/a Hank Parker's Rental***, 2006-CLA-17 (ALJ, June 6, 2007).

Similarly, in ***Reich v. Delon Olds Co.***, 1994-CLA-59 (ALJ, Mar. 4, 1996), the ALJ found that regardless of their job designation, minors whose principal functions were to wash and drive courtesy cars (i.e., transporting customers to or from work or home), and who were assigned to either task as needed, were not driving under the exemption of 29 C.F.R. § 570.52(b)(1) for "occasional" and "incidental" operation of vehicles on public highways.

Drive for Teen Employment Act, effect of

In ***Administrator, Wage and Hour Division v. Tacoma Dodge, Inc., et al.***, 1994-CLA-80, 88, 91, 112 (ALJ on remand, Dec. 15, 1999), the ALJ noted that, in his original decision, he found that the car dealerships had violated the child labor provisions of the FSLA:

> I concluded that assessments against Tacoma and BNS were correct because these respondents violated the Act as each of the minors employed with them drove during non-daylight hours. I also found that the assessments against North Seattle and Thomason must be sustained because these respondents failed to prove that the driving by the minors on public roads was 'occasional and incidental' so as to fall within the exception provided at 29 C.F.R. § 570.52(b)(2).

The ARB directed, however, that the ALJ consider how the provisions of the Drive for Teen Employment Act affected the foregoing conclusions of law with respect to the four respondents. On remand, the ALJ stated the following:

> I initially conclude that the amendment to the Act has no effect on the conclusions of law that I rendered with respect to Tacoma. As I found in the original decision, the minor who drove on public roads for this respondent did so during non-daylight hours and therefore the driving does not fall under the 'occasional or incidental' exception.
>
> . . .
>
> The same rationale applies to one of the child labor violations pertaining to BNS. I found as a fact in the original decision that one of the minors involved in driving on public roads for this employer provided courtesy transportation for customers on two occasions during non-daylight hours. I also concluded in the original decision with respect to this company that the minor who drove during non-daylight hours, even once, cannot fall under the 'occasional or incidental' exception.

By its language, Hazardous Order No. 2 prohibits, with limited exceptions, the employment of minor children age 16 or 17 in occupations which involve motor vehicle driving. One exception is that the driving is "incidental and occasional." *See also* 12 U.S.C. §§ 203(1) and 212(c); 29 C.F.R. § 570.52. The HO 2 was amended by enactment of the Drive for Teen Employment Act of 1998 at 29 U.S.C. § 219(e).

[e] Excessive hours

In ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999), the ALJ held that imposition of civil money penalties for the "hours-violations" of two minors was upheld where Respondent merely argued that it exercised "due diligence" and had a "good faith belief" that it was acceptable to train the minors. The ALJ concluded, to the contrary, that "this proposition that employment of minors in excess of lawfully restricted hours is excusable where the minors are being trained, finds no statutory, regulatory, or decisional support, and Respondents fail to identify any such support." *See also* ***Administrator, Wage and Hour Division v. Lamplighter Tavern***, 1992-CLA-21 (Sec'y., May 11, 1994).

[f] Record-keeping violations

In ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999), the ALJ upheld the assessment of a civil monetary penalty in the amount of $412.50 for failure to comply with the record-keeping provisions of the child labor laws where Respondent presented no defense or argument against assessment of this penalty. *See also* ***Administrator, Wage and Hour Division v. Lamplighter Tavern***, 1992-CLA-21

(Sec'y., May 11, 1994) (failure to maintain birth records for any employee under the age of 19 years constituted a violation of 29 C.F.R. § 516.2(a)(3)); ***Administrator, Wage and Hour Division v. Keystone Floor Refinishing Co.***, ARB Case Nos. 03-056 and 03-067, 2002-CLA-017 (ARB, Nov. 29, 2004) (failure to maintain birth record for 17 year old employee).

[g] Minimum sales volume at $500,000

The requirement of a minimum annual sales volume of $500,000 before an employer may be held liable for a penalty under the "enterprise coverage" component of the Act was part of the 1989 amendments that became effective on March 31, 1990. 29 U.S.C. § 203(c)(1)(A); ***Administrator, Wage and Hour Division v. Keystone Floor Refinishing Co.***, ARB Case Nos. 03-056 and 03-067, 2002-CLA-017 (ARB, Nov. 29, 2004). *See also* ***U.S. Dep't. of Labor v. J. Rental, Inc. d/b/a Hank Parker's Rental***, 2006-CLA-17 (ALJ, June 6, 2007).

In ***Administrator, Wage & Hour Division v. Ronald and Debbie Halsey***, ARB Case No. 04-061, 2003-CLA-5 (ARB, Sept. 29, 2005), *aff'd.*, 2007 WL 4106268 (D. Ak., Nov. 16, 2007) (unpub.), the Board noted that Section 12(c) of the FLSA states "[n]o employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce." A 14 year old minor was employed in Respondent's commercial salmon fishing business and he drowned when the boat capsized. Respondent argued that it was exempt from the provisions of the Act because its annual gross sales volume was less than $500,000. Thus, the Board stated that there are two types of coverage—(1) individual coverage, *i.e.* the minor was employed in oppressive child labor in commerce as defined at 29 U.S.C. § 203(b); *or* (2) enterprise coverage, *i.e.* the enterprise is engaged in commerce with annual gross volume sales of at least $500,000 and where the only regular employees of the business are not the owners. Thus, citing to ***Zorich v. Long Beach Fire Dep't. & Ambulance Serv., Inc.***, 118 F.3d 682 (9th Cir. 1997), the Board concluded that the minor was individually covered "by the Act even though the Halseys' salmon business did not meet the $500,000 sales requirement."

Investigation began when sales volume less than $500,000

In ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999), Respondents argued that a minor was hired in June 1997, and the government's investigation began in August 1997, when its sales were below the $500,000 threshold such that the civil money penalty was invalid. The ALJ cited to 29 C.F.R. § 779.266(b) as well as the district court's decision in ***Martin v. Deiriggi***, 1991 WL 323416 (N.D. W. Va.), *aff'd.*, 985 F. 2d 129 (4th Cir. 1992), to hold that, because the total sales of Respondents for the 12 month period immediately preceding the second quarter of 1997 (April 1996 through March 1997) was $518,019, the assessment of a civil monetary penalty was valid.

[h] Alleged inability to pay penalties

In ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999), the ALJ held that an employer's argument that it is unable to pay the assessed penalties "cannot serve to reduce the penalties" in light of the circumstances of the case, *i.e.* minors operated meat slicers and one minor was seriously injured.

In ***Administrator, Wage and Hour Division v. Elderkin Farm***, ARB Case Nos. 99-033 and 99-048, 1995-CLA-31 (ARB, June 30, 2000), the ALJ reduced the civil money penalty assessed by the Administrator, totaling $71,000, on grounds that Respondent filed for Chapter 13 bankruptcy and had not been able to make needed capital improvements on the farm because of a lack of income. The ALJ concluded that "another large judgment against [Elderkin] could force him out of business entirely." As a result, the ALJ decreased the penalty by 50 percent. The ARB disagreed with the reduction in penalty to state that, when the "serious financial difficulties" were weighed against the gravity of the violations, the civil money penalty of $71,000 was appropriate. First, two of the child labor violations were "extremely severe," *i.e.* the minor's right arm was severed while operating a feed mixer which was missing a protective guard.

Second, the ARB noted that the other minors operated dangerous farm machinery, worked inside manure pits, and worked in a yard occupied by a sow with suckling pigs or a cow with a newborn calf and "[t]hese types of violations intrinsically are of elevated gravity given the potential for serious physical harm." The ARB also found that children aged 7, 10, and 11 years old were performing these tasks and they "were not even marginally eligible to work in agriculture in hazardous occupations, for which the minimum age is 16." In addition, the ARB found that Respondent failed to keep records of his minor employees, "actively misled" Wage and Hour investigators, refused to provide documents to investigators, and denied investigators access to certain areas of his farm.

In sum, the ARB determined that 41 child labor violations were committed which, combined with the inherently dangerous work performed by the minors, Respondent's concealment and falsification, and the flaws in the Respondent's assurances of future compliance, a civil money penalty of $71,000 was appropriate. ***See also Administrator Wage & Hour Division v. Ronald and Debbie Halsey***, 2003-CLA-5 (ALJ, Feb. 2, 2004), *aff'd.,* ARB Case No. 04-061 (ARB, Sept. 29, 2005), *aff'd.*, 2007 WL 4106268 (D. Ak., Nov. 16, 2007) (unpub.) (fact that $11,700 penalty nearly equaled commercial fishing season's earnings "does not render it disproportionate *per se*" in light of 14 year old's drowning); ***Administrator, Wage and Hour Division v. Shronk Road Markets, Inc.***, 2001-CLA-73 (ALJ, May 19, 2003) (penalty of $8,100 proper given that Respondent has $800,000 in business volume).

D. Exceptions to imposition of civil money penalty

1. *De minimus* exception at 29 C.F.R. § 579.5(d)(1)

[a] Applicable

In ***Administrator, Wage and Hour Division v. City of Wheat Ridge, Colorado***, 1991-CLA-22 (Sec'y., Apr. 18, 1995), the Respondent employed 12 minors for a short period to distribute towels at a public swimming pool. The Secretary agreed with the ALJ

that the civil money penalty should be vacated, although he modified some of the ALJ's analysis. First, the ALJ erred in his conclusion that the fact that the civil money penalty would be paid with taxpayer money, rather than from profit, was a relevant consideration. The Secretary found that such a factor was not "necessarily a relevant consideration." Rather, a more pertinent consideration is whether the public entity is big enough to have sufficient financial and staff resources to provide that entity with access to information on child labor requirements. Second, the ALJ found under § 579.5(d)(1) that the violation was *de minimus*. The ALJ indicated that, although 12 minors were involved and there was a separate record-keeping violation, the aggregate of these factors did not bootstrap the violation to something greater than "*de minimus*." The Secretary noted that 12 minors was a significant percentage of the relevant workforce, although only a single job classification was involved and the duration of the underage employment was very short.

Rather than resolve the *de minimis* issue, the Secretary found that the criteria of subsection (d)(2) was satisfied because there was no previous history of child labor violations, the underage employees were not exposed to hazard or danger, none was injured, and Respondent gave credible assurances of future compliance. Despite conflicting testimony, the Secretary accepted the ALJ's finding that the violations were inadvertent. Finally, the Secretary noted that subsection (d)(2) requires a determination where a civil money penalty is necessary to achieve the objectives of the FLSA. Under the circumstances of the case, including the fact that immediate steps were taken to achieve compliance upon being informed the violation and the very brief duration of underage employment, the Secretary affirmed the ALJ's vacating of the civil money penalty.

In ***Administrator, Wage and Hour Division v. Horizon Publishers and Distributors***, 1990-CLA-29 (Sec'y., May 11, 1994), the Secretary concluded that envelope stuffing by minors constituted *de minimus* violations of the child labor laws. The children had flexible schedules and the amount of work done by each minor was minimal, *i.e.* an average of 17 hours worked per child. Moreover, the Secretary noted that the employer gave credible assurances of future compliance, which were supported by its lack of a history of violations of the Act as well as the fact that the employer immediately ended employment of the minors when its practices were brought into question by the Administrator.

In ***Administrator, Wage and Hour Division v. Navajo Manufacturing***, 1992-CLA-13 (Sec'y., Feb. 21, 1996), Respondent had employed underage minors in processing goods for shipment from a warehouse. The minors had been hired at the behest of their parents (who were employees) for periods ranging from two days to one month during breaks from school. No minors were injured, Respondent had no history of non-compliance with the FLSA, Respondent cooperated with investigation and terminated employment of the minors upon notification of the violation, and Respondent made a credible assurance that it would comply with the FLSA in the future. The ALJ vacated the civil money penalty. In doing so, he weighed the evidence, took into consideration the mitigating circumstances pursuant to 29 C.F.R. § 579.5(d), and concluded that the violations were *de minimus* and that the assessment of a civil money penalty was not mandatory.

The Secretary found that the ALJ's conclusion that a civil money penalty was not mandatory was contrary to the legislative intent of the FLSA. The Secretary focused, however, on "the amount of analysis or, in the ALJ's words, 'conscientious consideration,'

which is to be expected of those Department officials who determine and review cmp assessments." Slip op. at 6. The Secretary agreed with the ALJ that the analysis preceding the initial penalty assessment in the matter had been too perfunctory, although he also faulted the ALJ for extending the analysis too far beyond the regulatory elements of 29 C.F.R. § 579.5, thereby substituting the ALJ's own standards for the regulatory standards. The Secretary especially faulted the ALJ for paying too much attention to the nature of the work performed by the minors, stating that it was dispositive that the violations involved underage children working in a warehouse. See 29 C.F.R. §§ 570.34(b)(9) and 570.35. Although the Secretary reinstated the penalties, he reduced them by 75 percent.

In ***Administrator, Wage and Hour Division v. Triton Industries, Inc., L.L.C.***, 2006-CLA-2 (ALJ, May 3, 2006), Respondent employed the 16 year old son of one of its employees for a total of 16 days. During that time period, the minor spent half the time mowing Respondent's grass and babysitting. The other half of the time was spent at Respondent's shop where the minor swept, moved hoses, and picked up parts. On occasion, however, the minor's father had his son drive a forklift to move pallets, or drive a vehicle to get gas. The Wage and Hour investigator testified that Respondent had no previous history of child labor violations, did not know of the minor's activities driving the forklift or vehicles, and "exhibited no willingness in allowing the circumstances to take place." Because of the circumstances of the case, the investigator recommended that the assessed penalty amount of $2,400.00 be reduced. The Administrative Law Judge reviewed the factors at 29 C.F.R. § 579.5(c) and reduced the penalty to $100.00 for each violation for a total *de minimus* penalty amount of $200.00.

[b] Not applicable

In ***U.S. Dep't. of Labor v. J. Rental, Inc. d/b/a Hank Parker's Rental***, 2006-CLA-17 (ALJ, June 6, 2007), the ALJ determined that a penalty of $9,240.00 assessed against the Respondent was proper and that, "based on the number of total violations (including violations of operating a fork lift) and the same children were involved in multiple violations," the ALJ concluded that he could not find that the violations were *de minimus*.

In ***Administrator, Wage and Hour Division v. Shrock Road Markets, Inc.***, 2001-CLA-73 (ALJ, May 19, 2003), the ALJ concluded that Respondent's violations under the Act were not *de minimus*:

> Many factors . . . prevent the violations from being classified as *de minimus* including: the age of the minors in question [fourteen and fifteen-year-olds]; the repetitive nature of the violations; the fact that the violations took place after Labor Day and before June 1st; testimony regarding the large number of minor employees [50 percent], at least a few of whom were hired through community outreach programs; and the Respondent's inability or unwillingness to keep track of its employees.

Slip op. at 11. A penalty of $8,100 for 18 minors employed in violation of the Act was assessed.

In ***Secretary of Labor v. Fisherman's Fleet, Inc.***, 2001-CLA-34 (ALJ Oct. 24, 2002), *aff'd.*, ARB Case No. 03-025 (ARB, June 30, 2004), the ALJ concluded that 14 occupation violations and 17 forklift violations committed by Respondents, resulting in the death of one minor, were not *de minimus.*

In ***Administrator, Wage and Hour Division v. Thirsty's Inc.***, 1994-CLA-65 (ARB, May 14, 1997), the Wage and Hour Compliance Officer uncovered approximately 400 specific violations, with varying ranges of severity of noncompliance with work periods for children under the age of 16 -- with some children being subjected to multiple violations over a period of months -- the violations could not be considered *de minimus* pursuant to 29 C.F.R. § 579.5(d)(1).

The ALJ determined that Respondents' violation of the child labor prohibitions was not *de minimus* in ***Administrator, Wage & Hour Division v. Ronald and Debbie Halsey***, 2003-CLA-5 (ALJ, Feb. 2, 2004), *aff'd.*, ARB Case No. 04-061 (ARB, Sept. 29, 2005), *aff'd.*, 2007 WL 4106268 (D. Ak., Nov. 16, 2007) (unpub.) where a 14 year old working for a commercial deep sea fishing enterprise drowned when his boat capsized.

In ***Administrator, Wage and Hour Division v. Lamplighter Tavern***, 1992-CLA-21 (Sec'y., May 11, 1994), the Secretary noted that there was no instructive case law as to what constituted *de minimus* violations under § 579.5(d)(1). However, he concluded that the violations at issue in the case at bar were not *de minimus*:

> Here we have multiple violations regarding each child: age, records, and hours violations with regard to three of the four children; age and records violations regarding the fourth child.

Slip op. at 5.

In ***Acting Administrator, Wage and Hour Division v. Supermarkets General Corp.***, 1990-CLA-34 (Sec'y., Jan. 13, 1993), the Secretary held that the employer's violations were not *de minimus* where the ALJ cited to 88 time and hour violations. The Secretary stated that "[g]iven the high number of violations and the percentage of minors involved (seventeen of forty-six minors employed), I conclude that the violations are not *de minimus*."

2. Inadvertent conduct exception at 29 C.F.R. § 579.5(d)(2)

This exemption requires that Respondent establish that it "had no previous history of child labor violations, that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent, and that the person so charged has given credible assurance of future compliance . . .." 29 C.F.R. § 579.5(d)(2).

[a] Applicable

In ***U.S. Dep't. of Labor v. Mike Bludau d/b/a B&B Metal Buildings, Inc.***, 1994-CLA-58, slip op. at 4-5 (ALJ, Mar. 12, 1996), the ALJ determined that the imposition of a civil money penalty was not necessary to achieve the objectives of the Act under the particular circumstances of the case. Respondent was initially assessed a $2,400.00 penalty for employing a 16 year old who drove a fork lift and pick up, duties considered hazardous by the Department of Labor. Respondent, whom the ALJ found to be a very credible witness, testified that he did not know the minor drove a fork lift and that it was not within the minor's job duties. Respondent did not heedlessly expose the minor to obvious hazardous duties and was intending to help the minor earn credits at school. Respondent had no history of prior violations, no injuries occurred, and no allegation that the work interfered with the minor's school attendance. Because any violation that occurred was unintentional and because Respondent was repentant and assured future compliance, the ALJ did not impose a civil money penalty for the violations.

[b] Not applicable

In ***Administrator, Wage and Hour Division v. Chrislin, Inc.***, 1999-CLA-5 (ALJ, Dec. 17, 1999), the Secretary held that "the circumstances surrounding these violations support a finding of heedless exposure of minors to an obvious hazard (meat slicer), and the continued and persistent occurrence of not inadvertent violations." As a result, the exception to the civil money penalty was not applicable. *See also* ***Administrator, Wage and Hour Division v. Circulation Promoters, Inc.***, 1992-CLA-83 (Sec'y., Jan. 18, 1995) (total penalty was only two percent of employer's gross dollar volume during the years of violations; fact that penalty for prior violation was set for one-half of the original amount requested irrelevant; most children were under 14 years of age and many were under 12 years old; violations were willful as the employer knew of the restrictions on the employment of minors but took no precautions to prevent abuses from reoccurring which, in turn, supported use of multiplier).

VIII. Types of dispositions

A. Consent findings

In ***Secretary of Labor v. Pounders, Inc.***, 1999-CLA-4 (ALJ, May 9, 2000), the ALJ issued a *Decision and Order Adopting Consent Findings* in a case filed under the child labor provisions at 29 U.S.C. § 216(e) and 29 C.F.R. Parts 579 and 580. *See also* 29 C.F.R. § 18.9; ***Secretary of Labor v. Blue Diamond Mfg. Co.***, 2000-CLA-29 (ALJ, May 14, 2001); ***Administrator, Wage and Hour Division v. Butler Country Club, Inc.***, 1999-CLA-9 (ALJ, Jan. 6, 1999).

B. Appointment of settlement judge

In ***U.S. Dep't. of Labor v. Brothers Reid, Inc.***, 1999-CLA-17 (ALJ, Mar. 30, 1999), Chief Judge Vittone noted that the parties agreed to the appointment of a settlement judge pursuant to 29 C.F.R. § 18.9(e)(1) and the matter was referred accordingly.

C. Dismissal

1. Based on withdrawal of civil money penalties

In ***Secretary of Labor v. New England Fire Equipment***, 1998-CLA-51 (ALJ, Mar. 11, 1999), the ALJ issued an *Order of Dismissal* based on the government's motion to withdraw its request for civil money penalties. The government noted that "additional information" had come to its attention which resulted in its withdrawal of the penalties.

In ***Administrator, Wage and Hour Division v. Cornforth-Campbell Motors, Inc.***, 1994-CLA-73 (ALJ, May 24, 1999), the ALJ granted the Department's request for dismissal. The ALJ vacated the assessment of a civil money penalty "as the evidence of record fail[ed] to establish any violations of the child labor provisions of the Act under the definition of 'occasional and incidental' of Section 2(a) of the Drive for Teen Employment Act . . . as made applicable to this case by virtue of Section 2(b)(2) of that statute."

2. Based upon failure to comply with discovery order

In ***Adminstrator, Wage and Hour Division v. Vinton D. Erickson Farms***, 1991-CLA-76 (Sec'y., July 13, 1995), Respondent was found to have repeatedly and intentionally failed to comply with the ALJ's discovery order. Under such circumstances, the ALJ properly applied the sanction of dismissal. The Secretary found that, since the remedies for failure to comply with an order to compel discovery are not expressly stated in the Rules of Practice and Procedure for Administrative Hearings, 29 C.F.R. Part 18, it was proper to invoke Rule 37(b)(2) of the Federal Rules of Civil Procedure, which expressly establishes the appropriateness of sanctions against parties who fail to obey an order to provide discovery. *See also* 29 C.F.R. § 18.6. The Secretary noted that the purpose of Fed.R.Civ.P. 37 is to allow the presiding judge to fashion sanctions that are appropriate for the offense being sanctioned.

D. Default judgment

In ***U.S. Dep't. of Labor v. Chips Restaurant, Inc.***, 1998-CLA-5 (ALJ, Jan. 13, 1999), a decision and order finding Respondent in violation of the child labor provisions at 29 U.S.C. §§ 201 and 216 was issued. Respondent failed to comply with the Notice of Docketing which required that the parties exchange and submit evidence in support of their respective positions. An order to show cause was issued and no response was received. As a result, pursuant to 29 C.F.R. § 18.6(d)(2)(v), the ALJ found Respondent in violation of Section 12 of the Act and assessed civil money penalties against Respondent in the amount of $9,900.

In ***U.S. Dep't. of Labor v. Fox Chapel Yacht Club, Inc.***, 1992-CLA-151 (Sec'y. Sept. 12, 1995), the Secretary agreed that Respondents demonstrated recalcitrance in the pre-hearing stage of the administrative proceeding. It was noted that the Department filed a motion for an order to show cause why a default judgment should not be entered, the ALJ entered such an order, and Respondents did not file a timely response to the order. It was further noted that Respondents had failed to respond to the notice of docketing or to the Department's pre-hearing exchange. As a result, the Secretary determined that Respondents subjected themselves to the discretionary powers of the ALJ and those powers included a full range of sanctions pursuant to 29 C.F.R. § 18.6. The Secretary concluded that the ALJ's entry of a default judgment was clearly authorized and it was adopted on appeal.

E. Civil money penalty does not constitute "liquidated damages"

In ***United States v. Fisherman's Fleet, Inc.***, 2007 WL 4365356 (D. Mass. Dec. 12, 2007) (unpub.), when Respondent failed to pay $132,575.00 in civil money penalties awarded by the administrative law judge and affirmed by the Administrative Review Board, the Department of Labor commenced an enforcement action in federal district court. Respondent asserted that the enforcement action was time-barred by the two year statute of limitations contained at 28 U.S.C. § 2462 of the Portal-to-Portal Act. To the contrary, the district court agreed with the Department of Labor and concluded:

> Because the 'civil penalty' assessed under § 216(e) does not constitute 'liquidated damages,' the limitations period set forth in § 255 is inapplicable. In the absence of a particularized limitations period, 28 U.S.C. § 2462 provides the governing statute of limitations. Under that section, any action 'for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within *five years* from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.' (emphasis added). Because this action was filed within five years of the Administrative Review Board's Final Decision and Order, it is timely.

Fair Labor Standards Act of 1938

I. Generally

Purpose

The FLSA was enacted in 1938 for the purpose of eliminating labor conditions detrimental to a minimum standard of living required for the general well-being of workers engaged in commerce or in the production of goods for commerce. ***Overnight Motor***

Transp. Co. v. Missel, U.S. Md.1942, 316 U.S. 572, ***reh'g. denied***, 317 U.S. 706 (1942). There is coverage under the FLSA where: (1) a employer/employee relationship is established; (2) the requirements for either individual or enterprise coverage are met; and (3) the work is performed in the United States or a territory of the United States.

Citing to 29 U.S.C. § 202(a), the court in ***Hogan v. Allstate Ins. Co.***, 361 F.3d 621 (11th Cir. 2004), held that the FLSA establishes minimum standards to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

In ***Chao v. Gotham Registry, Inc.***, 514 F.3d 280 (2nd Cir. 2008), the court held that the purpose of the FLSA's overtime provisions are to "remedy the 'evil of overwork' by ensuring that workers were adequately compensated for long hours as well as by applying financial pressure on employers to reduce overtime."

II. Jurisdiction

A. Laches

Held inapplicable

In ***Herman v. Suwannee Swifty Stores, Inc.***, 19 F.Supp.2d 1365 (M.D. Ga. 1998), the court declined to dismiss the government's motion for partial summary judgment based upon Suwanee's argument that "two and a half years passed between the investigation and the lawsuit" and that "many of their managers have left the company." The company did not argue that the statute of limitations had run and the government conceded that it is barred from recovery of back wages for periods before April 1992. The court, without elaboration, declined to apply laches to the case.

B. The Tenth Amendment and state and local government employees

In ***Garcia v. San Antonio Transit Authority***, 469 U.S. 528 (1985), the Supreme Court held that the FLSA applied to state and local government employees.

C. Employees cannot waive application of the FLSA

In ***O'Brien v. Encotech Constr. Serv. Inc.***, 183 F.Supp.2d 1047 (N.D. Ill. Jan. 18, 2002), the district court held that an agreement signed by employees waiving application of the FLSA was void on grounds that it was against public policy.

Moreover, in ***Andrako, et al v. U.S. Steel Corp.***, Civ. Action No. 07-1629 (W.D. Pa. May 8, 2008), the court held that there is "no *per se* requirement that a union employee proceed through a collectively-bargained grievance and arbitration process prior to, or *in*

lieu of, bringing a statutory claim for wages under the FLSA." Citing to ***Barrentine v. Arkansas-Best Freight Systems, Inc.***, 450 U.S. 728 (1981), the court found that the Supreme Court "made clear that employees' statutory rights to minimum wages and overtime pay under the FLSA are separate and distinct from employees' contractual rights arising out of an applicable collective bargaining agreement."

In ***Chao v. Gotham Registry, Inc.***, 514 F.3d 280 (2nd Cir. 2008), the Secretary of Labor filed a civil contempt petition for Employer's violation of a consent decree requiring it to pay time and one-half wages to nurses working overtime. To avoid payment of overtime under the consent decree, Employer, as a nursing employment agency that contracted with area hospitals, provided the following "Notice" to its nurses:

> You must notify GOTHAM in advance and receive authorization from GOTHAM for any shift or partial shift that will bring your total hours to more than 40 hours in any given week. If you fail to do so you will not be paid overtime rates for those hours.

The court found that "[i]nformation that Gotham's nurses regularly worked overtime was communicated to Gotham each week on the nurses' time sheets." From this, the court stated that "an Employer's actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work" under 29 U.S.C. § 207(a).

Based on the timesheets, Employer had a "duty to make every effort to prevent . . . performance" of overtime work. The court held that "[t]his duty arises even where the Employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours." Citing to 29 C.F.R. § 785.13, the court held that the "mere promulgation of a rule against . . . (overtime) work is not enough" to escape liability under the FLSA, such as the above-referenced "Notice" from Gotham to its nurses. In sum, the court found that Employer violated the consent decree and failed to properly pay overtime in accordance with the FLSA's requirements.

D. The Portal-to-Portal Act is applicable

In ***IBP, Inc. v. Alvarez***, 546 U.S. 21 (2005), the Court explained that the Portal-to-Portal Act of 1947:

> . . . relieves an employer of responsibility of compensating employees for 'activities which are preliminary or postliminary to [the] principal activity or activities' of a given job. 29 U.S.C. § 254(a) (1999). Not all 'preliminary or postliminary activities can go uncompensated, however. '[A]ctivities performed either before or after the regular work shift,' the Supreme Court has noted, are compensable 'if those activities are an integral and indispensable part of the principal activities.'

See also ***Steiner v. Mitchell***, 350 U.S. 247, 256 (1956); ***De Asencio et al v. Tyson Foods, Inc***., 500 F.3d 361 (3rd Cir. 2007).

III. Standard of Review

The ALJ's review of the Administrator's findings is *de novo*. The regulatory provisions at 29 C.F.R. § 580.12(b) and (c) provide the following:

> (b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent committed a violation of section 12, or a repeated or willful violation of section 6 or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.
>
> (c) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented in the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.

29 C.F.R. § 580.12(b) and (c).

Moreover, the Secretary's standard of review in of an ALJ's decision in a Fair Labor Standards Act case is *de novo*. See 5 U.S.C. §§ 554 and 557(b); 29 U.S.C. § 216(e).

IV. Evidence

A. Determination of back wages owed

1. Established

In ***Herman v. Harmelech***, 2000 WL 420839 (N.D. Ill., Apr. 14, 2000)(unpub.), the court noted that the FSLA requires that an employer properly maintain records as to wages and hours worked by its employees. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2. Where an employer fails to maintain and preserve adequate records:

> . . . the Secretary can meet her burden of proof as to back wage liability by (1) showing that work was performed which was not properly compensated, and (2) producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Slip op. at 8 (citing to ***Anderson v. Mt. Clemens Pottery Co.***, 328 U.S. 680, 687 (1946)). In ***Harmelech***, the court found that back wages were properly calculated by the Secretary based on "copies of paychecks and verification by the affected employees." The burden then shifts to the employer to produce evidence "of the precise amount of work performed

or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence." If the employer fails to carry this burden, then the back wages may be awarded even though the amount is approximate. In ***Harmelech***, Judith Harmelech argued that the burden should not shift to her as she "had no control over recordkeeping." The court rejected this argument to state:

> . . . the duty to maintain records is an affirmative duty. An employer cannot shirk her responsibility merely by isolating herself from the daily operations of the company. Judith had a duty to ensure that the records were properly maintained and preserved regardless of her limited role in creating those records.

Slip op. at 9. Upon employer's failure to produce evidence to counter the Secretary's calculation of back wages owed, the court held that the Secretary was "entitled to the full amount of backwages sought."

In ***Metzler v. Hickey's Carting, Inc.***, 1997 U.S. App. LEXIS 24445, Case No. 96-6272 (2d Cir., Sept. 16, 1997)(unpub.), the government alleged that Hickey failed to "keep accurate records of hours worked by its employees and pay overtime as required by the Act" in accordance with an executed consent judgment. The court agreed and noted the testimony of numerous witnesses who stated that they "worked multiple hours each week that were neither compensated nor reflected on Hickey's time records."

Citing to ***Anderson v. Mt. Clemens Pottery Co.***, 328 U.S. 680 (1946), the court held that, initially, the Secretary must establish a *prima facie* case of unpaid wages. This burden was established, according to the court, by "testimony from multiple Hickey employees regarding the number of uncompensated hours worked by them and their coworkers; the Secretary's investigator also testified, and produced documentary evidence showing the inaccuracy of Hickey's own time records." Slip op. at 4. Therefore, the court held that the burden shifted to the employer to "prove the precise extent of uncompensated work." The court found Hickey's records to be inaccurate and incomplete such that it adopted the Secretary's findings as to the amount owed. The court concluded that the Secretary's determination "constituted a reasonable approximation of actual hours worked."

2. Not established

In ***Herman v. Express Sixty-Minutes Delivery Service, Inc.***, 161 F.3d 299 (5th Cir. 1998), the Secretary argued that office workers of the company were not paid for overtime in contravention of 29 U.S.C. § 207(a)(1). The court, however, held that the Secretary "failed to present sufficient credible evidence" to support its back wage claims. Specifically, the court noted that the testimony of two witnesses regarding overtime allegedly worked was conflicting:

> The Secretary's claim for back wages was supported at trial by the testimony of Shirley Kenyon who presented an exhibit purporting to reflect the overtime due these employees. Kenyon's testimony was rebutted by Lynn Clayton's testimony which indicated that the employment dates Kenyon used were

> incorrect and that Kenyon assumed that each employee worked a 55-hour week, rather than the 45-hour week actually worked. Lynn Clayton further testified that her office employees were being paid time and a half for overtime hours prior to the Secretary's investigation. Although Clayton had changed her method of record keeping, she testified that the office employees were being paid the same amount today as they were getting paid before the Secretary's investigation. (citation omitted). The district court concluded that the Secretary failed to present sufficient credible evidence to support claims for back wages for the office workers. We perceive no error in this conclusion, and the Secretary fails to point to any evidence in the record and fails to cite any binding precedent to support its position that a violation of the Act occurred.

Id. at 306-307.

B. Statutory affirmative defenses of the employer

1. Statute of limitations

The Portal-to-Portal Act of 1947 provided a statute of limitations for actions seeking backwages owed. 29 U.S.C. § 255. There is a two year statute of limitations "after the cause of action occurred" for an employee to file a complaint in federal or state court. However, the Act provides for a three-year statute of limitations where the violations were willful. 29 U.S.C. § 255(a). It is the complainant's burden to establish that a violation is willful. ***Cox v. Brookshire Grocery Co.***, 919 F.2d 354, 356 (5th Cir. 1990).

2. Good faith reliance on Administrator's rulings

Section 10 of the Portal-to-Portal provides the following with regard to reliance upon the Administrator's rulings:

> . . . no employer shall be subject to any liability or punishment for . . . failure of the employer to pay minimum wages or overtime compensation under the . . . [Act] . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the . . . [Administrator of the Wage and Hour Division of the Department of Labor], or any administrative practice or enforcement policy . . . with respect to the class of employees to which he belonged. Such . . . defense . . . shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined . . . to be invalid or of no legal effect.

29 U.S.C. § 259(a) and (b)(1). This defense must be timely asserted and is limited to an employer's alleged failure to comply with minimum wage and overtime provisions of the

FLSA, but not to actions involving retaliatory discharge, child labor, or record-keeping violations. ***Conklin v. Joseph C. Hofgesang Sand Co.***, 565 F.2d 405, 406-07 (6th Cir. 1977).

3. Good faith conduct by employer; reasonable grounds

Section 11 of the Portal-to-Portal Act provides for reduced liquidated damages where an employer establishes that it acted in good faith and on reasonable grounds:

> . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [Act], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

29 U.S.C. § 260.

The employer, in ***Reich v. Baystate Alternative Staffing, Inc.***, 1994-FLS-22 (ARB, Dec. 19, 1996), disagreed with the Wage and Hour investigator's interpretation of their status as an employer. The ARB held that it was not sufficient, however, for Respondents to rely on their counsel's opinions after they were advised by the Wage and Hour investigator that they were responsible for making overtime payments and that they had an obligation to make further inquiries by requesting an opinion from the Administrator. *See* 29 C.F.R. §§ 578.3(c)(3), 778.3, and 790.13. Failure to comply with the investigator's directives constituted "reckless disregard" of the requirements of the Act.

V. Discovery

A. Summary judgment

1. Based on default

In ***Sec'y. of Labor v. Sunrise Properties & Development, Inc.***, 1999-FLS-15 (ALJ, Jan. 4, 2000), the ALJ granted the government's request for summary judgment on grounds that the employer "failed to respond to discovery requests and that its officers failed to appear at properly noticed depositions." The ALJ also noted that the employer failed to respond to the ALJ's order to show cause. As a result, the government's motion for default judgment was granted pursuant to 29 C.F.R. § 18.6(d)(2). *See also* ***Administrator, Wage & Hour Division v. Blood, Sweat & Tears, Inc.***, 1999-FLS-2 (ALJ, Nov. 8, 1999) (failure to comply with a pre-hearing order).

2. Denied; genuine issue of material fact exists

In ***Administrator, Wage and Hour Division v. Cliff's Concrete, Inc.***, 1999-FLS-26 (ALJ, Nov. 30, 1999), the Administrator filed a motion for summary judgment alleging that the employer failed to timely file exceptions to the letters of assessment such that, pursuant to 29 C.F.R. § 580.5, the civil money penalties contained therein should be declared final. In support of his summary judgment motion, the Administrator submitted an affidavit stating that he had not received the employer's objections within 15 days as required by 29 C.F.R. § 580.4. However, counsel for the employer submitted a contrary affidavit asserting that the exceptions had been timely filed. The ALJ concluded that he had two directly conflicting affidavits before him such that a genuine issue of material fact existed and summary judgment was improper.

B. Privileges

Informant's privilege upheld

In ***Wirtz v. Continental Finance & Loan Co.***, 326 F.2d 561 (5th Cir. 1964), the employer was charged with violating numerous provisions of the FLSA and it propounded two interrogatories upon the Secretary of Labor seeking the names of all persons who had filed complaints charging violations of the Act as well as the names of witnesses which the Secretary planned to call at the time of trial. The Secretary refused to answer the interrogatories, but he did provide the employer with a list of 45 people believed "to have knowledge of facts relevant to the trial of the issues."

On appeal, the Secretary argued that "there is a vital public interest in preserving anonymity of employees who complain to the government that their employer is paying substandard wages." He maintained that the government relies on informants to enforce the FLSA, but notes that they "are particularly susceptible to the fear of retaliation . . .." The court held that it was "perfectly plain that the names of informers (were) utterly irrelevant" to the issues of whether the employer complied with the FLSA's hourly wage requirements. It determined that the most effective protection from retaliation was the anonymity of the informers, "[t]he pressures which an employer may bring to bear on an employee are difficult to detect and even harder to correct." The court cited to similar rulings by other circuit courts under the FLSA in ***Mitchell v. Roma***, 265 F.2d 633 (3d Cir. 1959) ("[a] distinction must be drawn between telling an employer which employees were underpaid and who gave the information about underpayment"); ***Wirtz v. B.A.C. Steel Products, Inc.***, 312 F.2d 14 (4th Cir. 1963) (witness statements were privileged and confidential and need not be released; "most of the information needed to prosecute or defend the case was in the Respondent's possession from the beginning; this was the Respondent's books and records").

As for disclosing the names of witnesses to be called at trial, the court declined to rule on the issue and stated that "[w]e do not now have before us the question whether the names of witnesses may be compelled at a pre-trial hearing or at a date shortly before trial" but the court stated that "[w]e have no doubt . . . that the obtaining of such names is no part of the discovery process before the filing of defensive pleadings."

See also ***Brock v. On Shore Quality Control Specialists, Inc.***, 811 F.2d 282 (5th Cir. 1987); ***Hodgson v. General Motors Acceptance Corp.***, 54 F.R.D. 445 (S.D. Fla. 1972) (court issued order denying motion to compel production of written statements); ***Wirtz v. Robinson & Stephens, Inc.***, 368 F.2d 114 (5th Cir. 1966).

VI. Employer/employee relationship

The Act does not apply unless an employer/employee relationship exists. *See* 29 U.S.C. §§ 206 and 207. An "employee" is defined as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). An "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The term "employ" includes to suffer or permit to work. 29 U.S.C. § 203(g); 29 C.F.R. § 785.11 ("[w]ork not requested but suffered or permitted is work time").

A. The "economic reality test," generally

The courts employ the "economic reality test" to determine whether an employer/employee relationship exists sufficient to invoke the FLSA protections. In ***United States v. Silk***, 331 U.S. 704 (1947), the Supreme Court set forth general elements of this test as including degree of control exercised by the employer over the employee, opportunity for profit or loss on behalf of the employee, investment by the employee, permanency of the employment relationship, and the skill level required of the employee. *See also* ***Goldberg v. Whitaker House Coop., Inc.***, 366 U.S. 28 (1961); ***Morrison v. International Programs Consortium, Inc.***, 253 F.3d 5 (D.C. Cir. 2001) (whether an employee is an independent contractor is for the fact-finder to decide; it was error for the district judge to grant summary judgment on the issue); ***Henthorn v. Dept. of Navy***, 29 F.3d 682, 684 (D.C. Cir. 1994).

B. Independent contractor status

The focus of the inquiry in determining whether an individual is an employee or an independent contractor is whether the worker "is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself." *See* ***Dole v. Snell***, 875 F.2d 802, 804 (10th Cir. 1989) (citing to ***Bartels v. Birmingham***, 332 U.S. 126 (1947)). The employer may be an enterprise or an individual depending upon the outcome of the "economic reality" test.

There are a number of occupations wherein the courts have held that the worker is an independent contractor and is, therefore, not covered by the FLSA. The Fifth Circuit set forth a number of factors to be considered in determining whether a worker is an independent contractor.

In ***Herman v. Express Sixty-Minutes Delivery Service, Inc.***, 161 F.3d 299 (5th Cir. 1998), the circuit court upheld a finding that delivery service drivers were independent contractors, and not employees, under the FLSA utilizing the "economic reality" test. Under the facts of the case, the company operated a courier delivery service and it contracted with area businesses to deliver packages 24 hours a day. The court held that the purpose of applying the five factor "economic reality" test was to "determine whether the individual is, as a matter of economic reality, in business for himself or herself." *Id.* at 303. The five factors to be considered were: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.* at 303. The court found that some factors pointed to an employer-employee relationship, while other factors supported a finding of independent contractor status.

On balance, the court held that the weight of the evidence established independent contractor status. With regard to the first factor, the court held that the company had minimal control over its drivers, "The drivers set their own hours and days of work and can reject deliveries without retaliation." Moreover, the drivers could work for other delivery companies. This factor supported independent contractor status. Under the second factor, the court held that the drivers did not have a significant investment. Although the drivers had to provide their own vehicle, insurance, dolly, two-way radio, pager, fuel, and equipment maintenance, the court noted that the "investment is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes." *Id.* at 304. Consequently, this factor pointed to a direct employer-employee relationship. As for the third factor, the court found that drivers were compensated on a commission basis. The district court had noted that "a driver's profit or loss (was) determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business." As a result, the circuit court found that this factor supported independent contractor status as "the drivers had the ability to choose how much they wanted to work and the experienced drivers knew which jobs were most profitable." *Id.* at 304.

Under the fourth factor, the trial court noted that, once a courier job was offered to the driver, "the driver must rely on his own judgment, knowledge of traffic patterns and road conditions . . ., ability to read MAPSCO, and the ability to anticipate the need for an alternate route." As a result, the trial court determined that the drivers possessed "specialized skill beyond that of merely driving an automobile" which supported the employees' independent contractor status. The circuit court disagreed and found that the job did not require initiative in advertising and pricing and the skill level required supported that of employee status, not an independent contractor status. Under the final factor, the circuit court noted that the Secretary conceded that the "permanency factor points toward independent contractor status." Specifically, a majority of the drivers worked for the company for only a short period of time and their contracts with the company did not "contain a covenant-not-to-compete." On balance, the appellate court concluded that the drivers were independent contractors, not employees, of the company.

There are a number of other cases where the courts concluded that the worker was an independent contractor. For example, *see* ***Dole v. Amerilink Corp.***, 729 F. Supp. 73 (E.D. Mo. 1990) (cable television installer); ***Carrell v. Sunland Constr., Inc.***, 998 F.2d

330 (5th Cir. 1983) (welders working on a project basis); ***Donovan v. DialAmerica Mktg., Inc.***, 757 F.2d 1376, 1384-87 (3d Cir.), *cert. denied*, 474 U.S. 919 (1985) (a distributor of telephone research cards to home workers conducting telephone research); ***Shultz v. Jim Walter***, 314 F. Supp. 454 (N.D. Ala. 1970) (carpenters).

C. Employer/employee relationship established

1. Temporary employment agency

In ***Baystate Alternative Staffing, Inc. v. Sec'y. of Labor***, 163 F.3d 668 (1st Cir. 1998), the court held that the temporary employment agencies were "employers" within the meaning of the FLSA. The agencies argued that the temporary workers on their payrolls were "independent contractors" such that the FLSA's overtime compensation provisions were inapplicable. The court applied the six factor "economic reality" test set forth in ***Martin v. Selker Bros., Inc.***, 949 F.2d 1286, 1293 (3d Cir. 1991) to hold that the temporary workers were employees of the agencies notwithstanding the fact of "simultaneous employer status of the client companies." In finding that an employer-employee relationship existed, the court noted the following:

> It is undisputed that Baystate was solely responsible for hiring the temporary workers, and that it had the power to refuse to send a worker back to a job site where he or she performed unsatisfactorily. The record also establishes that Baystate supervised and controlled employee work schedules and conditions of employment: dictated that times at which the workers were to report to the agencies' offices; screened workers for minimum qualifications; decided which workers would be assigned to particular job sites; sometimes transported workers to job sites at client companies; instructed workers about appropriate dress and work habits; and forbade workers from contacting directly a client company about potential job opportunities.

Id. at 676. Under such circumstances, the court found the fact that the agencies did not have direct supervisory oversight of the employees daily activities was not controlling. Rather, the court determined that Baystate "retained the authority to intervene if problems arose with a worker's job performance." In addition, the court noted that Baystate determined the rate and method of payment to the employees and the agencies maintained the employees' employment records. As a result, the court concluded that the agencies were employers within the meaning of the FLSA.

2. Miscellaneous

The courts in the following cases have held that employer/employee status was established such that the workers' wages were covered by the FLSA: ***Chao v. Gotham Registry, Inc.***, 514 F.3d 280 (2nd Cir. 2008) (employment agency required to pay overtime to nurses it referred to client hospitals); ***Donovan v. Unique Racquetball Clubs***, 674 F. Supp. 77 (E.D.N.Y. 1987) (locker room attendants); ***Luther v. Z Wilson, Inc.***, 528 F. Supp. 1166 (S.D. Ohio 1981) (real estate salesperson); ***Halferty v. Pulse Drug Co.***, 821 F.2d 261 (5th Cir. 1987) (ambulance service dispatcher); ***Brennan v. Partida***, 492 F.2d

707 (5th Cir. 1974) (laundromat attendant); ***Donovan v. Sureway Cleaners***, 656 F.2d 1368 (9th Cir. 1981) (operators of laundry and dry cleaning company's retail outlets); ***Mitchell v. Strickland Transp. Co.***, 228 F.2d 124 (5th Cir. 1955) (night security guards); ***Doty v. Elias***, 733 F.2d 720 (10th Cir. 1984) (waiters and waitresses); ***Dole v. Snell***, 875 F.2d 802 (10th Cir. 1989) (cake decorators paid by the cake); ***Brock v. Superior Care, Inc.***, 840 F.2d 1054 (2d Cir. 1988) (health care service nurses; working simultaneously for different employers); ***Martin v. Selker Bros., Inc.***, 949 F.2d 1286 (3d Cir. 1991), ***Donovan v. Williams Oil Co.***, 717 F.2d 503 (10th Cir. 1983), and ***Marshall v. Truman Arnold Distributing Co.***, 640 F.2d 906 (8th Cir. 1981) (service station operators); ***Weisel v. Singapore Joint Venture, Inc.***, 602 F.2d 1185 (5th Cir. 1979) (parking lot valet who worked for hotel, was covered by hotel's insurance, had an identity card stating he was a hotel employee, received hotel employee discount for meals, and received holiday bonus from the hotel); ***Donovan v. John Jay Esthetic Salons***, 26 WH Cases 823 (E.D. La. 1983) (shampooers at a beauty salon).

3. Cable splicer

In ***Cromwell v. Driftwood Elec. Contractors Inc.***, Case No. 09-60212 (5th Cir. Oct. 12, 2009)(unpub.), the court held that an employer/employee status was established such that the employees' wages were covered by the FLSA. Notably, two workers hired as subcontractors to provide cable slicing services after Hurricane Katrina were covered by the FLSA where they "had worked steadily over a 'substantial period of time' exclusively for the defendant, and they took direction from the defendant in performing their work." The court noted that the work schedule set by defendant "effectively precluded the men from taking other jobs" since they worked 12 hour days over a period of 13 days with one day off every two weeks. This schedule was in place over an eleven month period of time.

On the other hand, in ***Thibault v. Bellsouth Communications, Inc.***, ___ F.3d ___, Case No. 08-31226 (5th Cir. July 26, 2010), the court concluded that a slicer, who was hired to repair a telecommunications grid after Hurricane Katrina, was an independent contractor and not an employee of the telephone company for purposes of the FLSA's overtime compensation provisions. The court noted that the splicer did not work exclusively for the defendant and the defendant did not specify how the splicer was to perform the work. Moreover, the splicer provided his own truck and equipment for the job and the nature of his work required that he travel to different parts of the country.

D. Special relationships

Prisoners

1. Not an employee under the FLSA
Federal Prison Industries entitled to sovereign immunity

In ***Sprouse v. Federal Prison Industries, Inc.***, 480 F.2d 1 (5th Cir. 1973), the court held that an FLSA suit brought by inmates who worked for the Federal Prison Industries, an entity established under 18 U.S.C. § 4126 and 28 C.F.R. Part 0.99, was properly dismissed. The court determined that "the federal prison industries corporation (was) not a proprietary corporation whose goal (was) to make a profit, and judgment

against the corporation for back wages claimed by federal prisoners would expend itself on the public treasury." Moreover, it concluded that the "suit was in essence against the United States as to which government had not waived its sovereign immunity."

2. May be an employee; application of "economic reality" test
Denial of summary judgment

In ***Carter v. Dutchess Community College***, 735 F.2d 8 (2d Cir. 1984), the court applied the "economic reality" test in finding that a community college was the "employer" of inmates who served as teaching assistants in the prison. Initially, the court held that prisoners are not exempt from coverage under the FLSA. The court then determined that there were genuine issues of material fact regarding whether an employer/employee relationship existed such that summary judgment dismissing the inmate's complaint was improper. In particular, the court stated:

> In the instant case, accepting the facts and all reasonable inferences favorable to Carter as the non-moving party, (the college) made the initial proposal to 'employ' workers; suggested a wage as to which there was 'no legal impediment'; developed eligibility criteria; recommended several inmates for tutoring positions; was not required to take any inmate it did not want; decided how many sessions, and for how long, an inmate would be permitted to tutor; and sent the compensation directly to the inmate's prison account.

Id. at 15. The court noted that such control over the inmate workers by the college "may be sufficient to warrant FLSA coverage." As a result, the court declined to grant summary judgment against the inmates.

In ***Woodall v. Partilla***, 581 F.Supp. 1066 (N.D. Ill. 1984), a prisoner argued that the Respondent violated the FLSA by contracting out his labor for an excessive number of working hours per day at a wage level below that required by law. The trial judge noted that courts have applied the "economic reality" test in cases involving prisoners and have concluded that prisoners are not "employees" within the meaning of the FLSA. Based on the summary judgment pleadings before it, however, the court concluded that it did not have sufficient information to determine the relationship between the contractor and the prisoner in order to apply the "economic reality" test. As a result, the court afforded the parties 45 days to submit affidavits and other documentation related to the relationship between the prisoner and contracting employer.

VII. Individual or enterprise status

A. Establishing enterprise or individual coverage, generally

If an employer/employee relationship is demonstrated, then it must be determined whether the requirements for enterprise or individual coverage are met.

All employees of an enterprise are covered by the Act (1) if the enterprise is engaged in interstate commerce, engaged in the production of goods for interstate commerce, or working on goods or materials that have been moved in or produced for interstate commerce, and (2) the enterprise has an annual gross business volume of at least $500,000. 29 C.F.R. §§ 779.204, 779.237, and 779.245.

Individual employees are covered by the Act for each week during which they are individually engaged in interstate commerce, the production of goods for interstate commerce, or working in activities which are closely related and directly essential to the production of goods for interstate commerce. This coverage includes employees who work in communications or transportation; regularly use the postal service, telephones, or telegraph for interstate commerce; regularly cross state lines in the course of their employment; or work for independent employers which contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce. 29 C.F.R. §§ 779.103-779.119.

B. Coverage established

1. Enterprise

In ***Herman v. Harmelech***, 2000 WL 420839 (N.D. Ill., Apr. 14, 2000)(unpub.), the court held that Shai and Judith Harmelech qualified as an "enterprise" liable for the payment of minimum wages under the FLSA. In so holding, the court stated that "[a]n 'employer' need not be an 'enterprise' for purposes of FLSA liability, nor does the employer herself need to have the qualities of an enterprise . . .." Rather the court determined that the term "'enterprise' is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide." Slip op. at 5.

The court concluded that three elements must exist for FLSA liability to attach to an "enterprise": (1) related activities; (2) unified operation or common control; and (3) a common business purpose. Under the facts of ***Harmelech***, the court found that the jewelry concessions operated by Mr. and Mrs. Harmelech were related because all of the concessions involved the sale of jewelry. Moreover, the court found that unified operation and common control of the concessions rested with the Harmelechs. Moreover, it noted that the concessions were engaged in a common business purpose -- the retail sale of jewelry. Finally, in accordance with 29 U.S.C. § 203(5)(1)(A), the court determined that the companies were engaged in interstate commerce and had annual dollar volumes over $500,000 such that the Harmelechs would properly be held liable for the minimum wage and overtime violations.

2. Individual employer status not precluded by finding of corporate employer status

In ***Baystate Alternative Staffing, Inc. v. Herman***, 163 F.3d 668 (1st Cir. 1998), the court held that "[a] determination that the corporate plaintiffs are employers of the temporary workers does not preclude a determination that others are also 'employers' for purposes of the Act." Under the facts of the case, Baystate operated as a temporary employment agency. The court determined that the agency was an "employer" for purposes of the FLSA. However, the court was further confronted with the issue of whether Harold and Marlene Woods, as individuals who founded the corporate agencies, were personally liable for the civil money penalty which stemmed from violations of the Act. Harold and Marlene Woods maintained that they were not employers under the FLSA because they had no ownership interest in the corporations and did not have "true operational control over any aspects of the business."

The Secretary of Labor countered to state that the FLSA's definition of "employer" is broadly written at 29 U.S.C. § 203(d) and it covers Mr. and Mrs. Woods because these individuals "exercised control over the work situation." *Id.* at 677. Citing to ***Donovan v. Agnew***, 712 F.2d 1509 (1st Cir. 1983), a case wherein the corporate veil was pierced and officers of the company were personally held liable for back wages owed, the court in ***Baystate*** concluded that the same legal principles would apply where personal liability for a civil money penalty was at issue. Therefore, the court applied the "economic reality" test to determine whether Mr. and Mrs. Woods were individually liable for payment of the civil money penalty. The elements relevant to the issue of personal liability were:

> . . . significant ownership interest of the corporate officers; their operational control of significant aspects of the corporation's day-to-day functions, including compensation of employees; and the fact that they personally made decisions to continue operating the business despite financial adversity and the company's inability to fulfill its statutory obligations to its employees.

Id. at 677-78. The court noted that the "economic reality analysis focused on the role played by the corporate officers in causing the corporation to under-compensate employees and to prefer the payment of other obligations and/or the retention of profits." *Id.* at 678. Upon review of the ALJ's findings, the court noted that Marlene and Harold Woods "exercised some degree of supervisory control over the workers and . . . they had the authority to manage certain aspects of the business's operations on a day-to-day basis." However, the court found that the ALJ failed to determine whether these individuals "controlled Baystate's purse strings, or made corporate policy about Baystate's compensation practices." *Id.* at 678. As a result, the case was remanded for further fact-finding.

3. Individual status

In ***Herman v. Harmelech***, 2000 WL 420839 (N.D. Ill., Apr. 14, 2000)(unpub.), the Department maintained that the Harmelechs failed to pay the proper minimum wages and overtime and failed to properly maintain work and wage records. The district court held that Judith Harmelech was liable as an employer in her individual capacity because (1) she was an officer and director of the company, (2) she knew that the employees received insufficient funds payroll checks, and (3) she wrote checks for employees' compensation

and for other expenditures of the company. With regard to Shai Harmelech, the court also found that he was an employer because he (1) was the controlling shareholding, director, and an officer of the company, (2) he was authorized to sign employee payroll checks, (3) he had knowledge and authority to act on the employees' complaints about insufficient funds and non-payments of payroll checks, (4) he represented the company during the Wage and Hour investigation, and (5) he had authority to establish the salaries of the company's officers. Consequently, the court concluded that the employer status of these individuals was established as a matter of law.

VIII. Certain provisions under the FLSA

A. "Production of goods for commerce" defined

In ***Reich v. Thomas J. Stewart d/b/a Stewart Trucking & Pallet***, 121 F.3d 400 (8th Cir. 1997), the circuit court held that the employees were engaged in commerce or the production of goods for commerce such that the employer was not exempt from the FLSA pursuant to 29 U.S.C. § 203(s)(1), and the employees were entitled to overtime compensation. Under the facts of the case, Stewart was the sole proprietor of a business which repaired broken shipping pallets for sale to local businesses. Employees were paid fifty cents for each of the first 100 pallets repaired in a day and sixty cents per pallet thereafter. The company did not keep any records of the workers' daily or weekly hours. The court further noted that one employee worked weekends as well as during the week with the employer's knowledge. The employer argued that its employees were engaged only in local commerce such that they were exempt from the FLSA, "pallets were repaired in Lincoln, Nebraska, with materials purchased in Lincoln, and were returned to businesses in Lincoln." The court held to the contrary and defined "production of goods for commerce" as:

> . . . manufacturing, handling, working on, or, otherwise engaging in the production of boxes, barrels, bagging, crates, bottles, or other containers, wrapping or packing material which their employer has reason to believe will be used to hold the goods of other producers which will be sent out of the State in such containers or wrappings. It makes no difference that such other producers are located in the same state and that the containers are sold and delivered to them there. (citation omitted). Because Stewart knew that the pallets rebuilt by Petty and Hoss would likely carry Cooks and other customers' goods in interstate commerce–Petty and Hoss were engaged in the production of goods for commerce.

The court further held that, with regard to overtime compensation, "[t]he key inquiry is not whether overtime work was authorized, but whether (the employer) was aware that (the employee) was performing such work." If an employer does not want an employee to perform overtime work, then the employer "has a duty to see it is not performed." The court concluded that the employer had actual and constructive knowledge that his employee

worked overtime and was, therefore, liable for the payment of overtime wages. The fact that the employee did not seek overtime pay was irrelevant because the employee could not waive his entitlement to FLSA benefits. *See also* ***Ed and Janice Hudson d/b/a CJ's Country Market & Pizza Pro***, 2001-CLA-24 (ALJ, Jan. 7, 2003) (Employer in a child labor case conducted "interstate transactions by accepting food stamps and credit cards" and it received goods from interstate commerce).

B. Gross receipts must exceed $500,000

Irrelevant if complaint filed under individual coverage provision at

§ 207(a)(1)

In ***Reich v. Thomas J. Stewart d/b/a Stewart Trucking & Pallet***, 121 F.3d 400 (8th Cir. 1997), the employer maintained that it was exempt from the FLSA because the parties stipulated that its gross receipts did not exceed $500,000 during the relevant time period. The court concluded, however, that this was an irrelevant consideration because the "Secretary's complaint is based upon activities of . . . employees under the individual coverage provision, § 207(a)(1), not the enterprise provision, § 203(s)(1)."

C. Bona fide commission

In ***Herman v. Suwannee Swifty Stores, Inc.***, 19 F.Supp.2d 1365 (M.D. Ga. 1998), the Secretary argued that a company, which owned a chain of 215 food stores, failed to pay its store managers proper overtime compensation. Citing to 29 U.S.C. § 207(i), the court agreed and held that the employer failed to establish that it was exempt from the overtime pay requirements. The statute at Section 7(i) provides an exception to overtime compensation for an employee working in a retail or service establishment where (1) the regular rate of pay for the employee is more than one and one-half times the minimum hourly rate, and (2) more that half of the employee's compensation represents commissions on goods and services. *Id.* at 3. The Secretary argued that the company did not maintain a "bona fide commission rate" in violation of 29 C.F.R. § 779.416(c). The court agreed and stated:

> This court finds that when the commission rate is always less than the amount of the (guaranteed minimum wage at the company) then the commission rate is clearly not 'bona fide.' Moreover, if a manager exceeds the guaranteed rate only once in a year and the amount of the commissions only marginally increases the employee's annual earnings, as in this case, this also could not reasonably be considered a bona fide commission as required by Section 7(i).

Id. at 7. The court emphasized that it is the employer's burden to prove that it is entitled to any exemption and "any exemption to overtime is construed narrowly against the

employer." (citing to ***Avery v. City of Talladega***, 24 F.3d 1337, 1370 (11th Cir. 1994). In support of its holding, the court stated the following:

> The whole premise behind earning a commission is that the amount of sales would increase the rate of pay. Thus, employees may elect to work more hours so they can increase their sales, and in turn, their earnings. When a commission plan never affects the rate of pay, the purpose behind using a commission rate also fails.

The court stated that, to hold otherwise, would create a loophole in the overtime pay requirements whereby an employer could avoid paying overtime compensation by having a commission scheme which ultimately does not affect the employees' pay.

D. Proper pay periods established by contract or business practice

In ***U.S. Dep't. of Labor v. Micro-Chart, Inc.***, ARB Case No. 98-080, 1998-FLS-12 (ARB, Nov. 4, 1998), the ARB upheld the ALJ's finding of repeated and willful late payments of minimum wages and overtime as well as the ALJ's assessment of a civil money penalty. Under the facts of the case, the ARB noted that the company usually paid its employees on a bi-weekly schedule, but some employees had not been paid for 14 weeks. Initially, the ARB noted that the FLSA "does not explicitly establish a time for payment of wages," but such payments are "established by agreement or past practice of the parties." The ARB found that the record before it supported a finding that the company's practice was to pay its employee's on a bi-weekly basis. From this, it concluded that the company had violated the FLSA with regard to those employees which were not paid every two weeks.

With regard to the assessment of a civil money penalty, the company maintained that they paid the back wages owed prior to assessment of the penalty such that the penalty amount should be vacated. The ARB disagreed to state that there was no statutory or regulatory authority providing that a "civil money penalty may not be assessed where an employer has paid the back wages after a Wage and Hour investigation has begun." Citing to ***Brooks v. Village of Ridgefield Park***, 978 F. Supp. 613, 619 (D.N.J. 1997), the ARB noted that the district court held that allowing an employer to escape payment of liquidated damages by paying overtime compensation before liability was adjudicated would render that provision of the FLSA "toothless." The ARB concluded that the payment of back wages owed may support a reduction of a civil money penalty, but not its elimination.

IX. Anti-retaliation provisions

Section 15(a)(3) of the FLSA provides that it is unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

A. Protected conduct

Some courts have concluded that informal workplace complaints regarding FLSA violations constitute protected activity. ***Love v. RE/MAX of America, Inc.***, 738 F.2d 383 (10th Cir. 1984) ("the Act also applies to the unofficial assertion of rights through complaints at work). *See also* ***Chennisi v. Communications Construction Group***, 10 Wage & Hour Cas.2d (BNA) 734, Case No. 04-4826 (E.D. Pa. Feb. 17, 2005) (complainant alleged retaliatory termination after filing complaint against Employer for failure to pay proper overtime; court held internal complaints constituted protected activity); ***EEOC v. Romeo Community Schools***, 976 F.2d 985 (6th Cir. 1992); ***EEOC v. White and Sons Enterprises***, 881 F.2d 1006 (11th Cir. 1989); ***Brock v. Richardson***, 812 F.2d 121 (3d Cir. 1987).

In ***Hagan v. Echostar Satellite, LLC***, Case No. 07-20192 (5th Cir. May 30, 2008), the court held that an informal, internal complaint may constitute "protected activity" under Section 215(a)(3), but the complaint must "concern some violation of law." The court noted:

> Hagan admits that he did not think (the change in employees' work schedules) was illegal, and it is undisputed that the change was in fact legal. Thus, Hagan's personal objections to the schedule changes do not constitute protected activity under the FLSA.

Id.

However, the Second Circuit has held that informal complaints are not protected. ***Lambert v. Genesee Hosp.***, 10 F.3d 46 (2d Cir. 1993). In ***Shah et al. v. Wilco Systems, Inc.***, 2000 WL 1725015, Case No. 99 Civ. 12054 (AGS) (D. S.D.N.Y. Nov. 20, 2000), Plaintiff Shah argued that Respondent violated the anti-retaliation provisions at 29 U.S.C. § 215(a)(3) in discharging her for "having discussions with her Indian co-workers about Wilco's employment practices, specifically with regard to wages." The court noted that the plain language of the statute prohibited retaliation of an employee for filing a formal wage complaint, instituting a proceeding, or testifying in connection with a wage proceeding. Citing to ***Lambert v. Genesee Hosp.***, 10 F.3d 46, 55 (2d Cir. 1993) and ***Booze v. Shawmut Bank***, 62 F. Supp.2d 593, 598 (D. Conn. 1999), the court held that "employment decisions taken in response to complaints to a supervisor, or discussions with co-workers, are not actionable under the FLSA." In this vein, the court noted that Plaintiffs failed to allege that Shah's discharge was in response to filing a formal wage complaint or instituting a proceeding. As a result, Plaintiff's claim under the FLSA's anti-retaliation provisions was dismissed.

B. Burdens of production and persuasion

The burden initially lies with the employee to establish, by a preponderance of the evidence, a *prima facie* case of unlawful retaliation. This *prima facie* case is comprised of three elements: (1) the employee engaged in protected activity; (2) the employee suffered an adverse employment action; and (3) there was a causal link between the protected

activity and adverse employment action. ***Brock v. Richardson***, 812 F.2d 121 (3d Cir. 1987). *See also* ***Larsen v. Club Corp. of America***, 855 F. Supp. 247 (N. D. Ill. 1994) (a fourth element -- that the employer had knowledge that the employee engaged in protected activity -- is implicitly part of the third element in the Seventh Circuit). It is further noted that the proximity in time between the protected activity and adverse action is relevant to determining whether a causal link exists. *See* ***Conner v. Schnuck Markets***, 121 F.3d 1390 (10th Cir. 1997) (a span of four months between the worker's protected activity and his termination was, standing alone, insufficient to justify an inference of causation); ***Morgan v. Future Ford Sales***, 830 F. Supp. 807 (D. Del. 1993) (an employee terminated two days after engaging in protected activity establishes a *prima facie* case of retaliation).

If a *prima facie* case is presented, then the burden shifts to the employer to state legitimate, non-discriminatory reasons for the adverse employment action. If the employer presents such reasons, then the burden shifts to the worker to establish that the stated reasons are pretextual.

Analysis of the allocations of proof follow the line of Supreme Court decisions in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 802 (1973), ***Texas Dep't. of Community Affairs v. Burdine***, 450 U.S. 248 (1981), and ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502 (1993). Upon examining the entire record, the ALJ may conclude that the reasons proffered by the employer were pre-textual, or the adverse employment action was prompted by "mixed motives."

1. Pretext

Legitimate, non-discriminatory reasons for employment actions include violations of company policy, excessive lateness, unacceptable job performance, failure to follow directions, and mismanagement. The employee must demonstrate that such reasons are pre-textual by establishing that "a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." ***Rea v. Martin Marietta Corp.***, 29 F.3d 1450 (10th Cir. 1994).

2. Mixed motives

If it is determined that the adverse employment action was based on mixed motives, then the ALJ must apply the analysis in ***Price Waterhouse v. Hopkins***, 490 U.S. 228 (1989). A "mixed motive" analysis is utilized when the evidence reveals the presence of lawful and unlawful reasons for the adverse employment action. If an employee establishes the presence of mixed motives, then the Court's decision in ***Price Waterhouse*** requires that the burden of persuasion shift to the employer to demonstrate that the challenged action would have been taken even in the absence of the unlawful motivation.

C. Remedies

Section 16 of the FLSA provides that an employee who establishes unlawful retaliation may seek "without limitation employment, reinstatement, promotion, and the

payment of wages lost and an additional equal amount as liquidated damages . . .." 29 U.S.C. § 216(b). The courts have also upheld the following remedies: ***Avitia v. Metropolitan Club of Chicago***, 49 F.3d 1231 (7th Cir. 1995) (front pay -- the "difference (after discounting to present value) between what the plaintiff would have earned in the future had be been reinstated at the time of trial and what he would have earned in the future in his next best employment"; this supports a policy of not compelling reinstatement); ***Brock v. Richardson***, 812 F.2d 121 (3d Cir. 1987) (FLSA back pay awards should be presumed to carry pre-judgment and post-judgment interest unless required otherwise based on equity); ***Travis v. Gary Community Mental Health Center, Inc.***, 921 F.2d 108, 111 (7th Cir. 1990), *cert. denied*, 502 U.S. 812 (1991) (compensatory and punitive damages may be awarded).

D. The Patient Protection and Affordable Care Act (PPACA), Pub. L. 111-148, § 1558 (Mar. 23, 2010) as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (Mar. 30, 2010)

1. Prohibition on discrimination

Newly enacted legislation amends the Fair Labor Standards Act of 1938 to prohibit discrimination against any employee reporting a violation of Title I of the PPACA. The FLSA is amended by inserting after section 18B (as added by section 1512) the following:

> SEC. 18C. PROTECTIONS FOR EMPLOYEES.
>
> (a) Prohibition- No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has--
> (1) received a credit under section 36B of the Internal Revenue Code of 1986 or a subsidy under section 1402 of this Act;
> (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title);
> (3) testified or is about to testify in a proceeding concerning such violation;
> (4) assisted or participated, or is about to assist or participate, in such a proceeding; or
> (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).
>
> (b) Complaint Procedure-
> (1) IN GENERAL- An employee who believes that he or she has been discharged or otherwise discriminated against by any employer in violation of this section may seek relief in accordance with the procedures, notifications, burdens of proof, remedies, and statutes of limitation set forth in section 2087(b) of title 15, United States Code.

(2) NO LIMITATION ON RIGHTS- Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.'

Patient Protection and Affordable Care Act, Pub. L. 111-148, § 1558 (Mar. 23, 2010).

Reference to "this title", *supra*, means "Title I" of the PPACA, which pertains to medical insurance coverage and practices at hospitals, clinics, and physicians' offices. Section 18C of the FLSA does not cover employees who report violations under Titles II through X of the PPACA.

Title I of the PPACA covers a variety of issues including: (1) lifetime limits or unreasonable annual limits on the dollar value of benefits at § 2711 of the PPACA; (2) rescission of health insurance coverage at § 2712; (3) discrimination in favor of highly compensated individuals at § 2716; (4) implementation of an effective appeals process for appeals of coverage determinations and claims by states at § 2719; (5) access to insurance for uninsured individuals with a pre-existing condition at § 1101; (6) reinsurance for early retirees at § 1102; (7) exclusions from coverage or other discrimination based on pre-existing conditions or some other health status at § 2704; (8) discrimination against individual participants and beneficiaries based on health status, including physical and mental illness, claims experience, genetic information at § 2705; (9) maintenance of existing coverage at § 1251; and (10) large employers providing automatic enrollment of employees in a health plan at § 1511.

2. Complaint procedure

Complaints of discrimination arising under Section 18C of the PPACA are processed and adjudicated in accordance with the whistleblower provisions of the Consumer Product Safety Improvement Act of 2008 (CPSIA) at 15 U.S.C. § 2087(b).

SEC. 18C. PROTECTIONS FOR EMPLOYEES.

. . .

(b) Complaint Procedure-
(1) IN GENERAL- An employee who believes that he or she has been discharged or otherwise discriminated against by any employer in violation of this section may seek relief in accordance with the procedures, notifications, burdens of proof, remedies, and statutes of limitation set forth in section 2087(b) of title 15, United States Code.
(2) NO LIMITATION ON RIGHTS- Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.'

Incorporation of the CPSIA with regard to the new employee protection provisions of the PPACA places jurisdiction of complaint processing with the Department of Labor and the responsibility for conducting hearings and adjudicating the claims rests with the Office of Administrative Law Judges. The relevant portion of the CPSIA is set forth as follows:

(b)(1) A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act. Upon receipt of such a complaint, the Secretary shall notify, in writing, the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

> **(2)(A)** Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the complainant and the person named in the complaint an opportunity to submit to the Secretary a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary shall initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary concludes that there is reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Any such hearing shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.
>
> > **(B)**(i) The Secretary shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
> > (ii) Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
(iv) Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3)(A) Not later than 120 days after the date of conclusion of any hearing under paragraph (2), the Secretary shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary, the complainant, and the person alleged to have committed the violation. **(B)** If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation—

(i) to take affirmative action to abate the violation;
(ii) to reinstate the complainant to his or her former position together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and
(iii) to provide compensatory damages to the complainant. If such an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(C) If the Secretary finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary may award to the prevailing employer a reasonable attorneys' fee, not exceeding $1,000, to be paid by the complainant.

(4) If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States with jurisdiction, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. The proceedings shall be governed by the same legal burdens of proof specified in paragraph (2)(B). The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including—

(A) reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;
(B) the amount of back pay, with interest; and
(C) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

(5)(A) Unless the complainant brings an action under paragraph (4), any person adversely affected or aggrieved by a final order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order. **(B)** An order of the Secretary with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(6) Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(7)(A) A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order. **(B)** The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorneys' and expert witness fees) to any party whenever the court determines such award is appropriate.

15 U.S.C. § 2087(b).

X. Compensation

Section 6 of the FLSA requires that each covered employee be paid at least a specified minimum wage for each hour worked. Moreover, Section 7 of the Act provides that an employee may not be employed for more than a stated number of hours in a work week (usually 40 hours) without receiving at least one and one-half times their regular rate of pay for each additional hour of work. *See also* implications of the Portal-to-Portal Act of 1947 at Chapter II, **Jurisdiction**.

A. Waiting time

In ***Armour & Co. v. Wantoch***, 323 U.S. 126, 132-34 (1944), the Supreme Court held that if "waiting time" is spent by the employee for his or her own benefit, then it is not compensable under the Act. On the other hand, if the time was spent primarily for the benefit of the employer, then it is covered by the Act. The focus of the inquiry is the control which the employer has over the employee during the waiting time and whether the employee may effectively use that time for his or her purposes.

1. While on duty, covered by the FLSA

In ***Cole v. Farm Fresh Poultry, Inc.***, 824 F.2d 923, 929-30 (11th Cir. 1987), ***Fields v. Luther***, 28 WH Cases 1062, 1073-74 (D. Md. 1988), and ***Smith v. Superior Casting Crews***, 299 F. Supp. 725.730 (E.D. La. 1969), the courts held that an employee's waiting time while on duty is compensable under the FLSA, especially where such time was unpredictable or was of such short duration that the employee could not effectively use the time for his or her own purposes. This is so even where the employee spent time playing cards, watching television, or reading. *See* ***Armour & Co. v. Wantock***, 323 U.S. 126, 132-34 (1944); ***Handler v. Thrasher***, 191 F.2d 120 (10th Cir. 1951); ***Brock v. DeWitt***, 633 F.Supp. 892, 895-96 (W.D. Mo. 1986); ***Maxfield v. Marshall***, 25 WH Cases 293, 294 (D. Utah 1981). *See also* 29 C.F.R. § 785.15.

Some specific examples of compensable on duty waiting time are as follows: ***Mireless v. Frio Foods, Inc.***, 899 F.2d 1407, 1411-13 (5th Cir. 1990) (45 minutes of waiting time for assembly line workers due to delay and mechanical failures); ***Brock v. DeWitt***, 633 F.Supp. 892 (D. Utah 1981) (restaurant employees required to report to work at a specific time but could not "clock in" until there were enough customers); ***Donovan v. 75 Truck Stop, Inc.***, 25 WH Cases 448, 450-52 (M.D. Fla. 1981) (employees who washed trucks were waiting for the next truck to arrive); ***Wright v. Carrigg***, 275 F.2d 448, 449 (4th Cir. 1960) (truck drivers carrying mail who had two hour layovers due to loading and unloading difficulties); ***Smith v. Superior Casing Crews*** 299 F. supp. 725, 728-29 (E.D. La. 1969) (casing crew which waited for casings after they set up their equipment); ***Walling v. Dunbar Transfer & Storage***, 3 WH Cases 284, 287 (W.D. Tenn. 1943) (truck drivers required to wait on employer's premises for assignment); ***Wirtz v. Spencer***, 223 F. Supp. 692, 694 (N.D. Miss. 1963 and ***Mitchell v. Wigger***, 14 WH Cases 534, 536-37 (D.N.M. 1960) (employees who experienced occasional waiting time due to machinery breakdowns).

2. Off duty, not compensable under the FLSA

Under 29 C.F.R. § 785.16(a), "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." A determination regarding whether off duty time is compensable is fact specific and courts look at the amount of time involved and any restrictions placed upon the employee by the employer during that time.

Examples of non-compensable off-duty time are as follows: ***Halferty v. Pulse Drug Co.***, 864 F.2d 1185 (5th Cir. 1987) (telephone dispatcher answered small number on non-emergency ambulance care calls at night and was otherwise free to pursue her own

personal, social, and business activities during those hours); ***Rousseau v. Teledyne Movible Offshore, Inc.***, 805 F.2d 1245, 1247-48 (5th Cir. 1986, *cert. denied.*, 484 U.S. 827 (1987) (offshore oil derrick barge employees); ***Gifford v. Chapman***, 6 WH Cases 806, 809 (W.D. Ok. 1947) and ***Thompson v. Daugherty***, 40 F. Supp. 279, 284 (D. Md. 1941) (truck drivers picking up and delivering mail who were free to pursue personal interests during the waiting time between scheduled runs).

With regard to security guards who are required to work during a strike, in ***Allen v. Atlantic Richfield Co.***, 724 F.2d 1131, 1136-38 (5th Cir. 1984), the court held that the off duty time the guards was not compensable. However, in ***Campbell v. Jones and Laughlin Steel Corp.***, 70 F. Supp. 996, 998 (W.D. Pa. 1947), the court concluded that security guards who were on call at all times during the strike were entitled to compensation for working 24 hours per day.

3. Time waiting while on-call

In determining whether "on-call" time is compensable under the FLSA, the inquiry involves whether employees are required to remain on the employer's premises, or so close to the premises that the employees could not reasonably use the time effectively for their own purposes. *See* 29 C.F.R. § 785.17; ***Skidmore v. Swift & Co.***, 323 U.S. 134 (1944). This inquiry includes a determination of whether the time while "on-call" was primarily for the benefit of the employer or whether the employee was "waiting to be engaged." *Id.* at 137.

In ***Reimer, et al. v. Champion Healthcare Corp.***, 258 F.3d 720 (8th Cir. 2001), the court cited to ***Armour & Co. v. Wantock***, 323 U.S. 126 (1944) and ***Skidmore v. Swift & Co.***, 323 U.S. 134 (1944) to hold that "off-premises 'on-call' time" for nurses was not covered by the FLSA. The court agreed with the district judge that the on-call time was not spent primarily for the benefit of the employer and that "[s]hort of drinking alcohol or taking mind-altering drugs, the appellants could pursue a virtually unlimited range of activities in town or at home." The court further noted that the evidence established that "over a three-year span of time, only about a quarter of the appellants were actually called in more than once during their scheduled on-call times." *See also* ***Bright v. Houston Northwest Medical Center Survivor, Inc.***, 934 F.2d 671 (5th Cir. 1991).

[a] Compensable

In the following cases, the courts have held that "on-call" time was compensable: ***Armour & Co. v. Wantock***, 323 U.S. 126 (1944) (private firefighters required to remain at the employer's premises to respond immediately to emergency fire calls); ***Renfro v. City of Emporia***, 948 F.2d 1529 (10th Cir. 1991) (city fire fighters required to be at station house within 20 minutes of receiving a page); ***Cross v. Arkansas Forestry Commission***, 938 F.2d 912 (8th Cir. 1991) (forestry service employees had to remain within 50 miles of work site and had to monitor radio transmissions).

[b] Not compensable

The courts in the following cases found that the "on-call" time was not compensable because the employees were "waiting to be engaged" as opposed to "engaged to wait": ***Gilligan v. City of Emporia***, 986 F.2d 410 (10th Cir. 1993) (city water and sewer employees; called to duty, on average, less than one time per day); ***Armitage v. City of Emporia***, 982 F.2d 430, 432-33 (10th Cir. 1992) (city police detectives; called less than twice a week); ***Darrah v. Mo. Highway and Transp. Commission***, 885 F. Supp.2d 1307, 1313 (W.D. Mo. 1995) (state highway employee; called only once a week during winter season); ***Rousseau v. Teledyne Movible Offshore, Inc.***, 805 F.2d 1245 (5th Cir. 1986) (offshore derrick barge employees). *See also* ***Ormsby v. C.O.F. Training Services, Inc.***, 194 F.Supp.2d 1177 (D. Kan. 2002) (night manager at a transitional living house was not entitled to overtime for time spent sleeping four nights a week, even though he was not permitted to leave, because he was performing no routine duties).

4. Rest and meal periods

Rest periods which are short in duration, *i.e.* five to twenty minutes, are compensable. 29 C.F.R. § 785.18. However, if a break is thirty minutes or more, and the employee is relieved of duty, then the time is not compensable. 29 C.F.R. § 785.19; ***Donovon v. Bel-Loc Diner, Inc.***, 780 F.2d 1113, 1115 n. 1 (4th Cir. 1985) (a bona fide non-compensable break must last 30 minutes or more and the employee must be completely free from duty). Consequently, a "bona fide" lunch period is not compensable unless the employee is required to sit at his or her desk or machine during the lunch period. 29 C.F.R. § 786.19(a); ***Thompson v. Stock & Sons, Inc.***, 93 F. Supp. 213, 216 (E.D. Mich. 1950), *aff'd.*, 194 F.2d 493 (6th Cir. 1952). Some courts have required that the employee be "completely relieved from duty," ***Donovon v. Bel-Loc Diner, Inc.***, 780 F.2d 1113, 1115 n. 1 (4th Cir. 1985), whereas other courts have applied the "predominant benefit" test, ***Alexander v. City of Chicago***, 994 F.2d 333, 336-39 (7th Cir. 1993).

5. Travel and shop time

[a] Compensable

In ***Herman v. Rich Kramer Const., Inc.*** 1998 WL 664622 (8th Cir., Sept. 21, 1998)(unpub.), the circuit court held that the Portal-to-Portal Act at 29 U.S.C. §§ 251-262 did not exempt a foreman's travel time to job sites as compensable as a principal activity under the FLSA. In so holding, the court reasoned that the company "could not have constructed buildings without the tools, supplies, and employees transported by the foreman." The court further held that the Employee Commuting Flexibility Act of 1996 at 29 U.S.C. § 254, which provides that commuting time is not considered part of an employee's principal activities, was inapplicable. It reasoned that the foremen were not using trucks to commute; rather, they were also transporting other employees, equipment, and supplies. Moreover, the court held that a foreman's brief shop time benefitted the company and "should be aggregated with travel time to determine the uncompensated time." *Id.* at 2.

[b] Not compensable

The FLSA is amended by the Portal-to-Portal Act to provide that the following activities need not be compensated by employers:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> (2) activities which are preliminary and postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which the employee ceases, such principle activity or activities.

29 U.S.C. § 251; 29 C.F.R. § 785.34. *See* ***Bonilla v. Baker Concrete Construction, Inc.***, 487 F.3d 1340 (11th Cir. 2007) (time spent by employees going through mandatory screening at airport not compensable under the FLSA because screening was not "integral and indispensable" to the employees' "principle activity" of construction); ***Tum v. Barber Foods, Inc.***, 360 F.3d 274 (1st Cir. 2004) (time spent walking from one area to obtain a piece of clothing and walking to another area to obtain additional items is not compensable).

6. "Custom or practice"; use of collective bargaining agreements

In ***Bejil v. Ethicon, Inc.***, 269 F.3d 477 (5th Cir. 2001), the court held that, "under 29 U.S.C. § 203(o), the time spent (by the employees) changing clothes is to be excluded from the measured working time if it has been excluded by custom or practice under a bona fide collective-bargaining agreement." The court noted that the standard for establishing "custom or practice" was not a stringent one:

> In the present case, the clothes changing issue was discussed in negotiations between Ethicon and the Union, but no agreement stated explicitly that the Union consented to Ethicon's nonpayment for the gowning time. Ethicon, however, only need prove that the parties had a 'custom or practice' of non-compensation under the agreement. (citation omitted).

Even though the collective bargaining agreement was silent on the issue, the court found that a "custom or practice" of non-compensation for changing clothes was established. As a result, Ethicon did not violate the provisions of the FLSA. *See also* ***Andrako v. United States Steel Corp.***, ___ F.Supp.2d ___, Case No. 07-1629 (W.D. Pa. June 22, 2009) (donning and doffing clothes precluded as compensable by collective bargaining agreements between Respondent and the union dating back more than 60 years).

7. Donning and doffing required gear

In ***Tum v. Barber Foods, Inc.***, 360 F.3d 274 (1st Cir. 2004), the court held that time spent "donning and doffing of required gear is an integral and indispensable part of Employees' principal activities" and such activity is compensable.

In ***De Asencio v. Tyson Foods, Inc.***, 500 F.3d 361 (3rd Cir. 2007), the court cited to ***IBP, Inc. v. Alvarez***, 546 U.S. 21 (2005) and stated:

> Activity must be 'work' to qualify for coverage under the FLSA, and that 'work,' if preliminary or postliminary, will still be compensable under the Portal-to-Portal Act if it is 'integral and indispensable' to the principal activity. Under ***Alvarez***, such activities are, in themselves, principal activities. Although we recognize, of course, that whether donning and doffing is work was not directly at issue in ***Alvarez***, the Court could not have concluded that walking and waiting time are compensable under the Portal-to-Portal Act if they were not work themselves.

Citing to 29 C.F.R. § 790.8(c), the court held that the district court erred in instructing the jury:

> . . . to consider whether the gear was cumbersome, heavy, or required concentration to don and doff. This language in effect impermissibly directed the jury to consider whether the poultry workers had demonstrated some sufficiently laborious degree of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer; . . . exertion is not in fact required for (an) activity to constitute 'work.'

Based on the foregoing, the court held that time spent donning and doffing gear for Tyson Foods constituted "work" as a matter of law and was compensable under the FLSA.

8. Waiting in line for equipment or to punch time clock

In ***Tum v. Barber Foods, Inc.***, 360 F.3d 274 (1st Cir. 2004), the court held that time waiting to punch a time clock is not compensable. 20 C.F.R. § 790.8. Moreover, the court concluded that the "short time" employees waited in line to obtain gear was not compensable.

In ***IBP, Inc. v. Alvarez***, 546 U.S. 21 (2005), the Court held that pre-donning waiting time and waiting for supplies were not a "principal activity" such that the time was excluded from FLSA coverage under the Portal-to-Portal Act. *See also* ***Ballaris v. Wacker Siltronic Corp.***, 370 F.3d 901 (9th Cir. 2004).

On the other hand, in ***Steiner v. Mitchell***, 350 U.S. 247, 254 (1956), the Court held that time spent sharpening knives by workers at a meat packing plant was indispensable and integral to the principal work activities and was compensable under the FLSA.

9. Nursing mothers, express breast milk

The Patient Protection and Affordable Care Act (PPACA), Pub. L. 111-148, § 1558 (Mar. 23, 2010) as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (Mar. 30, 2010) adds Section 7(r) to the FLSA requiring employers of 50 employees or more to provide unpaid, reasonable break time for nursing mothers to express

breast milk for up to one year after the child's birth. Moreover, the employer must provide a place to express the milk, "other than a bathroom, that is shielded from view and free from intrusion." Employers of less than 50 employees will not be required to implement this provision provided the employer is able to demonstrate "undue hardship."

B. Non-cash benefits

1. Voluntary acceptance by employee not required

In ***Herman v. Collis Foods, Inc.***, 176 F.3d 912 (6th Cir. 1999), the court cited to ***Davis Brothers, Inc. v. Donovan***, 700 F.2d 1368, 1370 (11th Cir. 1983) and ***Donovan v. Miller Properties, Inc.***, 711 F.2d 49, 50 (5th Cir. 1983) and held that 29 C.F.R. § 531.30, which requires that an employee "voluntarily" accept non-cash benefits, was not a valid regulation. The court stated that there was no statutory authority for such a regulation. To the contrary, the court stated that the FLSA's focus is whether the "meals are 'customarily furnished' by the employer." The court further determined that:

> We hold that the § 203(m) meal deduction . . . is not dependent upon proof that such meals were actually consumed by all of the employees. By focusing instead on the cost to employers of the meals that they customarily make available to their employees, we produce a result that is consistent both with invalidating the voluntariness requirement and with the FLSA's policy of preventing employers from exploiting § 1 203(m) deductions for profit.

Id. at 7.

2. Acceptable non-cash benefit

[a] Meals

In ***Herman v. Collis Foods, Inc.***, 176 F.3d 912 (6th Cir. 1999), the court held that it was not a violation of the minimum wage provisions of the FLSA for the employer to deduct a set amount from the employee's cash wages in exchange for meals where the employer customarily furnished meals to its employees at no profit. The court noted that the definition of "wage" at 29 U.S.C. §§ 206(a) and 203(m) includes the "reasonable cost" of customarily furnishing meals to his employees. The court further stated that the implementing regulations provide that "reasonable cost" cannot include a profit to the employer. 29 C.F.R. § 531.3.

[b] Housing costs

Pursuant to 29 C.F.R. § 531.3(d)(1), the cost of furnishing "facilities," which are primarily for the benefit or convenience of the employer, may not constitute part of the employee's wages. On the other hand, if housing is provided for the benefit of the employee, then it may constitute part of the employee's wage. ***Bailey v. Pilots' Ass'n.***,

406 F. Supp. 1302, 1309 (E.D. Pa. 1976) (on-site housing for the benefit of the employer may not count as part of the employee's wage). To receive a credit for housing, the employer must demonstrate that the housing was adequate and that money withheld from an employee's wages for housing must bear a reasonable relationship to the quality of the housing. ***Calderon v. Witvoet***, 764 F. Supp. 536, 540*, aff'd. in part*, 999 F.2d 1101 (7th Cir. 1993); ***Osias v. Marc***, 700 F. Supp. 842, 845 (D. Md. 1988) ("substandard" housing may not included as a benefit).

C. Unlawful deductions from wages

1. Cash register shortages

A deduction for cash register shortages or unpaid bills, where such shortages are not due to fraud or theft on the part of the employee, is unlawful where it results in payment below the minimum wage to the employee. ***Mayhue's Super Liquor Stores, Inc. v. Hodgson***, 464 F.2d 1196, 1199 (5th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973).

2. Uniforms

If an employee is required by law, the employer, or by the nature of the work performed, to wear a uniform, then the cost of renting or buying and maintaining clean uniforms may not be counted against the employee's wages if such a deduction would result in payment of less than the minimum wage. 29 C.F.R. §§ 531.3(d)(2) and 531.32(c); ***Masters v. Maryland Management Co.***, 493 F.2d 1329 (4th Cir. 1974); ***Donovan v. K.F.C. Services***, 547 F. Supp. 503, 506 (E.D.N.Y. 1982).

D. *De minimus* time not compensable

In ***Anderson v. Mt. Clemens Pottery***, 328 U.S. 680 (1946), the Court held that, when the matter at issue concerns only a few seconds or minutes of work beyond the scheduled working hours, the time is not compensable under the FLSA.

Citing to 29 C.F.R. § 785.47 and ***Lindow v. United States***, 738 F.2d 1057 (9th Cir. 1984), the court in ***De Asencio et al. v. Tyson Foods, Inc.***, 500 F.3d 361 (3rd Cir. 2007), the court noted that, in determining whether otherwise compensable time is *de minimus*, some factors to consider may include the practical administrative difficulty in recording the additional time, the aggregate amount of compensable time, and the regularity of the additional work.

XI. Exemptions from coverage

A. Generally

1. Employer's burden to demonstrate exemption

In ***Hogan v. Allstate Ins. Co.***, 361 F.3d 621 (11th Cir. 2004), the court held that Employer carries the burden of proving that an exemption applies. *See also* ***Cash v. Cycle Craft Co.***, 508 F.3d 680 (1st Cir. 2007).

2. All requirements for exemption must be satisfied

In ***IntraComm, Inc. v. Bajaj***, 492 F.3d 285 (4th Cir. 2007), the district court held that Baback Habibi, who was a founder of IntraComm Incorporated (IntraComm), was not exempt from FLSA's minimum wage and overtime requirements. Under the facts of the case, Habibi entered into a 15 month employment agreement with an information technology service provider whereby Habibi was paid $7.00 per hour plus commissions from the sales of a hardware integration system created by him. Habibi earned no commissions because he was not successful in selling licenses for the system he created.

Habibi alleged that he was instructed "not to report hours he worked in excess of forty hours per week and that (Employer's) time-reporting system prohitibed him from doing so." The parties stipulated that, in sum, Habibi was not paid for 300 hours that he worked.

Citing to 29 C.F.R. Part 541, the court noted that executive, administrative, professional, outside sales, and computer employees may be exempt from the FLSA's minimum wage and overtime pay requirements. The court noted that an employee's "primary duty" must fall under one of the classifications at 29 C.F.R. Part 541. Moreover, the court observed that the regulations impose a "salary test" for certain classes of employees; namely, executive, administrative, and professional employees must receive compensation of at least $455 per week. 29 C.F.R. §§ 541.100, 541.200, and 541.300. On the other hand, the "outsides sales" exemption at 29 C.F.R. § 541.500(c) does not contain a "salary test."

The court also noted that the Secretary has developed a "combination exemption" at 29 C.F.R. § 541.708, which would affect the outcome of this case. The regulation provides:

> Employees who perform a combination of exempt *duties* as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employment may qualify for exemption. Thus, for example, *an employee whose primary duty involves a combination of exempt administrative work and exempt executive work may qualify for exemption.*

> In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

29 C.F.R. § 541.708 (italics added). From this, the court noted that it "is the interrelationship of the individual exemptions and the combination exemption that concerns us here."

Applying the regulatory criteria, the court found that Habibi's duties were most akin to the administrative exemption, but he would not qualify for the exemption because he was paid an hourly wage and never made more than $455 per week. Moreover, while Habibi was involved in "outside sales," it was agreed that he "did not customarily and regularly sell outside (his) place of business." Indeed, Habibi went on four sales calls over a ten month period of time.

The court framed the issue as whether Habibi could qualify for the Secretary's "combination exemption" since he did not satisfy the requirements of the individual exemptions. The court concluded that Habibi did not qualify for the combination exemption such that Employer was required to compensate Habibi in accordance with the FLSA's requirements.

In so holding, the court adopted the Secretary of Labor's position on the issue as presented in her *amicus curiae* brief:

> Although the combination exemption permits the blending of exempt duties for purposes of defining an employee's primary duty, it does not, according to the Secretary, relieve employers of their burden to independently establish the other requirements of each exemption whose duties are combined. (citation omitted). In the Secretary's view, then, the combination exemption cannot apply to an employee with administrative job functions constituting part of her 'primary duty' unless the employee also meets the administrative exemption's salary requirement. Since Habibi does not meet the salary requirement, he would not, under the Secretary's approach, qualify for exemption under the FLSA.

As a result, the court concluded that Habibi was entitled to payment of wages and overtime as prescribed by the FLSA.

3. Examples of exemption coverage

The exemptions at 29 U.S.C. § 213[2] include any contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting and decorating public buildings or public works; any work to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act at 41 U.S.C. § 35 *et seq.*; any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect; any contract for the furnishing of services by radio, telephone, telegraph, or cable companies which are subject

[2] A copy of this section of the statute is located at Appendix A.

to the Communications Act of 1934 at 47 U.S.C. § 151 *et seq.*; any contract for public utility services, including electric light and power, water, steam, and gas; any employment contract providing for direct services to a Federal agency by an individual or individuals; and any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.[3]

4. "Short test" and "long test"

The "short test" or "long test" may be applied to determine whether an employee is a manager, administrator, or professional and is, therefore, exempt from the FLSA requirements. The short test is employed for those workers who are paid on a salary basis of $455.00 or more per week (or $380.00 per week if employed in American Samoa by employers other than the Federal government) exclusive of board, lodging, or other facilities. 29 C.F.R. §§ 541.100 (executive), 541.200 (administrative), 541.300 (professional), and 541.400 (computer employees). *See also* 29 C.F.R. § 541.500 (outside sales employees). The "long test" is applied where the worker is paid more than $155, but less than $250 per week.

B. Management or executive employees

Under the "short test", a worker is exempt if: (1) the worker's primary duty consists of the management of the enterprise, or a customarily recognized department or subdivision thereof; and (2) the worker customarily and regularly directs the work of two or more other employees. *See* 29 C.F.R. § 541.1(f).

The "long test" provides that the worker may be exempt as a manager if the following criteria apply: (1) the worker's primary duty consists of the management of the enterprise, or a customarily recognized department or subdivision thereof; (2) the worker customarily and regularly directs the work of two or more other employees; (3) the worker has the authority to hire or fire other employees, or the worker's recommendations in this regard are accorded particular weight; (4) the worker customarily and regularly exercises discretionary powers; and (5) the worker does not devote more than twenty percent, or more than forty percent in the case of an employee of a retail or service enterprise, of his or her hours of work in the work week on activities which are not directly and closely related to the performance of the work described above. *See* 29 C.F.R. § 541.1(a)-(f).

The regulatory provisions at 29 C.F.R. § 541.103 provide guidance in determining whether the performance of managerial duties constitutes the employee's primary duty:

> The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of the employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's

[3] Note that the McNamara-O'Hara Service Contract Act at 41 U.S.C. § 356 contains similar provisions.

> time . . .. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

29 C.F.R. § 541.103. *See also* ***Ale v. Tennessee Valley Authority***, 269 F.3d 680 (6th Cir. 2001).

1. Exemption established

In ***Hays v. City of Pauls Valley***, 74 F.3d 1002 (10th Cir. 1996), a golf course manager was found to be an executive employee and, therefore, was exempt from the FLSA. The court found that he spent over 50 percent of his time on management tasks, including maintaining financial records, making recommendations regarding the hiring and firing of employees, overseeing the operations of the golf course, and supervising more than two full-time employees.

In ***Rowe v. Laidlaw Transit, Inc.***, 244 F.3d 1115 (9th Cir. 2001), the court held that Plaintiff was properly designated as an exempt employee under the FLSA and was not, therefore, entitled to overtime compensation. Under the facts of the case, Plaintiff was promoted to a "FLSA: EXEMPT" position in 1995. She was paid a set amount of compensation every two weeks and the "pay was not reduced or increased for quantity or quality of work." In 1997, Plaintiff suffered an injury and her salary was reduced *pro rata* as permitted by the Family Medical Leave Act (FMLA). Citing to 29 U.S.C. § 2612(c) and 29 C.F.R. § 825.206(a), the court held that an employer's compliance with the FMLA did not affect the employee's FLSA exempt status. In this vein, the court disagreed with Plaintiff who argued that her reduced schedule and pay while recovering from her injury was an indicia of hourly compensation. To the contrary, the court held that Plaintiff's injury qualified her for coverage under the FMLA and "her reduced schedule qualified as FMLA leave." As a result, Plaintiff remained exempt from the requirements of FLSA and was not entitled to overtime compensation.

2. Exemption not established

In ***Rodriguez v. Farm Stores Grocery, Inc.***, 518 F.3d 1259 (11th Cir. 2008), Respondent maintained that its "store managers" were exempt from FLSA overtime requirements as "executive" employees who were paid on a salary basis. The store managers bringing suit had been terminated due to a company reorganization unrelated to wage and hour issues under the FLSA.

Citing to 29 C.F.R. § 541.1(f) (2002), the court noted that the "executive exemption" applies to an employee (1) who earns a salary of at least $250 a week, (2) whose primary

duty is management of a recognized department or subdivision, and (3) who regularly directs two or more employees. Because the parties agreed that the salary of the store managers exceeded $250.00 a week and the jury found that the store managers regularly directed two or more employees, the sole remaining issue was whether the store managers' "primary duty" was management of a recognized department or subdivision.

The court held that the jury reasonably found "that the primary duty of the store managers was not management." In this vein, the court cited to testimony that, while some "managers conceded that they spent some time each week performing managerial tasks, all of them insisted it was not the majority of their work, and more than one testified to spending only about ten percent of their time on management-related duties." The court also noted testimony that "store managers lacked authority and discretion over their respective stores and employees."

In ***Yourman v. Giuliani***, 229 F.3d 124 (2d Cir. 2000), the circuit court vacated a district court's judgment that managerial city employees were not entitled to overtime compensation as required under 29 C.F.R. § 541.118(a)(6). The district court erred in finding that the city employees fell under the FLSA's "executive, administrative, or professional" exemption and were exempt from the overtime pay requirements under the "salary basis" test. The court noted that, under 29 C.F.R. §§ 541.1(f), 541.2(e), and 541.3(e), "an employee is employed in a 'bona fide executive, administrative, or professional' capacity only if he or she is compensated on a 'salary basis.'" It further stated that an employee is paid on a salary basis if s/he is paid on a weekly, or less frequent, basis. Moreover, the court noted that "[d]eductions from pay in less than one week increments for disciplinary violations are inconsistent with compensation on a salary basis." The court agreed with the Secretary of Labor's position that employees whose pay was adjusted for disciplinary reasons were not exempt from FLSA's requirements because genuine salaried employees are not "disciplined" through piecemeal deductions from their pay.[4] The court stated that, in determining what constitutes an "actual practice" of pay deductions, the adjudicator must determine "whether the employer's practices reflect an 'objective intention' to pay its employees on a salaried basis." It held:

> That question cannot be answered by simply dividing the number of impermissible pay deductions by the number of managerial employees, but necessarily involves consideration of additional factors such as the number of times that other forms of discipline are imposed, the number of employee infractions warranting discipline, the existence of policies favoring or disfavoring pay deductions, the process by which sanctions are determined, and the degree of discretion held by the disciplining authority. *Cf. Auer*, 519

[4] The court also noted that the regulatory provisions at § 541.118(a)(6) allowed for a "window of correction" where an employer takes inadvertent or mistaken deductions from a salaried employee's pay. If a deduction is made inadvertently or for reasons other than lack of work, then the exemption continues to apply. On the other hand, the court found that the "window of correction" is unavailable if the employer engages in a practice of taking improper deductions or of regularly communicating a policy of taking such deductions to its employees.

> U.S. at 462, 117 S. Ct. 905 (taking note of 'unusual circumstances' surrounding improper pay deduction).

Respondent maintained that the employment practices of each city agency must be viewed separately as opposed to being analyzed as one municipality in determining whether the agencies engaged in the actual practice of taking improper pay deductions. The Secretary of Labor cited to the U.S. Census Bureau's *1997 Census of Governments: Government Organization*, at ix (1999) to argue that city agencies in New York are not viewed as independent from the municipality. The court disagreed to state that Plaintiff may offer to show an actual practice of pay deductions by any entity that satisfies the FLSA definition of an employer and an agency of a municipality would fall within that definition. Finally, the court held that the district court was required to consider allegedly improper pay deductions dating back to April 1986, after the Supreme Court's decision in ***Garcia v. San Antonio Metro. Transit Auth.***, 469 U.S. 528 (1985) was issued wherein the Court held that the FLSA applied to public sector employees. The court reasoned:

> Although the appellants may not recover damages or back pay for violations of the FLSA prior to the applicable limitations date, April 1, 1989, any impermissible deductions before that time nevertheless would have relevance to the existence of an actual practice of imposing such deductions.

In ***Herman v. Harmelech***, 2000 WL 420839 (N.D. Ill., Apr. 14, 2000)(unpub.), the court rejected an employer's argument that its jewelry store managers were "executives" within the meaning of the FSLA such that the Act's minimum wage and overtime requirements were inapplicable. The court held that it is the employer's burden to establish that an employee fails under one of the executive, administrative, or professional exemptions to the FLSA. *See* 29 U.S.C. § 213(a)(1). The court noted that the regulations set forth a "short test" and a "long test" at 29 C.F.R. § 541.1 for determining whether an employee is exempt. The employer maintained that the "short test" should be applied since its employees were paid a weekly salary of $250 or more.

Under this test, it must be determined (1) whether the employees' primary duties were management of the enterprise or a subdivision thereof, and (2) whether the employees regularly and customarily directed the work of two or more other employees within that enterprise or subdivision thereof. Under the second prong of the test, the Secretary maintained that the employees must supervise other employees collectively working at least 80 hours a week, *i.e.* tow employees working 40 hours a week or one full-time employee working 40 hours per week and two part-time employees each working 20 hours per week.

Citing to ***Sec'y. of Labor v. Daylight Dairy Products, Inc.***, 779 F.2d 784, 787 (1st Cir. 1985), the court noted that the 80 hour rule had been upheld as reasonable. The ***Harmelech*** court then held that none of the store managers supervised employees working more than 80 hours per week "other than over the Christmas period, for which the Secretary has not sought recovery of overtime compensation" such that the employees did not qualify as "executives" and they were required to be compensated for overtime. *See also* ***Herman v. Suwannee Swifty Stores, Inc.***, 19 F.Supp.2d 1365 (M.D. Ga. 1998) (employer required to pay overtime to store managers where the employees did not receive "bona fide commissions" in addition to their hourly wage).

For examples of other non-exempt workers, see ***Ale v. Tennessee Valley Authority***, 269 F.3d 680 (6th Cir. 2001) (security shift lieutenants who "supervised" 15 to 30 officers and furnished security were not exempt because "nearly everything that the lieutenants did and nearly every decision that the lieutenants made was prescribed, controlled, or governed by . . . a Nuclear Regulatory Commission regulation or a Nuclear Regulatory Instruction"; court also held that shift supervisors were not exempt because "they did not direct other employees work, decide which posts they would hold, or have any authority to discipline other employees"); ***Brennan v. Whatley***, 432 F. Supp. 465 (E.D. Tex. 1977) (supervisor of a real estate company's crew who worked along side of crew); ***Donovan v. Rockwell Tire & Fuel, Inc.***, 711 F.2d 1050 (4th Cir. 1983) (foremen who spent most of time repairing vehicle, waiting on customers, and cleaning service area).

C. Administrative employees

Under the short test,[5] these workers are exempt if: (1) the worker's primary duty consists of office work directly related to management policies or general business operations of the employer or employer's customers; and (2) the worker's job involves the exercise of discretion and independent judgment. *See* 29 C.F.R. § 541.1(e)(2). *See also* ***Ale v. Tennessee Valley Authority***, 269 F.3d 680 (6th Cir. 2001).

The "long test" provides that the worker may be exempt as a manager if the following criteria apply: (1) the worker's primary duty consists of office work directly related to management policies or general business operations of the employer or employer's customers; and (2) the worker's job involves the exercise of discretion and independent judgment; (3) the worker meets the tests for an executive or administrative assistant, staff employee, or one who performs special assignments as set forth at § 541.2(c); and (4) the worker does not devote more than twenty percent, or more than forty percent in the case of an employee of a retail or service enterprise, of his or her hours of work in the work week on activities which are not directly and closely related to the performance of the work described above. *See* 29 C.F.R. § 541.2(a)-(e). It is noteworthy that the regulations provide that titles alone are not determinative of a worker's exempt status. *See* 29 C.F.R. § 541.201(b).

The provisions at 29 C.F.R. § 541.207(a) provide guidance for determining whether an employee is exempt as "administrative":

> In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term used in the regulations in subpart A of this part, more over, implies that

[5] In ***Webster v. Public School Employees of Washington, Inc.***, 247 F.3d 910 (9th Cir. 2001), the court stated that the first two parts of the short test are commonly referred to as the "salary basis test" and the last two parts are known as the "duties test." *See also* ***Hogan v. Allstate Ins. Co.***, 361 F.3d 621 (11th Cir. 2004).

> a person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

29 C.F.R. § 541.207(a).

1. Exemption established

29 C.F.R. §§ 541.205(c)(4) and 541.207(c)(6) (buyers who purchase inventory or set prices may be exempt); 29 C.F.R. § 541.301(f) (accountants may qualify as exempt as administrative or professional employees); ***Robinson-Smith v. Government Employees Insurance Co***, ___ F.3d ___, Case No. 08-7146 (D.C. Cir. Jan. 5, 2010) (position of "auto damage adjuster" exempt from FLSA requirements); ***Smith v. Johnson and Johnson***, ___ F.Supp.2d ___, Case Nos. 09-1223 and 09-1292 (3rd Cir. Dec. 17, 2009) (Senior Professional Sales Representative exempt as "administrative employee" because she independently developed strategic plan to maximize sales in her territory and "executed nearly all of her duties without direct oversight"); ***Roe-Midgett v. CC Services, Inc.***, 512 F.3d 865 (7th Cir. 2008) (Material Damage Appraiser II employees of insurance company contractor were "administrative" employees exempt from FLSA overtime requirements because they "represent the 'face' of CCS to countless claimants with whom they interact" and they "spend much of their time in the field without direct supervision; they also conduct investigations and have authority to settle claims up to $12,000); ***Renfro v. Indiana Michigan Power Co.***, 497 F.3d 573 (6th Cir. 2007) (technical writers for Employer exercised sufficient discretion and independent judgment in developing maintenance procedures to render the jobs exempt from FLSA requirements); ***Hippen v. First Nat'l. Bank***, 30 WH Cases 1402, 1408 (D. Kan. 1992), *recon. denied*, 2 WH Cases 2d 828 (D. Kan. 1994) (the vice president of a bank was exempt where he could unilaterally authorize loans up to $50,000 and where he sat on the loan committee); ***Hills v. Western Paper Co.***, 825 F. Supp. 936, 939 (D. Kan. 1993) (where an employee made customer inquiries, tracked bills and payments, and made recommendations regarding extensions of credit and discounts, he was exempt); 29 C.F.R. § 531.208(c) (establishing credit limits, the decision to ship orders on credit, and variation of credit terms is exempt work); ***Goldberg v. Arkansas Best Freight System, Inc.***, 206 F. Supp. 828 (W.D. Ark. 1962) (a dispatcher, who assigned employees, equipment and routes); 29 C.F.R. § 541.208(e) (a worker who plans efficient routes, contracts with carriers, resolves damage claims, and makes adjustments for irregularities in transportation, is exempt); 29 C.F.R. §§ 541.207(c)(5) and 541.208(d) (assistants, who arrange interviews and meetings without supervision, who handle callers and meetings in absence of superior, and who elect to respond to correspondence personally or present it to the superior, are exempt); ***Donovan v. Reno Builders Exchange, Inc.***, 26 WH Cases 1234, 1236 (D. Nev. 1984) (editor of a publication).

In ***Cash v. Cycle Craft Co.***, 508 F.3d 680 (1st Cir. 2007), the court held that Employer presented evidence sufficient to demonstrate that Plaintiff was an "administrative employee" such that the exemption applied and Employer was not required to pay overtime. The court noted that Plaintiff received a salary of $60,000 per year and his job as the "New Purchase/Customer Relations Manager" included developing an "overall customer service strategic plan," developing a "clear business plan to support organizational changes," and

taking "appropriate action" regarding delivery problems. The court held that actual duties performed by Plaintiff met the "management and discretion" requirements of the administrative employee exemption. Indeed, the court found that Plaintiff "did not simply produce a product; he exercised independent judgment as he engaged in the company's business operations."

2. Exemption not established

On March 24, 2010, the Deputy Administrator for the Wage and Hour Division issued a general legal interpretation stating that, if an employee is performing the typical duties of a mortgage loan officer, then the employee does not qualify for an exemption from the FLSA's requirements as an "administrative employee." *See Administrator's Interpretation*, 2010-1 (Mar. 24, 2010).

In ***Webster v. Public School Employees of Washington, Inc.***, 247 F.3d 910 (9th Cir. 2001), Plaintiff, a field representative for a labor union comprised of Washington state public school employees, sought overtime compensation under the FLSA. Respondent, on the other hand, argued that Plaintiff was an administrative employee who was exempt from the overtime compensation requirements of the Act. The court noted that Plaintiff:

> . . . spends most of his time negotiating collective bargaining agreements that determine the terms and conditions of employment for bargaining unit members. Webster regularly meets with members of a unit's negotiating committee to draft agreement proposals.
>
> . . .
>
> After Webster and his bargaining team have negotiated a tentative agreement with the school district, Webster explains the agreement to bargaining unit members. Webster has authority to sign contract extension agreements, side letters, and interim agreements members have approved.
>
> Webster's other main duty is handling bargaining unit members' grievances related to issues arising under the agreements.

The court further noted that Plaintiff was paid an annual salary of $65,000 and that there was evidence of record that he worked in excess of forty hours per week on a regular basis. With regard to the FLSA requirements for establishing a bona fide administrative professional, the parties agree that Plaintiff was paid at least $250 per week and that his work required the exercise of discretion and independent judgment. Plaintiff argues, however, that the remaining requirements have not been met; namely, he states that he was not paid on a salary basis and his duties of negotiating collective bargaining agreements and handling grievances did not satisfy the "primary duties test."

With regard to whether Plaintiff was a salaried employee, he argued that when he missed part of a day, his "sick leave or vacation allowance was docked in fifteen minute intervals" which supports a finding that he is not a salaried employee. Citing to 29 C.F.R. § 541.118(a) and ***Barner v. City of Novato***, 17 F.3d 1256 (9th Cir. 1994), the court

disagreed and held that reduction in an employee's fringe benefits, such as leave time, does not affect his status as a salaried employee. The court also concluded that Plaintiff's primary duties, which included negotiating agreements and handling members' grievances, qualified for the administrative exemption to the FLSA. The court stated the following:

> Webster performs management work as his primary duty, and his work is administrative, allowing the bargaining unit members to produce services for the school districts. We hold that Webster's primary duty is the administrative work of the bargaining units.

As a result, the court held that Plaintiff was exempt from FLSA's overtime protection.

See also ***IntraComm, Inc. v. Bajaj***, 492 F.3d 285 (4th Cir. 2007); ***Ale v. Tennessee Valley Authority***, 269 F.3d 680 (6th Cir. 2001) (training officer did not have to exercise independent judgment or discretion in teaching lesson plans and administering tests which were already prepared); ***Brock v. National Health Corp.***, 667 F. Supp. 557, 566 (M.D. Tenn. 1987) and 20 C.F.R. § 205(c) (accountants or bookkeepers who merely review entries for accuracy, tabulate results, and compile reports are not exempt); ***Christenberry v. Rental Tools, Inc.***, 655 F. Supp. 374, 377 (E.D. La. 1987) (purchasing agent not exempt where he had no choice regarding which vendors to use and did not negotiate prices); ***Goldstein v. Dabanian***, 291 F.2d 208, 210-11 (3d Cir.), *cert. denied*, 368 U.S. 928 (1961) and 29 C.F.R. § 541.205(c)(2) a worker performing clerical duties is not exempt; ***Haber v. Americana Corp.***, 378 F.2d 854 (9th Cir.), *cert. denied*, 389 U.S. 914 (1967) (a salesperson's collection activities did not render him exempt).

D. Professional employees

1. Categories of professionals

Initially, it is noted that there are four recognized types of professionals exempt under the Act and regulations: (1) employees working in a "learned profession"; (2) artistic professionals; (3) teachers; and (4) employees in certain computer occupations.

Learned professionals. This exemption applies to those persons who have specific educational backgrounds such as law, medicine, and nursing. *See* 29 C.F.R. § 541.3. The worker must have knowledge of an advanced type in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine, mental, manual, or physical processes. *See* 29 C.F.R. § 541.301(a).

Artistic professionals. Persons who work in music, writing, theater, and the plastic and graphic arts are artistic professionals. *See* 29 C.F.R. § 541.302(b). Some courts have also found the definition expansive enough to include televison broadcasting. ***Freeman v. National Broadcasting Co.***, 80 F.3d 78 (2d Cir. 1996) (news writers, editors, producers, and field producers of NBC Nightly News held exempt as artistic professionals); ***Dalheim v. KDFW-TV***, 918 F.2d 1220 (5th Cir. 1990) (television reporters may be exempt). The

provisions at 29 C.F.R. § 541.302(d) provide that the requirements of an artistic professional are "easily met" by an actor, singer, violinist, or short story writer.

Teachers. Under the regulations, teaching includes lecturing, tutoring, instructing, and similar activities for the purpose of imparting knowledge. *See* 29 C.F.R. §§ 541.3(b), 541.302(g)(3), and 541.304(b).

Computer professionals. The FLSA was amended in 1990 to provide that certain computer occupations would be included in the professional exemption. *See* 29 C.F.R. § 541.303. To fall under the exemption, s/he must be highly skilled in computer systems analysis, programming, or related work in software functions. *See* 29 C.F.R. § 541.303(a). The regulations further provide that, while job titles may be useful, they are not determinative of a worker's exempt status. *See* 29 C.F.R. § 541.303(a). The exemption is intended to apply only to those workers who have gained a high level of proficiency through education and experience such that trainees and entry level employees will rarely qualify for the exempt status. *See* 29 C.F.R. § 541.303(a).

Under the short test, these workers are exempt if: (1) the worker's primary duty consists of work of a learned professional, an artistic professional, teacher, or computer-related professional; and (2) the worker's job involves the exercise of discretion and independent judgment.[6] *See* 29 C.F.R. § 541.3(e).

The "long test" provides that the worker may be exempt as a manager if the following criteria apply: (1) the worker's primary duty consists of work of a learned professional, an artistic professional, teacher, or computer-related professional; (2) the worker's job involves the exercise of discretion and independent judgment[7]; (3) the worker is engaged in work that is predominantly intellectual and varied in character such that the output produced or result obtained cannot be easily standardized; and (4) the worker does not devote more than twenty percent of his or her hours of work in the work week on activities which are not an essential part of, or necessarily incident to, his or her primary professional duties. *See* 29 C.F.R. § 541.3(c) and (d).

2. Exemption established

[no reported cases]

3. Exemption not established

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[6] This factor is required unless the worker is an artistic professional. In the case of an artistic professional, s/he must perform work requiring invention, imagination, and talent in a recognized field of endeavor.

[7] This factor is required unless the worker is an artistic professional. In the case of an artistic professional, s/he must perform work requiring invention, imagination, and talent in a recognized field of endeavor.

In ***Whetsel v. Network Property Services, L.L.C.***, 246 F.3d 897 (7th Cir. 2001), Plaintiff alleged that Network Property engaged in the practice of improperly deducting the salaries of employees which it claimed were exempt under the FLSA. Consequently, Plaintiff urged the court to conclude that she was not an exempt employee and was, therefore, entitled to overtime compensation. The district court skirted the issue and concluded that the employer took advantage of the regulatory "window of correction" such that the employee did not lose her exempt status and summary judgment in favor of the employer was proper. Network Property maintained, on the other hand, that Plaintiff was exempt from the FLSA requirements as a salaried executive pursuant to 29 U.S.C. § 213(a)(1).

Citing to ***Auer v. Robbins***, 519 U.S. 452 (1997), the circuit court noted that an exempt employee's compensation could be "subject to" improper reductions, even if deductions were not taken from her salary. The court stated that the "subject to" standard was met where the employer maintains (1) an actual practice of impermissible deductions, or (2) a policy that creates a significant likelihood of deductions where the policy is clear and specific "so as to 'effectively communicate[]' that deductions will be made in specified circumstances." In the case before it, Plaintiff conceded that her salary was not reduced for partial day absences. However, she maintained that Network Property had an established policy and practice of impermissible deductions, as evidenced from the deductions of other executives' salaries, which could have resulted in docking her salary. The court held that, if Plaintiff established that Network Property had a practice and policy of taking impermissible deductions, then it could not utilize the "window of correction" set forth at 29 C.F.R. § 541.118(a)(6) and Plaintiff would be entitled to overtime compensation. The court agreed with the Secretary of Labor that the regulatory provision allowing for a window of correction is available only if it is first established that the employer objectively intended to pay its employees on a salary basis. The court then remanded the case for a factual determination regarding whether Network Property had a policy or practice of taking improper deductions as defined in ***Auer***.

4. "Combination of duties" exemption

In ***IntraComm, Inc. v. Bajaj***, 492 F.3d 285 (4th Cir. July 5, 2007), the district court held that Baback Habibi, who was a founder of IntraComm Incorporated (IntraComm), was not exempt from FLSA's minimum wage and overtime requirements. Under the facts of the case, Habibi entered into a 15 month employment agreement with an information technology service provider whereby Habibi was paid $7.00 per hour plus commissions from the sales of a hardware integration system created by him. Habibi earned no commissions because he was not successful in selling licenses for the system he created.

Habibi alleged that he was instructed "not to report hours he worked in excess of forty hours per week and that (Employer's) time-reporting system prohitibed him from doing so." The parties stipulated that, in sum, Habibi was not paid for 300 hours that he worked.

Citing to 29 C.F.R. Part 541, the court noted that executive, administrative, professional, outside sales, and computer employees may be exempt from the FLSA's minimum wage and overtime pay requirements. The court noted that an employee's "primary duty" must fall under one of the classifications at 29 C.F.R. Part 541. Moreover, the court observed that the regulations impose a "salary test" for certain classes of

employees; namely, executive, administrative, and professional employees must receive compensation of at least $455 per week. 29 C.F.R. §§ 541.100, 541.200, and 541.300. On the other hand, the "outsides sales" exemption at 29 C.F.R. § 541.500(c) does not contain a "salary test."

The court also noted that the Secretary has developed a "combination exemption" at 29 C.F.R. § 541.708, which would affect the outcome of this case. The regulation provides:

> Employees who perform a combination of exempt *duties* as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employment may qualify for exemption. Thus, for example, *an employee whose primary duty involves a combination of exempt administrative work and exempt executive work may qualify for exemption.* In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

29 C.F.R. § 541.708 (italics added). From this, the court noted that it "is the interrelationship of the individual exemptions and the combination exemption that concerns us here."

Applying the regulatory criteria, the court found that Habibi's duties were most akin to the administrative exemption, but he would not qualify for the exemption because he was paid an hourly wage and never made more than $455 per week. Moreover, while Habibi was involved in "outside sales," it was agreed that he "did not customarily and regularly sell outside (his) place of business." Indeed, Habibi went on four sales calls over a ten month period of time.

The court framed the issue as whether Habibi could qualify for the Secretary's "combination exemption" since he did not satisfy the requirements of the individual exemptions. The court concluded that Habibi did not qualify for the combination exemption such that Employer was required to compensate Habibi in accordance with the FLSA's requirements.

In so holding, the court adopted the Secretary of Labor's position on the issue as presented in her *amicus curiae* brief:

> Although the combination exemption permits the blending of exempt duties for purposes of defining an employee's primary duty, it does not, according to the Secretary, relieve employers of their burden to independently establish the other requirements of each exemption whose duties are combined. (citation omitted). In the Secretary's view, then, the combination exemption cannot apply to an employee with administrative job functions constituting part of her 'primary duty' unless the employee also meets the administrative exemption's salary requirement. Since Habibi does not meet the salary requirement, he would not, under the Secretary's approach, qualify for exemption under the FLSA.

As a result, the court concluded that Habibi was entitled to payment of wages and overtime as prescribed by the FLSA.

E. Motor carrier exemption

In ***Herman v. Hector I. Nieves Transport, Inc.***, 2001 WL 277251 (1st Cir. 2001), the court held that the FLSA's motor carrier exemption at 49 U.S.C. § 213(b)(1) did not apply to a trucking company, which had routes only in the territory of Puerto Rico. The court held that, under 49 U.S.C. § 13501, Puerto Rico is not considered a "state"; rather, it is a "territory or possession" of the United States. The motor carrier exemption, noted the court, applied only to carriers operating in the 50 states and the District of Columbia. As a result, because the exemption did not apply, Respondent was subject to FLSA's overtime requirements.

Also, in ***Collins v. Heritage Wine Cellars Ltd.***, ___ F.3d ___, Case No. 09-1181 (7th Cir. Dec. 21, 2009), the court held that the motor carrier exemption to the FLSA's overtime provisions applied to plaintiffs, who made wine deliveries exclusively within the State of Illinois, *i.e.* intrastate deliveries. In so holding, the court applied the "fixed and persisting intent" criteria at 29 C.F.R. § 782.7(b)(2).

In ***Abel v. Southern Shuttle Servs. Inc.***, ___ F.3d ___, Case No. 10-10659 (11th Cir. Sept. 21, 2010), the court held that drivers of airport shuttle vans fell under the Motor Carrier Act exemption to the FLSA and, therefore, were not entitled to overtime pay.

XII. Relief

A. Willful violation

1. Standard for establishing

In ***McLaughlin v. Richland Shoe Co.*** 486 U.S. 128 (1988), the Supreme Court held that, to establish a "willful violation" under the FLSA, it must be established that the employer either knew or showed reckless disregard as to whether its conduct was prohibited by statute. The Court noted that a civil enforcement action under the FLSA must be filed within two years after the cause of the action accrued, unless a "willful" violation is involved where the limitation of action period is three years. The Court adopted the "wilfullness" standard set forth in ***Trans World Airlines v. Thurston***, 469 U.S. 111 (1985)[8] and held that willful conduct is voluntary, deliberate, or intentional, and not merely negligent, acts.

In the case before it, Respondent employed mechanics to service the equipment that it used to manufacture shoes and boots. The government argued that the employees were not properly paid overtime under the FLSA and Respondent countered to state that the

[8] The dissent noted that this is the standard adopted by the Court in "construing a liquidated damages provision of the Age Discrimination in Employment Act of 1967" and that it is too narrow to effectuate the FLSA's purposes.

action was barred by the two year statute of limitations. The Court noted that, when originally enacted, the FLSA contained no limitation of action period. Congress subsequently enacted a two year statute of limitations for FLSA violations in the Portal-to-Portal Act of 1947 at 29 U.S.C. §§ 216, 251-262. The Court noted that this limitation period contained no distinction between willful and non-willful violations. However, without explanation, Congress enacted a three year statute of limitations for willful violations of the FLSA in 1966. The Court viewed this enactment as a clear indication of Congress' delineation of willful and non-willful conduct. In discussing this distinction, the Court stated the following in a footnote:

> If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful . . .. If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, (the action should not be considered willful).

Id. at 134, n. 13. The Court then remanded the case to the district court for a determination of whether the "willful" standard was met.

2. Civil money penalty assessment

In ***Baystate Alternative Staffing, Inc.***, 163 F.3d 668 (1st Cir. 1998), workers were employed by temporary employment agencies founded by William Woods (collectively referred to as Baystate). Mr. Woods was not an officer of any of the agencies. Baystate conceded that it did not pay its workers proper overtime compensation. The court noted that the company did not deduct taxes, contribute to social security on behalf of the workers, or pay any state unemployment insurance. The ARB cited to ***Richland Shoe*** and concluded that Baystate wilfully violated the FLSA pursuant to 29 C.F.R. § 578.3(c)(2) because Wage and Hour division officials put the employer on notice that its record keeping and overtime compensation practices violated the Act, yet Baystate failed to conform its practices to comply with the law. The court upheld use of the ***Richland Shoe*** standard for determining whether conduct was "willful" for purposes of § 16(e)'s civil money penalty provision. *Id.* at 680, n. 14. However, it found that, while examples of "willful" violations contained at 29 C.F.R. § 578.3(c) were not challenged by either party, the examples contained in the regulation did not comport with the ***Richland Shoe*** standard for establishing "willful" conduct. In particular, the court noted that one examples provides that a "willful" violation occurs where an employer's "actions are at variance with advice received from a responsible official of the Wage and Hour Division." The court found this example to be problematic because:

> On its face, such a standard precludes legitimate disagreement between a party and the Wage and Hour Division about whether the party is an employer covered by the Act, leaving a putative employer in an untenable position: either accept the Wage and Hour Division's position and comply with its advice, or risk a finding of a willful violation of the Act.

Id. at 680. As a result, the case was remanded to the ARB for application of the ***Richland Shoe*** standard.[9]

May not be eliminated by payment of back wages

In ***U.S. Dep't. of Labor v. Micro-Chart, Inc.***, ARB Case No. 98-080, 1998-FLS-12 (ARB, Nov. 4, 1998), the ARB upheld the ALJ's finding of repeated and willful late payments of minimum wages and overtime as well as the ALJ's assessment of a civil money penalty. Under the facts of the case, the ARB noted that the company usually paid its employees on a bi-weekly schedule, but some employees had not been paid for 14 weeks. With regard to the assessment of a civil money penalty, the company maintained that they paid the back wages owed prior to assessment of the penalty such that the penalty amount should be vacated. The ARB disagreed to state that there was no statutory or regulatory authority providing that a "civil money penalty may not be assessed where an employer has paid the back wages after a Wage and Hour investigation has begun." Citing to ***Brooks v. Village of Ridgefield Park***, 978 F. Supp. 613, 619 (D.N.J. 1997), the ARB noted that the district court held that allowing an employer to escape payment of liquidated damages by paying overtime compensation before liability was adjudicated would render that provision of the FLSA "toothless." The ARB concluded that the payment of back wages owed may support a reduction of a civil money penalty, but not its elimination.

B. Liquidated damages award

In ***Herman v. Harmelech***, 2000 WL 420839 (N.D. Ill., Apr. 14, 2000) (unpub.), the court held that the Harmelechs were liable for liquidated damages because they did not demonstrate that the FLSA violations were made in good faith or that they had reasonable grounds for believing that they had complied with the Act's requirements. As a result, the court concluded that both Judith and Shai Harmelech were liable for liquidated damages. In this vein, the court stated that a "strong presumption" exists under the FLSA in favor of doubling the damages award. It noted:

> The Supreme Court has recognized that liquidated damages are not imposed to punish the employer, but rather as 'compensation for the retention of a workman's pay' which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.

Slip op. at 9 (citing to ***Brooklyn Savings Bank v. O'Neill***, 324 U.S. 697, 707 (1945)). The court stated that liquidated damages may be avoided by an employer under Section 11 of the Portal-to-Portal Act of 1947 where the employer demonstrates that s/he reasonably believed that the act or omission was not a violation of the FLSA.

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[9] In its earlier decision (1994-FLS-22), the ARB affirmed the ALJ's proposed penalty of $150,000 reasoning that the alleged violations involved hundreds of employees over a period of several years, where the underpayment of wages was almost equal to the proposed penalty, and where Respondent's profit for that period was almost $3,000,000.

Employer failed to carry its burden under this standard as Judith Harmelech knew that employees were paid with checks which were returned for insufficient funds. Further, she did not ascertain whether there were bills to support the expense checks she wrote. Shai Harmelech decided what, when, and how employees would get paid and had authority to correct the payroll problems, but failed to do so. Given that liquidated damages were awarded, the court held that it was unnecessary to address the Secretary's request for pre-judgment interest. Citing to ***Uphoff v. Elegant Bath, Ltd.***, 176 F.3d 399 (7th Cir. 1999), the court held that recovery of liquidated damages and pre-judgment interest would amount to double recovery. Slip op. at 10 n. 4. *See also* ***U.S. Dep't. of Labor v. Micro-Chart, Inc.***, ARB Case No. 98-080, 1998-FLS-12 (ARB, Nov. 4, 1998).

Similarly, in ***Chao v. Barbeque Ventures, LLC***, Case No. 08-1284 (8th Cir. Nov. 28, 2008), the circuit court affirmed the district court's award of liquidated damages. Citing to ***Braswell v. City of El Dorado***, 187 F.3d 954, 957 (8th Cir. 1999), the court noted that "[a]n award of liquidated damages under § 216(b) is mandatory unless the employer can show good faith and reasonable grounds for believing that it was not in violation of the FLSA." The court concluded that Respondent had not demonstrated grounds supporting relief from an award of liquidated damages:

> The employers argue that they have demonstrated good faith by showing that (the corporate owners) did not have knowledge that employees worked at multiple locations. Lack of knowledge is not sufficient to establish good faith.

See also ***Jarrett v. ERC Props., Inc.***, 211 F.3d 1078, 1084 (8th cir. 2000) ("good faith" requires that the employer take affirmative steps to ascertain the requirements of the FLSA, but nonetheless violated its provisions; the employer must demonstrate that its position with regard to the FLSA is "reasonable" such that "[i]gnorance alone will not exonerate the employer").

C. Pre-judgment interest

Disallowed where liquidated damages awarded, no double recovery

In ***Herman v. Harmelech***, 2000 WL 420839 (N.D. Ill., Apr. 14, 2000) (unpub.), the court held that because liquidated damages were awarded, it was unnecessary to address the Secretary's request for pre-judgment interest. Citing to ***Uphoff v. Elegant Bath, Ltd.***, 176 F.3d 399 (7th Cir. 1999), the court held that recovery of liquidated damages and pre-judgment interest would amount to double recovery. Slip op. at 10, n. 4.

D. Attorney's fees

In ***Reimer, et al. v. Champion Healthcare Corp.***, 258 F.3d 720 (8th Cir. 2001), the court cited to a recent Supreme Court decision in ***Buckhannon v. W.V. Dept. of Health and Human Resources***, 121 S. Ct. 1835 (2001) to vacate a district judge's award of attorney's fees under the FLSA. The ***Buckhannon*** decision involved violations of the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act such that the

circuit court would "express no opinion . . . on the effect this decision may have on the award" but it concluded that the issue should be reconsidered by the district court.

In ***Loughner v. The University of Pittsburgh***, 260 F.3d 173 (3d Cir. 2001), the court held that an award of attorney's fees is permitted under the FLSA, which provides that "'a reasonable attorney's fee be paid by the Respondent, and costs of the action' to a prevailing Plaintiff." *See* 29 U.S.C. § 216(b).

XIII. Types of dispositions

A. Approval of stipulations and settlement agreement

In ***Administrator, Wage and Hour Division v. Castlerock Properties, Inc.***, 2000-FLS-5 (ALJ, Aug. 15, 2000), the ALJ issued a *Decision and Order Approving Stipulations and Settlement Agreement*. Citing to 29 C.F.R. § 580.12, the ALJ stated that his *Decision* constituted the final decision of the agency.

B. Consent findings

Pursuant to 29 C.F.R. § 18.9, the ALJ approved of consent findings submitted by the parties, which provided for payment of the civil money penalty with interest in installment payments. ***Administrator, Wage and Hour Division v. Cliff's Concrete, Inc.***, 1999-FLS-26 (ALJ, May 31, 2000). *See also* ***Administrator, Wage and Hour Division v. Abbiccis and Marietta Hickey***, 2000-FLS-3 (ALJ, Mar. 28, 2000); ***Administrator, Wage and Hour Division v. Baystate Alternative Staffing***, ARB Case No. 99-046, 1994-FLS-22 (ARB, June 29, 1999) (the ARB approved of the consent findings pursuant to 29 C.F.R. § 580.16 and dismissed the appeal).

In ***Administrator, Wage and Hour Division v. Four Seasons Landscaping, Inc.***, 1997-FLS-20 (ALJ, Mar. 29, 1999), the ALJ approved of the *Stipulation of Compliance and Modification of Civil Money Penalty* submitted by the parties. In essence, the employer agreed to pay a reduced civil money penalty without admitting to any allegations contained in the Administrator's *Order of Reference*. The *Stipulation* further provided that the employer assured its future compliance with the provisions of the FLSA. The ALJ concluded that his approval of the *Stipulation* constituted a final order of the Secretary pursuant to 29 C.F.R. § 580.12(e).

See also ***Chao v. Gotham Registry, Inc.***, 514 F.3d 280 (2nd Cir. 2008) (Employer violated consent decree in its continued failure to pay proper overtime wages in accordance with the FLSA's requirements).

C. Dismissal

Based on Fed.R.Civ.P. 41(a)

In ***Administrator, Wage and Hour Division v. Medi-Tech Associates, Inc.***, 1999-FLS-12 (ALJ, Jan. 25, 2000), the ALJ dismissed the case without prejudice pursuant to Fed.R.Civ.P. 41(a)(1)(ii) based upon a *Stipulation of Dismissal* submitted by the parties. The ALJ did not address the terms of the *Stipulation*.

D. Summary judgment

Based on default

In ***Sec'y. of Labor v. Sunrise Properties & Development, Inc.***, 1999-FLS-15 (ALJ, Jan. 4, 2000), the ALJ granted the government's request for summary judgment on grounds that Respondent "failed to respond to discovery requests and that its officers failed to appear at properly noticed depositions." The ALJ also noted that Respondent failed to respond to the ALJ's order to show cause. As a result, the government's motion for default judgment was granted pursuant to 29 C.F.R. § 18.6(d)(2). *See also* ***Administrator, Wage & Hour Division v. Blood, Sweat & Tears, Inc.***, 1999-FLS-2 (ALJ, Nov. 8, 1999) (default judgment based on failure to comply with a pre-hearing order)***.***

APPENDIX A

29 U.S.C. § 213

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation

which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub.L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub.L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub.L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69

(15) 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); or

(16) a criminal investigator who is paid availability pay under section 5545a of Title 5; or

(17) 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;

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

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

<u>(b) Maximum hour requirements</u>

The provisions of section 207 of this title shall not apply with respect to--

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [> 45 U.S.C.A. § 181 et seq.]; or

(4) Repealed. Pub.L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub.L. 93-259, § 21(b)(3), Apr. 8, 1974, 88 Stat. 68

(8) Repealed. Pub.L. 95-151, § 14(b), Nov. 1, 1977, 91 Stat. 1252

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub.L. 93-259, §§ 15(c), 16(b), Apr. 8, 1974, 88 Stat. 65

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub.L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249

(23) Repealed. Pub.L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children--

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub.L. 95-151, §§ 6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of Title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee--

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that--

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that--

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors--

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if--

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5-1990 for scrap paper balers and Standard ANSI Z245.2-1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that--

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports--

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide--

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August, 6 1996.

(6) In the administration and enforcement of the child labor provisions of this act, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if--

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve--

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factor set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211 and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C.A. § 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who--

(1) is employed by such employer--

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who--

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks--

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who--

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks--

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.