Ballard Spahr LLP

Wage and Hour Compliance:
Learn From Others' Mistakes

October 5, 2011

The Westin Mount Laurel
555 Fellowship Road, Mount Laurel, NJ

Ballard Spahr LLP

Ballard Briefing

Wage and Hour Compliance:
Learn from Others' Mistakes

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Ballard Spahr LLP

Wage and Hour Compliance: Learn from Others' Mistakes

A Ballard Spahr briefing by the Labor and Employment Group
The Westin Mount Laurel
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Stepped-Up Federal Enforcement

- DOL's increased enforcement initiatives:
  - Stepped-up enforcement efforts, bolstered by financial resources.
    - $12 million budget in 2011 dedicated to misclassification of independent contractors.
  - Appointment of officials who are more likely to push employee-friendly interpretations.
- The IRS is stepping up enforcement efforts to combat the misclassification of employees as independent contractors.

DOL - New Smartphone App

- *Department of Labor Releases Smartphone Application for Tracking Employee Work Hours*
  - Employers are required by law to keep records of all hours worked by their non-exempt employees. However, when an employer either fails to keep records or there is a dispute over the exempt status of an employee the lack of contemporaneous time entries can greatly complicate the dispute.
  - In an effort to alleviate this problem, the federal Department of Labor has released a free, downloadable smart phone app that employees can use to track their time and create their own, independent time sheets.

Litigation on the Rise

- Collective actions
  - Nearly 7,000 new collective actions filed in 2010 alone.

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Key Wage and Hour Issues

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Employer Questions

- Who is entitled to overtime compensation?
- How much overtime compensation am I required to pay?

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Fair Labor Standards Act

- The Fair Labor Standards Act ("FLSA") sets the minimum wage and governs overtime payments for workers.
- An employee who works more than forty hours per week is entitled to an overtime compensation at a rate of one and a half times the employee's regular rate of pay.
- The regular rate is a weighted average based on all hours an employee works in a given week.
- Certain classes of employees are exempt.
- State laws can impose additional obligations.

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Are you violating the FLSA?

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Warning Signs

- You treat all employees as "salaried."
- You classify over 50% of your workforce as "exempt."
- You classify all employees with a college degree as "exempt."
- You treat all supervisors as "exempt."
- You suspend "exempt" employees without pay.
- Employees continue working after clocking out.
- You give non-exempt employees a company BlackBerry.
- Employees often eat lunch at their desks, taking calls and answering e-mails.

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Warning Signs (cont.)

- You do not record employees' actual work hours.
- You automatically deduct a half-hour for lunch.
- You round employee work hours.
- You encourage employees to attend training over lunch without pay.
- You do not pay employees for time they spend changing and getting ready for work.
- You exclude all bonuses from an employee's regular rate of pay.
- Employees are on-call without being paid.

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Practical Steps: Self-Auditing Your Wage and Hour Practices

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The Two-Step Self-Auditing Process

- Step One: Review Classifications
  - Who are employees and who are independent contractors?
  - Which employees are entitled to overtime compensation?
  - Do I pay exempt employees consistently?
- Step Two: Review Overtime Compensation Calculations
  - Am I calculating overtime compensation correctly?
    - Which hours count?
    - What overtime rate applies?

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Step One: Who is Entitled to Overtime Compensation?

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Who are employees and who are independent contractors?

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Misclassification Woes

- *US Open Umpires Sue USTA for Overtime Pay*
  - Four U.S. Open umpires filed a putative class action in New York claiming the U.S. Tennis Association misclassifies them as independent contractors and that they are due unpaid overtime pay under the FLSA.
- *Judge Rules that Exotic Dancers are Employees Under FLSA*
  - A Georgia federal judge said that a class of 80 current and former exotic dancers should be classified as employees and not independent contractors.

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Misclassification Woes (cont.)

- *Pennsylvania Delivery Company Pays $256,000 in Back Overtime to 158 Drivers*
  - Parts Distribution Express of Essington, Pa., has paid $256,340 in back overtime pay to 158 delivery drivers who the company misclassified as independent contractors, the Labor Department announced.
- *FedEx paid $26.8 million in 2009 to settle a lawsuit by its drivers in California who claimed they were misclassified as independent contractors.*
  - Since then, FedEx has been sued in multiple states by drivers and by state attorney generals over the classification of its drivers as independent contractors.

Misclassification Woes (cont.)

- *Exotic Dancers, Clubs Reach $10M Deal in Wage Suit*
  - A California federal judge gave preliminary approval to a $10 million class action settlement in a minimum wage suit alleging nightclub operators misclassified exotic dancers as independent contractors.
- *US Open Attendants Win Class Cert. in FLSA Action*
  - A federal court certified a class of U.S. Open luxury suite attendants alleging their employers at the tennis tournament stiffed them on overtime wages. The complaint says the plaintiffs -- who sometimes worked up to 15 hours per day, seven days a week during the tournaments and pre-tournament events -- were improperly classified as independent contractors in 2007 and 2008 to prevent them from being eligible for overtime compensation.

Independent Contractor v. Employee

- There is no single rule or test to define whether an individual is an independent contractor or an employee for all purposes.
- Rather, the IRS, the courts, and various federal and state agencies have developed separate but similar tests to evaluate an individual's status.

Independent Contractor v. Employee (cont.)

- The Various Tests
  - Common Law Test
  - IRS Definition
  - "ABC" Test (applied in New Jersey)
  - FLSA's "economic reality test"
  - Tests established for purposes of federal anti-discrimination laws, NLRA, etc.

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Definitions of Independent Contractor

- FLSA "Economic Reality" Test
  - The degree of control exerted by the alleged employer over the worker
  - The worker's opportunity for profit or loss
  - The worker's investment in the business
  - The permanence of the working relationship
  - The degree of skill required to perform the work
  - The extent to which the service rendered is an integral part of the alleged employer's business
  - Some courts have recognized a seventh factor: "whether the employee is economically dependent on the employment."

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Definitions of Independent Contractor (cont.)

- The "ABC" Test
  - Usually used to determine eligibility for state unemployment and workers' compensation benefits
  - More than 20 states (including PA, NJ, and DE) use the "ABC test"
    - "A" Prong – whether the worker is free from control or direction over the performance of services
    - "B" Prong – whether service is performed outside of the usual course of the company's business, or outside of the company's places of business
    - "C" Prong – whether the worker is engaged in an independently established trade, occupation, profession, or business

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State Law Penalties

- New Jersey Construction Industry Independent Contractor Act
  - Applies the "ABC" test to determine whether a construction worker is an independent contractor under New Jersey's Prevailing Wage Act, Gross Income Tax Act, and State Wage and Hour Law. Improper classification of a worker by an employer can result in criminal sanctions for the employer or any officer, agent, superintendent, foreman, or employee, as well as administrative penalties and possible debarment from public contracts.
- The California legislature recently approved hefty new penalties for misclassifying workers as independent contractors.
  - Recently, the California legislature passed legislation prohibiting the willful misclassification of individuals as independent contractors. A violation could lead to civil penalties of between $5,000 and $25,000 per violation. Governor Brown is expected to sign the legislation.

Legal Implications of Misclassification

- Tax Consequences
  - Under the Internal Revenue Code (IRC), companies are required to pay employment taxes for their employees, but not for independent contractors.
  - If independent contractors are reclassified as employees, the employer is liable for all unpaid income as well as FITA and FUTA taxes.
  - In some cases, individual employees with financial responsibility over the financial affairs of the company may be personally liable for the unpaid taxes.
  - The IRC allows for reduced liability in instances of "good faith" misclassifications.

Legal Implications of Misclassification (cont.)

- IRS: Voluntary Compliance Program
  - The IRS recently announced a voluntary compliance program which allows businesses to reclassify "independent contractors" as "employees" while incurring only minimal tax liability and no interest or penalties.

Legal Implications of Misclassification (cont.)

- Unpaid Wages and Benefits
  - If an independent contractor is found to be misclassified, he or she may be entitled to certain wages and benefits under both federal and state law.
    - Causes of action for unpaid wages and overtime can be brought under the FLSA and state wage and hour laws.
    - Claims for benefits can arise under ERISA or possible state law implied contract claims.

Legal Implications of Misclassification (cont.)

- Government Audits
  - A handful of state governors have issued executive orders focusing on worker misclassification and creating task forces to coordinate and improve enforcement mechanisms.
  - For example, New York's Joint Enforcement Task Force on Employee Misclassification reported that, since 2007, it assessed $21.5 million in unpaid unemployment taxes, $1.85 million in unemployment insurance fraud penalties, $16.5 million in unpaid wages, and $2.3 million in workers' compensation fines and penalties as a result of misclassification.

So What Should You Do?

- Put the relationship in writing.
  - Enter into a written contract or agreement that sets forth the terms of the relationship.
  - The contractor should acknowledge in writing that he or she is an independent contractor and not an employee.
  - The contract or agreement should specify the manner in which the relationship can be terminated by either party.
  - Independent contractors typically can negotiate the terms and price at which they will provide their services.

So What Should You Do? (cont.)

- Don't treat independent contractors like employees.
  - Independent contractors should not receive the same training or attend the same meetings as employees.
  - Independent contractors should not be supervised in the same manner as employees. Generally, independent contractors direct themselves and determine their own processes and methods for achieving the goals set by the company.
  - Independent contractors typically do not fill out time cards or follow the same time tracking procedures as employees.
  - Employees have a long-term relationship with the company, while independent contractors typically work on a short-term project.
  - Don't require independent contractors to wear the same uniforms (excluding safety gear) or carry the same badges as employees.

So What Should You Do? (cont.)

- Do as you say.
  - If an organization truly intends to utilize independent contractors to perform work, then it must allow these workers to perform their tasks independently. This is often easier said than done.
  - Organizations should be careful to classify workers as independent contractors only when the worker possesses some level of skill in performing their duties.
  - Independent contractors must have the opportunity for profit or loss in their work. This means companies should tie compensation to performance by job or project.
  - Organizations should make sure all the proper paperwork is filed and maintained for independent contractors, such as IRS Form 1099, invoices, business licenses, and contracts. These files should be kept separate from employee files.

Which employees are entitled to overtime compensation?

Exempt v. Non-Exempt Employees

- Major Categories of Exemptions:
  - Executive
  - Administrative
  - Professional
  - Computer Professional
  - Outside Sales
- Partial Exemption:
  - Nurses and other health care employees (8/80)

Misclassification Woes – Part II

- *GSK Drug Reps Ask High Court to Review OT Exemption*
  - GlaxoSmithKline PLC drug sales representatives found exempt from overtime pay laws want the U.S. Supreme Court to take up their FLSA suit, claiming the Ninth Circuit created a circuit split by ruling against them.
- *State-Employed Social Workers May Pursue Overtime Under FLSA, Court Rules*
  - Social workers employed by the state of Washington do not fall within a "learned professional" exemption to the FLSA and therefore may be entitled to overtime pay, the U.S. Court of Appeals for the Ninth Circuit ruled.

Misclassification Woes – Part II (cont.)

- *Starbucks to Pay $1.55 Million to Settle Case Seeking Overtime Pay for Store Managers*
  - Starbucks Corp. will pay more than 550 current and former managers of the chain's retail coffee outlets more than $613,000 in a settlement of a nationwide collective action in which the employees alleged they were denied overtime pay in violation of the FLSA.
- *Court Decides NYPD Sergeants Don't Qualify For FLSA's 'Bona Fide Executive' Exemption*
  - The primary duty of a group of more than 4,000 New York Police Department sergeants seeking overtime pay under the FLSA is not management, and therefore the sergeants do not fall under the statute's "executive" exemption, the U.S. Court of Appeals for the Second Circuit ruled.

Misclassification Woes – Part II (cont.)

- *IT Worker Hits Xerox With $50M OT Action*
  - An employee at a Xerox Corp. unit filed suit seeking $50 million on behalf of a proposed class of California information technology workers reclassified as exempt from overtime pay protections in 2008.
- *Genentech Nears $2.6M Deal on IT Workers' OT Suit*
  - Genentech Inc. is close to finalizing a settlement in California state court requiring the company to shell out about $2.6 million to end a class action accusing it of misclassifying certain information technology support employees as exempt from overtime pay.

Misclassification Woes – Part II (cont.)

- *Wells Fargo to Pay $7M To Settle Techies' OT Suit*
  - Wells Fargo & Co. technical support workers asked a California court to approve a $6.72 million settlement in a FLSA collective action alleging the bank misclassified the employees as exempt from overtime wages.
- *AT&T, Tech Workers Reach $12.5M Deal in FLSA Suit*
  - A federal judge in California has initially approved a $12.5 million settlement between AT&T Inc. and six classes of technical support workers who alleged the telecom titan denied them overtime compensation and break periods.

The Executive Exemption

- Not all managerial and supervisory employees are exempt.
- Must supervise two or more employees, but doing so is not enough.
- Managing a recognized department or subdivision must be a primary duty.
- Employee must have authority to hire, fire, and discipline or be relied upon to give recommendations on such matters.
- Litigation frequently focuses on lower level supervisors, such as first level supervisors or "working foremen."

The Administrative Exemption

- Office or non-manual work only.
- Directly related to management of the employer's operations or that of its customers (i.e., management consulting).
- Work requires the exercise of discretion and independent judgment with respect to matters of significance.

The Administrative Exemption (cont.)

Generally applies to:

- Insurance claims adjusters
- Financial analysts
- Human resources managers
- Labor relations managers
- Credit managers
- Traffic managers
- Management consultants
- Purchasing agents
- Administrative assistants to business owners or senior executives who have been delegated authority regarding matters of significance

The Professional Exemption

- Job must require specialized academic knowledge:
  - Almost always means a college or specialized degree in the field (not just a degree in any field).
- Generally applies to:
  - Registered nurses, certified medical technologists, dental hygienists, and physician assistants
  - Accountants
  - Chefs who have attained specialized academic degrees in a culinary arts program
  - Athletic trainers
  - Funeral directors

The Professional Exemption (cont.)

- Generally does not apply to:
  - Licensed practical nurses
  - Bookkeepers
  - Paralegals and legal assistants
  - Paramedics or EMTs (assuming there is no educational requirement)
  - Social workers
  - Many other health care workers

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The Computer Professional Exemption

- The computer professional exemption generally applies to:
  - Computer systems analysts
  - Computer programmers
  - Software engineers
- This exemption is not meant to be applied to employees whose work is highly dependent on or facilitated by the use of computers and computer software programs.
- "Help desk" activities are not exempt.

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Other Exemptions

- Outside sales employees
- Creative professionals
- Highly compensated employees
- Health care employees
  - New Jersey does not permit employers to use the 8/80 rule.

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Pointers For Conducting Classification Audits

- Choose a comprehensive or selective scope of analysis.
- Choose a dated collection method:
  - Questionnaires;
  - Employee and/or supervisor interviews;
  - Content analysis;
  - Review detailed daily work logs; or
  - A combination of the above.
- Focus on current job responsibilities and avoid reliance on traditional notions of how jobs are done

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Pointers For Conducting Classification Audits
(cont.)

- Rely on job duties, not job titles
- Evaluate the scope of the employee's responsibilities on a day to day basis
- Do not confuse "salaried" with "exempt"
- Not all "supervisors" are exempt
- Be careful not to fall prey to office politics in classifying employees
- Review and revise out of date job descriptions
- Implement the results of the audit

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Do I Pay Exempt Employees Consistently?

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Salary Basis

- Most exempt employees must be paid at least $455 a week that is not subject to reduction based on the quality or quantity of work performed.
- The regulations only permit deductions in limited circumstances.
- Additional payments can be made in the form of overtime (straight time, time-and-a-half, or some other amount), compensatory time, bonuses, and commissions.

Biggest Salary Basis Issues

- Partial day absences
- Disciplinary suspensions

Permitted Deductions

- Can deduct if:
  - Absent from work for one or more full days for personal reasons;
  - Absent for one or more full days for sickness or disability, if the deduction is made in accordance with bona fide plan for providing compensation for loss of salary occasioned by such sickness or disability;
  - Violates important safety rules;
  - Breaks a serious workplace conduct rule (e.g., sexual harassment, workplace violence, drug and alcohol abuse) (full day increments only);
  - During initial and terminal weeks of employment; or
  - Takes unpaid leave under the FMLA.

Impact of Improper Deductions

- An employer with a practice of making improper deductions will lose the exemption for:
  - all employees who are in the same job classification,
  - working for the same decisionmakers responsible for the improper deduction,
  - for the entire time period of the practice of improper deductions.
- Isolated or inadvertent deductions will not result in loss of the exemption if employees are reimbursed.

Safe Harbor Policy

- Employers can adopt a "safe harbor" policy to avoid losing the exemption:
  - adopt a written policy prohibiting improper deductions.
  - adopt a complaint procedure.
  - publicize this policy to employees.
  - reimburse improper deductions.
  - do not continue the deductions.

Step Two: Am I Calculating Overtime Compensation Correctly?

Two Major Issues

- (1) Which hours count?
- (2) What overtime rate applies?

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Common Pitfalls

- Meal and Rest Periods
- Donning and Doffing and other "preliminary" work
- Waiting Time
- On-Call Time
- Telecommuting/Working From Home
- Travel Time
- Meetings and Training
- Calculating overtime pay

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Which Hours Count?

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Work Time Woes

- *Hilton, Call Center Workers Strike Deal Over Wages*
  - A group of Hilton Worldwide Inc. call center employees asked a California federal judge to grant final approval to a $950,000 settlement of a class action against the hotel giant, which stands accused of withholding workers' wages and forcing them to routinely work off the clock.
- *Girl Scouts Hit with OT, Travel Time Class Action*
  - A former sales employee of the Girl Scouts of Greater Los Angeles lodged a class action in California state court, claiming the youth organization didn't pay her for overtime and travel time, and retaliated against her complaints by firing her.

Work Time Woes (cont.)

- *Chicken Catchers Say Peco Foods Ran Afoul of Wage Laws*
  - Chicken catchers employed by poultry producer Peco Foods Inc. filed a putative class action in Alabama, claiming they were paid only per bird captured and not for travel time to farms, in violation of federal wage laws.
- *Sales Workers, Fitness Manager Bring FLSA Overtime Suits Against National Gym Chain*
  - Three former sales counselors and a fitness manager of 24 Hour Fitness filed two separate putative nationwide collective actions against the gymnasium chain in federal court in Florida, alleging that the company willfully violates the FLSA by altering employees' time records to eliminate or reduce overtime wages.

Work Time Woes (cont.)

- *Meat Company Settles Workers' Pay Claims For Time Spent Dealing with Protective Gear*
  - A federal judge approved a settlement agreement between Cargill Meat Solutions Corp. and a group of employees at its Schuyler, Neb., beef processing plant seeking unpaid wages and overtime under the FLSA and Nebraska law for time spent donning and doffing protective gear, among other activities.
- *Judge Rules Sprinkler Installers May Proceed With FLSA Claims for Daily Warehouse Work*
  - Five fire sprinkler company pipefitters may proceed to trial with their FLSA claims for unpaid wages for time spent loading and unloading supplies at a company warehouse and traveling between the warehouse and job sites.

Work Time Woes (cont.)

- *Palm Settles Calif. OT Action for $1.9M*
  - A California state judge approved a $1.9 million settlement between Palm Inc. and a group of software engineers who claimed they were denied overtime pay and meal breaks.
- *Kikka to Pay Sushi Chefs $2.5M in FLSA Action*
  - A California federal judge gave the final stamp of approval to a class action settlement in which sushi restaurant chain Kikka will fork over $2.5 million over claims that it shorted its chefs on overtime wages and rest breaks.

Work Time Woes (cont.)

- *Levi Strauss To Pay Workers $1M in Back Wages*
  - The U.S. Department of Labor said that Levi Strauss & Co. will pay more than $1 million in back wages to nearly 600 employees for violating the FLSA by misclassifying workers as exempt from overtime pay.
- *UPS Workers Eye Final Approval of $2.5M Meal Class*
  - Attorneys representing more than 28,000 UPS Inc. workers in California asked a federal judge to give final approval to a $2.5 million settlement in a meal break class action.

Work Time Woes (cont.)

- *Jury Sides with Tyson Workers in FLSA Class Action*
  - A jury in Kansas awarded more than $500,000 to a class of Tyson Foods Inc. meatpacking workers after finding the company had violated the FLSA by refusing to pay employees for time spent donning and doffing protective gear.
- *Kaiser Unit to Settle OT Class Action For $1.1M*
  - A Kaiser Permanente unit said that it would pay $1.1 million to settle a California class action claiming the health care provider illegally denied overtime to 117 information technology workers. Kaiser had ordered workers to be on-call all day, every day for no extra pay, and mandated that they answer queries in no more than 30 minutes -- a requirement that left plaintiffs unable to see movies, eat out, take long trips or even get an uninterrupted night's sleep, according to Yam's complaint.

Work Time Woes (cont.)

- *Dechert to Pay $429K to Settle Meal-Break Claims*
  - San Francisco Superior Court Judge Peter Busch approved a final settlement in a class action that accused Dechert of having workers sign waivers in order to work through meal breaks.
- *Dick's to Pay Up to $15.5M to Settle OT Actions*
  - Dick's Sporting Goods Inc. agreed to pay up to about $15.5 million to settle a host of putative class actions claiming the company failed to pay overtime and other wages. In the suit, the company was accused of failing to pay proper overtime and requiring employees to work off the clock.

What is Work?

- FLSA requires employees to be paid for all hours worked.
- Activities performed for the benefit of the employer are generally work.
  - But, exertion is not required.
- Even when work is not requested, employers must pay for all time employees are suffered or permitted to work.
- But, an employer may still discipline employees who work unauthorized overtime.

Meal Periods

- Breaks of at least 30 minutes where employees are completely relieved of duty can be unpaid.
- The employer may require the employee to stay on the premises, as long as the employee is otherwise completely freed from duties, whether active or passive (e.g., eating at desk to answer the phone).
- Work done *voluntarily* by an employee during his meal period can render the meal period compensable working time if the employer knows or has reason to know the employee is doing work.
- DOL takes the position that employees who work through any portion of an unpaid meal period must be paid for the entire meal period, not just the time worked.

Meal Periods

- Employees who work through meal breaks that they have been promised under their employers' policies may have also claims under state wage payment laws.
  - For instance, in recent years, hourly employees of Walmart filed class actions in several states claiming that they were forced to work off the clock and through lunch and meal breaks, one of which in Pennsylvania resulted in a $62 million verdict in October 2007.

Other Rest Periods

- Rest periods or breaks of short duration (typically 5 – 20 minutes) must be paid as working time.
- Sleeping
  - *On duty for less than 24 hours* – An employee is at work even when he is allowed to sleep or use down time for other personal activity.
  - *On duty for more than 24 hours* - The employer and employee may agree to exclude a bona fide sleep period. The sleep period must be regularly scheduled and not more than eight hours, and the employer should provide adequate sleeping facilities where the employee may take five hours of uninterrupted sleep.

Donning & Doffing & Other Preliminaries

- What do your employees do after they come on the property before they clock in?
- Common examples:
  - Changing clothes
  - Going through security
  - Preparing tools
  - Logging into computer systems

Donning & Doffing & Other Preliminaries

- An employer is only required to pay for "principal" activities and activities that are "integral and indispensible" to the principal activity.
- Courts often look at whether the activity is specific to the job (like wearing specialized protective gear) or applies equally to everyone on the premises (like waiting in line to go through security).

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Donning & Doffing & Other Preliminaries

- In a union setting, the FLSA exempts employers from paying a unionized employee for certain activity if:
  - The activity constitutes "changing clothes" and
  - The activity was excluded from working time "by custom or practice" under a valid CBA.

  29 U.S.C. § 203(o).
- Until recently, the DOL had concluded in opinion letters in 2002 and 2007 that "clothing" includes heavy protective equipment worn in the meat packing industry.

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Donning & Doffing & Other Preliminaries

- On June 16, 2010, current WHD Deputy Administrator Nancy Leppink issued an Administrator's Interpretation reversing that position and concluding that "clothes" does not include protective equipment.
  - The impact of this is that changing into and out of protective equipment is now compensable time.
  - Significantly, the Interpretation also concluded that changing into this protective equipment was a "principal activity" meaning that anything that comes after it at the start of the workday or before it at the end of the workday, including walking and waiting in line, is now compensable as well.
- This change could significantly expand activities that are now compensable and should lead employers who have been relying on Section 203(o) to revisit their policies.

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Waiting Time

- "Engaged to wait" is compensable; "waiting to be engaged" is not.
- Even if an employee leaves the premises briefly during periods of inactivity, she must be paid for that time if she cannot use it for her own purposes.
- An employer is not required to compensate if waiting time is "de minimis."

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On-Call Time

- Employers must compensate employees for on-call time when such time is spent "predominantly for the employer's benefit."
- The key is the degree of restriction on the employee's activities during the on-call period.
- Determining whether time spent on-call is compensable is a case-by-case analysis. Some factors to consider are:
  - The terms of the employment or collective bargaining agreement, if any;
  - Physical restrictions placed on the employee while on-call;
  - The frequency of calls during typical on-call periods;
  - How restrictive the fixed or expected response time is; and
  - How the employee actually uses his or her time while on-call.

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Telecommuting or Working From Home

- The fact that the employee is working from home or another location does not alter the requirement to pay overtime.
- If an employer knows or has reason to believe that an employee is working, that time counts.
- An employer should have a system to track hours worked by telecommuters.
- The same rules apply to time spent checking blackberries, cell phones, or pagers by non-exempt employees, even if not formally approved to telecommute, or other time spent doing activities for the employer's benefit.

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Travel Time

- Employees do not have to be paid for normal commuting time, even if employees go to different work sites.
  - If employees are required to report to a central location before and after the work site, then working time starts and ends at the meeting location.
- An employee must be paid for:
  - Travel from one job site to another during the workday.
  - The return trip from the job site to the employer's premises at the end of the workday.
  - Travel if required to drive the employer's vehicle on business.

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Travel Time

- Similar rule in the donning and doffing cases
  - Once an employee goes on the clock, he or she must be paid for all time in the continuous work day.
- Special rules apply to out-of-town travel and overnight travel.
- Travel time can be paid at a different rate of pay.

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Meetings and Training

- Time spent attending meetings and training is generally compensable unless:
  - It is not related to the employee's job
  - Attendance is voluntary
  - It is outside the regular work day
  - The employee does not work while attending
- Training that is voluntary and for promotion to another job will not be compensable.
- Training required by the state for the employee to keep a required license may not have to be paid.
- "Lunch and learn" programs can be problematic.

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"Rounding"

- The DOL and New Jersey permit the use of "rounding" practices -- the common practice of rounding the employees' starting and stopping time to the nearest 5 minutes or to the nearest 1/10 or 1/4 of an hour.
- Must average out over time so it equally benefits the employee and the employer.
  - It must be equally beneficial to employee and employer on its face.
  - It is unclear to what extent an employer must ensure that it actually balances out over time.

What Overtime Rate Applies?

Calculation Woes

- *DOL Seeks $1M in Back Pay From Kinder Morgan*
  - A DOL investigation found that Kinder Morgan failed to include certain types of bonuses in overtime calculations for thousands of current and former operators, technicians, maintenance workers, laborers, and administrative nonexempt employees, resulting in $1 million in unpaid overtime owed to the workers, the department said.
- *City Ordered to Pay $825,000 in Suit*
  - A federal judge ordered Pittsburgh to pay $825,000 to settle a lawsuit filed by police officers who claim they were paid less in overtime than they were entitled to over a three-year period. The city had failed to include the shift differential and longevity payment when calculating overtime pay.

Calculation Woes (cont.)

- *Luxe NYC Eateries Served Up FLSA Violations*
  - Upscale Manhattan eateries Cafe Boulud, Bobby Van's Steakhouse, and Cafe Centro have been hit with proposed overtime class actions by members of their waitstaff. Boulud operates several restaurants in New York. Plaintiff claims he worked at Cafe Boulud, which he alleges failed to pay waiters minimum wage or overtime for hours worked in excess of 40 hours per week and illegally retained portions of the tip pool.

Calculation Woes (cont.)

- *Houston Grocery Chain Paid $2 million in Penalties, Back Wages for 400 Workers*
  - Employees worked as many as 70 hours a week, but were paid less than the minimum wage and denied overtime compensation due for hours worked over 40 per week.
- *Northern Ohio Restauranteur to Compensate Workers Denied Minimum Wage and Overtime*
  - Employees of nine Mexican restaurants in northeastern Ohio denied minimum wage and overtime pay will receive nearly $400,000 in back wages from the eateries' owner, the Labor Department announced. Cooks, dishwashers, and table bussers had been paid cash salaries based on a 40-hour workweek but worked as many as 65 hours a week without overtime compensation, while servers only received tips, DOL said, adding the restaurants failed to keep accurate pay and time records, another violation of the act.

Calculating the "Regular Rate"

- The overtime rate equals one and one-half times an employee's "regular rate" of pay.
- The regular rate is a weighted average. In general, this weighted average is calculated by taking an employee's total compensation and dividing it by the number of hours worked.
- The regular rate may be different every week when there are wage supplements included.

"Regular Rate" Exclusions

Amounts <u>not</u> included in the "regular rate" calculation include:

- Holiday or special occasion bonuses as a reward for service
- Vacation, holiday, and sick pay
- Expense reimbursements (e.g., travel expenses) not for working
- Wholly discretionary bonuses
- Certain "clock time" or similar premiums

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Common Regular Rate Issues

- Longevity payments
- Shift differentials
- Contractual overtime
- Bonuses and incentive payments

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WAGE AND HOUR COMPLIANCE: LEARN FROM OTHERS' MISTAKES

A Ballard Spahr briefing by the Labor and Employment Group
8:00 AM - 10:00 AM
The Westin Mount Laurel, 555 Fellowship Road, Mount Laurel, N.J.
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1. BASIC PRINCIPLES

a. The Fair Labor Standards Act of 1938

i. The FLSA, 29 U.S.C. §§ 201-219, is a federal law that sets the minimum wage and governs overtime payments for workers throughout the country.

ii. It is enforced by the U.S. Department of Labor or through private lawsuits.

iii. The FLSA requires employers to:

1. Pay at least the federal minimum wage to all covered non-exempt employees for all hours suffered or permitted to work.

2. Pay at least 1.5 times the employee's "regular rate" for all time worked over 40 hours in a week for employees who are not exempt from this provision.

3. Comply with child labor laws.

4. Comply with recordkeeping requirements.

iv. Provides for two years of back pay (three in the case of willful violations) plus fines and penalties for violations.

v. The FLSA sets the floor on employees' rights and employers' obligations. State law, contracts, and collective bargaining agreements may impose stricter requirements.

NOTE: New Jersey state law is generally modeled after and is consistent with the FLSA, but there are some significant differences.

b. Collective bargaining agreements (CBAs)

i. CBAs frequently contain obligations that go beyond the requirements of the law.

ii. Violations are enforced through the grievance/arbitration procedure set forth in the CBA.

iii. Obligations may be modified or eliminated through subsequent bargaining or interest arbitration.

iv. Although some CBA provisions can affect overtime obligations under the FLSA (e.g., clock-time premiums), they cannot abridge an employee's rights under the FLSA.

c. Individual employment agreements

i. Employers may enter into agreements with individual employees (who are not represented by a union) that create additional obligations.

ii. A written agreement is not necessarily required; the agreement can be oral.

iii. Generally enforceable only through private litigation (for breach of contract).

iv. Agreements cannot waive an employee's statutory rights.

2. CONDUCTING AN AUDIT GENERALLY

A comprehensive audit has two parts: (1) ensuring that employees are correctly classified as exempt and non-exempt and (2) ensuring that non-exempt employees are being paid correctly. The first part of the audit – the classifications – requires an analysis of employees' job duties, as well as a review to ensure that employees classified as exempt are, in fact, being paid in a way that meets all the requirements of the "salary basis" tests. The second part of the audit – the payroll practices – requires an analysis of whether employees are being paid for all their "working time," as well as a review to ensure that the actual pay employees receive has been correctly computed. Both parts of the audit raise their own traps for the unwary.

3. EMPLOYEES V. INDEPENDENT CONTRACTORS

a. Introduction

i. As stated by the United States Supreme Court over sixty-five years ago: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship, and what is clearly one of independent entrepreneurial dealing." *NLRB v. Hearst Publications*, 32 U.S. 111, 121 (1944).

ii. A major source of confusion surrounding the determination of independent contractor status is that there is no single rule or test to define whether an individual is an independent contractor or an employee for all purposes.

iii. Rather, the IRS, the courts, and various federal and state agencies have all developed different tests to evaluate an individual's status as an independent contractor or employee under the myriad of workplace laws in which the question comes into play. As a result, an individual may be classified as an "employee" for one purpose, and as an "independent contractor" for another.

b. The Common Law Definition

i. Many of the legal standards for defining independent contractor status in different forums have been derived from the so-called "common law test."

ii. Right of Control. As developed long ago by the courts, an employment relationship will exist if the employer exercises "*control*" or has the "*right of control*" over the individual's performance of the job and how the individual accomplishes the job. The greater the control over terms and conditions of employment, the greater the chance that the company will be held to be an employer.

iii. The RESTATEMENT (SECOND) OF AGENCY (1958) defines the term "servant" ("employee" in modern parlance) as follows:

1. "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Id*. at §220.

2. The *Restatement* also sets forth the following essential elements of the common law "right of control" test:

a. The extent of control which, by the agreement, the master may exercise over the details of the work;

b. whether or not the servant is engaged in a distinct occupation or business;

c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

d. the skill required in the particular occupation;

e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

f. the length of time for which the person is employed;

g. the method of payment, whether by the time or by the job;

h. whether the work is part of the regular business of the employer;

i. whether the parties believe they are creating the relationship of master and servant; and

j. whether the principal is a business. *Id*. at §220.

iv. The Supreme Court has determined that where Congress has not explicitly defined "employee" in a statute, it will presume that the intent is to incorporate "the conventional master-servant relationship as understood by the common law agency test." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

c. Internal Revenue Service Definition and Rules

i. The classification of a worker as either an independent contractor or an employee determines whether the company is responsible for social security (FICA), unemployment (FUTA) taxes and withholding income taxes from the individual's compensation. Conversely, it also establishes the employee's obligation to pay self-employment taxes, as well as his entitlement to deduct certain "employee business" expenses.

ii. The IRS test purports to adopt the "common law" standard for determining the status of a particular worker. §31.312l(d)-l(c), §31.3306(i)-1, and §31.3401(c)-1 of the Employment Tax Regulations. In general, the IRS now groups the common law standards into three categories to evaluate the degree of control and independence:

1. Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job? The behavioral control factors fall into four categories:

a. Type of instruction given

b. Degree of instruction

c. Evaluation systems

d. Training

2. Financial: Are the business aspects of the workers' job controlled by the payer? The financial control factors fall into five categories:

a. Significant investment

b. Unreimbursed expenses

c. Opportunity for profit or loss

d. Services available to the market

e. Method of payment

3. Type of relationship: Are there written contracts? Are the employee-type benefits, such as a pension plan, insurance, or vacation pay? Will the relationship continue and is the work performed by the worker a key aspect of the business? The factors to determine the type of relationship fall into the following categories:

a. Written contracts

b. Employee benefits

c. Permanency of the relationship

d. Services provided as key activity of the business

iii. The IRS had previously used a detailed twenty-factor test. The widely-publicized twenty-factor test and its corresponding regulations were removed from the CFR, due to perceived inconsistencies in its application and its relationship to prior law. 61 Fed. Reg. 515 (January 8, 1996).

iv. While the IRS no longer expressly relies upon the twenty-factor test as the basis for making determinations regarding employee classifications, those factors are still generally encompassed in the standards now used by the IRS discussed above. More information is available at: http://www.irs.gov/businesses/small/article/0,,id=99921,00.html (page last updated January 27, 2009).

v. In summary, the IRS tends to concentrate on the degree of control the employer may exert over the worker. In reaching a conclusion about control, the IRS weighs and balances the typically numerous facts unique to each case. *See In Re Arndt*, 201 B.R. 853 (M.D. Fla. 1996) (Whether workers were employees or independent contractors depended on the control the business had over each position, such that sod layers, graders, and landscapers were independent contractors, but the secretary/bookkeeper and truck driver were employees).

d. Fair Labor Standards Act (FLSA)

i. FLSA Test

1. Determinations under the FLSA are made by applying the "economic reality test," which has been described as follows:

The focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders himself. In applying this test, courts generally focus on five factors:

a. The degree of control exerted by the alleged employer over the worker.

b. The worker's opportunity for profit or loss.

c. The worker's investment in the business.

d. The permanence of the working relationship.

e. The degree of skill required to perform the work.

2. As a sixth factor, courts often consider "the extent to which the service rendered is an integral part of the alleged employer's business." *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987); *see also Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989).

3. A few courts have recognized a seventh factor: "whether the employee is economically dependent on the employment." *Murray v. Playmaker Servs., LLC*, 512 F. Supp. 2d 1273, 1277 (S.D. Fla. 2007).

ii. Generally, "an employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the Fair Labor Standards Act, by granting some legal powers where the *economic reality* is that the worker is not and never has been independently in the business which the employer would have him operate." *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 303 (5th Cir. 1975).

e. The "ABC Test"

i. Over 20 states, including New Jersey, use some variation of the "ABC" test for determining whether a worker is an employee or an independent contractor. Most frequently states use the test in the unemployment compensation or workers' compensation contexts:

Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia

ii. A typical "ABC" test provides:

1. "Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S. 43:21-1 *et seq*.) unless and until it is shown to the satisfaction of the division that:

a. The individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

b. The service is either outside the usual course of the business for which such service is performed, or the service is performed outside of all the places of business of the enterprise for which such service is performed; and

c. The individual is customarily engaged in an independently established trade, occupation, profession or business."

iii. In particular, New Jersey penalizes employers who misclassify construction workers as "independent contractors." Enacted July 13, 2007, the "New Jersey Construction Industry Independent Contractor Act" applies the ABC test to determine whether a construction worker is an independent contractor under New Jersey's Prevailing Wage Act, Gross Income Tax Act, and State Wage and Hour Law. Improper classification of a worker by an employer can result in criminal sanctions for the employer or any officer, agent, superintendent, foreman, or employee, as well as administrative penalties and possible debarment from public contracts. See N.J.S.A. 34:20-1 et seq.

4. HANDLING FLSA EXEMPTION ISSUES

a. The Major Exemption Categories

i. Executive

ii. Administrative

iii. Learned Professional

iv. Creative Professional

v. Computer Professional

vi. Outside Sales

vii. Highly Compensated Employees

NOTE: Earlier this year, New Jersey adopted the federal exemptions from overtime except for state and local government employees. N.J.A.C. 12:56-7.2 (incorporating 29 CFR Part 541 of the FLSA by reference as to private sector employees). Civil service employee exemptions are governed by N.J.A.C. 4A:3-5.1 through 5.8.

b. The Executive Exemption

i. To qualify for the executive exemption, employees must:

1. Be paid on a salary basis at least $455 per week;

2. Have as their primary duty management of the enterprise or a recognized department or subdivision;

3. Customarily and regularly direct the work of two or more other employees; and

4. Have authority to hire or fire or have their recommendations as to hiring, firing, promotions, or other changes of status be given particular weight.

29 C.F.R. § 541.100.

ii. Exemption for business owners with at least a 20% equity interest, who are engaged in the management of the business, but who need not be paid on a salary basis. *See* 29 C.F.R. § 541.101.

iii. Frequent areas of dispute:

1. Store managers and assistant store managers

2. Working foremen

c. The Administrative Exemption

i. To qualify for the administrative exemption, employees must:

1. Be paid on a salary basis at least $455 per week;

2. Have as their primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

3. Exercise discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200.

ii. Factors that reflect an employee's exercise of discretion and independent judgment:

1. Authority to formulate management policies or operating practices;

2. Authority to perform work that substantially affects business operations;

3. Authority to commit the employer in matters with significant financial impact;

4. Involvement in planning business objectives;

5. Representing the employer in handling investigations, handling complaints, arbitrating disputes, or resolving grievances.

29 C.F.R. § 541.202.

iii. The regulations also provide examples of positions that generally meet the administrative duties test:

1. Insurance claims adjusters

2. Analysts in the financial services industry

3. Human resource managers

4. Labor relations managers

5. Credit managers

6. Traffic managers

7. Management consultants

8. Purchasing agents

9. Administrative assistants to business owners or senior executives who have been delegated authority regarding matters of significance. 29 C.F.R. § 541.203.

iv. Professions that are a frequent source of misclassification claims:

1. Executive assistants

2. Insurance adjusters

3. Mortgage loan officers

4. Copy editors

5. Loss prevention managers and employees

6. Securities brokers

d. The Learned Professional Exemption

i. To qualify for the learned professional exemption, employees must:

1. Be paid on a salary basis at least $455 per week; and

2. Have as their primary duty the performance of office or non-manual work:

a. That requires knowledge of an advanced type,

b. In a field of science or learning,

c. That is customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. 29 C.F.R. § 541.301.

ii. Examples of professions that generally will qualify:

1. Registered nurses, certified medical technologists, dental hygienists, and physician assistants

2. Accountants

3. Chefs who have attained specialized academic degrees in a culinary arts program

4. Athletic trainers

5. Funeral directors

iii. Professions that generally will not qualify:

1. Licensed practical nurses

2. Bookkeepers

3. Paralegals and legal assistants

4. 29 C.F.R. § 541.301(e).

iv. There are special professional exemptions for teachers, doctors, and lawyers, who are considered exempt employees even if not paid on a salary basis. *See* 29 C.F.R. §§ 541.303, 541.304.

e. The Creative Professional Exemption

i. To qualify for the creative professional exemption:

1. Employees must be paid on a salary basis at least $455 per week; and

2. Have as their primary duty the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.302.

f. The Computer Professional Exemption

i. To qualify for the exemption, computer professionals must:

1. Be paid on a salary basis at least $455 per week or on an hourly basis at least $27.63 per hour; and

2. Have as their primary duty either (a) application of systems analysis techniques and procedures; or (b) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs; or (c) design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (d) a combination of duties described in (a), (b), and (c); and

3. Be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

29 C.F.R. §541.400.

g. The Outside Sales Exemption

i. To qualify for the outside sales exemption, employees must:

1. Have as their primary duty the making of sales or obtaining of orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and

2. Be customarily and regularly engaged away from the employer's place or places of business (a sales employee working out of his or her home does not, in itself, qualify).

29 C.F.R. § 541.500.

ii. Telephone and Internet sales are not considered time spent away from the employer's place of business. *See* 29 C.F.R. § 541.502.

iii. There is no minimum salary requirement.

iv. The regulations maintain the requirement that outside sales employees must be regularly employed away from the employer's place of business, but have eliminated the percentage-of-time-spent-on-sales requirement.

h. Highly Compensated Employees Exemption

i. To qualify, employees must:

1. Be paid at least $455 per week on a salary basis and receive total annual compensation of $100,000 or more (including non-discretionary bonuses and commissions);

2. Perform office or non-manual work; and

3. Customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee. 29 C.F.R. § 541.601.

ii. Employers may designate the annual period for determining the employee's annual salary (otherwise, a calendar year test will apply). 29 C.F.R. § 541.601(b)(4).

iii. Employers have a one-month window for correction at the end of the employee's salary year (helpful when employee's salary is part bonus or commission, which may not be determined until the end of the year). 29 C.F.R. § 541.601(b)(2).

iv. For employees who work only part of the year, the required minimum salary level is prorated based on the number of weeks worked. 29 C.F.R. § 5 41.601(b)(3).

i. The salary basis test

i. Permissible pay docking

1. Pay may be docked (without jeopardizing exempt status) only:

a. When an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability;

b. When an exempt employee is absent for one or more full days for sickness or disability, if the deduction is made in

accordance with bona fide plan of providing compensation for loss of salary occasioned by such sickness or disability;

c. When an exempt employee violates important safety rules;

d. When, in good faith, an exempt employee is suspended for one or more full days for infractions of workplace conduct rules (must meet criteria listed below):

i. Salary must be docked in full-day increments

ii. Applies only to serious, written workplace conduct rules applicable to all employees (e.g., sexual harassment, workplace violence, drug and alcohol policies), not for issues like attendance

iii. Employees must receive prior notice that they can be suspended for violation of such rules

e. For initial and terminal weeks of employment; or

f. When an exempt employee takes unpaid leave under the FMLA. 29 C.F.R. § 541.602(b).

ii. Effect of improper deductions

1. An employer who has a practice of making improper deductions will lose the exemption for all employees who are in the same job classification working for the same managers responsible for the improper deductions during the entire time period when improper deductions were made.

2. Factors used to determine whether the employer has a practice of making improper deductions include:

a. The number of improper deductions;

b. The time period in which the deductions were made;

c. The number and geographic location of affected employees;

d. The number and geographic location of managers responsible for the improper deductions; and

e. Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

3. Isolated or inadvertent improper deductions will not result in loss of the exemption if the employees are reimbursed (i.e., the "window of correction"). *See* 29 C.F.R. § 541.603.

iii. Improper deductions – the safe harbor provisions

1. Despite an impermissible deduction, an employee will not lose exempt status if the employer:

a. Has a written policy prohibiting improper pay deductions including a complaint mechanism;

b. Notifies employees of that policy;

c. Reimburses employees for any improper deductions; and

d. Does not repeatedly and willfully violate the policy or continue to make improper deductions after receiving employee complaints.

29 C.F.R. § 541.603.

iv. Additional payments to exempt employees

1. The regulations clarify the DOL's position that exempt employees may receive certain payments in addition to their salary without losing their exempt status.

2. Permissible payments to exempt employees:

a. Overtime (either straight time or time-and-a-half), even if paid on an hour for hour basis for additional time worked;

b. Compensatory time off, even on an hour for hour basis for additional time worked;

c. Bonus payments;

d. Commissions.

29 C.F.R. § 541.604.

v. Minimum guarantee plus extras

1. Exempt employees may have their earnings computed on an hourly, daily, or shift basis if the following tests are met:

a. The employee receives a guaranteed amount each week (which must be at least $455 per week) regardless of the number of hours, days, or shifts worked; and

b. A reasonable relationship exists between the guaranteed amount and the amount actually earned (i.e., the weekly guarantee is roughly equivalent to the employee's usual weekly earnings).

29 C.F.R. § 541.604(b).

j. Other Notable Exemptions

i. Employees engaged in law enforcement or fire suppression

1. Section 207(k) exempts a "public agency" from FLSA's overtime-over-40-hours rule with respect to employees engaged in fire protection or law enforcement activities, including security personnel in correctional institutions.

2. The term applies to any employee in law enforcement activities:

a. who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes,

b. who has the power to arrest, and

c. who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid, and ethics. 29 C.F.R. § 553.211(a).

3. The FLSA regulations explain that "employees engaged in law enforcement activities include city police; district or local police, sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers." 29 C.F.R. § 553.211(c).

4. In order for an employee to be considered engaged in "fire protection activities," an employee (1) must be "trained in fire suppression;" (2) must have "legal authority and responsibility to engage in fire suppression;" and (3) must be "employed by a fire department." 29 U.S.C. § 203(y).

5. The Third Circuit held that the City of Philadelphia's paramedics, who are employed by the fire department, did not engage in "fire suppression" and did not have the "legal authority and responsibility to engage in fire suppression." *Lawrence v. City of Phila.*, 527 F.3d 299 (3d. Cir. 2008).

ii. Healthcare Employees: the 8/80 Rule

1. Section 207(j) states that no employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated the FLSA if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work—

   a. a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and

   b. if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed. 29 U.S.C. § 2070).

2. This rule is only applicable to employers engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective.

3. At least one Pennsylvania court has held this rule inapplicable under the Pennsylvania Minimum Wage Act. *Turner v. Mercy Health Sys.*, No. 03670, 2010 Phila. Ct. Com. Pl. LEXIS 146 (Phila. Ct. Com. Pl. Mar. 10, 2010).

4. This rule does not apply under New Jersey law because a workweek must be in the "form of seven consecutive 24-hour periods." N.J.A.C. 12:56-5.4.

k. Pointers for Conducting Classification Audits

i. Make sure that the audits are conducted by counsel or an experienced human resources professional familiar with the FLSA regulations, DOL interpretations, and court decisions.

ii. Choose a comprehensive or selective scope of analysis.

iii. Choose a data collection method.

1. Questionnaires;

2. Employee and/or supervisor interviews;

3. Content analysis;

4. Detailed daily work logs; or

5. A combination of the above.

iv. Focus on current job responsibilities and avoid reliance on traditional notions of how jobs are done.

v. Rely on job duties, not job titles.

vi. Evaluate the scope of the employee's job responsibilities. Focus on what the employee does on a day-to-day basis and how they do it.

vii. Do not confuse "salaried" with "exempt."

viii. Not all "supervisors" are exempt.

ix. Be careful not to fall prey to office politics in classifying employees.

x. Review and revise out-of-date job descriptions.

xi. Implement the results of the audit!

5. COMMON PITFALLS WHEN AUDITING PAYROLL PRACTICES

Once an employer determines that its employees have been properly classified as exempt and non-exempt, the hard work of ensuring that non-exempt employees are being properly compensated begins. Two major issues arise: (1) what hours need to be included as "hours" worked and (2) what rate needs to be paid. These issues are discussed in turn below.

a. Working Time Under The FLSA – General Principles

i. Work Defined

1. "Employ," under the Act, means "to suffer or permit to work." 29 U.S.C. § 203(g). While Congress did not define the word "work," courts have explained it as exertion or loss of an employee's time that is:

    a. controlled or required by an employer,

    b. pursued necessarily and primarily for the employer's benefit, and

    c. if performed outside the scheduled work time, an integral and indispensable part of the employee's principal activities.

2. Despite guidance from the courts, deciding what is "working time" is not easy, especially when it may involve unauthorized work, telecommuting, work through meal or rest breaks, donning and doffing of specialized clothing and equipment, on-call time, off-duty care for job-related equipment or assets, and travel time.

3. Neither the FLSA nor PA law requires breaks for adult workers. As a practical matter, however, nearly all employers provide breaks anyway. Employers may also have other non-productive periods during the workday. Whether these periods are compensable depends on the length of time, what limits are in place on the employees' activities, and who is benefited.

4. Some of the most difficult "working time" determinations involve time spent by employees outside of their regular shifts and/or away from the employer's premises. Particularly problematic areas include: on-call time; off-duty care for job-related equipment or assets such as uniforms, vehicles, real property (land or buildings), and animals; or other "off the clock" time. When paid, this work outside the shift can be paid at a different rate than the employee's usual rate.

ii. Even Unauthorized Overtime Is Work: "Work Is Work, After All."

1. Again, employers must pay for all time when employees are suffered or permitted to work, even when the work is unrequested.

    a. *Example*: A nursing staffing agency maintained a policy designed to limit unauthorized overtime. In cases where the agency had not authorized overtime or failed to negotiate an increased fee with a client hospital where a staffed nurse had worked some overtime, the nurse would receive a straight-time rate for the extra hours worked. The agency argued that because it neither benefited nor

controlled the nurses' unauthorized overtime, such time was not work time under the FLSA. The court, however, disagreed, and concluded, "Whether a nurse is working a morning, afternoon or night shift in emergency care, an operating room, or on a hospital floor, the overtime hours are indistinguishable from the straight-time hours. Such work from the nurses' standpoint is fungible. Work is work, after all." The court also found that an employer could not avoid liability by merely claiming that an employee's work was unprofitable. Moreover, just because the agency claimed no control over a nurse's decision to work overtime did not change the nature of the nurse's exertion as compensable work. *Chao v. Gotham Registry, Inc.*, No. 06-2432, 2008 U.S. App. LEXIS 1327 (2d Cir. Jan. 24, 2008).

2. Note, however, that even though an employer must pay its employees for unauthorized overtime work, the employer may nevertheless discipline employees who perform unauthorized work. 29 C.F.R. § 785.13.

b. Telecommuting

i. The expansion of modern technology has resulted in an increasing number of telecommuters, raising potential overtime issues for employers. Whether or not an employee is entitled to overtime is determined by the employee's actual job duties, not where the work is performed. The fact that the employee is working from home does not alter the requirement to pay overtime. The FLSA does not distinguish between work in an office and "work performed away from the premises or the job site, or even at home." 29 C.F.R. §785.12.

ii. The FLSA provides that "[i]f the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked." 29 C.F.R. §785.12. It also requires that an employer maintain payroll records accurately recording the total hours worked during the workweek. 29 C.F.R. §516.2(a)(7). Thus, to limit liability, an employer must establish some way to track the hours worked by a telecommuting employee.

iii. Despite working from home, the telecommuting arrangement may involve an element of travel, whether to and from the employer's worksite, after the first principal activity in the workday, or even to a different location for special project. An employer should be aware of the travel rules (see below) that may render some of this travel time as hours worked and compensable. For instance, travel time beyond the normal commute time outside a city for a unique assignment is compensable. 29 C.F.R. §785.37.

c. Compensable Meal Periods Under The FLSA

i. "Bona fide meal periods" are not working time and need not be paid. 29 C.F.R. § 785.19; see N.J.A.C. 12:56-5.2(b). There are two criteria for a "bona fide" (i.e., unpaid) meal period:

1. The break must generally be at least 30 minutes long, though in exceptional cases it may be shorter; and

2. The employee must be completely relieved of all duties for the purpose of eating a meal.

ii. *Example*: In a case where management and a corrections officers union agreed that 20 minutes would be long enough (because of, among other things, employees' proximity to the dining hall) and where all parties wished to reduce the 30-minute unpaid meal break to 20 minutes in exchange for an additional 10 minute paid rest break during shift, DOL found 20 minutes sufficient for a "bona fide meal period." *See* Wage & Hour Op. Letter FLSA 2004-22 (Nov. 22, 2004).

iii. *Example*: Employees working for a manufacturer of surgical sutures and needles complained that the manufacturer forced them to use their 30-minute lunch break for taking off and putting on their gowns. However, the Circuit Court upheld the district court's findings that the employees actually received 36 minutes for lunch, and 6 of these minutes were designated as paid time for gowning and degowning. In addition, the court noted that the manufacturer had procedures for complaining about the time actually worked, and no employee had ever reported that the 36-minute lunch period had forced the employee to lose lunch time due to gowning or degowning. *Bejil v. Ethicon Inc.*, 269 F.3d 477 (5th Cir. 2001).

iv. The employer may require the employee to stay on the premises, as long as the employee is otherwise completely freed from duties, whether active or passive (e.g., eating at desk to answer the phone). However, work done *voluntarily* by an employee during his or her meal period can render the meal period compensable working time if the employer knows or has reason to know the employee is doing work.

d. Compensable Rest Periods Under The FLSA

i. Rest periods, or breaks, of short duration (typically 5-20 minutes) must be paid as working time. *See* 29 C.F.R. § 785.18.

ii. Breaks that exceed an employer's rules need not be counted as working time if the employer has expressly and unambiguously communicated limitations on rest breaks and advised employees of the consequences for violating the policy. Where a break exceeds the length permitted under an

employer's clearly established and communicated rules, only the duration of the unauthorized extension may be treated as unpaid, non-working time. Wage & Hour Op. Letter FLSA 2001-16 (May 19, 2001).

e. Waiting Time

i. The regulations draw a distinction between when an employee is "engaged to wait" and when an employee "waits to be engaged." 29 C.F.R. § 785.14. The former is compensable, while the latter is not. Even if the employee may leave the premises briefly during periods of inactivity, she must be paid for that time if she cannot use it for her own purposes. 29 C.F.R. § 785.14.

ii. For brief periods of time, employers may raise the de minimis rule, which provides that an employer, in recording working time, may disregard "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes." 29 C.F.R. § 785.47. The de minimis rule applies only where the time involved is "of a few seconds or minutes duration, and where the failure to count such time is due to . . . industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him." *Id*.

f. Meetings and Training

i. Typically, time employees spend attending (and possibly traveling to) lectures, meetings, and training do not count as working time if all of the following conditions are satisfied:

1. The session is outside of the employee's regular working hours;

2. Attendance is voluntary;

3. The lecture, meeting, or training is not "directly related" to the employee's job; and

4. The employee does not perform productive work during the lecture, meeting, or training.

29 C.F.R. § 785.27-29.

ii. If attendance is required by the employer or if an employee believes that her working conditions or her continued employment would be adversely affected by non-attendance, attendance is not voluntary and an employee must be compensated.

1. *Example*: The DOL has advised that where training is required by a child care employer, the "voluntary" element in 29 C.F.R. § 785.27 would not be met because the employer controls the employee's time. On the other hand, seminars or classes required by the state for individual licensing in the child care field, such as continuing education requirements, would be considered voluntary. *See* Wage & Hour Op. Letter, 1996 WL 1031798 (Sept. 9, 1996).

iii. Training is "directly related" to the employee's job if it is intended to increase an employee's efficiency rather than training her for another skill or job.

1. *Example*: The DOL suggested in the same opinion letter that attendance at training of general applicability that "enables the individual to gain or continue employment with any employer" need not be compensated. One important factor to consider is whether the state has imposed licensing requirements on the employer or the employee. In the former circumstance, it is more likely that the time must be compensated; in the latter it is less likely. *See* Wage & Hour Op. Letter, 1996 WL 1031798 (Sept. 9, 1996).

2. *Example*: Post office clerks participated in a "scheme study," which involved memorizing lists of specific address components and practicing manual distribution of mail, and in training on letter-sorting machines. The court ruled that the study and training time was compensable under FLSA because it was controlled by the postal service, the activities were being performed for the benefit of the postal service, and the activities were an integral part of clerk's principal activity of distributing mail. *Donovan v. U.S. Postal Serv.*, No. 78-602, 1981 U.S. Dist. LEXIS 17145 (D.D.C. Oct. 23, 1981).

iv. Although the general rules for determining the compensability of training are set forth in 29 C.F.R. § 785.27-29, with respect to employees of state and local governments, 29 C.F.R. § 553.226(b) expressly provides that the following types of training are not compensable:

> Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers) …[and]
>
> Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of

government (e.g., where a State or county law imposes a training obligation on city employees)….

1. *Example*: In an opinion letter dated January 15, 2009, the DOL considered whether time spent by city employees at training programs intended to help the employees become more proficient at their jobs was compensable. The training occurred during normal work hours, and employees were required to read and study assigned material after leaving in order to be prepared for discussion at the next class. Because the training fell outside the regulation governing compensability of training applicable to state and local government employees, the DOL applied 29 C.F.R. § 785.27-29. The DOL concluded that the time was compensable because (1) attendance was during regular working hours; (2) it was not voluntary; and (3) the training was directly related to the employees' jobs. Wage & Hour Op. Letter, 2009 DOLWH LEXIS 19 (Jan. 15, 2009).

v. An employee who attends a course on his own initiative will not be compensated for that time even if the course is "directly related" to his job. 29 C.F.R. § 785.30.

g. Donning and Doffing and Other Activities at the Start and End of the Shift

i. Under the Portal-to-Portal Act, which amended the FLSA in 1947, time spent walking on an employer's premises to and from a work station at the start and end of a shift is considered "preliminary" or "postliminary" to the working day because working time does not start until the employee commences the job's "principal activities" for the shift, and ends when the employee finishes all such "principal activities" for the day. Such time is not compensable work time. 29 U.S.C. § 252(a).

ii. "Principal activities," which *are* compensable, are those that are integral to the job, including "closely-related" duties and tasks, such as preparatory and concluding activities. If the activities are indispensable to the performance of the employee's principal activities, they are compensable even if undertaken after regularly scheduled working hours. Thus, in *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Supreme Court held that time spent "donning" and "doffing" specialized protective gear at the start and end of a shift is compensable working time because it is "integral and indispensable" to the "principal activities" of the employee's work.

iii. More recently, in *IBP v. Alvarez*, 546 U.S. 21 (2005), the Supreme Court addressed the "donning and doffing" activities of meat-packers and slaughterhouse workers. These workers "donned" specialized protective gear at the start of their shifts, then walked to their work stations; they did reverse at the end of the shift. The Supreme Court held that "any activity

that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA." Because *Steiner* said donning and doffing the gear was a principal activity, the Court ruled that the employees' walking time was part of their work day and must be compensated.

1. *Example*: Chicken processing plant workers were required by their employer to put on and take off safety and sanitary clothing, and engage in washing activities, six times a day, before and after their paid shifts and two daily meal breaks. The Third Circuit concluded that "exertion is not in fact, required for activity to constitute 'work.'" Instead, donning and doffing activity is work if it is "controlled or required by the employer and pursued for the benefit of the employer." *De Asencio v. Tyson Foods Inc.*, 500 F.3d 361 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2902, 2008 U.S. LEXIS 4822 (2008).

2. *Example*: Police officers brought suit against the city, arguing that the time they spent donning and doffing uniforms and related gear at the police station was compensable under the FLSA. Although the city gave the officers the option of donning and doffing their uniforms and gear at home, the officers explained that it was *preferable* to do so at the station. The Ninth Circuit ruled that the time was not compensable, because the officers were not required by law, rule, the employer or the nature of the work to perform the donning and doffing at the employer's premises. *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010).

iv. In a union setting, the FLSA exempts employers from paying a unionized employee for "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved . . . by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o).

1. *Example*: Unionized poultry plant employees were required to put on the protective equipment like smocks, hair or beard nets, gloves, and hearing protection gear before a production line began running, and to take it off only after the line stopped. The poultry plant operator paid the employees only during the time the line was running, so they were not paid for the "donning and doffing" time. The court concluded that the operator was not required to compensate the employees for the donning/doffing time because

the practice under a collective bargaining agreement did not require such payment. Interestingly, the court applied the FLSA exception for time spent changing clothes to the donning/doffing activities here even though the employees did not have to disrobe or remove other clothing and even though the policy was never discussed during union contract negotiations. *Anderson v. Cagle's Inc.*, 488 F.3d 945 (11th Cir. 2007), cert. denied, 128 S. Ct. 2902, 2008 U.S. LEXIS 4743 (2008).

2. *Example*: Unionized employees sued their employer, a maker and manufacturer of various food products, for failure to pay for donning and doffing of sanitary and protective safety gear (hair nets, beard nets, safety glasses, and uniforms). The district court found that all of the items were "clothes" for purposes of § 203(o) - or, for the hair nets and beard nets, the time devoted to donning the items was *de minimis*. The court stated "whether a particular item of protective gear should be considered 'clothes' under § 203(o) depends on the exact nature of the item and the exact circumstances under which it is used." The court also said that there were three factors--time, knowledge, and acquiescence--to be considered when deciding whether there was a "custom or practice" for purposes Section 203(o) of the FLSA. Here, the record showed a six-year history of nonpayment for donning and doffing time. Yet, there was no evidence that the union had complained to management or that union employees had raised the issue of nonpayment amongst themselves, undermining the notion that the employees had knowingly acquiesced in the policy. Thus, the court denied the employer's motion for summary judgment because the evidence was insufficient to establish a "custom or practice" under the relevant collective bargaining agreement of nonpayment for clothes-changing time. *Kassa v. Kerry, Inc*., 487 F. Supp. 2d 1063 (D. Minn. 2007).

3. Not all courts have reached the conclusion that protective gear is "clothing" for the purposes of § 203(o). In fact, there is considerable disagreement on this issue. *Compare Andrako v. United States Steel Corp*., 632 F. Supp. 398 (W.D. Pa. 2009) (concluding that flame retardant jackets and pants, glasses, boots, snoods, and hard hats "unquestionably fall within … any common definition of the word 'clothes.'"); *Davis v. Charoen Pokphand (USA), Inc.*, 302 F.Supp.2d 1314 (M.D. Ala. 2004) (finding hairnet, earplugs, boots, a smock, an apron, cotton gloves, rubber gloves, cutting gloves, arm guards, and plastic sleeves qualified as clothes under § 203(o) in reliance on dictionary definition of "clothing" as "covering for the human body or garments in general"); *Figas v. Horsehead Corp*., No. 06-1344, 2008 U.S. Dist. LEXIS 87199 (W.D. Pa. Sept. 3, 2008) (rejecting plaintiffs' claim

that all protective gear is outside the category of "clothes" referenced in § 203(o)); *Anderson v. Pilgrim's Pride Corp*., 147 F. Supp. 2d 556 (E.D. Tex. 2001) (donning and doffing aprons, smocks, gloves, boots, hairnet, and earplugs were not compensable), *with, Spoerle v. Kraft Foods Global Inc*., 527 F.Supp.2d 860 (W.D. Wis. 2007) (concluding that "clothes" refers only to "something the employee would normally wear anyway" or a replacement for such clothing and not "safety and sanitation equipment" that is "uniquely job-related" and "under the employer's control"); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912 (N.D. Ill. 2003) (donning an doffing of "sanitary and safety equipment," including a helmet, white smock, plastic apron, arm guard, belly guard, plastic arm sleeve, gloves, a hook, knife holder, a piece of steel to straighten the edge of a knife blade, and knives did not constitute "changing clothes" under § 203(o)).

4. On June 16, 2010, current WHD Deputy Administrator Nancy Leppink issued an Administrator's Interpretation reversing that position and concluding that "clothes" does not include protective equipment.

    a. The impact of this is that changing into and out of protective equipment is now compensable time.

    b. Significantly, the Interpretation also concluded that changing into this protective equipment was a "principal activity" meaning that anything that comes after it at the start of the workday or before it at the end of the workday, including walking and waiting in line, is now compensable as well.

    c. This change could significantly expand activities that are now compensable and should lead employers who have been relying on Section 203(o) to revisit their policies.

v. Other types of preliminary and postliminary activities at the start and end of the shift are subject to the same analysis as donning and doffing time.

1. *Example*: Employees of a nuclear power plant sought compensation for time spent on security-related activities entering and exiting the plant. The activities ranged from waiting in line at the vehicle entrance to the final card-swipe and handprint analysis. Analogizing these activities to the "preliminary" and "postliminary" activities defined in the Portal-to-Portal Act, the court found that they were necessary for security but not integral to principal work activities. The fact that the security precautions were rigorous and lengthy did not render them principal activities

of the employment. *Gorman v. Consol. Edison Corp*., 488 F.3d 586 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 2902, 2008 U.S. LEXIS 4864 (2008).

h. Work Outside the Shift

i. Some of the most difficult "working time" determinations involve time spent by employees outside of their regular shifts and/or away from the employer's premises. Particularly problematic areas include: on-call time; off-duty care for job-related equipment or assets such as uniforms, vehicles, real property (land or buildings), and animals; or other "off the clock" time. When paid, this work outside the shift can be paid at a different rate than the employee's usual rate.

ii. On-Call Time

1. Employers must compensate employees for on-call time when such time is spent "predominantly for the employer's benefit." *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). Determining whether time spent on-call is compensable time is fact-specific, case-by-case analysis. *See Skidmore v. Swift & Co*., 323 U.S. 134 (1944). The inquiry focuses on the amount of freedom employees enjoy while on call and whether it is sufficient to allow employees to use the time effectively for their own purposes. 29 C.F.R. § 785.17; see N.J.A.C. 12:56-5.6, 5.7. Some important factors to consider are:

a. The terms of the employment or collective bargaining agreement, if any;

b. Physical restrictions placed on the employee while on-call;

c. The frequency of calls during typical on-call periods;

d. How restrictive the fixed or expected response time is; and

e. How the employee actually uses his or her time while on-call.

2. Section 553.221, which applies only to public sector employers, provides important guidance:

An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for

example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

29 C.F.R. § 553.221(d).

3. *Example*: Plaintiffs were members of four specialty police units (SWAT, bomb squad, K-9, and an accident investigation unit) who were required to carry beepers at all times, to live within a "close geographical area" and to respond immediately if called. Plaintiffs claimed that they were entitled to overtime because of the requirement that they carry beepers at all time. The court found that the plaintiffs were not entitled to overtime, stating that the plaintiffs must show that the on-call policy results in "burdens that seriously interfere with their ability to use the time for personal pursuits." The critical question was "whether, during [on-call] time, the employer imposes burdens on the employees so onerous that they prevent the employees from effectively using their time for personal pursuits." The court found that "the off-duty time was not utilized predominantly for the employer's benefit, but for the employees.'" *Adair v. Charter County of Wayne*, 452 F.3d 482 (6th Cir. 2006), *cert denied*, 127 S. Ct. 1828, 549 U.S. 1279 (2007).

4. *Example*: Nurses sought payment for off-premises on-call time from their hospital employer. Few restrictions were placed on the on-call hours: "Short of drinking alcohol or taking mind-altering drugs, the [nurses] could pursue a virtually unlimited range of activities in town or at home." It was also rare for the nurses to be called in more than once during their on-call hours. Utilizing a "practical approach based on the realities of each case," the court determined this time was not compensable work. *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 725, 726 (8th Cir. 2001).

5. *Example*: Plaintiffs, two city employees, had to be accessible via pager and respond within thirty minutes to an hour, could not consume alcohol, and had to stay within the city. The court determined that these restrictions were not onerous enough to render the on-call time for the employer's benefit, and thus, the employees were not entitled to compensation for the on-call time. *Gilligan v. City of Emporia*, 986 F.2d 410 (10th Cir. 1993).

iii. Off-Duty Care for Job-Related Equipment or Assets

1. Again, for an activity to constitute work, an FLSA plaintiff must prove that the activity was (1) undertaken for the benefit of the employer; (2) known or reasonably should have been known by the employer to have been performed; and (3) controlled or required by the employer. Moreover, for work to be compensable, the amount of time devoted to it must be more than de minimis. Whether overtime activity "benefits" the employer is an issue that frequently arises in the area of off-duty care for job-related equipment or assets.

2. For example, in *Hellmers v. Town of Vestal*, 969 F. Supp. 837 (N.D.N.Y. 1997), Plaintiff employee, a police officer, brought suit under the FLSA, claiming that he was entitled to overtime compensation for "off duty" time spent caring for his police dog and cleaning a police-issued weapon and vehicle. From the time that Hellmers joined the K-9 unit, he lived with his police dog. During that time, Hellmers was responsible for the care, training, and maintenance of the police dog. In connection with the care, training, and maintenance of the police dog, Hellmers claimed that he performed the following canine activities during "off-the-clock" time: grooming, bathing, exercising, cleaning the dog's living quarters, feeding and watering, training, and cleaning equipment.

   The court determined that time spent grooming, bathing, exercising, cleaning, and training the police dog were "required by the employer and [were] pursued necessarily and primarily for the benefit of" the Vestal Police Department. The court found that making and receiving dog-related phone calls and preparing police paperwork connected with canine duties were less clearly activities that were "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

   Hellmers also claimed that he performed the following "non-canine" duties during off-the-clock time: driving to and from regular shifts in marked police vehicles; performing police work immediately before regularly scheduled shifts; making and receiving telephone calls from home; preparing police paperwork at home; cleaning police uniforms; and cleaning his police firearm.

   The court determined that "Hellmers' cleaning of his police firearm and cleaning of his police vehicle were not activities performed for his own convenience, but were required by his employer and were an integral and indispensable part of the principal work activity of the Vestal Police Department," entitling

him to compensation performing these activities. With respect to the time spent cleaning his uniform, the court determined that, while cleaning is the type of activity that is generally compensable under the FLSA, the Collective Bargaining Agreement provided a stipend for such activity, so he was not entitled to overtime.

3. *Example*: Federal custom agency's canine enforcement officers used training and reward towels to train dogs to detect contraband. They devoted off-duty hours to the laundering and processing of these towels, but were not compensated for it. The fact that both the laundering process and its significance were part of the officers' initial training and that the agency compensated officers for these tasks during the workday suggested that the agency valued the benefit from these tasks. Thus, off-duty laundering and processing activities provided a benefit to agency and those hours worked were compensable. *Bull v. United States*, No. 01-56C, 2005 U.S. Claims LEXIS 293 (Fed. Cl. Oct. 14, 2001).

4. *Example*: Officers claimed wages for the following off the clock activities: grooming, cleaning, exercising, cleaning the dog's living areas, cleaning the vehicles used to transport the dogs, feeding and watering, and training. The district court found that "[T]he FLSA requires employers to compensate dog handlers for the off the clock time they spend caring for and maintaining their dogs." The district court determined that the dogs are "essential pieces of equipment that assist the officers in the efficient enforcement of the laws." The district court concluded that because time plaintiffs spend performing those activities is critical to the performance of their duties and to the preservation of the Sheriff Department's equipment, plaintiffs' off the clock time caring for and maintaining the dogs is integral and indispensable to their principal activities and performed for defendants' benefit. *Albanese v. Bergen County*, 991 F. Supp. 410, 420 (D.N.J. 1997).

iv. Other "Off the Clock Time"

1. Work includes exertional and non-exertional acts, provided that they are controlled by the employer.

2. *Example*: A federal judge in the Northern District of California approved a $ 4 million settlement in a case where security guards claimed that their employer failed to compensate them for attending fifteen-minute security briefings before their eight-hour shifts. *Adams v. Inter-Con Sec. Sys.*, No. 06-05428 (N.D. Cal. 2006).

3. *Example*: An employer required an employee to attend counseling sessions outside of the normal workday. The court found such time compensable, relying on a Department of Labor opinion letter stating that an employee required to undergo an "off the clock" medical or psychological evaluation as a prerequisite to continued employment is compensable under the FLSA. *Sehie v. City of Aurora*, No. 03-C-945, 2003 U.S. Dist. LEXIS 13051 (N.D. Ill. July 28, 2003), *aff'd, No*. 04-2308, 2005 U.S. App. LEXIS 28781 (7th Cir. Dec. 27, 2005).

4. *Example*: Plaintiff, a car alarm installation technician, sought compensation for time spent undertaking certain work-related administrative tasks before and after his scheduled shift, and for time spent traveling to his first assignment and from his last assignment under the "continuous workday" doctrine. The administrative tasks included receiving and prioritizing assignments, mapping travel routes, completing minimal paperwork, and uploading data to the employer upon completion of the day's assignments. The Ninth Circuit held that the plaintiff's pre-assignment activities were not integral to his principal activities, because they were related to his commute, which was distinct from his principal job activities. The court further found that, even if the pre-assignment activities had been principal activities, they were *de minimis*, and therefore, non-compensable. However, with respect to the plaintiff's post-assignment activities, the court vacated the district court's grant of summary judgment in favor of the employer, because the plaintiff's post-assignment activities may have been a non-*de minimis*, integral part of his principal activities. The court reasoned that the plaintiff's post-shift transmissions of data to the employer took about fifteen minutes per day, were "'part of the regular work of the employees in the ordinary course of business," and were "necessary to the business . . . and performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business."

   The court also concluded that the plaintiff's travel time between his pre-assignment and post-assignment activities was not compensable under the "continuous workday" doctrine. The court reasoned that the plaintiff's pre-assignment activities were not principal activities, or were *de minimis*, so they did not constitute the beginning of his day. The court further reasoned that, although the post-assignment activities were integrally related to the plaintiff's principal activity, they did not support the extension of his work day through his travel back to his residence, because 29 C.F.R. § 785.16 provides that "[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." Because the plaintiff was permitted to make his transmissions at any time from 7:00 p.m. to 7:00 a.m., the intervening time was long enough to enable him to use for his own purposes, and was not included in compensable work time. *Rutti v. Lojack Corp., Inc.*, 578 F.3d 1084 (9th Cir. 2009).

5. Activities such as checking e-mail via Blackberries or other remote access, checking voicemail, or taking work-related phone calls outside of the workday can also be compensable time unless de minimis. Employers who expect non-exempt employees to regularly engage in such activities or allow them to do so, should have systems in place to track and compensate the time worked.

i. Travel Time

i. Generally, the Portal-to-Portal Act exempts from the FLSA: "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1); *see also* 29 C.F.R. § 790.7(c).

ii. That said, under the FLSA, different rules may apply to different types of travel:

1. Travel to-and-from work;

2. Travel during the workday;

3. Special one-day trips away from home; and

4. Overnight trips away from home

iii. Whether, and to what extent, employees must be compensated for time spent traveling depends on which set of rules apply and how the travel occurs.

iv. Travel To-And-From Work

1. "Normal travel from home to work is not worktime." 29 C.F.R. § 785.35. "This is true whether [an employee] works at a fixed location or at different job sites." 29 C.F.R. § 785.35. Generally, an employee is not considered to be at work until he or she reaches the worksite. However, if an employee is required to report to a meeting place to pick up materials or equipment or receive instructions before going to the worksite, compensable time starts when the employee arrives at the meeting place. 29 C.F.R. § 785.38.

2. *Example*: Police officers spent time commuting from their homes to mandatory off-site training. The court held that under the Portal-to-Portal Act, the police officers were not entitled to pay for their commuting time to the training. Under the Act, "principal activities" included activities where are an "integral and indispensable part of the principal activities," and law enforcement training was one such activity. *Imada v. City of Hercules*, 138 F.3d 1294 (9th Cir. 1998).

3. *Example*: A refrigerator and utility mechanic, who did not have a fixed work location, was required to travel more than fifty stores, sometimes to more than one site a day. He was compensated from the travel time between work sites, but not for the travel time between home and the first and last work sites. He usually drove his own truck, but occasionally used an employer vehicle. The court held that under the FLSA regulations, regardless of the distance the employee traveled, the travel time to the first work site and from the last one was not compensable because this travel time was a "contemplated, normal occurrence" for the job. *Kavanagh v. Grand Union Co*., 192 F.3d 269, 273 (2d Cir. 1999).

v. Travel During the Workday

1. Employees must be compensated for travel from one job site to another during the workday. 29 C.F.R. § 785.38. Employees must also be paid for the return trip from the job site to the employer's premises at the end of the workday. An employee need not be paid for travel time between the work site and his home at the end of the day when he does not report back to the employer's premises at the end of the day, choosing to go home instead, unless, the employee must pay for time the employee spends driving a company vehicle. (See below)

2. *Example*: Engineers from a public works department drove county vehicles from county parking sites to the first work-site of the day, and from the last work-site of the day back to the county parking site. The county vehicles contained various tools and equipment that the employees used for their jobs, such as drawings, specifications, permits, manuals, tape measures, levels, safety vests, hard hats, wet weather gear, cell phones, and calculators. The court determined that the engineers were entitled to overtime compensation because the travel time to and from the county parking sites was required by the county. *Burton v. Hillsborough County*, 181 F. App'x 829 (11th Cir. 2006).

vi. Use of Employer-Provided Transportation

1. Employers must pay for travel time when the travel is a principal activity that the employee is hired to perform, but not if the travel is a preliminary or postliminary activity. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). Principal activities are activities performed as "regular work of the employees in the ordinary course of business," "necessary to the business" and "primarily for the benefit of the employer." *Vega v. Gasper*, 36 F.3d 417, 424 (5th Cir. 1994).

2. *Example*: Migrant workers traveled four hours to and from the worksite in their contractor's buses. This travel time was not compensable because the migrant workers did not work before getting on or while on the bus and use of the bus was voluntary. *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994).

3. Generally, with regard to standards on employer-provided vehicles, in a 1994 opinion letter, the DOL advised:

> [I]t is our opinion that those employees who elect to travel as passengers in the employer's vehicles to the job site at the beginning and end of the workday are engaged in ordinary home to work travel that is not compensable under the FLSA. This is true whether the employees work at a fixed location or at different sites. The mere fact that the employer provides employees with transportation does not convert such travel to a principal activity.... However, with regard to those employees who drive company-owned vehicles, such driving time is not considered "hours worked" in instances where an employee elects to transport other employees to and from work and such employee is driving the employer's vehicle for his/her own convenience. On the other hand, where the driver is directed by the employer to report to the company [facility] as a pickup point, then time spent driving the employees from such point to the workplace is hours worked.
>
> Wage & Hour Op. Letter, April 5, 1994.

4. Two types of issues arise concerning use of employer-provided vehicles:

   a. Whether employees must be paid for time spent riding on an employer-provided vehicle from a meeting site to the worksite and back again.

   b. Whether employees must be paid for time spent driving from their homes to and from work in an employer-owned vehicle that they take home at the end of the workday.

5. Employees who travel to or from work on transportation provided by the employer are not entitled to be paid for their travel time where the transportation is optional, is provided for the convenience of the employees and the employees do not perform work while they are traveling.

    a. *Example*: Bus drivers were not entitled to pay for time spent on a shuttle provided by their employer to the location for the first run of the day and back from the last run of the day because use of the shuttle was voluntary and was provided for the convenience of the employees. *United Trans. Union Local 1745 v. Albuquerque*, 178 F.3d 1109 (10th Cir. 1999).

    b. *Example*: One court has held that transportation time is non-compensable, even when the employees were required to use the employer's bus, but this decision appears to be an anomaly. The court held that time spent on bus between pick-up site and work site was not compensable, even though employees were required to report to work site each morning and were required to use employer's bus for transportation. The court based its decision on fact that no work was performed while on the bus and it was not a part of employees' principal activities. *Dolan v. Project Constr. Corp.*, 558 F. Supp. 1308 (D. Colo. 1983).

    c. *Example*: In a more recent and more representative case, the court held that county fire inspectors were entitled to overtime compensation for time spent driving from county parking lot to first work site of the day and from last work site of the day back to the lot, where county policy required inspectors to drive county cars during shift, prohibited inspectors from driving the cars home and required the cars to be picked up and dropped off each day in a central, secure county lot. *McGuire v. Hillsborough County*, 511 F. Supp. 2d 1211 (M.D. Fla. 2007).

vii. Driving the Employer's Vehicle

1. Use of an employer's vehicle for travel by an employee, and activities performed by an employee that are incidental to the use of that vehicle, are not part of the employee's principal activities if:

    a. The travel is within the normal commuting area for the employer's business and

b. Employee and employer have an agreement governing use of the vehicle.

29 U.S.C. § 254.

2. The employer must keep record of the agreement. The length of employee's commute does not determine whether travel time is compensable as long as a lengthy commute is an expected part of the employee's job. *Kavanagh v. Grand Union Co*., 192 F.3d 269, 273 (2d Cir. 1999) (employee not entitled to compensation for extensive travel time because it was a contemplated, normal occurrence under the parties' employment relationship).

3. However, the DOL has analogized a lengthy commute to a work site in an employer-provided vehicle to situations governed by 29 C.F.R. § 785.37 when employees are on special one-day out-of-town assignments. *See* Wage & Hour Op. Letter, Jan. 29, 1999. The employer must pay the employee for time spent traveling for such assignments but may deduct a reasonable commuting time from the hours paid. In that opinion letter, the DOL stated that it would not object to one hour being treated as a reasonable commuting time.

4. If an employee merely uses a company vehicle to travel from his home to the work site, then the employer may be able to treat the travel time as non-compensable, if an agreement is reached with the employee over use of the company vehicle. This is true even if the driver voluntarily uses the vehicle to transport other employees as well. See Wage & Hour Field Operations Handbook §31c01.

5. On the other hand, when employees drive specially-equipped vehicles to and from home, their travel time in those vehicles may be compensable, even if agreements are reached with the employees about use of the vehicles.

   a. *Example*: An employee traveled to the worksite in a specially-equipped truck that contained necessary tools to perform his job servicing rigs located in several states. The court noted that each case involving travel time "must be decided on its particular facts." Here, because the employee transported equipment needed to service the rigs, he was performing an activity so closely related to his work that it was an integral and indispensable part of his principal activity. Accordingly, the court determined that the employee was entitled to be compensated for time spent traveling to and from drill sites in his truck. *Crenshaw v.*

Quarles Drilling Corp., 798 F.2d 1345, 1350 (10th Cir. 1986).

b. Nevertheless, with regard to police officers, the DOL has stated that police officers who are permitted, but not required, to commute to work using police cruisers, in which they are required to carry specialized police gear, need not be compensated for their time commuting between their homes and the police station. *See* Wage & Hour Op. Letter, July 28, 1997. According to DOL, the key distinction is that the vehicle must not impose "substantially greater difficulties to operate than the type of vehicle which would normally be used for commuting." *See* Wage & Hour Op. Letter, April 18, 2001.

c. *Example*: Federal law enforcement officers were issued government-owned police vehicles and required to commute directly from home to work, refrain from personal errands during commute, have their weapons and other law-enforcement related equipment ready, and monitor communication equipment. The court held that they were not entitled to be compensated for their commuting time. *Adams v. United States*, 471 F.3d 1321 (Fed. Cir. 2006), *cert. denied*, 128 S. Ct. 866 (2008).

viii. Overnight Travel Away From Home

1. Time spent by an employee traveling away from home on an overnight trip as a passenger must be counted as work time if it "cuts across the employee's workday." 29 C.F.R. § 785.39. Employers must pay for travel time if it occurs during the employee's regular working days and regular working hours. Employers also must pay for such travel time when it occurs during the employee's regular working hours on non-working days.

2. Employers need not pay for travel time on overnight trips when it does not occur during regular working hours. But, if an employee performs any work for the employer while traveling, then the employer must pay the employee for all time actually worked. 29 C.F.R. § 785.41.

3. These rules apply to employees who travel as passengers and to employees who are offered transportation but choose to drive themselves to the destination. 29 C.F.R. § 785.40. If an employee is required to drive to the destination, then he or she is working while traveling and the employer must pay the employee for all

time spent driving. 29 C.F.R. § 785.39. An employer must pay an employee who is required to ride with the driver as an assistant or helper. 29 C.F.R § 785.41.

ix. Rate of Pay for Travel Time

1. An employer may pay employees at a lower rate for their travel time, provided that it agrees in advance with its employees that it will do so.

a. In a 1999 opinion letter, an employer asked the DOL whether it could compensate employees who visited various job sites throughout the day at a lower rate of pay for their travel time between job sites (generally 5 to 15 minutes). *See* Wage & Hour Op. Letter, Jan. 22, 1999. The DOL opined that the FLSA did not prevent an employer from paying employees different rates of pay for different types of work or work performed at different times, as long as all wages are in excess of the minimum wage. The DOL said "it is our opinion that the organization could pay a rate lower than the 'production' hourly rate for travel time, provided that rate is no less than the statutory minimum wage."

j. Rounding

i. The DOL and New Jersey permit the use of "rounding" practices -- the common practice of rounding the employees' starting and stopping time to the nearest five minutes or to the nearest 1/10 or 1/4 of an hour. The amounts must average out over time so rounding equally benefits the employee and the employer and the employer's rounding policy must be equally beneficial to the employee and to the employer on its face. § 29 C.F.R. 785.48(b); N.J.A.C. 12:56-5.8(b).

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Denise M. Keyser is a partner in the Litigation Department and a member of the Labor and Employment Group and Health Care Group. For over 20 years, she has represented national and locally based businesses in all types of labor and employment matters, including collective bargaining, arbitrations, OSHA, ERISA, wage and hour, employment-at-will, wrongful discharge, discrimination, management training, and affirmative action.

Ms. Keyser's experience includes serving as chief spokesperson and lead negotiator in collective bargaining negotiations for employers in a wide variety of industries, including health care, education, chemical manufacturing, food production, distribution, and public safety. She has handled numerous labor arbitrations on disciplinary and contract issues. She has experience before the National Labor Relations Board and has litigated cases involving issues such as discrimination, harassment, wrongful discharge, wage and hour issues, breach of contract, and ERISA in both state and federal courts. Finally, Ms. Keyser has worked closely with clients in drafting policies and handbooks, resolving compliance issues, and in day-to-day employment counseling.

Ms. Keyser is a member of the Executive Committee and a coordinator on the Disability Discrimination Subcommittee for the Labor and Employment Law Section of the New Jersey State Bar Association. She is also a former Co-chair of the section's Disability Discrimination Committee and a former Chair of the Alternate Dispute Resolution Committee. She was formerly on the Editorial Board of the *New Jersey Labor and Employment Law Section Quarterly*. She has been a contributing author to the ICLE/New Jersey State Bar Association compendium of New Jersey employment law, entitled *New Jersey Workplace Law*.

Ms. Keyser has been recognized as a Fellow by the College of Labor and Employment Lawyers. *Chambers USA: America's Leading Lawyers for Business* has recognized her as a leader in the field of labor and employment law since the directory's inception in 2003. She is also listed in the 2006 through 2012 editions of *The Best Lawyers in America* for labor and employment. Ms. Keyser has received an

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Ms. Keyser is a frequent speaker on developments in labor and employment law before bar, business, and community groups, including the New Jersey Institute for Continuing Legal Education and the Council on Education in Management. She is a member of both the New Jersey State Bar Association and the American Bar Association.

She is admitted to practice in New Jersey (1983) and Pennsylvania (1983).

Ms. Keyser is a graduate of the State University of New York at Stony Brook (B.A., with high honors, 1980) and the University of Pennsylvania Law School (J.D. 1983).

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Patricia A. Smith is a partner in the Litigation Department and a member of the Labor and Employment Group and Health Care Group. A veteran litigator, Ms. Smith has significant jury trial experience in state and federal courts. Ms. Smith also prepares affirmative action programs and represents clients during government audits and investigations. She has an active ERISA litigation practice and counsels employers on avoiding and resolving employment-related problems.

Ms. Smith represents management in all areas of employment and labor law and litigation. She has experience in a variety of industries, including computers, construction, health care, transportation, oil refining, manufacturing, and commercial lending. Ms. Smith regularly provides advice and counseling to employers concerning the implementation of reductions in force and other difficult employment decisions. She also practices traditional labor law and has handled numerous arbitrations, union organizing campaigns, collective bargaining negotiations, and unfair labor practice charges.

Ms. Smith has received an AV Peer Review Rating from Martindale-Hubbell, an honor indicating an attorney has reached the height of professional excellence.

Representative Engagements

- Successfully defended a nationally recognized construction company before a jury in two age-discrimination employment suits
- Successfully defended numerous claims of employment discrimination and retaliation claims on the basis of race, sex, age, disability, national origin, and whistleblower status in numerous state and federal courts throughout the country
- Successfully defended ERISA individual and class action matters
- Develops and implements strategies to preserve confidential corporate information and to avoid the loss of valuable employees to competitors

- Successfully obtains and enforces temporary restraining orders and injunctions in connection with massive strike activity

Ms. Smith regularly provides advice and counseling to employers concerning the implementation of reductions in force and other difficult employment decisions. She has lectured and written widely on numerous employment law topics, including sexual harassment, defamation, employee piracy, and union avoidance, and has experience in a variety of industries, including computers, construction, health care, transportation, oil refining, manufacturing, and commercial lending.

Ms. Smith is listed in the 2007 through 2011 editions of *Chambers USA: America's Leading Lawyers for Business*, a directory built primarily on client interviews, as a leader in the field of labor and employment law. She regularly speaks before business, bar, and community groups on labor and employment law topics, including before the American Bar Association, the New Jersey Institute for Continuing Legal Education, and the Council on Management.

Ms. Smith is a graduate of Rowan University (B.A., *magna cum laude*, 1973) and Rutgers, The State University of New Jersey School of Law-Camden (J.D., *cum laude*, 1981).

Labor and Employment Group

Our Labor and Employment Group has experience in counseling and litigating an array of labor, employment, and ERISA matters in the public, private, profit, and nonprofit sectors and in representing a large variety of industries.

The types of matters we handle regularly include:

- Representation of employers in collective bargaining negotiations; interest arbitration; private and AAA labor arbitration; NLRA and state labor law compliance issues; the labor implications of mergers, acquisitions, and asset purchases; strike prevention and control; union campaigns; union-free training of management and supervisors; and unfair labor practice proceedings before the NLRB and state labor boards

- Employment discrimination advice and defense of claims on grounds of protected class membership, such as age, race, gender, sexual orientation, disability, religion, national origin, and sexual harassment; and Equal Pay Act claims

- Preparation and defense of affirmative action plans under Executive Order 11246 and other federal and state laws, including advice on implementation of monitoring processes; plan analyses and drafting; and advice, counseling, and litigation over OFCCP audits

- ERISA and other employee benefits advice and litigation, including administrative claims appeals; breach of fiduciary duty claims; litigation of benefit claims and interference with protected rights; ERISA preemption; and plan design counseling for litigation avoidance and defense

- Defense of class action and collective action cases, including claims of wage and hour violations brought against employers

- Defense of at-will employment, wrongful discharge, and employment tort claims

- Design and implementation of corporate-wide HR and labor strategies and initiatives

Practice Group Description

- Preparation of, and advice and litigation concerning, employment agreements, executive compensation programs, restrictive covenants and trade secret agreements, and employment terminations
- Advice and litigation on behalf of public employers such as cities, states, school districts, authorities, and municipalities in traditional labor and employment matters, as well as under specialized labor laws regarding police, fire, and other personnel (e.g., Heart and Lung Act and civil service laws)
- Training of managers and employees on topics such as sexual harassment, EEO compliance, ADA, FMLA, chronic absenteeism, managing the difficult employee, health and safety compliance, hiring, interviewing, and wage and hour compliance
- Review and legal audit of personnel policies, manuals, and employment forms; formulation of personnel policies, such as FMLA and applicable state leave laws; sexual harassment; drug and alcohol abuse and testing; privacy rights; and ADA compliance
- Advice concerning OSHA and state health and safety laws, including compliance and self-audits; governmental investigations and citations; negotiations with OSHA; and litigation before the OSHRC and the courts
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