WAGE & HOUR DEVELOPMENTS: A YEAR IN REVIEW

2022

Table of Contents

INTRODUCTION 3

FEDERAL LEGISLATION 3

U.S. SUPREME COURT CASES 4

OTHER NOTABLE FEDERAL COURT CASES 5

DOL AGENCY DEVELOPMENTS 19

STATE UPDATES 26

- California 26
- District of Columbia 28
- Georgia 28
- Hawaii 29
- Illinois 29
- Massachusetts 31
- Michigan 32
- Nebraska 33
- Nevada 33
- New York 33
- Ohio 35
- Oregon 36
- Pennsylvania 36
- Puerto Rico 39
- Rhode Island 40
- South Carolina 41
- Virginia 41
- Washington 42
- West Virginia 45

MINIMUM WAGE INCREASES 46

MINIMUM SALARIES FOR THE "WHITE COLLAR" EXEMPTIONS 46

INTRODUCTION

2022 saw continued wage and hour policy changes at the federal level. A final rule addressing independent contractor status issued by the Trump Administration (which some argued made it easier to classify individuals as independent contractors) was withdrawn by the U.S. Department of Labor (DOL) under the Biden Administration before it became effective in March 2022. But a federal court revived and reinstated the Trump final rule holding the Biden Administration's withdrawal invalid. The DOL then responded by issuing a new proposed independent contractor rule, and a final rule is expected to be issued in 2023.

Meanwhile, employers waited with bated breath for the DOL to propose a new rule increasing the salary level for employees subject to the "white collar" overtime exemptions — those for executive, administrative, and professional (EAP) employees. The current salary level for the standard exemptions stands at $35,568 and, for "highly compensated" employees, $107,432. During 2022, the DOL repeatedly stated a rule was in the works for months, and even held "town halls" to obtain input from the public and affected stakeholders. But 2022 has come and gone without a new rule. With inflation at its highest level in years, some pundits are speculating the new rule will include a large minimum salary level increase. However, the DOL may be concerned about implementing too drastic a change, in light of the 2016 federal court ruling invalidating a previously proposed significant increase. The Department also may be concerned about avoiding the "major questions" doctrine, revived by the U.S. Supreme Court last term, which limits the power of agencies to regulate areas that significantly impact the economy without clear authority from Congress.

Through all of this, the Biden Administration struggled to achieve approval of its nominee to head the Wage and Hour Division (WHD) of the DOL. After narrowly making it out of the Senate Health, Education, Labor and Pensions Committee, the first nominee, David Weil, was rejected by the full Senate in late March 2022. The administration responded in August 2022 by nominating Jessica Looman, who had been the acting administrator of the WHD since June 2021. Looman's nomination has yet to be addressed by the full Senate as the new year begins. Stay tuned for further DOL developments in early 2023.

With the COVID-19 pandemic easing, employees returned the workplace, but often only for three or four days per week. Courts began to address some of the wage and hour issues that arose from the pandemic, such as whether testing, screening, and vaccination time are compensable as "integral" to the employee job performance.

At the state level, more states and local jurisdictions enacted pay transparency statutes and regulations, requiring employers to disclose salary information in greater detail in job advertisements and postings. Some states require the disclosure for any job posted in the United States if the job could be performed remotely in the jurisdiction.

In the 2022 Year in Review report, we review some of the significant wage and hour developments at both the federal and state level, as well as identify all the new state minimum wage rates. While the federal minimum wage has not changed since July 2009, the number of states and local jurisdictions increasing minimum wage rate continues to expand. Notably, in 2022, Hawaii enacted a tiered minimum wage increase that eventually will max out at $18.00 per hour (in 2028) – the first state to officially enact a statutory increase to this level – while Massachusetts and Washington joined the $15-per-hour club as of January 1, 2023. Also, as of January 1, Seattle has become the city with the highest minimum wage rate at $18.69 per hour (for large employers).

FEDERAL LEGISLATION

As 2022 ended, Congress passed, and President Joe Biden signed, the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP for Nursing Mothers Act). The PUMP for Nursing Mothers Act expands existing employer obligations under the Fair Labor Standards Act (FLSA) to provide an employee with reasonable break time to express breast milk for the employee's nursing child for one year after the child's birth. The employer obligation to provide a place to express milk shielded from view and intrusion from coworkers and the public (other than a bathroom) continues. Except for changes to available remedies, the amendment to the FLSA took effect on December 29, 2022. The changes to remedies will take effect on April 28, 2023.

Changes to the PUMP for Nursing Mothers Act

The PUMP for Nursing Mothers Act covers all employees, not just non-exempt workers. The break time may be unpaid unless otherwise required by federal or state law or municipal ordinance. Employers should ensure that non-exempt nursing employees are paid if they express breast milk during an otherwise paid break period or if they are not completely relieved of duty for the entire break period. Exempt employees should be paid their full weekly salary as required by federal, state, and local law, regardless of whether they take breaks to express breast milk.

With some exceptions, the law requires employees to provide notice of an alleged violation to the employer and give the employer a 10-day cure period before filing a suit.

Employers with fewer than 50 employees may still rely on the small employer exemption, if compliance with the law would cause undue hardship due to significant difficulty or expense. Crewmembers of air carriers are exempted from the law. Rail carriers and motorcoach services operators are covered by the law, but exceptions and delayed effective dates exist for certain employees. No similar exemption is provided for other transportation industry employers.

U.S. SUPREME COURT CASES

Supreme Court Considers Whether "Highly Compensated" Employees Paid on a "Day Rate" Basis Are Overtime-Exempt Under FLSA

On October 12, 2022, the U.S. Supreme Court held oral argument to address the decision of the U.S. Court of Appeals for the Fifth Circuit in *Hewitt v. Helix Energy Sols. Group, Inc.*, 15 F.4th 289 (5th Cir. 2021), cert. granted, No. 21-984 (U.S. May 2, 2022), and a corresponding split among the circuit courts of appeal regarding the application of FLSA regulations for the "highly compensated employee" (HCE) exemption from overtime.

In *Hewitt*, the Fifth Circuit held that the employer's day-rate pay structure did not satisfy the "salary basis" component of the "white collar" exemptions under the FLSA, even though the employee at issue unquestionably met the salary level and duties requirements of the HCE variation of those exemptions. The Fifth Circuit further concluded that the employee did not meet a separate exemption requirement, namely, that there be a reasonable relationship between the employee's total weekly pay and any weekly minimum salary he received.

Background

In *Hewitt*, the plaintiff worked month-long hitches on an oil rig and was paid $963 for every day that he worked. He admittedly earned over $200,000 per year and supervised about a dozen other employees. On its face, this would satisfy the FLSA's HCE exemption from overtime, which requires a relaxed duties test and, at the time, annual compensation of at least $100,000 (now, $107,432).

However, the plaintiff argued that his "day rate" pay did not satisfy DOL regulations, which, to satisfy the HCE exemption, require an employee's pay to be calculated on a "salary basis," generally defined as the regular receipt of a "predetermined" amount of pay "on a weekly, or less frequent basis," the amount of which cannot be reduced due to "variations in the quality or quantity of work performed." Further, the plaintiff relied on a DOL regulation indicating that an exempt employee's guaranteed salary must bear a "reasonable relationship" to any additional pay received on a daily or hourly basis. He asserted that his "day rate" pay system was incompatible with these regulations.

In a sharply divided *en banc* proceeding, the Fifth Circuit concluded the plaintiff did not qualify for the HCE exemption because, even though his day-rate pay was well above the $455 (now, $684) per week minimum salary required by the exemption, the pay structure failed to satisfy the regulatory requirement that an employee be paid a guaranteed weekly salary that complied with the "reasonable relationship" test found in Section 541.604(b) of the regulations.

In *dicta*, the Sixth and Eighth Circuit Courts of Appeal previously had reached the same conclusion regarding the exemption's requirements. However, the First and Second Circuits previously had determined that the "reasonable relationship test" does not apply to highly compensated employees, at least for those paid a minimum guaranteed weekly salary. The Supreme Court granted certiorari to resolve these potentially conflicting interpretations of the regulations.

The Takeaway

Based on the questioning by the justices, it is unclear how the Court will resolve the dispute over regulatory interpretation, yet its decision is certain to affect the pay practices of many oil, gas, and utility companies, given the prevalence of day rates and hybrid salaried/hourly pay structures in the energy industry. A decision should arrive by the end of the Court's current term in June 2023.

The justices' inquiries regarding inconsistencies between the salary regulations and the statutory text of the EAP exemptions may spark a new wave of litigation challenging the validity of *any* salary requirement. Their inquiries may suggest a belief that the salary regulations are outside the scope of the DOL's regulatory authority under the "major questions" doctrine, invoked by the Court earlier in 2022 in overturning an Environmental Protection Act regulation. That doctrine provides that Congress cannot defer significant issues of national policy to an administrative agency unless there is a clear expression of such intent.

Since the Court's recent application of the major questions doctrine, a lawsuit challenging the DOL's recent Tipped Regulations Final Rule has cited it as a basis for overturning the regulations. Thus, it is not inconceivable that the doctrine ultimately may come into play with respect to any or all of the salary regulations applicable to the EAP exemptions. Furthermore, when a federal district court enjoined, and ultimately invalidated, the DOL's 2016 overtime final rule establishing a significant increase in the salary threshold for the "white collar" exemptions, that court relied on the plain language of the statute and the Chevron doctrine to conclude that "Congress intended the EAP exemption to depend on an employee's duties rather than an employee's salary." *Nevada v. DOL*, 218 F. Supp. 3d 520, 530 (E.D. Tex. 2016); *Nevada v. DOL*, 275 F. Supp. 3d 795 (E.D. Tex. 2017) (invalidating the 2016 overtime final rule). Although the DOL changed course by implementing new salary requirement regulations in 2020, only time will tell whether new challenges to the validity of the salary regulations, inspired by the justices' comments, will gain traction in the courts.

OTHER NOTABLE FEDERAL COURT CASES

FLSA Retaliation Provisions Protect Anticipated Collective Action Members, Third Circuit Holds

Does a plaintiff's allegation, that he was about to join a pending FLSA collective (class) action against his former employer, combined with the employer's knowledge that he was a potential class member, sufficiently constitute being "about to testify" in an FLSA proceeding, such that former employer's actions in prohibiting the plaintiff from working for its subsidiary might constitute unlawful retaliation under the FLSA?

Yes, according to the U.S. Court of Appeals for the Third Circuit. *Uronis v. Cabot Oil & Gas Corp.*, 2022 U.S. App. LEXIS 25727 (3d Cir. Sept. 14, 2022). The Third Circuit has jurisdiction over the federal courts in Delaware, New Jersey, Pennsylvania, and the Virgin Islands.

Background

The FLSA prohibits discrimination against employees who have engaged in "protected activity" which, in part, includes having "testified" or being "about to testify" in any FLSA-related proceeding. 29 U.S.C. § 215(a)(3). In February 2019, a former coworker of plaintiff Matthew Uronis filed a collective action lawsuit against both Cabot Oil & Gas Corporation and a transport and rental company, claiming that the two companies were joint employers and that they failed to properly pay overtime to members of the class, in violation of the FLSA. Uronis, who also had been employed by the transport and rental company – and, therefore, arguably had been jointly employed by Cabot – fell within the putative class of individuals set forth in the collective action complaint.

According to the Complaint, in August 2019, Uronis applied for a position with GasSearch Drilling Services Corporation (GDS), a subsidiary of Cabot. On August 28, 2019, a GDS manager sent Uronis a text message unequivocally stating that, despite his clear qualifications, GDS could not hire Uronis because he was a putative member of the collective action lawsuit against Cabot and the purported joint employer. That same day, Uronis signed his consent to join the collective action and, although he already had contacted the lead plaintiff about testifying in that lawsuit, he had not informed anyone at Cabot or GDS that he planned to do so.

Uronis subsequently filed his own collective action, against Cabot and GDS, alleging they violated Section 215(a)(3) of the FLSA when GDS refused to hire him and others because they were "about to testify" in his former coworker's lawsuit. In support of this retaliation claim, Uronis referenced the text message from the GDS manager. The defendants filed, and the district court granted, a motion to dismiss on the basis that Uronis had not pled conduct constituting protected activity under Section 215(a)(3).

The district court concluded that Uronis was not "about to testify" because he had not alleged he was scheduled to provide testimony in the underlying collective action. "Had Congress intended [Section 15(a)(3)] to apply to scenarios in which putative collective action members might potentially testify at some point in the proceeding, it would have said so," concluded the trial court. On the contrary, it continued, "Section 15 uses the phrase 'about to testify,' suggesting some sense of certainty and immediacy as opposed to mere possibility." In this case, Uronis had not alleged that he or other putative class members "were subpoenaed to testify or that they were told they would be called upon to testify, nor ha[d] he alleged any facts that Defendants had a reason to know that [he] or any others would be testifying." Uronis appealed and the Third Circuit reversed the trial court decision.

Third Circuit Decision

Noting first that "Congress included in the FLSA an antiretaliation provision … to encourage employees to assert their rights without 'fear of economic retaliation [which] might often operate to induce aggrieved employees to quietly accept substandard conditions,'" the Third Circuit stated that the FLSA "must not be interpreted or applied in a narrow, grudging manner." In support of this position, the Court of Appeals cited to the U.S. Supreme Court's decision in *Kasten v. Saint-Gobain Performance Plastics Corporation*, 563 U.S. 1 (2011), in which the Court held that an oral complaint of an FLSA violation constitutes protected activity, even though the statute (in a companion subsection) refers to a complaint that has been "filed," which most commonly is interpreted to require a written document.

In so holding, the Supreme Court reasoned that to limit the scope of Section 15(a)(3) to the filing of written complaints would foul Congress' intent by "'prevent[ing] Government agencies from using hotlines, interviews, and other oral methods of receiving complaints' and 'discourag[ing] the use of desirable informal workplace grievance procedures to secure compliance with the [FLSA].'" The Court further noted that it had interpreted an analogous provision of the National Labor Relations Act (NLRA) to protect conduct not explicitly listed in that NLRA, specifically, to extend anti-retaliation protection to individuals who merely had participated in a National Labor Relations Board investigation, even though the language of the NLRA itself referred only to those who had "filed charges or given testimony."

The Court of Appeals further noted that previously, in *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987), it had extended the protections of Section 215(a)(3) to individuals whom the employer believed had filed a complaint with the Department of Labor, even though they had not actually done so. "Even though the statute could be narrowly read to not include retaliation based on perception, such retaliation 'creates the same atmosphere of intimidation' as does discrimination based on situations explicitly listed in Section 15(a)(3)," the Court of Appeals reiterated, adding that "[s]uch an atmosphere of intimidation is particularly repugnant to the purpose of the FLSA in the context of collective actions." Similarly, "[i]f employers can retaliate against an employee because the employer believes the employee has or will soon file a consent to join an FLSA collective action, this enforcement mechanism – and employee protection – will be gutted."

However, added the Third Circuit, "Section [2]15(a)(3) is not a *per se* bar against any adverse employment action against an employee who is or might soon be a collective action member. Rather, it bars discrimination because of protected activity." Again citing to *Kasten*, the Court of Appeals emphasized that to qualify as arguably protected activity, the employer must be given "fair notice" that a reasonably detailed and clear complaint, whether oral or written, has been asserted (as in *Kasten*) or, as here, that the individual was "about to testify" in an FLSA proceeding (as the Third Circuit now broadly interprets that phrase) and there must be plausible evidence (or allegations) that the employer was aware of the conduct.

In this case, the district court implicitly interpreted the definition of "testify," as set forth in Section 215(a)(3), to require that an employee be scheduled or subpoenaed to testify, a "narrow interpretation is not consistent with the FLSA's purpose, or with *Kasten* and *Brock*. On the contrary, the Third Circuit said:

The reasoning of *Kasten* and *Brock* compel the conclusion that to "testify" under Section [2]15(a)(3) includes the filing of an informational statement with a government entity. A consent to join a collective action is just that: it is an informational statement (that an employee is similarly situated to the named plaintiff with respect to the alleged FLSA violation) made to a government entity (the court).

Accordingly, concluded the Third Circuit, "an employee testifies under Section [2]15(a)(3) when the employee files a consent to join an FLSA collective action."

Moreover, again in support of the FLSA's broad remedial purpose and contrary to the reasoning of the district court, the Court of Appeals held that "'about to testify' includes testimony that is impending or anticipated, but has not been scheduled or subpoenaed." As set forth in several other district court decisions, "'about to' … includes activity that is 'reasonably close to, almost, on the verge of,' or 'intending to do something or close to doing something very soon.'" This includes individuals who, like Uronis, intended to soon file his consent to join the collective action and testify in that lawsuit, the Third Circuit noted. Finally, the Court of Appeals held, Uronis had sufficiently pled — as evidenced by the text to him from the GDS manager — not only that Cabot and GDS were aware, or at least assumed, that he would join the collective action, but that GDS was flatly refusing to hire him for this very reason. Based on these allegations, "[i] t is plausible that [GDS would not hire Uronis] because they anticipated [he] and his former co-workers would soon file consents to join the putative collective action, or otherwise provide evidence relating to it." Accordingly, the Third Circuit said, the complaint should not have been dismissed on the pleadings and the case was due to be remanded for further consideration.

The Takeaway

The Third Circuit's decision makes clear that, at least in the courts under its jurisdiction, the FLSA's retaliation provisions extend to circumstances beyond the traditional employer-employee relationship. Thus, employers should be cautious in their dealings with both former and prospective employees (actual or alleged) to ensure that they are not basing employment decisions on activity, or even reasonably likely activity, that might be construed as protected conduct under the FLSA's retaliation provisions.

Store Sampler Representatives Are Exempt Outside Salespersons, First Circuit Holds

Who doesn't like getting free samples when shopping? But, are the representatives providing those samples actually "selling" them so that they are exempt from overtime under the FLSA as outside salespersons?

Yes, according to the U.S. Court of Appeals for the First Circuit. Although they may not undertake the final act of selling the products to customers, in-store brand representatives employed by a third party satisfy the requirements of the exemption. *Modeski v. Summit Retail Sols*., Inc., 2022 U.S. App. LEXIS 5132 (1st Cir. Feb. 25, 2022). The First Circuit has jurisdiction over the federal courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

The Outside Sales Exemption

The FLSA generally requires that employees be paid at least minimum wage for all hours worked and one-and-a-half times their hourly wage for hours worked beyond 40 in a week. 29 U.S.C. §§ 206(a), 207(a)(1). One of the exceptions to both of these requirements applies to anyone employed "in the capacity of outside salesman." *Id.* § 213(a)(1).

The FLSA itself does not define the term "outside salesman," instead leaving those details to DOL. The DOL, in turn, has established two primary requirements for the exemption: (1) the employee's primary duty must be making sales (as defined in the FLSA) or obtaining orders or contracts for services or for the use of facilities, for which a consideration will be paid by the client or customer; and (2) the employee must be customarily and regularly engaged away from the employer's place or places of business in performing such primary duty. 29 C.F.R. § 541.500(a)(1) - (2).

The Case

Summit Retail Solutions contracts with department stores, grocery stores, and wholesale clubs to provide in-store product samples and demonstrations designed

to increase sales. To this end, Summit employs "Brand Representatives" to conduct these demonstrations and to engage with customers.

The Brand Representatives set up a display and hand out samples or otherwise demonstrate the product to customers. For efficiency purposes, if a customer decides to purchase the product, the sale is consummated by the store's checkout cashiers, rather than by the Brand Representatives themselves.

Summit determines the store(s) to which a Brand Representative will be assigned, sets the Representative's schedule, and determines which product(s) they will display. Brand Representatives' hours are carefully recorded and tracked, and they are paid an hourly wage of $10 to $15. In addition, they may qualify for a commission-type bonus if a sufficient quantity of the product is sold while they are operating the display, even if they did not directly engage with every customer who purchased the product during that time. Conversely, if a Brand Representative's product sales are routinely poor during an extended period, they may operate with a "negative" balance for bonus purposes and, ultimately, may be disciplined or discharged.

A group of former Brand Representatives filed a collective and class action against Summit, seeking to recover unpaid overtime wages under the FLSA and analogous state wage laws. The Brand Representatives asserted that they were compelled to systematically underreport their actual hours to avoid the potentially adverse consequences of the company's bonus system. As a result, they sometimes worked more than 40 hours per week, yet were not paid overtime.

Summit argued, in part, that the plaintiffs were exempt from overtime under the FLSA's outside sales exemption and, thus, were not entitled to overtime compensation at all. The trial court agreed with Summit on this issue and granted summary judgment to the company.

First Circuit Decision

On appeal, the Brand Representatives did not contest either that they were "customarily and regularly engaged away from the employer's place or places of business" or that their primary duty was to try to convince customers to buy the products they were featuring. They claimed instead that they were not "making sales" because they did not obtain a commitment from the customers to purchase the products.

Citing to the U.S. Supreme Court's analysis in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the First Circuit noted that the FLSA's use of the language "'in the capacity of [an] outside salesman' … counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works." Similarly, the statute's use of the words "sale" or "sell" to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," the Court said, suggests that the examples provided in the statute are "illustrative, not exhaustive." Moreover, "*Christopher* noted that the DOL itself has explained (in reports and regulations) that the exemption is applicable whenever an employee in some sense make[s] a sale" and "should not depend on technicalities, such as whether it is the sales employee or the customer who types the order into a computer system and hits the return button." (Internal quotations and citations omitted.)

In light of this broad definition of "sales," the First Circuit had no trouble concluding that the Brand Representatives qualified for the outside sales exemption. The First Circuit noted, "Although they do not ring up any purchase at the register, Brand Reps do as much as practically possible to 'in some sense make[] a sale' in the retail store context in which they operate." In this respect, the First Circuit explained, they "work to persuade shoppers, who then can demonstrate some intention (or 'nonbinding commitment') to buy a product by placing it in their shopping carts or baskets." By contrast, the cashiers make no effort to persuade customers to buy the product, the First Circuit pointed out, so the Brand Representative "is the last person to make an actual sales effort; the finalization process – at the checkout register when the cashier rings up the purchase – is simply a nondiscretionary, ministerial act that does not involve any additional sales effort."

Cable Technicians Were Exempt Commissioned Employees, Fifth Circuit Concludes

Cable technicians who were paid by the completed job and not by the hour were bona fide commissioned employees and, therefore, exempt from the overtime requirements of Act, the Fifth Circuit Court of Appeals

ruled in August 2022. Accordingly, the district court's grant of summary judgment to the plaintiffs' employer was affirmed. *Taylor v. HD & Assocs*., 2022 U.S. App. LEXIS 22762 (5th Cir. Aug. 16, 2022). The Fifth Circuit has jurisdiction over the federal courts in Louisiana, Mississippi, and Texas.

HD & Associates (HDA), a subcontractor for a major cable communications corporation, installs and repairs cable and telephone equipment for the cable corporation's residential customers in Louisiana. HDA is located in Louisiana and all of the relevant work that HDA performed for the cable corporation was in Louisiana. The cable corporation creates daily work orders for customer service requests in a digital platform, bundles them, and creates and assigns routes for the technicians, with arrival times for each work order assigned based on the time estimate for that type of work order. Both the cable corporation and HDA use the digital platform to track the location of each technician and their completed assignments, and to update routes and assignments as needed. Each work order is allocated a point value based on the complexity of the assignment and the point value determines how much the technician is paid for that assignment.

Plaintiff Byron Taylor, on behalf of himself and other similarly situated technicians, filed a lawsuit against HDA, alleging that they worked in excess of 40 hours per week but were not paid overtime, in violation of the FLSA. Following a grant of conditional certification, HDA moved for summary judgment, asserting that the company was not covered by the FLSA and even if it was, the technicians were bona fide commissioned employees exempt from the FLSA's overtime requirements. The district court agreed with both contentions, and further concluded that the technicians were exempt under the FLSA's Motor Carrier Act (MCA) exemption. Thus, the district court granted summary judgment to HDA and dismissed the case. The plaintiffs appealed and the Court of Appeals affirmed the grant of summary judgment.

On appeal, the Fifth Circuit first addressed whether the technicians or HDA (or both) are covered by the FLSA, noting that there are two methods for establishing FLSA coverage: individual and enterprise-wide. An individual employee is covered by the FLSA if they "engage[] in commerce or in the production of goods for commerce." In this respect, "[t]here is no *de minimis* requirement," so "[a]ny regular contact with commerce, no matter how small, will result in coverage." The fact that the technicians "work directly on the instrumentalities of interstate commerce, including phone and internet service," the Fifth Circuit concluded, is sufficient for them to fall under the FLSA's individual coverage prong. Thus, even if the company was not covered under the enterprise prong – which the district court mistakenly had analyzed by relying on individual-coverage precedent – the plaintiffs were subject to the FLSA.

Regardless, the technicians were in fact *bona fide* commissioned employees and, therefore, exempt from the FLSA's overtime requirements. The commissioned employee exemption, set forth in 29 U.S.C. § 207(i), applies to (1) employees of retail or service establishments; (2) whose regular rate of pay is in excess of one and one-half times the applicable minimum hourly rate; and (3) more than half of whose compensation represents commissions on goods or services.

Here, neither party disputed the first two elements of the exemption, so the only issue was whether the technicians' pay constituted commissions. Noting that whether a payment is a commission depends on how it works in practice rather than its name, the Fifth Circuit adopted the definition of a commission frequently used by other courts and involving several, non-dispositive factors: (1) whether the commission is a "percentage or proportion of the ultimate price passed on to the consumer"; (2) whether the commission is "decoupled from actual time worked, so that there is an incentive for the employee to work more efficiently and effectively"; (3) the type of work is such that its "peculiar nature" does not lend itself to a standard eight-hour work day"; and (4) whether the commission system "offend[s] the purposes of the FLSA."

In this case, the "commission" paid to the technicians is a percentage of the ultimate price passed onto the cable corporation's customers and the amount earned is tied to customer demand, not to the number of hours the technicians work. Moreover, concluded the Court of Appeals, "given the nature of cable repairs, the work does not lend itself to a standard workday" and, given that the payment system is widely used in the cable technician industry, it "does not offend the purposes of the FLSA." On the contrary, as the Fifth Circuit had

noted in a previous case, "where a system of pay is industry-wide, it is persuasive that the whole industry is not violating FLSA overtime provisions."

Most importantly, the amount of income technicians can earn is based on how hard they work and how skilled they are, rather than how long they spend on a given assignment. Thus, a technician given a five-point job earns the same amount whether the assignment takes one hour or three to complete it, thereby incentivizing them to work faster and more efficiently. Moreover, because technicians are paid only for services they actually provide and cannot "stock" their services as, for example, a garment worker can sew items that can then be placed into inventory if not immediately needed, the points system is not a "piece rate" compensation method. In sum, the points-based compensation method is a commission system and the technicians were properly deemed to be overtime-exempt under the FLSA. In light of this determination, the Court of Appeals elected not to address the district court's further conclusion that the MCA exemption also applied.

Fifth Circuit Ruling a Stark Reminder of Employer Obligations When Taking FLSA Tip Credit, Imposing Uniform Fees

Generally, the FLSA requires employers to pay at least minimum wage (currently, $7.25) for all non-overtime hours in a workweek. However, subject to any contradictory state laws, an employer may pay a "tipped employee" — one who customarily and regularly receives at least $30 per month in tips – a reduced minimum wage of $2.13 per hour, with the employee's tips making up the difference. This difference commonly is known as the "tip credit." To claim the tip credit, the employer must comply with certain notice requirements, and failure to do so may result in a claim that the employer violated the FLSA by not paying the required minimum wage. A Fifth Circuit case involving a Houston, Texas pizza parlor exemplifies the potential perils of failing to satisfy those tip credit notice provisions, as well as for overcharging employees for the cost of uniform cleaning. *Ettorre v. Russos Westheimer, Inc.*, 2022 U.S. App. LEXIS 7295 (5th Cir. Mar. 18, 2022).

The Law

When an employer elects to take a tip credit under the FLSA, it must inform tipped employees of its use of the tip credit, including: (1) the amount of the employee's cash wage; (2) the amount of the tip credit claimed by the employer; (3) that the amount claimed may not exceed the value of the tips actually received; (4) that all tips received must be retained by the employee except for a tip pooling arrangement limited to employees who customarily and regularly receive tips; and (5) that the tip credit shall not apply to any employee who has not been informed of all of these requirements. 29 U.S.C. § 203(m); 29 C.F.R. § 531.59(b). An employer may not take the tip credit for any period during which these notice requirements are unmet.

The Lawsuit

Plaintiff Chiara Ettorre was employed as a server at a Russos pizza restaurant in Houston from May 2016 until December 2018. Throughout that time, Russos paid her $2.13 per hour plus tips and claimed the FLSA tip credit. In addition, Russos deducted a mandatory $10 "linen fee" per pay period from Ettorre and other servers to cover the cost of cleaning their work aprons, which they were required to wear. That fee also covered the cost of providing unlimited soft drinks to the employees while they worked. Following her discharge, Ettorre sued Russos, alleging it failed to provide her the FLSA's requisite notice before claiming the tip credit and that the linen fee was an improper pay deduction. The district court granted summary judgment to Ettorre, finding no evidence that Russos had ever satisfied the required tip credit notice provisions. The trial court further concluded that the linen fee was an unreasonable charge for merely laundering an apron and that Russos had failed to show the actual cost of providing free drinks, as opposed to the menu price it charged customers for such drinks. Accordingly, Russos was liable for the full amount of the tip credit and the linen fee for the time Ettorre was employed, as well as liquidated (double) damages and attorney's fees.

Russos appealed and the U.S. Court of Appeals for the Fifth Circuit affirmed summary judgment for Ettorre in all respects. In response to Ettorre's affidavit asserting that she was not informed of the tip credit notice provisions other than that she would be allowed to keep her tips, the company's corporate designee admitted she did not know whether the restaurant informed Ettorre of the required tip credit notice provisions and further admitted there was no policy of informing employees about these provisions at the time of hiring. Rather, Russos demonstrated only that Ettorre was aware that her hourly rate was $2.13 and that she could retain her tips. Moreover, even if Ettorre was provided with an

employee handbook (which she denied), the Court of Appeals ruled that there was no evidence the tip credit notice provisions were included in it. In sum, the Fifth Circuit held that Russos had failed to produce sufficient evidence to survive Ettorre's summary judgment motion.

As for the linen fee, the Fifth Circuit noted that under Section 203(m)(1) of the FLSA, an employer may count toward wages "the reasonable cost … of furnishing [an] employee with board, lodging, or other facilities, if [they] are customarily furnished by [the] employer to his employees" but "reasonable cost" in this respect means "actual cost" absent any employer profit. 29 C.F.R. §§ 531.3(a)-(b). The Court of Appeals held that Russos failed to produce any evidence of the cost of providing unlimited drinks to an employee. Regardless, concluded the Fifth Circuit, if an item is "primarily for the benefit or convenience of the employer," it is *per se* not a reasonable cost to impose on employees. 29 C.F.R. § 531.3(d)(1).

Moreover, the cost of providing and cleaning uniforms was primarily for the benefit of Russos and, therefore, could not reasonably be imposed on Ettorre or other employees. Regardless, even if some portion of the linen fee was reasonably imposed on employees, Russos failed to maintain and preserve adequate records to separate out that cost. Finally, the Court of Appeals held that Russos produced no evidence that it had reasonable, good-faith grounds to believe that its actions complied with the FLSA. Thus, an award of liquidated damages was appropriate.

Farm Animal Enclosure Construction Worker Not Penned In by FLSA's Agricultural Exemption, 7th Circuit Holds

The mere fact that the plaintiff was building livestock enclosures on farms did not necessarily preclude his entitlement to overtime pay under the agricultural exemption of the FLSA, the Seventh Circuit Court of Appeals has held. Therefore, the district court improperly dismissed the plaintiff's complaint. *Vanegas v. Signet Builders, Inc*., 2022 U.S. App. LEXIS 23206 (7th Cir. Aug. 19, 2022). The Seventh Circuit has jurisdiction over the federal courts in Illinois, Indiana, and Wisconsin.

The Agricultural Exemption

One of the lesser-known overtime exemptions to the FLSA is the "agricultural" exemption. That exemption, found in 29 U.S.C. § 213(b)(12), applies to "any employee employed in agriculture" and includes primary and secondary definitions. The primary definition of agriculture involves what people typically envision as farming: "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities … , [and] the raising of livestock, bees, fur-bearing animals, or poultry[.]" *Id.* § 203(f).

The secondary definition pulls in in a broad variety of activities related to the primary farming activities, if they are "performed by a farmer or on a farm as an incident to or in conjunction with [primary] farming operations, including preparation for market [and] delivery to storage or to market or to carriers for transportation to market." *Id.* This secondary definition contains language that became the focus of the lawsuit at issue, that is, did the plaintiff's judicial complaint plead facts unequivocally demonstrating that his work was "incident to or in conjunction with" the primary farming operations where he built the enclosures, such that the exemption clearly applied?

The Lawsuit

Plaintiff Luna Vanegas, a Mexican citizen, was hired by defendant Signet Builders on an H-2A guestworker visa to build livestock enclosures on farms in Wisconsin and Indiana. Although Vanegas worked on land belonging to farms, he never had any contact with livestock. Vanegas filed a complaint on behalf of himself and his construction coworkers, alleging that they routinely worked more than 40 hours per week but were not paid overtime, in violation of the FLSA.

In response, Signet filed a motion to dismiss under Federal Rule of Civil Procedure (FRCP) 12(b)(6), raising the affirmative defense that Vanegas and the putative plaintiffs are overtime-exempt under the FLSA's agricultural exemption. Citing to DOL regulation 29 C.F.R. § 780.136, which provides that "[e]mployees engaged in the erection of silos and granaries" are "examples of the types of employees of independent contractors who may be considered employed in practices performed 'on a farm,'" the district court agreed with Signet that Vanegas's work qualified as agricultural labor and dismissed the complaint.

The Court of Appeals Decision

Vanegas appealed and the Seventh Circuit reversed. As an initial matter, the Court of Appeals noted that, in this case, a motion to dismiss under Rule 12(b)(6) was inappropriate, as the FLSA exemption on which the defendant based its motion – and on which the district court based its dismissal – is not one of the affirmative defenses listed in Rule 12(b), and this is not "one of the rare [cases] in which the plaintiff had pleaded himself out of court by including 'facts that establish an impenetrable defense to its claims' in the complaint" (*quoting Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008)). Rather, the defendant should have included the FLSA exemption defense in its answer, and then filed a motion to dismiss under Rule 8(c) after the pleadings had closed. Regardless, concluded the Seventh Circuit, questions of material fact remained unanswered that precluded dismissal of the lawsuit solely on the plaintiff's complaint.

Looking to guidance from the DOL, the Court of Appeals cited to an interpretive rule explaining that three conditions must be met for work to fall within the agricultural exemption: (1) it must constitute an established part of agriculture; (2) it must be subordinate to the farming operations involved; and (3) it must not amount to an independent business. 29 C.F.R. § 780.144.

Focusing on the third condition as dispositive of the appeal, the Seventh Circuit noted that DOL regulations establish a "fact-driven, totality-of-the-circumstances test" to determine whether the defendant's construction business amounts to an independent business apart from agriculture. 29 C.F.R. § 780.145. Thus, the defendant's (and the district court's) reliance entirely on the "erection of silos and granaries" example ignored the remainder of that regulation, which clarifies that whether such construction workers are engaged in agriculture "depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm[.]"

To that end, stated the Seventh Circuit, the "nuanced, fact-intensive inquiry" required to determine whether the construction work is incident to or in conjunction with the farming operations, or conversely is an independent business, "is ill-suited for resolution based only on the allegations of a complaint," particularly given that "[w]ork that once was routinely performed by farmers" – for example, the production of fertilizer that is now routinely mass-created in factories – "can evolve into something separately organized as an independent productive activity." Similarly, if the work at issue is routinely subcontracted by farmers, rather than performed by the farmers themselves, that would be a "'significant indication'" that the work is not agricultural. 29 C.F.R. § 780.146. In the case at hand, "[n]othing in the complaint addresses whether farmers in the modern agricultural economy ordinarily build their own large livestock enclosures or hire separately organized construction companies to do so – facts relevant only to the affirmative defense."

Second, courts should consider whether the construction contracts are "in competition with agricultural or with industrial operations." 29 C.F.R. § 780.146. "If a business's primary competitors are not farming operations, then work performed for that business is unlikely to fall within the agricultural exemption." Nothing in the plaintiff's complaint addressed this question, let alone unequivocally answered it.

Third, courts should look at "the division of labor and supervision between a contractor's employees and those of the farmer." If there is minimal (or non-existent) overlap between the work performed by the farm's employees and that performed by the contractor's workers, "the logical implication is that the contractor's work does not fall within the [agricultural] exemption." Again, nothing in the judicial complaint resolved this question in Signet's favor. On the contrary, the complaint alleged that Vanegas and his coworkers were employed and paid exclusively by Signet.

The Court of Appeals further rejected Signet's argument that Vanegas's work necessarily was "agricultural" because his H-2A visa had been approved, noting that the definition of "agricultural" work is broader under the H-2A visa application program than it is under the FLSA. After rejecting a procedural argument asserted by the company, and after briefly reviewing some other factors cited by the DOL regulations and looking to several analogous cases, the Seventh Circuit was "convince[d] [] that the district court adopted too narrow a focus when it looked only at the work that [the plaintiff] performed as an employee, omitting consideration of questions such

as whether his employer was engaged in a productive activity separately organized from farming." Thus, while, ultimately, Signet might be able to prove that the agricultural exemption applies to the work performed by Vanegas and his coworkers, it had not carried its burden to establish the exemption at this early juncture. Therefore, the Seventh Circuit reversed the dismissal of the case and remanded it to the district court for more analysis on the exemption's application.

Are Non-Emergency Transport Providers Employees or Independent Contractors? Jury Questions Exist, Eighth Circuit Held

Reversing summary judgment in favor of the DOL, the Eighth Circuit held that jury questions exist as to whether the defendant employed drivers who provide non-emergency medical transport services or whether it properly classified those drivers as independent contractors. Walsh v. Alpha & Omega USA, Inc., 2022 U.S. App. LEXIS 19431 (8th Cir. July 14, 2022). The Eighth Circuit has jurisdiction over the federal courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

Background

Alpha & Omega USA, Inc. d/b/a Travelon engages drivers for non-emergency transportation of patients to and from medical appointments (known as special transportation services (STS)). Travelon provides vans and electronic tablets to the drivers and pays for some of their costs, such as internet service and vehicle insurance. Customers pay Travelon for the transportation services, which, in turn, distributes those payments to the drivers. However, drivers must pay Travelon a 35% commission for all weekly payments totaling $300 or more per week and a variety of expenses, such as fees for dispatch services, insurance, vehicle lease and maintenance, and tablet rental. These fees are how Travelon generates its revenue.

Travelon assigns trips to drivers on the electronic tablets through an application called "MediRoutes," which monitors the drivers' locations and availability. Although Travelon establishes the hours during which dispatch services are available (M-F 5:00 a.m.-6:00 p.m., Sa 5:00 a.m.-4:00 or 5:00 p.m.), drivers may set their own schedules within these hours.

The company classifies and pays the drivers as independent contractors but, following an investigation, the DOL's WHD concluded that the drivers were in fact employees and sued the company on behalf of 21 drivers for minimum wage, overtime, and recordkeeping violations. On cross-motions for summary judgment, the trial court agreed with DOL that the drivers were employees and awarded them both backpay and liquidated damages. Travelon appealed, and the Eighth Circuit reversed.

The "Economic Realities" Test

Over the years, both the courts and DOL have developed similar, yet somewhat varying, standards and factors that should be used for determining whether an individual is an employee or an independent contractor. The standards developed seek to reveal the "economic reality" of the relationship between the employer and the individual, and are derived from six, non-exclusive factors originally presented by the U.S. Supreme Court in two cases on the same day, *United States v. Silk*, 331 U.S. 704 (1947), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

The Eighth Circuit has concluded (without actually deciding, it notes) that the economic realities test is the proper method for determining whether an individual is an employee or an independent contractor and applies a six-factor test that closely mirrors the Supreme Court's original version. Those six factors are:

1. The degree of control exercised by the alleged employer over the business operations;
2. The relative investments of the alleged employer and employee;
3. The degree to which the alleged employee's opportunity for profit and loss is determined by the employer;
4. The skill and initiative required in performing the job;
5. The permanency of the relationship; and
6. The degree to which the alleged employee's tasks are integral to the employer's business.

The Circuit Court Decision

In reversing the trial court's grant of summary judgment, the Eighth Circuit concluded that jury questions exist as to whether the drivers are employees or are independent contractors, particularly with respect to factors one

(the employer's degree of control), three (the drivers' opportunity for profit or loss), and six (whether the drivers are integral to the employer's business).

With respect to the employer control issue, the trial court concluded that Travelon exercised significant control by assigning trips, pressuring drivers to accept trips, regulating the times during which drivers could provide services, requiring them to obtain permission to take breaks, tracking them through GPS location monitoring, and requiring them to submit travel logs. However, the Court of Appeals noted that both the company's owner and its long-time dispatcher testified that drivers were allowed to turn down trips without penalty. Moreover, a driver who claimed he felt pressured to accept assignments admitted that on occasion he declined trips without repercussion. Furthermore, the Court of Appeals found that drivers were able to and, in fact, did set their own schedules within the available service hours and could change their schedules daily. Additionally, the fact that the company limited the available service hours was more an indication of "common sense" rather than control over the drivers, given that the drivers were providing non-emergency transportation services that rarely would be required outside of these hours.

As to the "opportunity for profit or loss" factor, Travelon set the drivers' rates and facilitated trip assignments through the MediRoutes app, thereby limiting to some extent the drivers' opportunity for profit or loss. Drivers, however, were able to earn additional income by, for example, transporting multiple customers at a time to make trips more profitable and by using their own vehicles and tablets rather than leasing them from the company. In addition, competing testimony existed over whether drivers could provide transportation services independent of Travelon, even while using Travelon's vans.

As to the final factor — whether the drivers are integral to Travelon's business — DOL asserted that Travelon refers to itself as an STS provider (that is, registered with Minnesota as an STS provider) and that its customers depend on the drivers to perform services. The Eighth Circuit, however, found that Travelon distinguishes itself from actual STS providers, instead describing itself as an "intermediary company that supports the drivers' transportation businesses" by leasing vehicles and equipment to drivers and selling dispatch subscriptions. Thus, Travelon's revenue is generated entirely from commissions and fees charged to the drivers, not from the fees paid by the passengers, as would be the case with traditional STS providers.

Accordingly, the Court of Appeals concluded questions of material fact remain for a jury as to whether these three factors favor a finding of an employer-employee or employer-independent contractor relationship. Thus, the summary judgment ruling was reversed and the case was remanded for trial.

Property Damage Investigators Are Non-Exempt "Production" Employees, 11th Circuit Holds

Employees whose job it was to investigate and determine the likely cause of damage to the equipment of broadband service providers were misclassified as exempt by their employer, the Eleventh Circuit Court of Appeals has held. Therefore, the employees' overtime claims under the FLSA were improperly dismissed by the trial court. *Fowler v. OSP Prevention Group, Inc.*, 2022 U.S. App. LEXIS 17679 (11th Cir. June 27, 2022). The Eleventh Circuit has jurisdiction over the federal courts in Alabama, Florida, and Georgia.

The FLSA generally requires that employees be paid no less than minimum wage for all hours worked and overtime at one-and-a-half times their "regular rate" for all work in excess of 40 hours per workweek. However, the FLSA also includes a number of exemptions from overtime, including what is commonly referred to as the "administrative" exemption. To qualify for that exemption, an employee must earn at least $684 per week ($35,568 per year) and their primary duty must be "office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" and include "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a).

In this case, the plaintiffs were employed by OSP Prevention Group (OSP) as property damage investigators, who were assigned to investigate and determine the likely cause (*e.g.*, backhoe digging, rodent infestation, fallen tree branch) and cost of damage to property or equipment (such as fiber optic lines, overhead wires, and cable housings) belonging to broadband service providers. The investigators were not responsible for notifying the party liable for the damage

(if any) about possible subrogation or for attempting to settle with that party, as those responsibilities were handled by other OSP employees. OSP billed the broadband service providers by the hour for the plaintiffs' work but classified them as overtime-exempt under the FLSA's administrative exemption.

The plaintiffs sued OSP, claiming they were improperly classified as exempt and, therefore, were entitled to overtime wages, liquidated damages, prejudgment interest, attorney's fees, and costs. Following discovery, OSP moved for summary judgment, asserting that the plaintiffs were in fact administrative employees. The district court agreed with OSP that the plaintiffs were administrative employees and granted summary judgment to the company. The plaintiffs appealed and the Eleventh Circuit reversed.

The Court of Appeals concluded that the plaintiffs did not satisfy the first element of the FLSA's administrative exemption because, "for all practical purposes[,] the liability determination was akin to plugging data into a formula." The Eleventh Circuit continued, "OSP's Area Manager and Supervisor of Damage Investigators in Georgia testified that if a thousand different investigators each investigated the same damage, they should all reach the same conclusions and have roughly the same measurements, even though they might arrive at their answers by slightly different methods." Moreover, the investigators used a cost sheet furnished by the broadband service provider to calculate the monetary value of the damages and had no discretion to determine how much a repair might cost.

To satisfy the administrative exemption, noted the Eleventh Circuit, in addition to meeting the salary requirement (undisputed in this case), OSP was required to demonstrate that the investigator's "work directly related to [the company's] management or general business operations" and (2) "include[d] the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a). "To meet [the first] requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." *Id.* at § 541.201(a). Examples of what the applicable DOL regulations consider to be such administrative support work include areas such as accounting, human resources, safety and health, and information technology.

"By contrast," the Court of Appeals stated, "investigative duties primarily involve investigation (of course) and factfinding, compiling reports, and making calculations and recommendations about liability according to prescribed criteria." Employees who perform such duties fall among the categories of jobs the DOL regulations cite as not qualifying for the administrative exemption — categories such as "[o]rdinary inspection work" using "well-established techniques and procedures" often derived from manuals, 29 C.F.R. § 541.203(g), and "inspectors or investigators of various types" whose work involves using "skills and technical abilities in gathering factual information." Individuals performing these jobs typically are considered "production" employees, because they "help the business run by following the standards that have been set for them," as opposed to the administrative employees who develop those standards.

Here, the plaintiffs were performing one of the core products that the company sells: property damage investigation. The Eleventh Circuit concluded that the case involving insurance claims adjusters, on which the district court heavily relied in its summary judgment ruling, was inapposite because those employees had "significant, policy-infused, decision-making authority, including evaluating and making recommendations about coverage for claims, negotiating settlements, and making recommendations about litigation." By contrast, the plaintiffs in this case only undertook factfinding and left decisions regarding the outcomes of their investigations to others. Thus, the plaintiffs were more akin to the insurance fraud investigators in *Calderon v. GEICO General Insurance Co.*, 809 F.3d 111 (4th Cir. 2015), where the Fourth Circuit concluded that the investigators did not meet the requirements of the administrative exemption.

Accordingly, the Eleventh Circuit concluded that the summary judgment ruling should be vacated and the case remanded to the district court. Because OSP could not establish the first "duties" element of the administrative exemption, the Court of Appeals elected not to address the second element, that is, whether the plaintiffs' duties "include[ed] the exercise of discretion and independent judgment with respect to matters of significance."

Forensic Photographer Trainee Takes Shot at Employee Status, But It Doesn't Develop, 11th Circuit Rules

A forensic photographer who enrolled in a county training program was an intern and not an employee, a three-judge panel of the Eleventh Circuit Court of Appeals has held in a divided opinion. As a result, her minimum wage and overtime claims under the FLSA were properly dismissed by the trial court. *McKay v. Miami-Dade County*, 2022 U.S. App. LEXIS 15910 (11th Cir. June 9, 2022).

Plaintiff Brandi McKay was enrolled in a six-month, unpaid program sponsored by Miami-Dade County, Florida to train photographers in forensic imaging (taking photos of deceased individuals during autopsies, at crime scenes, and so on). The plaintiff elected to enroll in this program rather than undertake the time and expense to obtain a four-year undergraduate degree that would have provided comparable training. She understood that she would work full-time, uncompensated, five days a week and, sometimes, on the weekend. After the first two months of the program, she and other trainees often would work unsupervised during their weekend assignments.

The plaintiff resigned from the program about a month before completing it and, a few months later, filed a lawsuit in federal court, asserting that during her time in the training program she was a county employee and, therefore, was due minimum wage and overtime pay. The County responded that the plaintiff was an intern or, alternatively, that she was a volunteer, as those terms have been defined under the FLSA, and was not entitled to any pay. Both parties subsequently filed motions for summary judgment. Although it rejected the County's assertion that the plaintiff was a volunteer, the trial court agreed that she was categorized correctly as an intern and dismissed her claims.

The plaintiff appealed and the Eleventh Circuit affirmed the lower court's summary judgment ruling in favor of Miami-Dade County. First, the Court of Appeals agreed with the trial court that the plaintiff did not meet the definition of a volunteer of a public agency. The FLSA excludes from the definition of employee "any individual who volunteers to perform services for a public agency … if (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency." 29 U.S.C. § 203(e)(4)(A). However, the FLSA does not further define "volunteer," leaving that determination instead to DOL. The DOL, in turn, has defined volunteer as "an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered."

In this case, both parties had stipulated before the trial court that the plaintiff did not participate in the training program for civic, charitable, or humanitarian reasons, and the Eleventh Circuit rejected the County's argument that the DOL's definition was unreasonable and ambiguous. On the contrary, applying the Chevron standard, the Court of Appeals noted that they were bound to follow the DOL's regulation, unless it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." The County had not demonstrated that any of these conditions existed, the Eleventh Circuit concluded.

However, the Court of Appeals agreed that the plaintiff was properly characterized as an intern. Under the law of the Eleventh Circuit (and all other courts of appeal), whether an individual is an intern or an employee depends on who the primary beneficiary is of the relationship, the individual or the employer. Although the courts and DOL have developed somewhat differing tests to make this determination, all apply a number of similar factors. In the case of the Eleventh Circuit, those non-exclusive factors are:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation;
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions;
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

No one factor is dispositive and, as was the case here given that the plaintiff was participating in a program that did not involve formal academic training, not all factors necessarily will apply.

Applying the factors, the Eleventh Circuit agreed with the trial court that the plaintiff was the primary beneficiary of her relationship with the County's training program. First, the parties agreed that the plaintiff understood there was no promise or expectation of compensation for her participation in the program. Second, her participation in the program provided her with valuable training similar to what she would have received in a formal forensic degree program. The seventh factor also weighed heavily in the County's favor, the Eleventh Circuit said, as the plaintiff did not expect a job with it following completion of the program.

The trial court properly excluded consideration of the third and fourth factors, the Court of Appeals noted, because the plaintiff was not participating in a formal academic program, and further properly determined that the fifth factor at most "very weakly" favored the plaintiff, because, while the program arguably may have been longer than necessary, it was not so long as to be "grossly excessive in comparison to the period of beneficial learning." The trial court also correctly determined that the sixth factor "weakly" weighed in the plaintiff's favor, given that the work she did on weekends sometimes displaced that of the County's staff photographers, but it noted that both parties benefited from this work. Thus, considering all of the relevant factors, the Court of Appeals concluded the plaintiff was properly deemed to be an intern and her minimum wage and overtime claims were due to be dismissed.

Restaurant's Mandatory Service Charge Was Not a Tip and May Satisfy FLSA Wage Requirements, Eleventh Circuit Holds

A Miami restaurant's mandatory 18% service charge did not constitute a "tip" under the FLSA and, therefore, was properly applied toward satisfying the FLSA's employee wage requirements, the U.S. Court of Appeals for the Eleventh Circuit has held, affirming summary judgment in favor of the employer. *Compere v. Nusret Miami, LLC*, 2022 U.S. App. LEXIS 7293 (11th Cir. Mar. 18, 2022).

The Law

DOL regulations defining what constitutes a "tip" expressly provide that mandatory service charges are not tips. The central characteristic of a tip is customer discretion: If the customer decides whether to leave a gratuity, and if so the amount of that gratuity, then it is considered a tip under FLSA regulations. Conversely, if the employer imposes a fee that the customer has no choice but to pay (unless, for example, the *employer* waives the fee to resolve a complaint about the service provided), the fee is not a tip and the employer may use it to satisfy its wage obligations.

The Lawsuit

Since its opening in 2017, Nusret Miami, an upscale steakhouse in Miami, Florida, has added a mandatory 18% "service charge" to customer's bills, after which it redistributes those charges to certain employees to cover the restaurant's minimum and overtime wage obligations. The employees who receive a portion of the service charges are very well paid, sometimes earning in excess of $100,000 per year and, if the 18% fee constituted a legitimate service charge, then undisputedly the restaurant satisfied its minimum wage and overtime obligations to these employees.

A group of tipped employees filed suit against the restaurant, asserting that Nusret failed to properly pay them minimum wage and overtime pay, and forced them to participate in an illegal tip pool with non-tipped employees, all in violation of the FLSA. The plaintiffs' primary argument was that Nusret's service charge was, in fact, a tip and, therefore, could not be used to satisfy the restaurant's minimum wage and overtime obligations. In support of this argument, the plaintiffs asserted that Nusret failed to include the service charges in its gross receipts and failed to report the revenue for federal income tax purposes. The restaurant

countered that the 18% fee was a legitimate service charge and that it properly had met its wage obligations under the FLSA. The district court agreed with the employer and granted it summary judgment.

The Appeal

On appeal, the Eleventh Circuit affirmed summary judgment for the restaurant. In support of its decision, the Court of Appeals cited 29 C.F.R. § 531.52(a), which explains that the critical feature of a tip is that the sole discretion lies with the customer as to whether it is to be given and, if so, in what amount. In this case, customers undisputedly had no say as to whether they had to pay Nusret's 18% service charge. Moreover, DOL regulations specifically identify mandatory service charges as an example of a fee that is not a tip.

The Eleventh Circuit rejected the plaintiffs' argument that the service charges had to be treated as tips unless Nusret included them in their gross receipts and reported them for tax purposes, finding this assertion to be "irrelevant." The Court of Appeals likewise rejected the plaintiffs' argument that the service charge was not mandatory because, for example, management could remove it as a means of resolving a customer complaint. Reiterating that to constitute a tip, the discretion to pay it must lie with the customer and not the employer, in this case Nusret's customers unarguably had no such discretion. Thus, Eleventh Circuit concluded the 18% fee was a legitimate service charge and the restaurant properly applied it to satisfying its wage obligations.

Eleventh Circuit Case an Excellent Primer on the FLSA's Administrative Exemption

Business development managers, whose job was to convince corporate customers to purchase General Motors vehicles for their corporate fleets, qualified for the administrative exemption from the overtime provisions of the FLSA, the Eleventh Circuit Court of Appeals held. *Brown v. Nexus Bus. Solutions, LLC*, 2022 U.S. App. LEXIS 8777 (11th Cir. Apr. 1, 2022). While not establishing new law, the decision is an excellent primer on the FLSA's administrative exemption.

Background

The FLSA generally requires that employees be paid overtime, at a rate of at least one-and-a-half times their regular rate of pay for all hours worked beyond 40 in a week. 29 U.S.C. § 207(a)(1). However, there are some exceptions to that general rule and one of those is the "administrative" exemption. The requirements of the administrative exemption are easy enough to recite but often difficult to apply. To qualify for the exemption, an employee must: (1) be paid, on a salary basis, at least $684 per week; (2) perform office or non-manual work directly related to the employer's general business operations; and (3) have as a primary duty "the exercise of discretion with respect to matters of significance." 29 C.F.R. § 541.200(a).

The Lawsuit

In *Brown*, the business development managers did not actually sell vehicles – that was done by local dealerships – but were charged with connecting potential corporate buyers with the local dealers by generating leads and making sales presentations. A group of these managers filed a collective action under the FLSA, asserting that the company had misclassified them as exempt and, therefore, that they should have been paid overtime for the hours they worked in excess of 40 per week, which were considerable. The employer moved for summary judgment, contending that the business development managers were exempt under both the FLSA's administrative exemption and its outside sales exemption. The trial court denied summary judgment with respect to the outside sales exemption, but it agreed that the managers qualified for the administrative exemption and granted summary judgment in favor of the company.

The Eleventh Circuit's Decision

The employees appealed and the Eleventh Circuit affirmed the trial court's dismissal. As is common in scenarios involving the administrative exemption, there was no dispute that the first two requirements were met, that is, that the managers were paid at least $684 a week on a salary basis and that they performed non-manual work related to the company's general business operations. Thus, the focus of the appeal was whether the business development managers' primary duties included the "exercise of discretion with respect to matters of significance."

In concluding that the business development managers, in fact, did possess and exercise such discretion, the Court of Appeals looked to the DOL regulations for guidance. The DOL regulations provide when applying the administrative exemption, only those employees

who engage in "the comparison and the evaluation of possible courses of conduct, and act[] or mak[e] a decision after the various possibilities have been considered," qualify for the exemption. 29 C.F.R. § 541.202(a). Citing the DOL regulations, the Eleventh Circuit noted that the analysis is "ultimately a holistic determination, but several factors guide the inquiry," including that:

- The employee should have the "authority to make an independent choice, free from immediate direction or supervision," even though their choices may still be subject to review, revision, or reversal;
- The work must involve "more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources" and cannot be "mechanical, repetitive, recurrent or routine;" and
- Must relate to "matters of significance," which "refers to the level of importance or consequence of the work performed."

29 C.F.R. §§ 541.202(a) – (e).

Applying those principles here, the Court of Appeals concluded that the business development managers met the requirements for the administrative exemption because they "had a hand in choosing which leads to develop, performed customized research before meeting with selected leads, and delivered presentations that necessarily required some amount of customization." Moreover, based on testimony from some of the managers, the Eleventh Circuit determined that the position's primary role is to "develop business leads and opportunities for the dealerships," with a focus on "developing those new relationships and bringing them to the dealer." Unquestionably, this was a matter of significance for the employer's business, concluded the Court of Appeals, because the business depended on bringing in new customers for its financial success. Thus, in dismissing the case, the trial court had properly concluded that the administrative exemption applied.

DOL AGENCY DEVELOPMENTS

What's Old is New Again: Labor Department Flip-Flops on Independent Contractor Analysis

In October 2022, DOL issued a Notice of Proposed Rulemaking (NPRM), seeking to revise the standard for determining whether a worker is an employee or "independent contractor" under the FLSA. In so doing, the NPRM proposes withdrawing the current regulations (the "Trump IC Rule" or "Rule") – issued during the last days of the previous administration and arguably allowing for expanded use of independent contractors – and replacing them with the standards that existed prior to the current regulations, supplemented by some additional clarifications and examples. The period for submission of public comments on the NPRM has passed, and a Final Rule is expected in 2023.

This is not the current DOL's first attempt to nullify the Trump IC Rule. Shortly after the Biden Administration took office in January 2021, the DOL first delayed implementing the Trump IC Rule, then withdrew the Rule altogether in May 2021. In March 2022, however, a Texas federal court held that both the delay and the withdrawal were unlawful. As a result, the Trump IC Rule went into effect. With the NPRM, the DOL seeks not only to again withdraw the Trump IC Rule but (unlike its previous effort) to replace the Rule with standards already applied, with minor variations, by a number of circuit courts, along with some additional discussion about how to apply those standards.

Background

The FLSA guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. As the U.S. Supreme Court first noted more than 70 years ago, individuals who perform services for a company as an independent contractor are not afforded the FLSA's minimum wage and overtime protections because they are not "employees." However, the FLSA says little about how to distinguish an employee from an independent contractor.

Over the years, both the DOL and the courts developed similar standards for determining whether an individual is an employee or an independent contractor, most of which focused on the "economic reality" of the relationship between the employer and the individual.

Those standards were derived from six, non-exclusive factors originally presented by the Supreme Court in two cases decided on the same day, *United States v. Silk*, 331 U.S. 704 (1947), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The factors are:

1. The employer's versus the individual's degree of control over the work;
2. The individual's opportunity for profit or loss;
3. The individual's investment in facilities and equipment;
4. The permanency of the relationship between the parties;
5. The skill or expertise required by the individual; and
6. Whether the work is "part of an integrated unit of production."

While the courts and the DOL have applied these factors, or some similar variation of them, for the last 70-plus years, they have applied these factors inconsistently, sometimes reaching opposite conclusions when applying what appear to be essentially the same facts. This tension led to the adoption of the Trump IC Rule.

Trump IC Rule

In the Trump IC Rule, the DOL elevated the comparative value of the following two "core" factors, rather than treating the factors as having equal weight: "the nature and degree of the individual's control over the work" and "the individual's opportunity for profit or loss." The Trump IC Rule explained that these factors are traditionally the "most probative" and, therefore, should be "afforded greater weight" than the other factors. However, if these "core factors" are inconclusive, it instructed that the following three other factors should be considered: the skill or expertise required by the individual; the permanency of the relationship between the parties; and whether the work is "part of an integrated unit of production." Thus, the Trump IC Rule sought to clarify the tension created by decades of inconsistent and subjective application of the factors.

Nevertheless, shortly after the Biden Administration arrived, the DOL temporarily delayed the Trump IC Rule's March 2021 effective date, then issued an NPRM to withdraw the Rule altogether. In proposing to withdraw the Rule, the DOL asserted that it "is inconsistent with the FLSA's text and purpose, and would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent." In lieu of proposing a new rule at that time, however, the DOL simply revoked the Rule, leaving in place the judicially created inconsistencies adopted through the decades.

However, in March 2022, a Texas federal court concluded that the DOL's delay and withdrawal of the Trump IC Rule violated the Administrative Procedure Act, because neither action followed a legally adequate notice-and-comment period. The court also held that withdrawing the Rule was "arbitrary and capricious" because the DOL did not consider alternatives to eliminating the Rule, for example, issuing a revised rule or clarifying what subset (if not all) of the factors should be used in the analysis. Consequently, the court immediately reinstated the Trump IC Rule that the NPRM now seeks to again rescind. The DOL appealed that ruling, but the appeal has been stayed in light of the anticipated issuance of new regulations.

NPRM

Attempting to satisfy the Texas federal court's admonitions, the DOL issued the NPRM. The NPRM unequivocally abandons the Trump IC Rule's concept of "core factors" and repeatedly explains why the Rule should be withdrawn, noting that such a "predetermined and mechanical weighting of factors is not consistent with how courts have, for decades, applied the economic reality analysis." In lieu of the "core factors" approach, in the NPRM the DOL returns to its longstanding position that the economic reality of the relationship between contractor and alleged employer should be evaluated considering the "totality of the circumstances" and not by weighting or tallying factors.

Instead, the NPRM considers six, equally weighted factors that, with some "slight variation," both the DOL and the federal courts historically have applied. These factors are:

1. The degree of control exercised by the employer over the worker;
2. The worker's skill or initiative;
3. The permanency of the relationship between the parties;

4. The worker's opportunity for profit or loss dependent on managerial skill;
5. The worker's investment in equipment or other resources as compared to the employer's investment; and
6. Whether the work is an integral part of the employer's business.

The NPRM clarifies that in some cases one or more factors may be more probative than others, and in some cases one or more factors may be irrelevant. The NPRM also explains that this approach offers flexibility because, as these six factors are non-exhaustive, other considerations may arise in a given situation.

1. Employer's vs. Worker's Degree of Control

The "control" analysis "focuses on whether the alleged employer still retains control over meaningful economic aspects of the work relationship such that the control indicates that the worker does not stand apart as their own business." Significantly, the NPRM reiterates that it is an employer's *right* to control, even if rarely or never exercised, that guides the determination.

The NPRM summarizes the control factor as follows:

Control can be exerted directly in the workplace by an employer, such as when it sets a worker's schedule, compels attendance, or directs or supervises the work. However, the absence of these more apparent forms of control does not invariably lead to the conclusion that the factor weighs in favor of independent contractor status. Employers may also exercise control in other ways, such as by relying on technology to supervise a workforce, setting prices for services, or restricting a worker's ability to work for others—actions that can exert control without the traditional use of direct supervision, assignment, or scheduling.

The Department believes that the nature and degree of the employer's control should be fully assessed, and this assessment may, in some cases, include consideration of control that is due to an employer's compliance with legal, safety, or quality control obligations. As with all the economic reality factors, this control should be examined in view of the ultimate inquiry: is it probative of whether the worker is in business for themself or economically dependent on the employer for work. For example, when an employer, rather than a worker, controls compliance with legal, safety, or other obligations, it may be evidence that the worker is not in fact in business for themself because they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to the legal and other requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance.

The NPRM notes, for example, that an employer's safety requirement for all individuals to wear hard hats at a construction site is less probative of control than if the employer sets the time and location for weekly safety meetings and mandates that all workers attend. Moreover, while a worker's ability to set their own schedule, in theory, might demonstrate a lack of control, it would not suggest independent contractor status if, for example, the employer sets limited hours during which the worker may set their schedule, precludes the worker from working for other customers, or disciplines or otherwise penalizes the worker for declining work.

Furthermore, an employer's close supervision of a worker may evince employee status, while the ability to work without close supervision may suggest an independent contractor relationship. However, non-traditional forms of supervision, such as control of a remote worker through computer-based location monitoring and productivity tracking, must be considered.

In addition, whether the worker could set, or influence, the price or rate for the goods or services they are providing is relevant to the control factor analysis, as the worker's ability to do so "relates directly to whether the worker is economically dependent on the employer for work and helps answer the question whether the worker is in business for themself."

Finally, regarding the control factor, the NPRM provides:

Where a worker has an exclusive work relationship with one employer and does not have the ability to work for others, this indicates employee status. Where the employer exercises control over a worker's ability to work for others — either by directly prohibiting other work, for example, through a contractual provision, or indirectly by, for example, making demands on workers' time such that they are not able to work for other employers — this is indicative of the type of control over economic

aspects of the work associated with an employment relationship. Conversely, "the mere fact that an employer allows workers to work for others does not transform an employee into an independent contractor."

2. Worker's Skill and Initiative

The NPRM describes this factor as "whether a worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative that is consistent with the worker being in business for themself instead of being economically dependent on the employer." A worker's lack of specialized skills required for the work would suggest employee status, while the "use of those specialized skills in connection with business-like initiative" indicates independent contractor status. The NPRM explains, "That the work does not require prior experience, that the worker is dependent on training from the employer to perform the work, or that the work requires no training are indicators that the worker lacks specialized skills. Even if the worker possesses specialized skills, this factor may indicate employee status if the work does not require those skills."

However, the presence of specialized skills must be combined with "business-like initiative" in relation to those skills. As an example, the NPRM provides:

A highly skilled welder provides welding services for a construction firm. The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. The skill and initiative factor indicates employee status.

[By contrast], [a] highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. The skill and initiative factor indicates independent contractor status.

3. Permanence of the Relationship

The NPRM provides that "an indefinite or continuous relationship is consistent with an employment relationship, but [] a worker's lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative." Moreover, the NPRM states that "a lack of permanence may be inherent in certain jobs—such as temporary and seasonal work—and [therefore] this is not necessarily an indicator of independent contractor status because a lack of permanence does not necessarily mean that the worker is in business for themself instead of being economically dependent on the employer for work."

Furthermore, the "permanence" factor commonly addresses whether the worker's relationship with the employer is exclusive, as such a relationship suggests permanence. However, simply because a worker holds more than one job at a time, or only works irregularly, does not necessarily imply that they are an independent contractor, particularly if these workers "are economically dependent on each employer for work—as compared to a worker who is in business for themself and chooses to market their independent services or labor to multiple entities[.]"

Finally, because exclusivity also may suggest how much control the employer exerts over the worker, the NPRM states (contrary to the Trump IC Rule) that exclusivity will be considered under both the permanence and the control factors.

4. Worker's Opportunity for Profit or Loss Dependent on Managerial Skill

The NPRM states that this factor "focuses ... on whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work." The NPRM sets forth the following facts that may be probative of whether the worker's managerial skill affects the worker's economic success or failure in performing the work:

- Whether the worker determines the charge or pay for the work provided (or at least can meaningfully negotiate it);
- Whether the worker accepts or declines jobs or chooses or can meaningfully negotiate the order and/or time in which the jobs are performed;

- Whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and
- Whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space (as opposed to the amount and nature of the worker's investment).

In summarizing this factor, the NPRM states:

If a worker has no opportunity for a profit or loss, then that fact suggests that the worker is an employee. On the other hand, workers who are in business for themselves face the possibility of experiencing a loss, and the risk of a loss as a possible result of the worker's managerial decisions indicates independent contractor status. Workers who incur little or no costs or expenses, simply provide their labor, and/or are paid an hourly or flat rate are unlikely to possibly experience a loss, and this factor may suggest employee status in those circumstances. The fact that workers may earn more or less at times (and their earnings may decline) depending on how much they work is not the equivalent of experiencing a financial loss .... [A] worker's decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill.

5. Worker's Investment vs. Employer's Investment

Unlike the Trump IC Rule, the NPRM treats relative investment as a standalone factor. According to NPRM, not all investments are created equal. To suggest independent contractor status, "the investment borne by the worker must be capital or entrepreneurial in nature," as "[s]uch investments ... generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach, thus suggesting that the worker is in business for themself." By contrast, "costs borne by the worker simply to perform their job (*e.g.*, tools and equipment to perform a specific job and the worker's labor) are not evidence of capital or entrepreneurial investment." Nevertheless, the DOL notes:

The [DOL] understands that independent contractors make both capital investments to generally support their business and investments to perform particular jobs; therefore, the existence of expenses to perform jobs will not prevent this factor from indicating independent contractor status so long as there are also investments that are capital in nature indicating an independent business.

Finally, and again contrary to the Trump IC Rule, the NPRM states, "the worker's investments should be evaluated on a relative basis with the employer's investments." However, "a worker's investment need not be (and rarely ever is) of the same magnitude and scope as the employer's investment to indicate that the worker is an independent contractor." Nevertheless, the worker's investment should be of sufficient magnitude to support the conclusion that the factor supports independent contractor status.

6. Whether the Work is an Integral Part of the Employer's Business

The Trump IC Rule defined this factor as whether the worker's work "is part of an integrated unit of production" of the employer's business, explaining that "the relevant facts are the integration of the worker into the potential employer's production processes" because "[w]hat matters is the extent of such integration rather than the importance or centrality of the functions performed" by the worker. Returning to the historical interpretation of this factor, the NPRM looks at "whether the worker's work is an 'integral part' of the employer's business." In this regard, the NPRM provides:

Most courts adopt a common-sense approach to whether the work or service performed by the worker is an integral part of the employer's business. For example, if the employer could not function without the service performed by the workers, then the service they provide is integral. Such workers are more likely to be economically dependent on the employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer.

Importantly, the focus of this factor is on the work, not the worker: An individual worker who performs the work "that an employer is in business to provide" — even if but one of a hundred, or a thousand, such workers — is nonetheless integral to the business, even if their individual contribution is relatively minimal. The NPRM provides, as an example of an integral worker, a tomato

picker who works on a large tomato farm, whereas the accountant at the payroll service who prepares the farm's tax returns would not be integral to the primary purpose of the farm's business.

Takeaway

The NPRM abandons the Trump IC Rule's elevation of certain "core factors" in assessing independent contractor status, and instead returns to a "totality of the circumstances" approach, where the factfinder is free to consider any relevant facts in assessing whether an individual is "economically dependent on their employer for work" or, conversely, is "in business for themselves." While the proposed standard permits flexibility and consideration of all facts, ultimately, it may provide little assistance to courts in trying to distinguish between an employee and an independent contractor.

DOL Signals Intent to Revise Overtime Regulations

In the fall of 2021, DOL announced its intention to issue revised overtime regulations, most likely focusing on an increase in the minimum salary threshold required for the EAP or "white collar" exemptions under the FLSA. To this end, DOL held several online "listening sessions" during the spring and summer months of 2022, to obtain input from employees, employers, and others on the current regulations and potential changes to them. DOL originally suggested the proposed rule would be issued by April 2022. After that timeframe passed, in mid-2022 the DOL announced that it planned to publish a proposed rule by October 2022. That deadline, too, came and went without further development. It is now more likely that a proposed new rule will be released sometime in early 2023.

Presumably, the proposed rule would increase the minimum salary threshold for the EAP exemptions, perhaps to a level comparable to, or even higher than, the overtime rule set forth by the DOL in the late stages of the Obama Administration. That rule would have doubled the minimum salary, from $23,660 to $47,476 per year, but was overturned by a federal court in December 2016. Initially, the DOL appealed that decision, but it subsequently dropped the appeal and, in 2019, issued a new overtime rule, increasing the minimum salary more modestly, to $35,568 per year. That salary level has been in effect since the beginning of 2020. Potentially, DOL also could revise the "duties" requirements for these exemptions, although the Department has not given any indication of its intent to do so.

DOL Issues, Then Withdraws, Updated Guidance on Compensability of COVID-19 Testing and Vaccine Time

On January 20, 2022, the DOL issued Fact Sheet #84, "Compensability of Time Spent Undergoing COVID-19 Health Screenings, Testing, and Vaccinations Under the Fair Labor Standards Act (FLSA)," finally addressing the circumstances under which employers would be required to pay employees for the time spent obtaining COVID-19 vaccinations and undergoing COVID-19 testing outside of regular work hours.

However, about 24 hours after publication on the DOL's website, the guidance suddenly was withdrawn without explanation, perhaps because the Fact Sheet cited to and relied upon the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS). The U.S. Supreme Court essentially rejected the ETS on January 13, 2022, and, on January 25, 2022, OSHA announced it was officially withdrawing the ETS in the Federal Register on January 26, 2022. Thus, the only published guidance from the DOL is that first published in 2020 through a series of FAQs on the agency's website.

What Did Fact Sheet #84 Say?

Fact Sheet #84 was consistent in some respects with the previous (and still current) DOL guidance, which provides that if an employer requires employees to undergo testing or temperature screenings *during* regular work hours, the time spent doing so must be paid. Fact Sheet #84 treated vaccinations in the same manner.

As to time spent going to, waiting for, and obtaining a mandatory COVID-19 vaccine outside of regular work hours, Fact Sheet #84 stated that employers must pay for such time if the employees work in positions where other individuals are present, unless all affected employees work exclusively outdoors. Thus, for all but the small subset of employees, Fact Sheet #84 would have required employers to pay for employee time spent obtaining a required vaccine.

However, Fact Sheet #84 provided an exception for employers that require their employees to either be vaccinated or undergo testing, and an employee

chose to be tested in lieu of being vaccinated. In this circumstance, the employer had to pay only for the employee's time outside of working hours spent getting vaccinated, not for such time spent getting tested – except, where the employee is being tested rather than vaccinated as a reasonable accommodation for medical or religious reasons, the employer would still need to pay for the time spent getting tested. Finally, Fact Sheet #84 provided that if an employer did not require either vaccinations or testing, and for personal reasons an employee elected to undergo one or both of these, the employer did not have to pay for that time.

Again, this guidance was withdrawn shortly after its publication.

What DOL Guidance Is in Effect?

During the summer of 2020, the DOL published a series of online FAQs regarding various FLSA issues implicated by the COVID-19 pandemic. The DOL periodically updated those questions and answers in 2021. In that guidance, the DOL states that the compensability of temperature screening or testing outside of *regular work hours* "depends" on whether it is "necessary for the work" performed by the employee and that, "for many employees," undergoing COVID-19 testing "may be" compensable, because the testing is necessary for them to perform their jobs safely and effectively during the pandemic. As examples, the DOL cites the pre-work temperature screening of "a nurse who performs direct patient care services at a hospital" and the COVID-19 testing on an off-day of "a grocery store cashier who has significant interaction with the general public." The FAQs do not address employees whose work interactions are limited only to coworkers, focusing instead only those employees whose roles require direct interaction with the public. The existing guidance also provides that COVID-19 temperature and testing conducted during regular work hours always is compensable.

White House Nominates Acting DOL Wage & Hour Administrator to Lead Division

Four months after its controversial nominee, David Weil, withdrew his name from contention as administrator of WHD of DOL, in August 2022 the White House nominated Acting Administrator Jessica Looman to head the post. Prior to joining the DOL as principal deputy administrator of the WHD at the beginning of 2021, Looman was executive director of the Minnesota building trades coalition. She had been in the position of acting administrator since June 2021 but, due to regulatory requirements for agency nominees, that title officially has been removed, despite the fact that she will retain all of the same duties while her nomination is pending.

Since Looman began leading the WHD as acting administrator, the Division has rescinded final rules, issued during the previous administration, concerning the joint employer and independent contractor analyses (the latter subsequently having been deemed unlawful, as discussed herein); has issued a Notice of Proposed Rulemaking to issue a new independent contractor final rule; and has signaled an intent to review and revise eligibility for the executive, administrative, and professional (*i.e.*, the "white collar") exemptions.

Prior to Looman's nomination, the Biden Administration tapped Dr. David Weil for the position. Weil headed the WHD under the Obama Administration. Under his leadership, the DOL published an overtime final rule that would have more than doubled the minimum salary to qualify for the white collar exemptions. That rule was struck down by a Texas federal judge shortly before it was to go into effect in late-2017 and a new final rule was issued under the Trump Administration, raising the minimum annual salary to a relatively more modest $35,568. It remains to be seen whether, as part of its current rulemaking efforts, the WHD will once again seek a substantial increase in the minimum salary required to qualify for these exemptions.

As of the time of publication of this report, hearings have been held by the Senate on Looman's nomination, but no votes have been taken.

STATE UPDATES

California

California Pay Transparency Obligations Increase

Pay Transparency

Effective January 1, 2023, Senate Bill (SB) 1162 requires certain employers to provide more pay transparency regarding pay scales and expands pay data reporting obligations for other employers. Employers with at least 15 employees must include the pay scale for a position in any job posting. Employers also must provide current employees with the pay scale for their current position upon request.

SB 1162 also adds an annual report requirement for California employers with at least 100 employees. Previously, California employers could submit an EEO-1 report to comply with state demographic reporting obligations. Beginning in 2023, employers must submit a report to the California Civil Rights Department that includes:

1. Separate pay data report for employees hired through labor contractors (*i.e.*, covering temporary staffing agencies) that discloses the "ownership names of all labor contractors used to supply employees"; and
2. The median and mean hourly rate for each combination of race, ethnicity, and sex for each job category for both traditional employees and those hired through labor contractors.

The report will be due annually on the second Tuesday in May.

The FAST Recovery Act

AB 257 (the Fast Food Accountability and Standards Recovery Act or the "FAST Recovery Act") established a Fast Food Council comprised of fast food employees, worker advocates, franchisors, franchisees, and government officials within the Department of Industrial Relations. The Council will be responsible for setting industry-wide standards for wages, working hours, and other working conditions related to the health and safety of fast food employees working for a Fast Food Restaurant that is part of a Fast Food Chain. Fast Food Chain is defined as a set of restaurants consisting of at least 100 establishments nationally that share a common brand or are characterized by standardized options for decor, marketing, packaging, products, and services. Fast Food Restaurant is defined as any establishment in the state that is part of a Fast Food Chain and that, in its regular business operations, primarily provides food or beverages in the following manner:

1. For immediate consumption either on or off the premises;
2. To customers who order or select items and pay before eating;
3. With items prepared in advance, including items that may be prepared in bulk and kept hot, or with items prepared or heated quickly;
4. With limited or no table service. Table service does not include orders placed by a customer on an electronic device.

(A lawsuit was filed by a coalition of California small business owners, restaurateurs, franchisees, and related entities seeking to enjoin the enforcement of the FAST Recovery Act. A temporary restraining order was granted, and a further hearing on a preliminary injunction is set for January 13, 2023.)

Pre-Employment Drug Testing Not Compensable Under California Law, Ninth Circuit Holds

In *Johnson v. WinCo Foods Holdings, Inc.*, the U.S. Court of Appeals for the Ninth Circuit upheld the district court's ruling in favor of the defendant grocery chain, holding that the plaintiffs were not yet employees when they took drug tests and, therefore, were not entitled to compensation for the time spent being tested.

In *WinCo Foods*, a class of applicants who successfully received job offers and subsequently were hired as employees of the grocery chain, filed suit against the company, alleging they should have received compensation as employees for the time and expense of taking a pre-employment drug test. Under WinCo's procedures at the time, a hiring manager would call successful applicants to extend a job offer contingent on the completion of a background check and drug test. WinCo paid for the testing fee, but did not it compensate travel expenses or the time required to undergo the testing.

The district court ruled that class members were not employees of WinCo when they underwent drug testing and, therefore, were not entitled to compensation. The

Ninth Circuit upheld the lower court decision, noting the absence of any California state court case on this issue. The Ninth Circuit considered the "control test" standard under California law for the determination of whether an individual is an employee. While WinCo prescribed the time and date of the tests and where the test was performed, the drug test was part of the application process, and the test result did not control any aspect of job performance.

The Ninth Circuit also determined that the job offer was contingent on the drug test being completed (and a background check being passed) and, therefore, no contract of employment existed to support the plaintiffs' claim that they were contracted to be employees at the time they were drug tested. The Court of Appeals noted that, at the time the verbal offers of employment were made, WinCo went to great lengths to expressly communicate that its job offer was conditioned on passing the drug test.

Although the Ninth Circuit commonly asks the California Supreme Court to decide on new issues of California law, the Ninth Circuit stated that, in this case, "[t]he law is clear. There is no need to delay resolution of this case and others that may be pending in the federal district courts by certifying any questions to the California Supreme Court."

Ninth Circuit Holds California's ABC Test for Classifying Independent Contractors Does Not Violate First Amendment

The U.S. Court of Appeals for the Ninth Circuit reviewed a challenge to California's "ABC Test," also referred to as Assembly Bill (AB) 5, which is California's test for whether a worker can be classified as an independent contractor. In *Mobilize the Message, LLC v. Bonta*, the plaintiffs appealed the district court's denial of a preliminary injunction seeking to restrain the California Attorney General from applying the ABC Test to classify doorknockers and signature gatherers as either employees or independent contractors.

In the case, Mobilize the Message, LLC argued that the California law violated the First Amendment of the U.S. Constitution because it discriminates against speech based on its content. The plaintiffs argued that it was discriminatory to require doorknockers and signature gatherers to be classified as employees or independent contractors under the ABC Test while occupations such as direct salespersons, newspaper distributors, and newspaper carriers are exempt from the test's application.

In the Ninth Circuit's review of the district court's denial, it accepted the plaintiffs' assertion that their doorknockers and signature gatherers would likely be classified as employees under the ABC Test, and that such classification would impose greater costs which may limit clients from retaining their services. The Ninth Circuit panel stated, however, that such an indirect impact on speech did not violate the First Amendment. The panel further noted that the codification of the ABC Test into California law does not target certain types of speech and applies across California's economy aside from certain exemptions. As such, "plaintiffs were not unfairly burdened by the application of the ABC test to their doorknockers and signature gatherers."

Moreover, the panel rejected the plaintiffs' argument that exemptions for direct sales salespersons, newspaper distributors, and newspaper carriers were content-based discrimination, as the exemptions did not depend on the content of communications conveyed but rather the worker's occupations.

Based on the panel's findings, the district court's ruling in denying a preliminary injunction was upheld.

California Supreme Court Rules Additional Penalties May Be Recoverable for Meal and Rest Period Violations

In *Naranjo v. Spectrum Security Services*, a class action was brought by former and current employees alleging violations of meal period violations. The plaintiffs sought not only premium wages for the violations, but also waiting time penalties and penalties for failure to provide accurate wage statements. The results of the trial court decision were mixed, and the parties appealed.

The California Court of Appeal case discussed several issues, including whether unpaid premium wages for meal and rest period violations entitled an employee to recover waiting time penalties under Labor Code section 203 and wage statement violations under Labor Code 226. The Court of Appeal deemed premium pay for missed meal and rest periods not "wages," thus not entitling employees to waiting time or wage statement violation penalties.

On further appeal, the California Supreme Court considered the following questions:

1. Does a violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims for waiting time penalties or violations of wage statement requirements when the employer does not include the premium wages in the employee's wage statements but does include the wages earned for meal breaks?
2. If so, what is the applicable prejudgment interest rate for unpaid premium wages owed under Labor Code section 226.7?

To the first question, the California Supreme Court disagreed with the Court of Appeal decision, stating that the extra pay for missed meal and rest periods constitutes "wages" and therefore must be reported on statutorily required wage statements pursuant to Labor Code section 226 and paid within statutory deadlines when an employee separates from employment pursuant to Labor Code section 203. Thus, if an employer fails to pay premium pay for missed meal and rest periods, additional penalties for failure to provide an accurate wage statement and waiting time penalties may also be recoverable by plaintiffs.

As to the second question, the California Supreme Court held that the rate of prejudgment interest that applies to amounts due for failure to provide meal and rest periods is the 7% default rate set by the state Constitution.

District of Columbia

In November 2022, voters in the District of Columbia passed the Tip Credit Elimination Act. Previously, under District of Columbia law, employers of tipped workers were permitted to take a credit against tipped wages received by workers to satisfy the minimum wage guaranteed to all workers under the law. Under the Tip Credit Elimination Act, the tip credit gradually will be eliminated, and the base minimum wage increased, until 2027, when the mandatory base wage for tipped workers will match the District of Columbia's minimum wage. Tips will remain the property of employees and will be in addition to the statutory minimum hourly wage. The first increase for tipped workers will occur on Jan. 1, 2023, increasing tipped worker minimum wage to not less than $6.00 an hour with tips.

Georgia

Georgia enacted two laws in 2022 that impact the employment relationship. The first, Act 809 (H.B. 389), altered the definition of employment for purposes of unemployment benefits. The second, Act 823 (S.B. 331), precludes local governments from regulating the scheduling or work hours of a private business's employees.

Act 809: Classification of Employees for Unemployment Benefit Purposes

Act 809 seeks to expand the types of workers who may be able to claim unemployment benefits. It also ensures, however, that the nature of an individual's work will ultimately determine the existence of an employer-employee relationship. Act 809 became effective on *July 1, 2022*. In Georgia, only individuals who are deemed "employees" may be eligible for unemployment benefits. Independent contractors are not entitled to such benefits. Act 809 changes the definition of employment to include any services performed by an individual for wages. Under this definition, the majority of workers would qualify as "employees," unless the Georgia Department of Labor makes a contrary determination. Based on Act 809's expanded definition of employment, more workers may be able to obtain unemployment benefits from a business.

Under the new law, an individual will not qualify as an "employee" only if it is shown that the individual is free from control or direction over the performance of services for a company and is customarily engaged in an independent trade, occupation, profession, or business. The following seven factors are to be considered in making this determination:

- Ability to work for other companies or holding other employment at the same time;
- Freedom to accept or reject work assignments without consequence;
- Lack of a minimum number of hours to work or orders to be obtained;
- Ability to set their own work schedule;
- Lack of oversight or instructions concerning the services to be performed;
- Absence of territorial or geographic restrictions; and
- Lack of a requirement to perform, behave, or act in a certain manner related to the performance of services.

The law also provides specific standards that apply in the context of music industry professionals, ride share network services, and certain delivery services.

For Georgia businesses now, a worker's classification as an "employee" or an "independent contractor" is more crucial than ever. Act 809 creates an enforcement mechanism by implementing a civil penalty, paid to the Georgia Department of Labor, if a business incorrectly classifies its workers. Under the new law, the commissioner sets the amount of the civil penalty by evaluating the number of individuals who were improperly classified and the frequency of misclassifications.

Act 823: Preemption of Local Governments From Enacting Certain Laws

Act 823 precludes local governments from enacting laws regulating work hours, scheduling, or employee output of private businesses. The measure became effective on May 5, 2022. Act 823 is Georgia's latest attempt at drawing businesses to the state by precluding local governments from enacting restrictive wage and hour laws. Georgia law already bars cities and local governments from adopting laws applicable to private employers. These laws govern matters such as minimum wage, overtime, employee benefits, and pay related to scheduling changes. Act 823 amends existing law to prohibit local governments from enacting laws applicable to private employers that would govern work hours, scheduling, and employee output.

Hawaii

Hawaii Becomes First State to Enact $18 Minimum Wage

Citing poverty concerns in, and the economic effects of the COVID-19 pandemic on, the Aloha State, Hawaii Governor David Ige signed House Bill 2510, gradually raising the State's minimum wage to $18.00 per hour on January 1, 2028. Although, given HB 2510's nearly six-year phase-in period, other states may reach that mark first, Hawaii nevertheless becomes the first state to officially enact an $18 minimum wage.

Under House Bill 2510, the minimum wage increased to $12.00 per hour on October 1, 2022. The minimum wage will increase to $14.00 per hour on January 1, 2024; to $16.00 per hour on January 1, 2026; and, finally, to $18.00 per hour on January 1, 2028.

In addition, the tip credit an employer may take for traditionally tipped employees increased to $1.00 per hour on October 1, 2022. The tip credit will increase to $1.25 per hour on January 1, 2024; and to $1.50 per hour on January 1, 2028. As already is the law in Hawaii, the employer may take the tip credit only if the combined amount the employee receives from the employer and in tips is at least $7.00 more than the applicable minimum wage.

Illinois

Illinois Amends 'One Day Rest in Seven' Law, With Significant Revisions

In May 2022, Governor J.B. Pritzker signed into law Senate Bill 3146, amending the Illinois "One Day Rest in Seven" Act (ODRISA). Those amendments add additional meal period, day of rest, and notice requirements to, and significantly increase the potential civil penalties for violations of, the Act. The amendments to ODRISA became effective on January 1, 2023.

Additional Meal Periods Required During Long Shifts

With limited exceptions, ODRISA currently requires that employers provide employees who work for 7.5 continuous hours or longer a meal period of at least 20 minutes, said meal break to begin no later than 5 hours after the start of the work period.

The amended law will require subsequent, minimum 20-minute, meal breaks for every additional 4.5 continuous hours worked beyond the first 7.5 continuous hours. Moreover, the amendments specifically prohibit employers from designating "reasonable time spent using the restroom facilities" as a meal period.

Subsequent Days of Rest Must Occur Within a Seven-Day Period

In addition to the meal period requirement, and as the name of the law suggests, ODRISA currently requires that employers provide employees with at least 24 consecutive hours of rest during "every calendar week," in addition to the regular period of rest allowed at the close of each working day. As a result, an employer could require employees to work for up to 12 consecutive days and still comply with the requirement that a day of rest occurs within each calendar week. That will no longer be the case.

The amendments change "calendar week" to "consecutive seven-day period," thereby requiring that employers provide subsequent days of rest no more than 7 days apart, regardless of the calendar week(s) in which those days fall. The amendments further provide that each "week" (presumably, each consecutive 7-day period) during which an employee is not provided with the required 24 hours of rest constitutes a separate offense for purposes of assessing civil penalties. Similarly, each day that an employee is not provided with the required meal period(s) constitutes a separate offense.

Potential Penalties Increased, Additional Notice Requirements Imposed

As originally enacted, the penalty for ODRISA violations was relatively modest: no less than $25 and no more than $100 per violation. Under the amended law, those penalties increase significantly. For employers with fewer than 25 employees, the civil penalty for a violation of the meal period requirement may be as high as $500 per offense — $250 to the Department of Labor and $250 to the affected employee. For larger employers, the penalty may be as high as $1,000 per offense, with $500 going to the Department of Labor and $500 to the affected employee.

Employers covered by the Act must post and keep posted, in one or more conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice summarizing the requirements of the Act and information pertaining to the filing of a complaint. The Director of Labor is expected to provide the notice. For employees who work remotely or who otherwise do not regularly report to a physical workplace (*e.g.*, traveling salespersons), the employer must provide the notice by mail or on a freely accessible website regularly used by the employer to communicate work-related information.

Unlike the day-of-rest and meal-period requirements, failure to comply with the notice-posting requirement is considered a single offense, subject to a penalty of no more than $250.

Employees Subject to CBAs Excluded

Since its original enactment, ODRISA has exempted from its day-of-rest requirements certain categories of employees, including but not limited to individuals employed in a "bona fide executive, administrative, or professional capacity or in the capacity of an outside salesman" as defined under the FLSA; "supervisors," as defined under the NLRA; and part-time employees who work 20 or fewer hours in a calendar week. In a companion bill signed shortly after the original amendments, employees subject to collective bargaining were excluded from ODRISA's requirements. The companion amendment tracked ODRISA's existing language concerning meal periods, which provides that the meal period requirement "does not apply to employees for whom meal periods are established through the collective bargaining process." For those employers with employees represented by a labor organization, this amendment may provide a basis to exempt bargained-for employees from the day-of-rest requirement. As with the other recent ODRISA amendments, the CBA exemption became effective on January 1, 2023.

Primary Contractors May Now Be Liable for Wages or Benefits Owed by Subcontractors

On June 10, 2022, Governor Pritzker signed into law amendments to the Illinois Wage Payment and Collection Act (IWPCA), providing that for all contracts entered into on or after July 1, 2022, a primary contractor is liable for debts owed by a subcontractor to its employee for wages or other benefits. There are two categories of contractors exempt from liability for such unpaid wages and benefits: (1) contractors who are parties to collective bargaining agreements on projects where the work is being performed; and (2) primary contractors altering or repairing an existing single-family dwelling or single residential unit in an existing multi-unit structure.

Additionally, the scope of the IWPCA amendment is limited to contractors doing work for private (non-governmental) projects where the aggregate costs of the project exceed $20,000. These amendments also do not apply to a property owner who acts as the primary contractor on a project for his or her own primary residence.

Prior to the commencement of a civil action to hold a primary contractor liable under this section of the IWPCA, an employee must provide written notice to the primary contractor and the employee's employer, detailing the nature and basis for the alleged nonpayment. If the employer or primary contractor fails to resolve the claim within 10 days after receipt of the notice or by any agreed-upon extension of that deadline, the employee-claimant may file a lawsuit.

Illinois DOL Amends Minimum Wage Regulations

The Illinois Department of Labor amended the state's minimum wage regulations to, among other things, clarify that domestic workers must be paid for all compensable hours worked, including time and one-half pay for overtime hours; specify how employers should account for rest and sleeping periods; set parameters for when meal or lodging costs can be deducted from a worker's paycheck; require employers of domestic workers, like all other employers subject to the Illinois Minimum Wage Law, to keep wage and hour records; and to clarify obligations where multiple employers share services of a domestic worker.

Massachusetts

State Law Remedies Not Available for Violations of FLSA, Massachusetts High Court Holds

Employees who assert wage claims available only under the federal FLSA cannot recover the greater remedies available under the Massachusetts Wage Act (MWA), the Massachusetts Supreme Judicial Court has held. Devaney v. Zucchini Gold, LLC, 2022 Mass. LEXIS 156 (Mass. Apr. 14, 2022). In so ruling, the high court rejected the conclusion of several lower court decisions that had allowed such state law remedies for violations of the FLSA.

Differences Between Massachusetts and Federal Wage Law

Although the MWA mirrors the FLSA in many respects, they are not identical. Under the FLSA, either a two- or three-year statute of limitations applies, depending on whether the claimant can demonstrate that the employer acted "willfully." In addition, a prevailing plaintiff is entitled to costs, attorney's fees, and potential liquidated damages equal to the amount of lost wages (*i.e.*, double damages). However, under Massachusetts state law, all claims are subject to a three-year limitations period and, in addition to attorney's fees and costs, violations are subject to mandatory triple damages.

Another difference is the types of exemptions from the respective laws' overtime requirements. For example, all employees who work in a restaurant, hotel, hospital, or gasoline station are exempt from the overtime requirements of Massachusetts law, whereas these exemptions do not exist under the FLSA.

The Lawsuit

Plaintiff Rutchada Devaney was an employee at the Rice Barn, a Needham, Massachusetts restaurant owned by the defendant corporation. She and several other employees filed suit against the company, alleging violations of the FLSA for failure to pay overtime wages; violations of the MWA for failure to pay the overtime wages in a timely manner; and violations of both the MWA and FLSA for failure to properly pay minimum wages.

The evidence demonstrated that these plaintiffs routinely worked well in excess of 40 hours per week, but were paid a day rate, which was reduced when the plaintiffs were absent for part of a day and only half of which was paid on weekends, when the restaurant was open just for dinner.

Following pretrial discovery, the superior (trial) court granted summary judgment to the plaintiffs on their FLSA overtime and MWA claims. Based on the judge's instructions in a separate trial on damages, a jury awarded each of the plaintiffs actual overtime damages at one-and-a-half times their "regular rate" for all overtime hours worked. The judge then trebled the plaintiffs' actual damages and awarded them attorney's fees and costs. The defendant appealed.

High Court Decision

On appeal, the Supreme Judicial Court reversed and remanded the case, concluding that the trial court had both improperly instructed the jury on the calculation of actual damages and in awarding treble damages under the MWA for overtime claims that were viable only under the FLSA.

As to the plaintiffs' actual damages calculation, the Supreme Judicial Court concluded that, because the plaintiffs were paid a day rate, the proper calculation of their overtime wages is set forth in 29 C.F.R. § 778.112, which provides the calculation methodology for employees who are paid "a flat sum for a day's work … without regard to the number of hours worked in the day … and [who] receive[ ] no other form of compensation for services." Under these circumstances, the employee's "regular rate is determined by totaling all the sums received at such day rates … in the workweek and dividing by the total hours actually worked" and the employee "is then entitled to extra half-time pay at this rate for all hours worked in excess of [forty] in the workweek."

This is so because the employee's day rate was intended to compensate them for all hours worked. In effect, they already have been paid their regular rate for the non-overtime hours they worked each week. Thus, they were entitled only to the additional one-half the regular rate for their unpaid overtime hours.

More significantly, the Supreme Judicial Court further held that the trial court improperly had awarded treble damages under the MWA when the plaintiffs had asserted their overtime claims only under the FLSA. As noted above, the plaintiffs worked at a restaurant and, thus, were exempt from the overtime provisions of the MWA. Therefore, their unpaid overtime claims were viable only under the FLSA.

While recognizing that the FLSA does not fully preempt state wage and hour laws, and, in fact, the MWA expressly states that it does not do so, the high court concluded that "allowing an employee aggrieved by a violation of the Federal overtime law to elect State wage act remedies for untimely payments of wages due solely under the FLSA would present an 'obstacle to the accomplishment and execution of the full purposes and objectives' of the FLSA" (quoting *Sawash v. Suburban Welders Supply Co.*, 407 Mass. 311, 314 (1990)).

Thus, while Federal "courts are all over the map on whether plaintiffs may bring [S]tate law claims in addition to FLSA claims for the same conduct, … [t]he common thread is this: When the FLSA provides a remedial measure, it conflicts with similar [S]tate law causes of action and thus preempts them; when the FLSA does not provide a remedial measure, there is no preemption.

In this case, the FLSA unquestionably provides a comprehensive scheme of remedies for overtime pay violations that conflicts in significant ways with the MWA's remedy provisions. In addition to the difference in the amount of liquidated damages available, the FLSA provides a defense to those damages where the employer can demonstrate a reasonable, good-faith basis for its actions, whereas the MWA imposes strict liability for established violations. Moreover, the FLSA's standard statute of limitations is two years, with a third year available only if the plaintiff can demonstrate "willful" conduct on the part of the defendant, while the MWA's limitations period is three years for all claims. Therefore, concluded the Supreme Judicial Court, the only way to avoid conflict between the two laws is to allow only those remedies available under the FLSA when claims are asserted solely under that federal law.

Michigan

Michigan Minimum Wage and Paid Leave Laws Revert to Requirements of 2018 Ballot Initiatives – At Least for Now

On July 19, 2022, the Michigan Court of Claims held that, in 2018, the state legislature violated the Michigan Constitution when it enacted, and within the same legislative session amended, two ballot initiatives, one to raise the minimum wage and the other to require employers to provide paid sick leave. Now, citing public concerns over the ability of employers and the relevant state agencies to immediately implement the changes required by its decision, the court has granted a stay of its order until February 20, 2023.

Absent a further stay by the Michigan Court of Appeals or the Michigan Supreme Court, or absent further – albeit unlikely – action by the legislature, the Improved Workforce Opportunity Wage Act (IWOWA) (the minimum wage law) and the Paid Medical Leave Act (PMLA) will remain in effect until February 20, 2023. Thereafter, the ballot initiatives as they originally existed in 2018 will become law, and with them the corresponding minimum wage and paid sick leave obligations.

Background

When presented with the ballot initiatives in 2018, the Michigan legislature could have rejected them, in which case they would have been placed on the November 2018 ballot for the voters to either approve or disapprove; they could have been adopted and enacted without modification; or the legislature could have proposed alternatives, which would then be placed on the ballot alongside the initiative(s), with the option receiving the most votes becoming law. Undisputedly, if it had enacted one or both of the initiatives, the legislature could have amended them in a subsequent legislative session, but it instead enacted both initiatives and then immediately amended them.

On July 19, the Court of Claims held, in *Mothering Justice v. Nessel*, No. 21-000095-MM, that this "adopt and amend" action was unconstitutional. As a result, the court voided the amended laws adopted by the legislature and ordered reinstatement of the ballot initiatives as originally presented in 2018.

What This Means for Employers

On December 5, 2022, the Michigan Department of Labor and Economic Opportunity (LEO) issued guidance on the issue, stating that, absent further judicial or legislative intervention, on February 20, 2023, the following will take effect:

Minimum Wage

- The standard minimum wage will increase from its current $9.87 per hour to $13.03 per hour. Because the 2018 ballot initiative would have increased the standard minimum wage to at least $12.00 effective January 1, 2022, that amount simultaneously will be increased in February 2023 due to an inflation-based provision in the initiative. Moreover, because the unemployment rate currently is below 8.5%, an interim increase to $10.10 per hour will occur on January 1, 2023, as set forth in IWOWA.
- The minimum wage for tipped employees will increase from its current $3.75 per hour (38% of standard minimum wage) to $11.73. Under the ballot initiative, the tipped employee minimum wage was set to increase to 80% of standard minimum wage on January 1, 2022; to 90% of standard minimum wage on January 1, 2023; and to be eliminated altogether beginning in 2024.

Paid Sick Leave

Under the ballot initiative (known as the "Earned Sick Time Act"), nearly all Michigan employers will be required to offer 72 hours of sick leave annually. For large employers (those with at least 10 employees), all 72 hours of leave must be paid. Small employers, on the other hand, must provide at least 40 hours of paid sick leave annually, while the balance of the 72 hours of leave may be unpaid.

In addition, unlike the PMLA, the Earned Sick Time Act includes a provision prohibiting an employer from taking retaliatory action against an employee who uses sick leave.

On December 13, 2022, the Michigan Court of Appeals heard oral arguments in the appeal of *Mothering Justice*. Questioning by the judges suggested that at least two of the three entertained serious concerns about the validity of the underlying Court of Claims decision. Attorneys for both sides asked that the Court of Appeals opinion be published, that it be given immediate effect, and that the Court's decision be issued by February 1, 2023, *i.e.*, three weeks before the stay established by the Court of Claims is set to end. However, the did not commit to any of these requests and Jackson Lewis cannot predict the eventual timing or outcome of the decision.

Nebraska

In November 2022, Nebraska voters approved an increase in the state's minimum wage. The hourly minimum wage has incrementally increased since 2015 to its current rate of $9.00 per hour. The new law will increase the minimum wage in stages, ending in January 2026 with a minimum wage of $15.00. The first increase will take effect Jan. 1, 2023, increasing the state minimum wage to $10.50.

Nevada

Nevada voters likewise approved an initiative to add a minimum wage provision to the state constitution. Under the measure, effective July 1, 2024, the minimum wage will increase from $10.50 to $12.00. Thereafter, if at any time the federal minimum wage is higher than $12.00, the state minimum wage will increase correspondingly.

New York

New York Courts Flooded With Pay Frequency Claims

In 2022, hundreds of lawsuits were filed seeking to take advantage of a 2019 New York State Appellate Division decision, holding that employees may bring a private civil action against employers who have not paid them as frequently as required by law and who have not obtained a waiver from the New York State Department of Labor (NYSDOL) permitting an exception to the required pay frequency. Most of these cases have been brought by employees who claim they are "manual workers" and therefore must be paid weekly, not bi-weekly. Typically, these plaintiffs bring their claims as class actions and seek liquidated damages equal to one-half of the wages they were already paid, arguing that half their pay was "late." These cases are still winding their way through the courts, with other appellate courts, including the U.S. Court of Appeals for the Second Circuit and the New York Court of Appeals, to weigh in.

New York State Increases Minimum Wage

The minimum wage for "upstate" New York (everywhere outside of New York City, Long Island, and Westchester) increased to $14.20 per hour beginning December 31, 2022, while the minimum wage for New York City, Long Island, and Westchester remained at $15.00 per hour. The upstate minimum hourly wage increased to $9.45 for tipped food service employees and $11.85 for tipped service workers, while those rates for New York City, Long Island, and Westchester remained at $10.00 and $12.50, respectively.

Similarly, salary thresholds for the executive and administrative employee overtime exemptions for upstate New York increased to $1,064.25 per week ($55,341.00 annually), while remaining at $1,125.00 per week ($58,500.00 annually) for New York City, Long Island, and Westchester.

New York City, New York State Pay Transparency Updates

Effective November 1, 2022, covered New York City employers were required to comply with the New York City pay transparency law. This legislation requires disclosure of salary ranges in advertisements, rather than through offer letters or upon request from applicants or employees. The city law is similar to enactments in other jurisdictions such as California, Colorado, and Washington.

Not to be upstaged, in the waning days of 2022, the New York State Legislature passed, and the governor of New York signed, a pay transparency law for the entire state of New York that will become effective in September 2023.

Under the law, employers with at least four employees and employment agencies (except for temporary help firms as defined by Section 619 of the Labor Law) must include in any advertisement for a job, promotion, or transfer opportunity the minimum and maximum annual salary or hourly range of compensation that the employer in good faith believes to be accurate at the time of the posting. For a commission-only position, the disclosure obligation is satisfied by making a general statement that compensation will be based on commission. Covered entities also must disclose the applicable job description if one exists. Significantly, the measure contains an anti-retaliation provision.

New York Construction Wage Theft Law: Prime Contractors Responsible for Subcontractor's Failures

The scope for liability related to employee wage claims has changed dramatically for contractors and subcontractors operating in New York under a new law that shifts wage payment obligations to prime contractors. In January 2022, New York Governor Kathy Hochul signed into law NY State Senate Bill S2766C, which is intended to reduce wage theft claims and amend wage theft prevention and enforcement in the construction industry within the state. The law became effective retroactively to January 4, 2022.

Background

The New York Legislature proposed this amendment to existing wage theft law to increase the likelihood that allegedly exploited workers in the construction industry will be able to secure payment and collect unpaid wages and benefits for work already performed by shifting the ultimate payment obligation to prime contractors.

Prior to the new law, a worker could only bring a private lawsuit for alleged unpaid wages (including overtime and fringe benefits) against their direct employer. The New York State Assembly asserted that this was a major issue in the construction industry and that subcontractors hid assets, changed their corporate identities, or took part in other alleged unscrupulous practices to avoid liability and make themselves judgment-proof from a potential wage theft action.

The New Standards

There are two sections to the new law. Section one pertains to construction industry wage theft and is codified under NY CLS Labor § 198-e. Pursuant to this new section, a construction contractor, as defined within, would assume liability for any *unpaid wages, benefits, damages, and attorney's fees* related to a civil or administrative action by a wage claimant or the Department of Labor against a lower tier subcontractor.

Section two amends section 756-a of the General Business Law to clarify that a contractor may withhold payment to a subcontractor or lower tier subcontractor for failure to provide certain payroll records.

In essence, under the new legislation, the prime contractor of a construction project is liable for *all* subcontractors that it chooses to utilize on a jobsite for up to three years, in the hopes that "construction workers are quickly able to collect unpaid wages." However, there is no guarantee that this law will be more effective, given that similar laws in other states still have high rates of alleged wage theft.

Takeaways

The new law aims to create an incentive for the construction industry to ensure compliance and reduce the burden on the Workers' Compensation Board, where these claims were filed originally. In reality, the new law likely will increase the burden on state courts. Plaintiffs are expected to file even more claims against prime contractors (now, for unpaid wages), and prime contractors, in turn, are expected to file third-party actions against their subcontractors for indemnity and contribution.

Prime contractors need to be judicious, so they are not financially liable for subcontractors after project completion, given the three-year statute of limitations. Prime contractors need to be proactive to prevent costly claims that inevitably will arise out of the law. They will need to develop programs to ensure all workers on their projects are adequately and timely paid.

Prime contracts will need to be amended to include expanded indemnity and additional insured provisions for wage theft actions, compliance provisions from subcontractors, a vetting process to ensure compliance from subcontractors and other lower tier contractors, and adequate financial coverage for the prime contractor.

Prime contractors also will need to provide training to their employees to properly inspect subcontractor payroll records and implement the withholding of payments to their subcontractors if there is a potential violation.

New York State Vaccination Paid Leave Law extended throughout 2023

First passed in the March 2021, New York requires employers to provide workers with up to four hours of paid leave per vaccine shot, including booster shots. NYLL § 196-c. The absence period is not to be charged against any other leave the employee is otherwise entitled to, such as paid sick leave under Section 196-b or under a collective bargaining agreement. The rate of payment for time used under the paid leave for COVID-19 vaccination should be that of the employee's regular rate of pay. All private employers are covered under this provision. Public employers have a separate paid vaccine leave law under New York State Civil Service Law § 159-c. While this law was set to expire on December 31, 2022, in June 2022 the law was extended to remain in effect until December 31, 2023.

Ohio

Ohio Formally Adopts FLSA's Portal-to-Portal Act, Collective Action Opt-In Procedure

In April 2022, Governor Mike DeWine signed Senate Bill (S.B.) 47, thereby formally adopting Sections 2 and 4 of the Portal-to-Portal Act (PPA) amendments to the FLSA. In addition, S.B. 47 incorporates the FLSA's "opt-in" requirement for individuals seeking to join a class (collective) action based on state law claims for failure to properly pay overtime wages. The law became effective on July 6, 2022.

Because Ohio law (O.R.C. § 4113.03) expressly incorporates by reference Section 7 of the FLSA "as amended," and because the PPA is an amendment to Section 7, Ohio federal courts routinely have assumed that the PPA applies to Ohio state law claims. *See, e.g. Baughman v. KTH Parts Industries*, 2021 U.S. Dist. LEXIS 62059 (S.D. Ohio Mar. 31, 2021). S.B. 47 now expressly recognizes that longstanding assumption.

Portal-to-Portal Provisions

Under SB 47 (and the PPA), an employer is not required to pay overtime wages to an employee for time spent:

- "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities that the employee is employed to perform," *i.e.*, normal commuting time;
- "performing activities that are preliminary to or postliminary to the principal activity or activities; or
- "performing activities requiring insubstantial or insignificant periods of time beyond the employee's scheduled working hours," that is, *de minimis*

These provisions apply to activities "performed either prior to the time on any particular workday that the employee commences the employee's principal work activity or after the time on any workday that the employee ceases performing the employee's principal work activity." In other words, the provisions do not apply to activities performed on a non-workday. With respect to the law's provision declaring *de minimis* time as non-compensable, the law does not define what constitutes "insubstantial or insignificant" time but more importantly – and unlike its federal counterpart – does not state that the activity must be performed infrequently.

Consistent with the PPA, S.B. 47 clarifies that employers must still pay employees for preliminary or postliminary activity performed "during the employee's regular workday or during prescribed hours" or "at the specific direction of the employer." In addition, employers must pay for employee time performing activities "pursuant to an express provision of a contract in effect at the time the employee performed the activity" and activities "pursuant to a custom or practice, not inconsistent with a contract, in effect at the time the employee performed the activity."

Opt-In Requirement

S.B. 47 provides that employees shall not join an Ohio overtime lawsuit as plaintiffs unless they first give written consent to become a plaintiff and file that consent with the court in which the action is brought. This requirement is consistent with the FLSA's "opt-in" provisions for collective actions and eliminates the so-called "hybrid" collective/class wage lawsuits that combine both "opt-in" plaintiffs under the FLSA and "opt-out" plaintiffs under parallel state law claims.

Oregon

Oregon Revises Overtime Laws for Bakers and Farmworkers

In the spring of 2022, the Oregon legislature passed Senate Bill (SB) 1513, revising the Beaver State's overtime rules for bakers. In addition, the legislature passed House Bill (HB) 4002, revamping the overtime entitlements for farmworkers. Both laws became effective on January 1, 2023.

Based on legislators' stated concerns that bakery workers should not be penalized for refusing last-minute overtime obligations, the Oregon legislature passed SB 1513, limiting bakeries from imposing overtime on workers without at least five days' notice. Any manufacturing establishment classified as a "bakery" by the North American Industry Classification System (NAICS) may not discipline an employee who refuses to work mandatory overtime unless the employer has provided at least five days' advance notice. The advance notice must specify the anticipated shift's date and time. The bill authorizes Oregon's Bureau of Labor and Industries to investigate violations and enforce compliance.

Farmworkers

Traditionally, both federal and state law exempt agricultural workers from overtime requirements for work beyond 40 hours in a week, with only seven states providing for overtime pay for farmworkers. With the passage of HB 4002, Oregon became the eighth such state. Subject to certain exceptions, the bill extends overtime entitlements to agricultural workers, dairy employees, employees involved with raising livestock, bees, or fur-bearing animals, and some others. Overtime obligations are phased in under the new law, starting on January 1, 2023. During the first phase, which extends through 2024, covered employers must pay overtime at the rate of one and one-half an employee's regular rate when the employee works over 55 hours in a week. For calendar years 2025 and 2026, the overtime requirement begins at 48 hours per week and, beginning in January 2027, the requirement will apply to all work in excess of 40 hours per week.

Pennsylvania

Pennsylvania's Labor Department Issues New Regulations for Tipped and Salaried Employees

The Pennsylvania Department of Labor and Industry implemented new regulations under the Pennsylvania Minimum Wage Act (PMWA) that went into effect on August 5, 2022.

The new rules make a number of changes affecting employees whose pay includes tips or service charges. They also change how regular and overtime rates are calculated for *non-exempt salaried employees only*. The new regulations provide: "The regular rate for salaried employees who are not exempt from overtime is the amount of remuneration determined under subsection (a), [which provides that all remuneration shall be

included, with certain exceptions,] *divided by 40 hours*." 34 Pa. Code § 231.43(g) (emphasis added). This change essentially codifies the Pennsylvania Supreme Court's decision in *Chevalier v. General Nutrition Centers, Inc.*, 656 Pa. 296 (2019), prohibiting use of the fluctuating-workweek method to calculate overtime for non-exempt salaried employees under the PMWA. Nothing in the new regulations extends this change to anyone other than non-exempt salaried employees.

Some legal observers have opined that the new regulations apply to *all* non-exempt employees, whether salaried or hourly, but this interpretation is plainly incorrect in light of the regulatory language quoted above. In addition, Department of Labor and Industry representatives rejected this interpretation at a recent presentation on the new regulations. When asked, "Will there be changes to the regular rate calculation for a standard hourly employee?" Director of the Bureau of Labor Law Compliance Bryan Smolock responded, "No, these changes only apply to salaried, non-exempt workers."

Minimum Monthly Tip Requirement Increased to $135

Since 1998, employers in Pennsylvania have been able to pay tipped employees a base rate of $2.83 per hour if they earn at least $30 a month in tips, with tips making up the remainder of the employee's wages to reach the standard minimum wage, currently $7.25 per hour. This difference is commonly known as a "tip credit." The $30 level is found in both the federal FLSA and the laws of other states that allow a tip credit.

If a tipped employee's combined base wages and tips do not equal at least $7.25 per hour for all hours worked, then the employer must make up the difference. Under the new regulations, tipped employees will need to earn at least $135 in tips before they qualify as tipped employees for whom their employer may pay the $2.83 per hour tipped rate. The IRRC cited the effects of inflation since the $30 tip threshold went into effect more than four decades ago as the basis for the increase. According to the regulations, the $30 tip threshold is so outdated that most tipped employees earn at least $135 per month in tips anyway, so the IRRC does not anticipate a substantial impact on those businesses with tipped employees.

The $135 tip threshold must be met each and every month — averaging does not appear to be permissible under the new rules. The regulations revise the definition of "tipped employee" to "an employee engaged in an operation in which the employee *customarily and regularly* receives more than $135 a month in tips." 34 Pa. Code § 231.1(b) (emphasis added). In turn, the rule defines "customarily and regularly" as "a frequency which must be greater than occasional, but which may be less than constant." At the same time, the regulations provide, "The tip credit only applies if an employee received over $135 in tips for a month." 34 Pa. Code § 231.101a(b)(1). Employers should examine the threshold each month and pay the difference if the employee's tips fall short. 34 Pa. Code § 231.101a(b)(2).

Traditional "80/20" Rule Adopted

Until recently, under sub-regulatory provisions enforced by DOL for the past several decades, an employer could not take the tip credit for an employee who worked "dual jobs" – one traditionally tipped and one traditionally non-tipped – for time the employee spent performing related but non-tipped tasks (*e.g.*, folding napkins or filling dispensers) if those related tasks required more than 20% of the employee's total time in workweek. This limitation is commonly known as the "20%" or "80/20" Rule. By contrast, an employer could take the tip credit for all of the time spent on directly tip-producing tasks (*e.g.*, taking customer orders and serving their food), but could never take the tip credit for unrelated, non-tip-producing tasks (*e.g.*, cleaning the bathroom).

The DOL under the former administration published a Final Rule that would have eliminated the 80/20 Rule, thereby allowing an employer to take the tip credit for all time spent on tip-related tasks as long as they occurred within a "reasonable" time before or after tip-producing tasks. The current DOL rescinded that Final Rule and, in October 2021, issued a new Final Rule that reinstated the 80/20 Rule, with a modification that the limit on time devoted to *tip-related* activities must not exceed either 20% of a tipped employee's workweek or a continuous period that exceeds 30 minutes.

As approved by the IRRC, the Pennsylvania regulation formally adopts the 80/20 Rule as it existed prior to its withdrawal by the Trump DOL and the current DOL's recently enacted Final Rule. That is, Pennsylvania will not implement or enforce the 30-minute limitation imposed by the current federal Final Rule. In addition,

Pennsylvania will not automatically adopt any future revisions to the federal tipped employee regulations, citing the "oscillating," politically influenced federal law and the need for clarity and consistency in application of state law.

Tip Pooling Officially Permitted

Although Pennsylvania already permits tip pooling, the IRRC noted that the state currently has no specific regulations addressing the subject. Under the approved regulations, Pennsylvania will formally adopt the federal tip-pooling regulations published in a DOL Final Rule in 2021, but, again, will not automatically adopt any future federal regulation on tip pooling. The federal tip-pooling regulations implemented a 2018 Congressional amendment to the FLSA that permits tipped employees to pool tips with traditionally non-tipped workers, as long as the employer does not take a tip credit and, instead, pays such workers a direct wage equal to or greater than the minimum wage.

However, employers, including managers and supervisors, are prohibited from keeping any tips received by employees, regardless of whether the employer takes a tip credit. The federal regulations define those who qualify as a "supervisor" or "manager," and therefore are excluded from participating in a tip pool, by reference to the FLSA's "duties" test for the executive exemption. On the other hand, managers or supervisors may retain or share any tips that are paid directly to them by customers for service that the supervisor or manager personally provided.

Under the new rules, employees must receive advance notice of any tip-pooling arrangement. The FLSA tip-pooling regulations, which are incorporated into the new Pennsylvania regulations by reference, require: "The employer must notify its employees of any required tip pool contribution amount[.]" 29 C.F.R. § 531.54(c)(2). The new regulations also require the employer to provide advance written notice of the tip pooling arrangement to all employees in the tip pool. 34 Pa. Code § 231.112(b). A single comprehensive written notice should be sufficient to satisfy both notice requirements.

The new regulations require employers to maintain records of the name, position, and amount distributed to every participant in the tip pool. 34 Pa. Code § 231.34(6).

Transactional Fee Deductions from Tips Prohibited

While FLSA regulations permit employers to reduce the tips paid to employees by the amount of (but no more than) the transactional fees associated with credit card payments, the approved Pennsylvania regulations do not allow such for such fee deductions. While acknowledging that the significant majority of purchase transactions (about 70%) are now paperless and that some business commenters stated that the practice regularly occurs, in formally rejecting the practice the IRRC relied on the state's explicit statutory language, found in 43 P.S. § 333.103, that gratuities are the property of the employee.

Service Charges for Banquet Employees

The new regulations affect both banquet team members' compensation and the employers' banquet operations. The regulations define "service charge" as "a mandatory fee an employer may charge to a patron for service that an employee renders." 34 Pa. Code § 231.1(b). Employers that "charge for the administration of a banquet, special function, or package deal shall notify patrons of this charge[.]" 34 Pa. Code § 231.114(a). This notice must appear in both the banquet agreement and on any banquet menu and must state that the charge "is for administration of the banquet … and does not include a tip to be distributed to the employees who provided service to the guests." *Id.*; 34 Pa. Code § 231.114(b). Similarly, the billing statement for any banquet must include separate lines for service charges and tips. 34 Pa. Code § 231.114(c). That is, it must state the service charge(s) and include a separate line for patrons to tip.

Service charges count toward the employer's minimum-wage obligation, but they may not be treated as tips (that is, service charges may not be used to reach the new $135-per-month threshold). 34 Pa. Code § 231.114(d).

A banquet server's hourly rate that is under the minimum wage may receive additional compensation from service charges, as long as the banquet server's regular rate — which includes all service charges — meets or exceeds the minimum wage.

How are employees who perform both tipped work and banquet service treated?

For employees who perform both tipped jobs and banquet service (which is also a tipped job given the new requirement that every banquet receipt include a separate tipping line), the employer must ensure the employee's regular rate (which includes service charges) always meets or exceeds the minimum wage. Just as it does for employees who do not perform banquet service, the employer must ensure it does not take a tip credit for these employees, unless their tips exceed the new $135-per-month threshold. 34 Pa. Code §§ 231.1(b), 231.101a(b)(1).

What notices do the new regulations require?

The regulations require employers to provide several kinds of notice. First, the FLSA tip-pooling regulations, which are incorporated into the new Pennsylvania regulations by reference, require: "The employer must notify its employees of any required tip pool contribution amount[.]" 29 C.F.R. § 531.54(c)(2). The new regulations also require the employer to provide advance written notice of the tip pooling arrangement to all employees in the tip pool. 34 Pa. Code § 231.112(b). A single comprehensive written notice should be sufficient to satisfy both notice requirements.

Second, employers that use banquet service charges must inform their customers of the charge on every banquet agreement, menu, and receipt. Each receipt must provide separate lines breaking out the amount of the service charge and providing an additional space for the customer to tip. 34 Pa. Code § 231.114(a), (b), (c).

Finally, the mandatory PMWA poster has been updated to reflect the new regulations.

Pennsylvania DLI Formally Rejects Fluctuating Workweek Pay Method

While not really a tipped employee issue, the IRRC included in the approved regulations a formal recognition of state law, as held by the Pennsylvania Supreme Court in *Chevalier v. General Nutrition Centers., Inc*., 220 A.3d 1038 (Pa. 2019), that the FLSA's fluctuating workweek pay method does not apply under Pennsylvania law.

Typically, a non-exempt employee must be paid 1.5 times their regular rate for all hours in excess of 40 in a workweek. A different calculation may be applied if the employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all "straight time" (non-overtime) hours the employee works. The employer can satisfy the FLSA's overtime pay requirements if, in addition to the salary amount, it pays at least one-half (0.5 times) the "regular rate" of pay for any hours worked in excess of 40. The salary must remain fixed and be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a "clear and mutual understanding" that the salary will remain the same regardless of the hours worked each week.

Citing Pennsylvania statutory law that "[e]mployees shall be paid for overtime not less than one and one-half times the employee's regular rate," 43 P.S. § 333.104(c), and recognizing that states may enact law more beneficial wage laws than those provided under the FLSA, the Pennsylvania Supreme Court in Chevalier held that the standard, 1.5 times, multiplier must be used for any overtime calculation, thereby rejecting the FLSA's fluctuating workweek overtime pay calculation method.

Puerto Rico

Puerto Rico Reforms 2017 Law

Puerto Rico Governor Pedro Pierluisi signed into law changes reversing portions of the 2017 employment reform law. House Bill 1244 (HB 1244) rolls back and changes a number of wage and hour provisions. The changes went into effect for most employers on July 20, 2022. For certain "small" and "mid-size" businesses as defined in the new law, changes became effective on September 18, 2022.

Vacation and Sick Leave

HB 1244 reduces the minimum threshold for eligible employees to accrue paid vacation and sick leave from 130 hours to 115 hours of work per month. The monthly accrual rate for paid vacation leave is increased to 1.25 days of vacation leave if the employee works at least 115 hours a month. (This is the pre-2017 Employment Law Reform accrual requirement for vacation leave.) The one-day-per-month accrual rate of sick leave remains the same for this group of employees.

Significantly, HB 1244 introduces accrual of paid vacation and paid sick time for part-time employees. Eligible employees who work at least 20 hours per week, and fewer than 115 hours a month, will accrue 0.5 day of paid vacation leave and 0.5 day of paid sick leave.

Annual ("Christmas") Bonus Threshold

Under HB 1244, the hours-worked threshold to be eligible for the Christmas bonus returns to 700 hours for most employees and will apply regardless of hiring date. Prior to the amendment, employees hired on or after January 26, 2017, had to meet a threshold of 1,350 hours between October 1 and September 30. However, for employees hired on or after January 26, 2017, who work for an employer that meets the definition of "small" and "midsize" business, the hours-worked threshold for bonus eligibility is 900 hours between October 1 and September 30.

Meal Periods

HB 1244 reverts meal period commencement to no earlier than the third hour of work (as opposed to the second hour of work), unless there is a written agreement to do so. The provision that the meal period can be omitted if the total works hours is not more than six hours in a working day also is repealed. HB 1244 introduces a requirement for a second meal period if the total number of hours worked exceeds 10 hours. However, if the total hours worked does not exceed 12 hours, the second meal period can be waived only if there is a written agreement with the employee and the first meal period was enjoyed by the worker.

Weekly Day of Rest

HB 1244 introduces a new premium rate for nonexempt employees who work on the weekly day of rest required after six consecutive workdays. If the employee is a "student" (broadly defined to include any person enrolled in superior, university, and postgraduate institutions) the premium payment is 2 times the regular rate of pay. However, for employers that fall under the "small" and "midsize" business statutory definition, the premium rate for this group of employees is 1.5 times the regular rate of pay. HB 1244 does not address whether employers need to have actual knowledge that the employee is a student in order for the premium rate to apply.

Unchanged Provisions of Law 4-2017

HB 1244 is less aggressive in scope than prior attempts at amending the 2017 Employment Law Reform. Following are some important provisions of Law 4-2017 related to wages and hours that remain:

- Requirement of consistent interpretation between federal and local laws that regulate the same issues.
- Acknowledgment of an employer's discretion to interpret its own rules or policies, unless such interpretation is arbitrary, capricious, or contrary to law, if the employer reserved said discretion in writing in the rules or policies.
- Daily overtime computation. The 2017 Employment Law Reform definition of time worked over eight hours in a *calendar* day remains in place, eliminating "technical" overtime resulting from changes in daily schedules and meal periods.
- Availability of flexi-time agreements in which, by mutual written agreement, an employee may agree to a workweek of up to 40 hours a week, with no more than 10 hours of work per day, without incurring daily overtime.
- Makeup time. An employer may allow an employee to work up to 12 hours in a day to make up time missed for personal reasons during the week without incurring overtime obligations if the makeup hours are worked within the same week.
- Statutory irrefutable presumption of independent contractor status if certain requirements are met.

Rhode Island

In 2022, Rhode Island joined the list of states adopting laws governing the payment of tips. House Bill (HB) 7510, which is codified as Public Law 2022-245, mirrors nearly all tip-related aspects of the federal FLSA and its regulations. The law became effective on June 28, 2022.

Under the law, tips are the sole property of the tipped employee. A "tipped employee," just as under the FLSA, is one who regularly and customarily receives at least $30 in tips per month. Employers and employees are prohibited from entering into any agreement that would allow the employer to keep any portion of an employee's tips.

Nevertheless, employers may implement a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips. To this end, employers must notify their employees of the amount of any required tip pool contribution amount, may take a tip credit only for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips except as required for distribution to a valid tip pool or to offset the actual charges assessed by a third-party credit card company (discussed further below).

If an employer does not take a tip credit and instead pays its employees full minimum wage, it may allow non-tipped, non-exempt employees to participate in a tip pool. Exempt employees, as defined under Part 541 of the FLSA regulations, may not participate in a tip pool whether a tip credit is taken or not. The FLSA in this regard is a bit broader, as the FLSA would exclude non-exempt "managers" or "supervisors" from participating in a tip pool (although the FLSA itself would do so for most employers), whereas Rhode Island law is limited to exempt employees only.

Sums assessed to customers as service charges and distributed to employees may not be counted as tips (either for establishing an employee's eligibility as a tipped employee or for determining application of the tip credit) but, just as under the FLSA, may be used to satisfy the employer's minimum wage and overtime requirements.

If an employer must pay a credit card company a percentage of each credit card sale and that sale includes tips, the employer may deduct that percentage from the employee's tips. The employer must notify the employee that it is taking this deduction and any such deduction may not reduce the employee's wage below the applicable minimum wage. Furthermore, the employer must pay the employee all amounts due no later than the next regular payday and may not withhold any amount while awaiting reimbursement from the credit card company.

South Carolina

In May 2022 the South Carolina legislature passed, and Governor Henry McMaster signed, Bill 533, which prohibits employers in South Carolina from using Section 14(c) of the FLSA to pay employees with disabilities less than the federal minimum wage. In other words, employers in South Carolina must pay everyone at least the federal minimum wage, including persons with disabilities.

Virginia

Déjà Vu: Virginia Returns to FLSA Overtime Standards

On July 1, 2021, the Virginia Overtime Wage Act (VOWA) went into effect, significantly deviating the state's overtime pay laws from its long-standing reliance on the standards set forth in the FLSA. As a result of House Bill (HB) 1173, signed by Governor Glenn Youngkin on April 11, 2022, exactly one year later, in almost all respects, Virginia will return to the overtime standards that applied prior to VOWA. HB 1173 provides that any employer who violates the state's overtime pay requirements "shall be liable to the employee for the applicable remedies, damages, or other relief available under the [FLSA]." HB 1173 went into effect on July 1, 2022.

Regular Rate Calculations

Generally, the FLSA requires that non-exempt employees be paid overtime at a rate of one-and-one-half times their "regular rate of pay" for all hours worked in excess of 40 hours in a workweek. Under the FLSA, the regular rate of pay is the sum of an employee's compensation for a given workweek (barring certain statutory exclusions) divided by the total hours worked by the employee during that workweek. Under the original VOWA, if a non-exempt employee was paid on a salary basis, their regular rate of pay was calculated by dividing that same compensation by 40 hours rather than actual hours worked, resulting in a higher regular rate.

HB 1173 eliminated this difference and returns to the FLSA's regular rate calculation method entirely. In so doing, Virginia employers once again should be able to use the "fluctuating workweek" (FWW) method of paying traditionally non-exempt employees a fixed salary to cover wages for hours in excess of 40 in a workweek. Under the FLSA's FWW pay method, if a non-exempt employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all "straight time" (non-overtime) hours the employee works, the employer satisfies the FLSA's overtime pay requirements if, in addition to the salary

amount, it pays at least one-half of the "regular rate" of pay for any hours worked in excess of 40. The salary must remain fixed and be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a "clear and mutual understanding" that the salary will remain the same regardless of the hours worked each week. As originally enacted, VOWA's regular rate calculation requirements effectively precluded use of the FWW pay method. Now that the FLSA's regular rate calculation standards will again apply, so should the availability of the FWW pay method.

Similarly, a return to the FLSA standards should alleviate some of the risks Virginia employers faced under VOWA for misclassifying employees as exempt. In FLSA claims, employers often argue that a misclassified employee's salary already covers the employee's straight-time wages for all hours worked and, therefore, only the additional "half-time" amount is owed for hours in excess of 40. By explicitly requiring that all salaried employees were entitled to one and one-half times their regular rate for hours worked over 40 in a workweek, VOWA originally precluded that contention.

Exempt Classifications

Based on the definition of "employee" set forth in VOWA, arguably some of the FLSA's exemptions from overtime were no longer available under state law. A return to the FLSA's standards ensures that all overtime exemptions available under federal law likewise will be available under Virginia law.

Statute of Limitations

As originally enacted, VOWA provided for a three-year statute of limitations in all overtime wage payment disputes. By contrast, the FLSA generally provides for a two-year limitations period, while allowing a three-year limitations period only if a claimant can demonstrate that the employer's actions in violating the FLSA were "willful." HB 1173 returns Virginia's limitations periods for overtime claims to parallel those asserted under the FLSA.

Liquidated Damages

VOWA originally provided that all established overtime wage violations were automatically subject to liquidated (double) damages, plus pre-judgment interest at eight percent a year, with no defense available to mitigate the liquidated damages. In addition, VOWA provided for treble damages for "knowing" violations.

With a return to the FLSA's remedies, while a claimant may still recover liquidated damages equal to the amount of unpaid overtime wages, the treble damages provision is eliminated and an employer once again may defend against a claim for liquidated damages by demonstrating that it acted in good faith, with reasonable grounds for believing it acted in compliance with the FLSA's requirements.

Collective Actions Still Available

Prior to VOWA, Virginia law rarely authorized claimants to bring their overtime disputes as class or collective actions. However, the original VOWA specifically authorized collective overtime wage payment claims and *HB 1173 does not alter this authorization*. Just as with the FLSA, claimants may bring their overtime wage payment claims as collective actions under Virginia law.

Washington

Washington Requires Salary Ranges in Job Postings Starting in 2023

Effective January 1, 2023, Washington employers with at least 15 employees must affirmatively disclose the wage scale or salary range and a general description of all benefits and other compensation being offered when posting job openings, regardless of whether such information is requested by the applicant. Washington joins the growing number of states requiring employers to include salary ranges and benefits offerings on job postings.

The new law, signed March 30, 2022, revises a 2019 amendment to the Washington Equal Pay and Opportunities Act (EPOA). The 2019 amendment required employers to disclose wage scale and salary ranges if an applicant for employment requested it. Under the new law, an applicant's request is no longer required.

Significantly, the new law does not change the 2019 amendment regarding current employees being transferred or promoted. In those cases, employers only must provide the required compensation information when requested by the current employee. The legislature also removed the portion of the 2019 amendment stating that, if there is no wage scale or salary range, employers are required only to give the minimum wage or salary expectation before posting the position or making the internal transfer or promotion.

Covered Job Postings

The new law does not require employers to create job postings, but it imposes obligations on those employers who choose to create such postings. The law defines a posting as "any solicitation intended to recruit job applicants for a specific available position … that includes qualifications for desired applicants," whether by the employer or through a third party and whether electronic or hard copy. Based on this definition, a general "help wanted" sign will not trigger posting requirements. It is unclear whether employers will be held liable for noncompliance by third-party job posting boards and unrelated third-party internet search engines.

The law does not define "new positions" or "promotions" that will trigger the posting obligations. If Washington follows an aggressive approach (such as Colorado's), a "new position" could be created by simply changing an employee's title. Thus, employers considering reorganizations or restructuring may consider implementing these changes prior to January 1 to avoid uncertainties.

Disclosures

The new law requires general descriptions of (1) benefits such as health insurance, paid days off, retirement benefits and (2) all compensation such as bonus structure, and commissions. Dollar or specific plan amounts or small "perks" such as bagels and coffee on Fridays likely are not required. Employers should inventory all compensation plans and offerings and avoid using shortcuts such as "bonuses, etc." or "insurance, and more."

Violations

Violations of the new law may result in the same remedies as any other violation of the EPOA. Employees have the right to bring an administrative action or lawsuit for a variety of actual and statutory damages, including fees and costs.

Draft Guidance from the DLI

In October 2022, the Department of Labor and Industries (DLI) released a draft administrative policy with updated guidance on the modified pay transparency requirements. This draft policy aims to clarify issues raised by stakeholders in the feedback process for the development of the final administrative policy. The draft policy gives some new insight on several important topics.

Employers Covered

The guidance clarifies that the 15-employee threshold "includes employers that do not have a physical presence in Washington, if the employer has one or more Washington-based employees." Covered employers sponsoring foreign national employees for legal permanent residence ("green cards") through the PERM process will have to comply with these requirements when conducting PERM recruitments.

Job Posting Defined

Job postings include openings for internal transfers as well as remote jobs, according to the new guidance. Stating in a posting that the employer will not accept Washington applicants does not excuse compliance with this law.

Information Required

Each posting must include "the wage scale or salary range and a general description of all the benefits and other compensation for a specific available position to be offered to the hired applicant." The new guidance provides detailed examples of information that should and should not be included. For example, the wage scale/salary range should have a low and high number, rather than open-ended descriptions, such as "up to $29/hr" or "$60k and up." Any starting pay or range should be specified. If there are multiple levels for a job, the pay scale for each level should be provided. If the employer offers a different job than what the applicant applied for, the employer should provide the postings for both jobs.

Postings also must include a general description of all benefits and other compensation. Benefits include items such as health care benefits, retirement benefits, any benefits permitting paid days off (including more generous paid sick leave accruals than the minimum required by law, parental leave, and paid time off or vacation benefits), and any other benefits that must be reported for federal tax purposes, such as fringe benefits. The guidance explains that "other compensation" can be discretionary bonuses, stock options, travel allowance, relocation assistance, profit-sharing, or other forms of compensation that would

be offered to the hired applicant along with their established salary range or wage scale. Employers need not include monetary values, but providing them does not excuse the requirement of the general description.

The guidance states that employers should update postings as this information changes. The guidance also addresses how to use links regarding benefits and other compensation. The posting must have the "general description" of the benefits and other compensation, but employers can choose to link to more details, which must remain updated. If the benefits and other compensation information is available on the original or subsequent web pages, then the information needs to only be listed at least once. According to the Department, "[i]t is the employer's responsibility to assure continuous compliance with functionality of links, up to-date information, and information that applies to the specific job posting, regardless of any use of third-party administrators."

Seattle Independent Contractor Protections Order Guidance

In October 2022, the Seattle Office of Labor Standards released a Fact Sheet on the city's Independent Contractor Protections Ordinance offering guidance on the implementation of new pay protections for independent contractors.

Seattle's Ordinance is in line with the trend of state and local governments adopting workplace protections for independent contractors as the number of such workers continues to rise. The Ordinance aims to increase pay transparency and timely payments for independent contractors and went into effect on September 1, 2022.

Businesses Covered

The Ordinance (SMC 14.34) broadly applies to "hiring entities," which generally includes any person or entity that hires an independent contractor.

The city's Fact Sheet describes the law as applying to any hiring entities "regularly engaged in business or commercial activity," including non-profits.

Workers Covered

"Independent contractor" is defined as "a person or entity composed of no more than one person, regardless of corporate form or method of organizing the person's business that is hired by a hiring entity as a self-employed person or entity to provide services in exchange for compensation." The person or entity's work also must be performed, at least in part, in Seattle and the hiring entity must be aware of this.

However, the Ordinance excludes:

- Lawyers;
- Workers whose relationship with the hiring entity is limited to a property rental agreement (such as a hair stylist who rents a booth at a salon);
- Independent contractors working for a Transportation Network Company, as defined in RCW 46.04.652; and
- Any other class of independent contractors that the director of the Office of Labor Standards excludes through forthcoming rules.

Contracts Covered

A contract between a hiring entity and an independent contractor must also meet two additional requirements to be covered by the Ordinance:

1. It must be for an exchange of services for compensation; and
2. It must involve proposed or actual compensation of $600 or more, either alone or in combination with all other services provided by the independent contractor to the same hiring entity in the calendar year.

Employer Obligations

Before any work begins, the hiring entity must provide the independent contractor with (1) a notice of rights under the Ordinance and (2) a pre-contract disclosure.

The "notice of rights" must inform the independent contractor of their right to:

- Pre-contract disclosure, timely payment, payment disclosures, retaliation protection; and
- File a complaint with the Seattle Office of Labor Standards or bring a private lawsuit.
- The "pre-contract disclosure" must include:
- Current date;
- Names of both parties and contact information of the business;

- Description of the work;
- The location(s) of the work, as well as the regular place of business of both parties;
- Compensation structure (*e.g.*, pay rate, pay basis, tips/ service charge distribution policy, reimbursements, deductions, fees, and charges); and
- Pay schedule.

At the time of each payment, hiring entities must provide additional written payment disclosures, including many of the above items, as well as gross payment, specific deductions, and net payment after deductions.

The notice of rights, pre-contract disclosure, and payment disclosures must be in English and any language the hiring entity has reason to know is the primary language of the independent contractor.

Additionally, hiring entities must provide timely payment as required by the terms of a contract, the terms of the pre-contract disclosure, or within 30 days of contract performance. However, the Ordinance does not specify a minimum hourly rate that hiring entities must pay for the independent contractor's services.

The Ordinance also requires hiring entities to maintain records showing compliance with the Ordinance for three years.

Hiring entities "and other persons" are forbidden from taking adverse actions against an independent contractor for exercising rights under the Ordinance in good faith.

App-Based Companies Must 'Pay Up' in Seattle

Shortly after the Washington State legislature approved legislation that sets minimum wage and other benefits for gig drivers of rideshare companies, the City of Seattle passed the first of a series of bills that ask app-based companies for all *gig-type workers* to "Pay Up."

An attempt to address issues that gig workers face, such as vehicle expenses or lack of adequate information provided before accepting a job, the PayUp policy package is a group of bills that aims to offer gig workers, who often are classified as independent contractors, employee-type legal protections. The first bill passed (Council Bill 120294) specifically addresses minimum payment, transparency, and flexibility and will go into effect in 2024.

Minimum Payment

Under the new law, app-based workers will receive a minimum wage that accounts for expenses incurred and is exclusive of tips.

Transparency

App-based companies must provide information up front regarding pay, tips, and details of each job, and drivers must have access to their policies. App-based companies also are required to provide receipts to app-based workers that detail time, miles, and compensation within certain time periods.

Flexibility

App-based workers have the right to decide when to be available to work and which offers to accept and reject, without penalty.

Other Provisions

Finally, app-based workers are protected against retaliation and other adverse actions, and have traditional remedies, such as liquidated damages and attorneys' fees, if successful, available to them under the law.

The bill was signed into law on June 13, 2022, and is set to take effect on January 13, 2024. The city will consider regulations, such as enforcement, no later than August 1, 2023.

West Virginia

West Virginia Enacts Changes to Payroll Card Method of Wage Payment

During the spring of 2022, the West Virginia legislature passed Senate Bill 245, thereby enacting several changes to its wage payment provisions using payroll cards. These changes became effective on June 9, 2022.

While payroll cards already were an authorized method of paying employee wages, both the employer and the employee had to agree to use of the pay method. That is no longer the case. Under SB 245, which amends Sections 21-5-3 and 21-5-4 of the Wage Payment and Collection Act, the employer may unilaterally elect to pay employee wages via payroll card, provided the employer discloses in writing any applicable fees associated with the payroll card.

In addition, the employee must have the ability to make *at least one* withdrawal or transfer from the payroll card per pay period without cost or fee, for any amount up to the amount contained on the card, and must be able to make *unlimited in-network* withdrawals or transfers from the payroll card without any cost or fee, for any amount up to the amount contained on the card. Finally, employers who use payroll cards must give employees the option of being paid by electronic transfer (*i.e.*, direct deposit) instead.

MINIMUM WAGE INCREASES

The following state minimum wage increases went into effect as of January 1, 2023, unless otherwise noted. States marked with an asterisk (*) also have city or other local minimum wage increases for 2023; contact a Jackson Lewis attorney if you need details for these local rates.

Alaska	$10.85
Arizona*	$13.85
California*	$15.50 (All employers)
Colorado*	$13.65
Connecticut	$15.00 (June 1)
Delaware	$11.75
Dist. of Columbia	TBD (July 1)
Florida	$12.00 (Sept. 30)
Illinois*	$13.00 (Standard) $10.50 (Youth)
Maine*	$13.80
Maryland*	$13.25
Massachusetts	$15.00
Michigan	$10.10 $13.03 (Feb. 20) (tentative)
Minnesota*	$10.59 (Large employers) $8.63 (Small employers) $8.63 (Training/Youth)
Missouri	$12.00
Montana	$9.95
Nebraska	$10.50
Nevada	$11.25 (w/o health benefits) $10.25 (w/ health benefits) (July 1)
New Jersey	$14.13 (Standard) $12.93 (Small employers) $12.01 (Agricultural employees) $17.13 (Long-term care staff)
New Mexico*	$12.00
New York	Outside NYC and Nassau, Suffolk & Westchester Counties: $14.20 (generally); all others $15.00 (generally) (Dec. 31, 2022)
Ohio	$10.10
Oregon	TBD (July 1)
Puerto Rico	$9.50 (July 1)
Rhode Island	$13.00
South Dakota	$10.80
Vermont	$13.18
Virginia	$12.00
Washington*	$15.74 (Standard) $13.38 (employees ages 14-15)

MINIMUM SALARIES FOR THE "WHITE COLLAR" EXEMPTIONS

The following state minimum annual salaries for the FLSA Executive, Administrative, and Professional (*a.k.a.* the "white collar") exemptions are effective in 2023. These minimum salaries became effective on January 1, 2023, unless otherwise noted. Contact a Jackson Lewis attorney if you need additional details.

California	$64,480
Colorado	$50,000
Maine	$41,400.84
New York (eff. 12/31/2022)	$58,500 (New York City + Nassau, Suffolk & Westchester Counties) $55,380 (remainder of the State) **Note: Applicable to Executive and Administrative exemptions only; Professional exemption follows federal law**
Washington	$65,478.40 (51+ employees) $57,293.60 (1-50 employees)

Thank you for your interest in the

2022 Wage & Hour Developments: A Year in Review.

Contact

Jeffrey W. Brecher

Principal
New York Metro
Long Island
(631) 247-4652
Jeffrey.Brecher@jacksonlewis.com

Justin R. Barnes

Principal
Atlanta Office
Atlanta, GA
(404) 586-1809
Justin.Barnes@jacksonlewis.com

David T. Wiley

Knowledge Management Attorney
Birmingham Office
Birmingham, AL
(205) 332-3104
David.Wiley@jacksonlewis.com

©2023 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome. Reproduction of this material in whole or in part is prohibited without the express prior written consent of Jackson Lewis P.C., a law firm focused on labor and employment law since 1958. Our 950+ attorneys located in major cities nationwide help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse.

jacksonlewis.com