

WAGE AND HOUR CLASS ACTIONS IN THE HEALTHCARE INDUSTRY

March 2012

AUTHORS

Gregory C. Keating, Esq.

Lisa "Lee" A. Schreter, Esq.

Robert M. Wolff, Esq.

Angelo Spinola, Esq.

Bradley E. Strawn, Esq.

Allan G. King, Esq.

Jennifer L. Mora, Esq.

Carole F. Wilder, Esq.

Anne Mellen, Esq.

IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

Copyright ©2012 Littler Mendelson, P.C.

All material contained within this publication is protected by copyright law and may not be reproduced without the express written consent of Littler Mendelson.

Table of Contents

SECTION / TOPIC	PAGE
I. THE SCOPE OF THE PROBLEM	1
II. CLASS AND COLLECTIVE ACTIONS: THE PROCEDURAL BACKDROP	3
A. Class versus Collective Action — Overview	3
B. Opt-In versus Opt-Out	3
C. Statutes of Limitation	3
D. Standards for Certification and Notice	4
E. Contents of the Notice	5
F. Availability of an Interlocutory Appeal	5
G. Hybrid Class and Collective Actions	5
H. Settlement of Class and Collective Actions	6
I. The Class Action Fairness Act	6
III. TYPES OF CLASS ACTIONS IMPACTING HEALTHCARE EMPLOYERS	7
A. Off-the-Clock Claims	7
B. Misclassification Issues	12
C. Overtime and the Regular Rate	18
D. ERISA Claims	20
E. RICO Claims	21
F. Beware of State Wage and Hour Law	22
IV. EMPLOYERS RESPOND	25
A. Existing Statutory Defenses to Wage and Hour Claims	25
B. Can Employers Stop Solicitation by Plaintiffs' Counsel?	27
V. PRACTICAL RECOMMENDATIONS	31
A. Questions Regarding Pay Practices Involving Nonexempt Employees	31
B. Questions Involving Exempt Versus Nonexempt Status	31
C. Steps Employers Should Consider to Avoid or Minimize Liability	31

WAGE AND HOUR CLASS ACTIONS IN THE HEALTHCARE INDUSTRY

I. THE SCOPE OF THE PROBLEM

Healthcare employers have not been immune to the dramatic increase in wage and hour class and collective actions that have plagued employers in the last few years. What started in 2008 as a localized outbreak by a single law firm filing class and collective actions against hospital systems in Rochester, New York challenging automatic 30-minute pay deductions for meal periods has now become an epidemic. The cases spread quickly because the same firm filed nearly identical lawsuits against large healthcare systems in Syracuse, Utica, and Buffalo, New York; Pittsburgh and Philadelphia, Pennsylvania; and Boston, Massachusetts.

In 2010, the same firm filed 22 wage and hour class and collective actions in federal and state courts against prominent New York City area hospital systems. The range of employers named in those cases was extensive and included some of New York's most notable healthcare institutions. In addition to the hospital systems named in the caption of the complaints, the lawsuits also named hundreds of other healthcare facilities that the plaintiffs alleged are subsidiary, joint or affiliated organizations throughout the entire New York metropolitan area, including community hospitals, rehabilitation centers, clinics, laboratories, research institutions, veterans' hospitals, psychiatric hospitals, drug and alcohol rehabilitation facilities, adult day care facilities, fertility centers, and other specialized institutions for diagnosis, care and treatment of conditions such as AIDs, Alzheimer's Disease, epilepsy, cardiac and vascular disease, pediatric diseases, cancer and blood disorders, and many other types of illness or disease. Some of the cases also named the president and/or CEO of the healthcare institution as individual defendants. The putative class sizes were also broad, potentially reaching 100,000 employees in some cases.

Since then, many more law firms have filed wage and hour class and collective actions against healthcare employers in state and federal courts across the country, including Alabama, Georgia, Florida, Texas, Illinois, California, Tennessee, Michigan, Indiana, the District of Columbia, and elsewhere.

The aggressive tactics of plaintiffs' lawyers have played a significant role in this trend.¹ Plaintiffs' class action counsel no longer wait for potential wage and hour plaintiffs to walk through the door or call. Instead, they are turning to sophisticated means to identify and gather "opt-in" plaintiffs. For example, a prominent New York plaintiffs' class action firm has sent letters to hospital employees across the country stating:

Our investigation has revealed that many hourly employees in the health care industry are not paid for all the hours that they work, especially during meal periods. You may be owed unpaid wages for situations including when you worked during your meal break. We are currently investigating.

Enclosed with the letter is a "fact sheet" that posed the question: "Is there any urgency to complete the consent form?" The response: "Yes ... any delay in returning the Consent Form can cost you back wages."

The internet has also helped plaintiffs' attorneys to more efficiently and expeditiously amass information regarding an employer's practices, and reach employees across the country, in some cases using names and addresses gathered from unions and other publicly available sources such as state nurses registries. Plaintiffs' attorneys also have set up websites to provide information to employees about current class and collective actions against healthcare employers. One plaintiffs' firm has a website entitled www.hospitalovertime.com, which states "if you worked as an hourly employee for a Health Care facility or Hospital our investigations suggest you may not have been paid for all the time you were permitted to work" and urges such employees to "take action" and contact the firm.

¹ Collective actions provide a powerful tool for unions seeking to organize healthcare employers as well. The ability to directly contact a large class of nonexempt employees which it likely would not have otherwise, and to publicly assert claims of unlawful compensation practices, provides positive press for an organizing effort. The Service Employees International Union (SEIU) has provided financial and legal support in a number of class actions against healthcare employers. See, e.g., <http://www.timesunion.com/local/article/Albany-Med-nurses-settle-1027093.php>.

Healthcare employers have recently had some significant successes in healthcare wage and hour class and collective actions, obtaining dismissals,² defeating plaintiffs' motions for conditional certification in an FLSA collective action,³ and obtaining decertification.⁴

Nevertheless, because of the sheer size of these cases, the disruption they cause, the large potential damages, the possibility of adverse publicity, and the cost of litigation, many healthcare employers feel compelled to pay significant amounts to settle these lawsuits. The settlements, which are often reported on the internet, serve to foment additional litigation. Moreover, the pleadings filed by plaintiffs' counsel, and typically available online, provide a template for plaintiffs' counsel nationwide. The following are some examples of some recently publicized settlements — some involving well known and highly respected healthcare employers, and each involving significant fees to plaintiffs' counsel:

- An \$8.5 million settlement of a class and collective action against a large Boston hospital system by employees claiming the hospital violated the FLSA and Massachusetts law by failing to pay employees for time worked before and after their scheduled shifts, during meal periods automatically deducted from their pay, and for time spent attending required meetings.
- A \$7.75 million settlement of an FLSA collective action against a large hospital in Philadelphia asserting claims for failure to pay employees for time worked during meal periods automatically deducted from their pay.
- \$5.4 million settlement of a class action against a large healthcare plan by support specialists, product specialists, and business application coordinators who worked in an IT capacity and claimed they were misclassified as exempt. The plaintiffs alleged they were denied overtime under the California Labor Code and the FLSA for hours worked in excess of 40 and that they were not paid for travel time and meal breaks.
- A \$15 million settlement of a class action against a large hospital by current and former nurses, social workers and aides who claimed they were denied overtime and rest and meal periods in violation of the California Labor Code.
- A \$2 million settlement of a class action by 3,000 home healthcare workers who claimed they were not paid for time spent (or expenses) when traveling between patient visits and — as a result — were denied overtime. The employer also agreed to prospectively pay for travel time and to include that time in the calculation of overtime pay.
- A \$9 million settlement by a large hospital and healthcare system to a class of nurses and other employees who claimed they worked during uncompensated rest breaks that were automatically deducted from their time cards and paychecks.
- Following an investigation by the California Division of Labor Standards Enforcement, a California hospital paid \$2.7 million to settle claims that they had not been paid for second meal breaks during shifts as required by California state wage law.
- A U.S. Department of Labor (DOL) settlement for more than \$ 1.7 million to 4,000 health care workers involving a Missouri medical corporation comprised of seven healthcare centers and hospitals and allegations that employees were subject to an automatic deduction for meal periods whether the employees were fully relieved of their duties or not.

The explosion of wage and hour class actions that has affected employers in all sectors of the economy is now increasingly focused on healthcare industry employers, in part because it remains one segment of the economy that continues to grow. The recent class action lawsuits (and settlements) have predominately involved three distinct areas of wage and hour law: (1) “off-the-clock claims”; (2) employee misclassification; and (3) failure to properly calculate overtime using the “regular rate of pay”. This Littler Report examines the legal theories and practical implications of lawsuits brought under these three general theories and suggests practical solutions to defend against and perhaps avoid such claims.

² *E.g., Wolman v. Catholic Health Sys. of Long Island, Inc.*, 2012 U.S. Dist. LEXIS 21654 (E.D.N.Y. Feb. 16, 2012) (dismissing a class and collective action against 25 hospitals and healthcare facilities that the plaintiffs claimed were part of a single “integrated healthcare system.”); *Sampson v. MediSys Health Network, Inc.*, 2011 U.S. Dist. LEXIS 12697 (E.D.N.Y. Feb. 8, 2011) (Magistrate Judge recommended dismissal with prejudice of an FLSA collective action); *Nakahata v. New York-Presbyterian Healthcare Sys.*, 2011 U.S. Dist. LEXIS 8585 (S.D.N.Y. Jan. 28, 2011) (Dismissing four wage and hour class/collective actions against New York City hospitals); *Cavallaro v. UMass Mem. Health Care, Inc.*, 2011 U.S. Dist. LEXIS 61003 (D. Mass. June 8, 2011) (granting judgment on the pleadings to UMass Memorial Health Care, Inc. defendant in a class and collective action alleging claims for unpaid meal periods, among other things. The court had also previously dismissed all of the numerous state law claims against the hospital, its subsidiaries and affiliates).

³ *E.g., Blaney v. Charlotte-Mecklenburg Hospital Authority*, 2011 U.S. Dist. LEXIS 105302 (W.D.N.C. Sept. 16, 2011).

⁴ *E.g., Kuznyetsov v. West Penn Allegheny Health Sys.*, 2011 U.S. Dist. LEXIS 146056 (W.D. Pa. Dec. 20, 2011); *White v. Baptist Mem. Health Care Corp.*, 2011 U.S. Dist. LEXIS 52928 (W.D. Tenn. May 17, 2011).

II. CLASS AND COLLECTIVE ACTIONS: THE PROCEDURAL BACKDROP

A. Class versus Collective Action — Overview

Plaintiffs' counsel routinely use class or collective action devices in wage-related litigation. The named plaintiffs in class or collective actions, in addition to prosecuting their own claims, purport to represent the interests of numerous other current and former employees with allegedly substantially similar claims. Federal class actions in which plaintiffs assert violations of state wage laws must be brought under Rule 23 of the Federal Rules of Civil Procedure whereas class-action-type lawsuits for violations of the FLSA must be brought as collective actions under Section 216 of the FLSA. There are significant differences between these two types of cases that may impact the course and outcome of the litigation and defense strategy.

B. Opt-In versus Opt-Out

One of the main distinctions between FLSA “collective actions” and Rule 23 “class actions” is that putative class members in Rule 23 class actions need to “opt-out” or affirmatively decline to participate in order to avoid being part of the class. In FLSA collective actions, individuals who fall within the class definition must “opt-in” if they want to be a plaintiff in the lawsuit. Section 216(b) of the FLSA, the collective action provision, provides that no employee “shall be a party plaintiff to [an FLSA collective] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” Thus, while the existence of a Rule 23 class action “does not depend in theory on the participation of other class members,” an FLSA case cannot become a collective action unless other plaintiffs affirmatively “opt-in” by giving written and filed consent.⁵

The opt-in requirement of FLSA collective actions is an obvious advantage to employers since fewer current and former employees are likely to participate if they must affirmatively join the action rather than, simply by inaction, remain part of the class in a Rule 23 case. Although there is no hard and fast data, the opt-in rate in FLSA collective actions not backed by a union is generally estimated to be between 15 and 30 percent, in contrast to Rule 23 class actions in which participation is far greater.⁶ Of course, the rate of opt-in plaintiffs “goes up if labor organizations or other groups become involved and rally the potential plaintiffs.”⁷ The economy may also play a role in opt-in rates because current or former employees who have lost their job are more likely to opt-in to an FLSA collective action. More class members can justify greater recovery and more attorneys' fees. It is more difficult to justify a significant fee award in opt-in cases with fewer plaintiffs, especially if plaintiffs' counsel's fee appears disproportional to the backpay collected by the opt-in plaintiffs.

C. Statutes of Limitation

Another major distinction between Rule 23 class actions and FLSA collective actions is the impact of applicable statute of limitations. Under the FLSA, a plaintiff suing for unpaid wages and overtime can recover for the two-year period preceding the date he files a claim, or three years if the employer acted willfully.⁸ The filing of the collective action complaint does not toll (or halt the operation of) the statute of limitations for anyone other than the named plaintiffs (assuming they filed a consent form).⁹ Rather, the statute of limitations is tolled separately for each individual when he or she files a written consent form, affirmatively opting-in to the case. Thus, if a case has 1,000 opt-in party plaintiffs, it also may have 1,000 different applicable limitations periods. In contrast, in a Rule 23 class action, the filing of the complaint tolls the statute of limitations for all individuals ultimately found to be part of the class until the court decides whether to certify the case as a class action.¹⁰ For this reason, plaintiff's counsel routinely move to certify an “opt-in” class, for purposes of giving notice to potential class members, at the earliest stages of a case.

⁵ *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248-49 (11th Cir. 2003).

⁶ *Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 444 (W.D. Pa. 2007).

⁷ Attorneys Discuss Strategies for Bringing, Defending FLSA Collective Action Lawsuits, Daily Lab. Rep. (BNA), Aug. 13, 2002.

⁸ 29 U.S.C. § 255(a). Under the continuing violation theory, employees also can recover for violations that occur after the filing of the lawsuit.

⁹ See *Hoffman v. Sbarro*, 982 F. Supp. 249, 260 (S.D.N.Y. 1997).

¹⁰ *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-53 (1974).

D. Standards for Certification and Notice

Plaintiffs seeking to bring a class action under Rule 23 must meet all of the four requirements of Rules 23(a): numerosity, commonality, typicality and adequacy of representation. In addition to satisfying these requirements, to be certified as a class action the case must meet one of three categories listed in Rule 23(b).¹¹

Instead of having to meet the Rule 23 requirements discussed above, plaintiffs seeking to bring a collective action under the FLSA must prove that they are “similarly situated” to other potential class members. Most courts have adopted a “two-stage” procedure for certifying FLSA collective actions. Courts following this procedure first make a preliminary determination whether the employees are sufficiently similarly situated for purposes of providing notice to putative class members so that they may “opt-in.” At this stage, called the conditional certification stage, courts have generally required plaintiffs to make some factual showing that they and the other putative collective action members “were victims of a common policy or plan that violated the law” and that there is nexus between their situation and that of the other putative class members.¹²

In many jurisdictions, particularly in the Southern and Eastern Districts of New York, courts have readily granted conditional certification based on a minimal showing.¹³ Even under this fairly lenient standard, however, courts have denied conditional certification in cases that would require an individualized, fact-intensive inquiry because of such things as differences in the putative class members’ job responsibilities, departments, and day-to-day duties.¹⁴ In addition, at least one court has required that, the plaintiff show “commonality between the basis for his claims and that of the potential claims of the proposed class, “beyond the mere facts of job duties and pay provisions.”¹⁵

If conditional certification is granted, notice is sent to all putative class members and discovery proceeds. At the close of discovery (or an earlier time if defendant chooses), the defendant may move to “decertify” the conditionally certified class. At this second stage of the two-step process, the court applies a more “stringent standard” of proof in determining the appropriateness of certification.¹⁶ The main factors a court considers at this stage are: (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant that appear to be individual to each plaintiff; and (3) fairness and procedural considerations.¹⁷

The peril for employers in FLSA collective actions is that even if the underlying claim is without merit, if the case is conditionally certified, the court will authorize the plaintiff to send a notice to all putative class members oftentimes early in the litigation. As discussed further below, the notice will contain a description of the claims in the case, and the potential class members to whom it is sent may include all nonexempt employees, particularly in cases where all employees are subject to the same payroll policy (e.g., automatic 30-minute deduction for meal periods)¹⁸ Although employers may be successful in decertifying a collective action, this motion practice occurs late in the proceedings after the employer has expended considerable time and money on discovery, motions and hearings — and after the employer’s workplace has been disrupted and employees distracted.¹⁹ However, employers with demonstrable variations in the pay practices applicable to putative class members that are germane to the litigation should strongly consider litigating through the decertification stage as the likelihood of successfully decertifying a case is significantly greater than successfully defeating a motion for conditional certification.

11 Class actions may be brought under Rule 23(b)(1), (2), or (3). Rule 23(b)(1) is used where the funds available may be insufficient to satisfy all claims, and is rarely used in employment class actions. Certification under Rule 23(b)(2) is appropriate only when the claims are for equitable relief, such as injunctions to require employers to change policies. Backpay, which is considered equitable relief also is available under 23(b)(2). Rule 23(b)(3) actions allow for both injunctive relief and compensatory and punitive damages.

12 *Blaney*, 2011 U.S. Dist. LEXIS 105302, at *19 (plaintiffs must provide sufficient evidence that they were “victims of a common policy or plan that violated the law.”); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 467 (S.D.N.Y. 2008).

13 In the Eastern District of New York, for example, conditional certification has been granted in approximately 97% of the putative FLSA collective actions filed.

14 See, e.g., *Davis v. Lenox Hill Hosp.*, 2004 U.S. Dist. LEXIS 17283 (S.D.N.Y. Sept. 1, 2004) (holding that RNs in a special elite corps program for RNs who were interested were not similarly situated to other RNs, LPNs, and nurses aides who were not in the program); *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265, 1274-75 (M.D. Ala. 2004) (denying conditional certification in the first stage after considering evidence that there were substantial differences between individual employees’ daily tasks and responsibilities).

15 *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1314 (N.D. Ala. 2002).

16 *Zivali v. AT&T Mobility, LLC*, 784 F. Supp. 2d 456, 460 (S.D.N.Y. 2011); *Reyes v. Tex. EZPawn, L.P.*, 2007 U.S. Dist. LEXIS 1461 (S.D. Tex. Jan. 8, 2007).

17 *Id.*

18 See, e.g., *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 2009 U.S. Dist. LEXIS 40571 (W.D. Pa. May 14, 2009).

19 In fact, *Camesi* was decertified, but that only occurred more than two and a half years after notice was sent to all potential class members. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 2011 U.S. Dist. LEXIS 146067 (W.D. Pa. Dec. 20, 2011).

E. Contents of the Notice

Once a court certifies a class under Rule 23(b)(3), it must provide notice of class certification to putative class members. Although there are no mandatory notice requirements in Rule 23(b)(1) and (b)(2) class actions, the court may order notice “if the absence of such notice would violate Constitutional due process requirements.”²⁰ At a minimum, the notice must state concisely, clearly, and in plain, easy to understand language: (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) that a class member may enter an appearance through counsel; (5) that the court will exclude from the class any member who wishes to opt-out, stating when and how members may do so; and (6) the binding effect of a class judgment on class members.²¹ If any certified Rule 23 class action is being settled or voluntarily dismissed, notice also must be sent to absent class members who will be bound by the proposed settlement or dismissal.²²

Notice of conditional certification in FLSA collective actions, which must be approved by the court, generally includes the following: (1) a description of the action; (2) a statement that the employer denies the allegations; (3) a description of the individuals eligible to receive the notice; (4) information about the procedure for opting in to the litigation; (5) the effect of joining or failing to join the litigation; (6) the statute of limitations for the types of claims asserted; (7) a statement that the employer cannot retaliate against employees for exercising their rights under the FLSA; and (8) the identity of the plaintiff’s counsel.²³

Of course, an employer always will be concerned about any language in the notice that suggests that it has violated the law and that employees have been underpaid because of the potential that such implications may have on employees, causing them to search for additional claims that may be asserted. Not surprisingly then, the language in the notice describing the claims in the case is often hotly disputed by the parties and must be resolved by the court. Because of these concerns, the granting of conditional certification may drive employers to seek settlement of the litigation at an early stage.

F. Availability of an Interlocutory Appeal

If a federal district court grants or denies a request to certify a class under Rule 23, federal appellate courts may permit an appeal if a petition for permission to appeal is filed within 10 days after the order granting or denying class certification is entered.²⁴ An appeal does not automatically stay proceedings in the district court unless the district court or the federal appellate court orders a stay of all proceedings.²⁵ In contrast to Rule 23, under the FLSA employers have no direct avenue to appeal certification decisions.²⁶ Although employers may petition for interlocutory review under U.S. Code title 28 section 1292(b), such motions are rarely granted.²⁷

G. Hybrid Class and Collective Actions

To obtain the advantages of both class and collective actions — potential early notice, an opt-out class, a longer statute of limitations — plaintiff class action lawyers often bring “hybrid” class/collective actions asserting claims under both the FLSA and state wage laws. *Ruggles v. Wellpoint, Inc.*,²⁸ is an example of such a hybrid case against a healthcare provider. To avoid this “double whammy,” employers in hybrid class/collective actions often seek to dismiss the state wage law claims, as Wellpoint did, albeit unsuccessfully.²⁹ Some employers have, however, been successful in arguing that the opt-out procedures in class actions under Rule 23 are inherently incompatible with the opt-in procedures of collective actions under the FLSA, and therefore, the Rule 23 state law claims should be stricken or dismissed.³⁰ The trend in most jurisdictions is to allow “hybrid” class/collective actions to proceed.

20 Alba Conte & Herbert B. Newberg, *NEWBERG ON CLASS ACTIONS* § 8.2 at 163 (4th ed. 2002).

21 FED. R. CIV. P. 23(c)(2)(B).

22 FED. R. CIV. P. 23(e)(1)(B).

23 *Whalen v. United States*, 85 Fed. Cl. 380 (Fed. Cl. 2009); *Ruggles v. Wellpoint, Inc.*, 591 F. Supp. 2d 150 (N.D.N.Y.); *Lynch v. United States Auto. Ass’n*, 491 F. Supp. 2d 357 (S.D.N.Y. 2007); *De Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660 (E.D. Pa. 2001).

24 FED. R. CIV. P. 23(f).

25 *Id.*

26 *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 549 (6th Cir. 2006); *Baldrige v. SBC Commc’ns, Inc.*, 404 F.3d 930, 933 (5th Cir. 2005).

27 *See, e.g. Pereira v. Foot Locker, Inc.*, 2010 U.S. Dist. LEXIS 5845 (E.D. Pa. Jan. 25, 2010).

28 253 F.R.D. 61 (N.D. N.Y. 2008).

29 *Id.* at 65-66, 68.

30 *See, e.g. Woodard v. Fedex Freight East, Inc.*, 250 F.R.D. 178 (M.D. Pa. 2008) (dismissing state law class allegations and requiring individual state law claims to be asserted by opt-ins on a pendent basis because the objectives of the FLSA’s collective action procedure would be defeated “if plaintiffs can obtain federal jurisdiction with an FLSA claim and then sidestep [FLSA] § 216(b)’s opt-in requirement by asserting an opt-out class claim under a parallel state law that lacks an opt-in requirement.”).

H. Settlement of Class and Collective Actions

Settlement of a collective action under the FLSA is typically approved by the court and only binds those employees who have affirmatively opted to participate in the lawsuit. In contrast, settlement of a Rule 23 class action can bind all class members who have not affirmatively “opted out.” Federal Rule of Civil Procedure 23(e) provides that a “class action shall not be compromised without the approval of the court, and notice of the proposed ... compromise shall be given to all members of the class as the court directs.” The court’s approval must be based on a finding that the proposed settlement is fundamentally “fair, adequate and reasonable.”³¹

In assessing a settlement proposal, the court balances several factors: (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the litigation; (6) the experience and views of counsel; and (7) the reaction of class members to the proposed settlement.³² The Sixth Circuit Court of Appeals reviews the “public interest” as well.³³ The Third Circuit Court of Appeals, in addition to these factors, also reviews the ability of defendant to withstand a greater judgment and the difference between the settlement and plaintiffs’ maximum recovery.³⁴ The district court must demonstrate on the record that it has explored these factors comprehensively and that the settlement is not the product of collusion between the parties.³⁵ The district court’s findings on the fairness of the settlement are reviewed under an abuse of discretion standard.³⁶

I. The Class Action Fairness Act

The Class Action Fairness Act of 2005 (CAFA) contains a series of provisions that seek to curb plaintiffs’ attorneys’ fees, provide both plaintiffs and defendants with broader access to the federal courts, and offer greater protection to the individual class members.³⁷ CAFA gives federal district courts jurisdiction over state law class actions if more than \$5 million is at stake, any member of the class resides in a state different from any defendant, and there are at least 100 class members.³⁸ District courts have discretion to decline jurisdiction over class actions in which more than one-third, but less than two-thirds, of the potential class members and the primary defendants are citizens of the state where the suit was originally filed.³⁹ Additionally, federal district courts are required to decline jurisdiction where more than two-thirds of the class members and at least one major defendant is a citizen of the state where the suit was originally filed.⁴⁰ In addition to the jurisdictional provisions, CAFA also alters the required notice of settlement by requiring participating defendants to serve the proposed settlement on the appropriate state official in each state where a class member resides.⁴¹

Although CAFA has played a significant role in determining case strategies and the venues chosen for employment class actions, it has had little impact on the pace and volume of workplace class action lawsuits being filed.⁴² It appears that many plaintiffs’ attorneys are simply becoming more comfortable litigating class actions in federal court, and others have pursued strategies to avoid CAFA’s reach and to keep their cases in state court by seeking less than \$5 million in relief, filing multiple small-scale claims with fewer than 100 plaintiffs, and limiting the scope of claims to residents of one state.⁴³

31 *Id.*

32 *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003).

33 *UAW v. GMC*, 497 F.3d 615, 631 (6th Cir. 2007).

34 *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).

35 *Staton*, 327 F.3d at 959-60.

36 *Id.* at 953.

37 28 U.S.C.S. §§ 1711, *et seq.*

38 *Id.* § 1332(d).

39 *Id.* § 1332(d)(3).

40 *Id.* § 1332(d)(4).

41 28 U.S.C.S. § 1715(b).

42 13 Daily Lab. Rep. (BNA), Jan. 22, 2008, at A-6.

43 *Id.*

III. TYPES OF CLASS ACTIONS IMPACTING HEALTHCARE EMPLOYERS

Although a variety of claims have been asserted in wage and hour class actions against healthcare employers, the following three claims have predominated: (1) alleged failure to pay for work during unpaid meal periods or pre and/or post shift; (2) misclassification of nonexempt employees as exempt; and (3) failure to calculate overtime properly. First, and perhaps the “hottest” current wage and hour theory, involves “off-the-clock” claims. Specifically, a wave of class actions have been brought challenging a common practice in the healthcare industry of automatically deducting 30 minutes from an employee’s pay each work day for a meal period and/or for work performed outside of recorded work hours. Second are lawsuits by employees who claim they were improperly classified as exempt and, therefore, improperly deprived of overtime. Unless an employee fits within certain narrow exceptions, all employees are entitled to overtime payments for all hours worked in excess of 40 in a given week under federal law. Some state laws may require employers to pay overtime based on hours worked each day. Employees with job duties that traditionally are considered exempt from overtime, such as registered nurses and pharmacists, may not automatically be so classified, depending on their job responsibilities or how they are compensated. The third type of claim plaintiffs’ lawyers are asserting involves the employer’s failure to include shift differentials, premium rates and bonuses in determining the regular rate of pay for purposes of calculating overtime. These three types of wage and hour class actions are described below, as well as some defenses available to employers for the same. Finally, practical recommendations are provided for avoiding and limiting liability under these and other wage and hour claims.

A. Off-the-Clock Claims

Currently, one of the most frequent wage-related claims asserted by nonexempt employees involve allegations of “off-the-clock” work (*i.e.*, work performed but not reported as or considered compensable working time). Many employers assume that it is the employee’s burden to accurately record all working time and that an employee is not entitled to be paid for unreported work. Courts, however, often disagree with this assumption. Not surprisingly, employers consider off-the-clock work claims to be fundamentally unfair when the employee does not advise the employer of hours worked “off-the-clock.”

Off-the-clock claims in wage and hour class and collective action litigation generally relate to pre- and post-shift activities (*i.e.*, the things employees must do each day to get ready to work and get ready to leave, such as putting on and removing safety equipment and the like); forced off-the-clock work to avoid paying overtime; and work performed during unpaid meal and break periods. Off-the-clock work can occur inadvertently, negligently or — most seriously — intentionally. Most often, however, it occurs because employers and employees do not understand what constitutes compensable working time under the FLSA. Accordingly, one of the best ways to reduce potential liability for off-the-clock work is a thorough understanding of that basic concept.

Although the FLSA does not define “hours worked,” it does define the term employ to mean “to suffer or permit to work.”⁴⁴ Interpreting this requirement, the U.S. Supreme Court has explained that employees must be paid for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.”⁴⁵ The Supreme Court later opined in *Anderson v. Mt. Clemens Pottery Co.*, that the workweek includes “all the time during which an employee is the employer’s premises, on duty or at a prescribed work place.”⁴⁶ Courts also have defined work to include stand-by or waiting time.⁴⁷

In the Portal-to-Portal Act of 1947, Congress limited the Supreme Court’s broad interpretation of working time, in part to reduce the extraordinary number of claims seeking compensation for time spent walking to and from work areas and in preparatory activities. Specifically, section 4 of the Portal-to-Portal Act overruled *Anderson*, in part, by expressly providing that noncompensable activities include “walking, riding, or traveling to and from the actual place of performance of the principal activity” as well as “activities which are preliminary to or postliminary to... principal activity or activities,” and “which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday of which he ceases, such principal activity or activities.”⁴⁸

Under this legislation, principal work activities are compensable, but “preliminary or postliminary” activities are not, unless they are closely related and indispensable to an employee’s principal duties. For example, time spent by an employee before the start of the workday

44 29 U.S.C.A. § 203(g); *see also* 29 C.F.R. § 785.6.

45 *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *see also* 29 C.F.R. § 785.7.

46 328 U.S. 680, 690-91 (1946).

47 *Armour & Company v. Wantock*, 323 U.S. 126, 133 (1944).

48 29 U.S.C. § 254.

putting on required safety equipment may be compensable working time. In contrast, walking from an employer's front door to a time clock or traveling to work at the beginning of the day typically is not.

DOL regulations set forth the guiding principles employers should use when determining compensable hours worked.⁴⁹ These regulations state that it is management's duty "to exercise its control and see that the work is not performed if the employer does not want it to be performed."⁵⁰ The DOL has stated that management simply "cannot sit back and accept the benefits" of work that is performed without compensating employees for their work.⁵¹ Consistent with the DOL's position, in *Chao v. Gotham Registry, Inc.*, the Second Circuit Court of Appeals found that a nurse staffing agency violated the FLSA in its enforcement of a rule requiring prior approval of overtime and informing nurses that, absent such pre-approval, they would be paid straight wages for the time worked.⁵² According to the Second Circuit, the nurse staffing agency did not "adopt all possible measures" to prevent the overtime such as disciplining nurses for disregarding the pre-approval overtime rule.⁵³

In assessing employer liability for off-the-clock work, a key inquiry is whether the employer knew or had any reason to believe the employee was performing work.⁵⁴ Generally, actual or constructive knowledge of off-the-clock work will be sufficient to show the time devoted to that work is compensable. Typically, plaintiffs prove employer knowledge by showing: (1) a supervisor or manager was in a position to observe the work; (2) the work performed by the employee was too much to be completed within scheduled hours; and (3) a pattern of extra work performed and the employer's acquiescence in the extra work. Applying these principals, in *Barvinchak v. Indiana Regional Medical Center*,⁵⁵ a Pennsylvania district court granted summary judgment to a healthcare employer upon a finding that the employee asserting the overtime claim knew she needed pre-approval for overtime and could not demonstrate the employer knew she was working off-the-clock. According to the court, the fact that the employee complained to her supervisor that she could not get her work assignments completed during her scheduled hours did not create a logical inference that the employer should have known she was working overtime.⁵⁶ Furthermore, as the employee was performing much of this work at home, it became even more difficult to establish that the medical center had constructive knowledge of the overtime work.⁵⁷

1. Meal Breaks and Automatic Meal Period Deductions

As mentioned in Section I, many of the recent wage and hour class and collective actions against hospitals have asserted claims for work allegedly performed during meal breaks automatically deducted from pay. To understand this phenomenon, it is helpful to understand the laws regarding compensation for meal breaks. In contrast to many state wage laws,⁵⁸ the FLSA does not require employers to provide meal or rest breaks to employees. Under the FLSA, however, if an employer provides non-exempt employees meal breaks of less than 30 minutes, the employees generally must be paid for that time. But if an employer provides a meal break of 30 minutes or more, that time may be unpaid provided that the employee is "completely relieved from duty."⁵⁹ The federal regulations state that an employee is not completely relieved from duty "if he is required to perform any duties, whether active or inactive, while eating."⁶⁰

Courts in most federal circuits no longer apply this "completely relieved from duty" language literally; instead, they apply the more fact intensive "predominant benefit standard," assessing, on a case-by-case basis "whether, on balance, employees use mealtime for their

⁴⁹ See generally 29 C.F.R. §§ 785.1-785.45.

⁵⁰ 29 C.F.R. § 785.13.

⁵¹ *Id.*

⁵² 514 F.3d 280, 287-88 (2d Cir. 2008).

⁵³ *Id.*

⁵⁴ 29 C.F.R. § 785.12.

⁵⁵ 2008 U.S. Dist. LEXIS 33385 (W.D. Pa. Apr. 23, 2008).

⁵⁶ *Id.* at *8.

⁵⁷ *Id.* at **9-10.

⁵⁸ Currently, the following states require meal and rest breaks for adult employees: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, West Virginia, and Wisconsin.

⁵⁹ 29 C.R.F. § 785.19(a).

⁶⁰ *Id.*

own, or for their employer's benefit."⁶¹ Under this test, the question is not whether employees' meals are interrupted, but the extent of the interruptions and whether the interruptions cause them to spend their meal periods primarily for their employers' benefit.⁶² For example, in *Beasley v. Hillcrest Medical Center*, the Tenth Circuit Court of Appeals concluded that evidence establishing that nurses and technicians were restricted as to where they could take their meals, and that they responded to calls, watched monitors, or worked on computers during their lunch could support a finding that they spent those meal periods predominately for the benefit of the hospital.⁶³

Kohleim v. Glenn County often is cited as one of the only circuit court decisions still applying the strict "completely relieved from duty standard,"⁶⁴ but even in that case, the Eleventh Circuit stated that "what matters in meal period cases is whether the employees are subject to real limitations on their personal freedom which inure to the benefit of their employer."⁶⁵

There is a difference of opinion among the courts as to who bears the burden of proof regarding the compensability of a 30-minute meal period when employees claim they performed work during meal periods. The Sixth Circuit has held that the employee bears this burden.⁶⁶ In one putative class and collective action against a large hospital system,⁶⁷ involving an automatic meal period deduction policy that allowed employees to override the deduction by making a manual note on a written log, the court granted summary judgment to the employer on the employees' claims they were not paid for lunch periods they missed completely because of work and, in turn, forgot to note this in a log book. In support of its decision, the court noted that "the Sixth Circuit has stated that 'an employee cannot undermine his employer's efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid.'"⁶⁸

The plaintiffs in that case also claimed that their meal periods were frequently interrupted by pages and other work requirements, and that they were never told they could record such periods of interruption as work time. As to this claim, the court denied the employer's motion for summary judgment finding that there was a genuine issue of material fact as to whether the employees were instructed or allowed to report interrupted lunches or only lunch periods that were completely missed. Significantly, however, the district court rejected the plaintiffs' argument that interrupted meal breaks are presumptively compensable as rest breaks and instead applied the predominant benefit test to determine whether, under the facts and circumstances of the case, the interruptions rendered the breaks compensable.⁶⁹ In applying the "predominant benefit" test, the court stated that the question was not whether the defendant "received a benefit from having the therapists on call during lunch, but whether plaintiff[s] [are] engaged in the performance of any substantial duties during [their] lunch break."⁷⁰ The court held that "as long as the employee can pursue his or her meal time adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA."⁷¹ Given the conflicting testimony in the case, the court found that there was a question of fact precluding summary judgment as to whether plaintiffs' meal breaks met this standard.⁷² In contrast to courts in the Sixth Circuit, courts in most other circuits have held that the employer has the burden of proving that employees' meal periods were not compensable.⁷³

61 See, e.g., *Beasley v. Hillcrest Med. Ctr.*, 78 Fed. Appx. 67, 70-71 (10th Cir. 2003); *Roy v. County of Lexington*, 141 F.3d 533, 545 (4th Cir. 1998); *Bernard v. IBP, Inc.*, 154 F.3d 259 (5th Cir. 1998); *Reich v. Southern New Engl. Telecommc'ns Corp.*, 121 F.3d 58, 64 (2d Cir. 1997) (*Myracle v. General Elec. Co.*, 1994 U.S. App. LEXIS 23307, at **10-13 (6th Cir. 1997); *Alexander v. City of Chicago*, 994 F.2d 333, 337 (7th Cir. 1993); *Henson v. Pulaski County Sheriff Dep't*, 6 F.3d 531, 534 (8th Cir. 1993); *Haviland v. Catholic Health Initiatives, - Iowa, Corp.*, 2010 U.S. Dist. LEXIS 79782, at **39 - 57 (S.D. Iowa Aug. 6, 2010) (discussing cases); *Chavez v. IBP, Inc.* 2005 U.S. Dist. LEXIS 29714, at **41-43 (E.D. Wash. May 16, 2005); *O'Hara v. Menino*, 253 F. Supp. 2d 147, 157 (D. Mass. 2003).

62 *Beasley*, 78 Fed. Appx. at 71.

63 *Id.* at 69.

64 See *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1305, n.4 (N.D. Ala. 2008) ("The Eleventh Circuit now appears to be an anomaly among the circuits in its application of the completely relieved from duty standard to Section 785.19 claims.").

65 *Id.* at 1477 & n.19.

66 *Myracle v. General Elec. Co.*, 1994 U.S. App. LEXIS 23307 (6th Cir. Aug. 23, 1994).

67 *Berger v. Cleveland Clinic Found.*, 2007 U.S. Dist. LEXIS 76593 (N.D. Ohio Sept. 29, 2007).

68 *Id.* at **37-38 (citing *Wood v. Mid-America Mgmt. Corp.*, 192 F. Appx. 378, 381 (6th Cir. 2006)); accord *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 475 F. Supp. 630, 634 (D. Or. 1979), *aff'd*, 646 F.2d 413, 414-15 (9th Cir. 1981) (stopping plaintiff from recovery where he "prevented the employer from complying with the act by failing to report his overtime hours accurately").

69 *Berger*, 2007 U.S. Dist. LEXIS 76593, at **49-51.

70 *Id.* at *52.

71 *Id.* (quoting *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984)).

72 *Id.* at *55.

73 See, e.g., *Bernard v. IBP, Inc.*, 154 F.3d 259 (5th Cir. 1998); *Roy v. County of Lexington, S.C.*, 141 F.3d 533, 544 (4th Cir. 1998); *Reich v. Southern New England Telecommc'ns Corp.*, 121 F.3d 58, 63-65 (2d Cir. 1997); *Leahy v. City of Chicago*, 96 F.3d 228, 230-31 n.2 (7th Cir. 1996); *Henson v. Pulaski County Sheriff Dep't*, 6 F.3d 531, 534 (8th Cir. 1994); *Lamon v. City of Shawnee, Kans.*, 972 F.2d 1145, 1155 (10th Cir. 1992).

Given this framework, it is not surprising that, as discussed in Section I, there have been numerous, recent FLSA collective actions by nurses and other healthcare employees challenging their employers' practice of applying automatic 30-minute meal period deductions. Many of these cases were conditionally certified as collective actions under the FLSA.⁷⁴ More recently, however, several automatic unpaid meal deduction cases against hospitals have been dismissed, denied certification, or decertified on a number of grounds.⁷⁵ For example, in *Nakahata v. New York-Presbyterian Healthcare Sys.*,⁷⁶ Judge Crotty of the Southern District of New York dismissed four identical automatic meal break deduction cases asserting claims under the FLSA, New York labor law, and the Racketeer Influenced and Corrupt Organizations Act (RICO). As to the plaintiffs' wage claims under both the FLSA and state law, the court found the complaints were deficient because they failed to provide any factual foundation for the conclusory allegation that plaintiffs were not paid for all hours worked. More specifically, the court stated:

There are no factual allegations about when the alleged unpaid wages were earned (*i.e.*, which lunches and breaks were worked through without proper compensation), or the number of hours allegedly worked without compensation—the heart of the claim. Nor do they allege any specific facts about the plaintiffs' employment, such as their dates of employment, pay, or positions.⁷⁷

Moreover, the court found the complaints deficient:

due to the failure to specify which entity, among the many named defendants, employed the respective plaintiffs. Certainly if one entity did not pay an employee for overtime, that is an insufficient basis for naming every other health care facility affiliated with the employer.⁷⁸

As a final nail in the coffin on the plaintiffs' class action claims, the court stated that “even if the claims of the plaintiffs have merit, which they do not, there is no basis for a collective or class action with regard to every other so-called hourly employee in the system from custodian and porter up to surgical specialist.”⁷⁹

Similarly, in *Cavallaro v. UMass Memorial Health Care, Inc.*,⁸⁰ the court granted judgment on the pleadings to a large Boston healthcare system in an automatic meal period deduction case asserting class claims under the FLSA, Massachusetts law and Employee Retirement Income Security Act (ERISA).⁸¹ The plaintiffs, purporting to represent a class of 13,000 nonexempt current and former employees in numerous job titles ranging from custodians to professional staff nurses, sued various related hospitals and healthcare systems and two executive officers asserting they were all the “employer (single, joint or otherwise) of the plaintiffs and Class Members and/or alter egos of each other.” Noting that the complaints failed to make any plausible allegations that any of the defendants was the plaintiffs' employer under the FLSA, under either a joint or single employer theory, the court found the conclusory legal assertions regarding the employment relationship failed to satisfy the pleading standards the Supreme Court articulated in *Ashcroft v. Iqbal*⁸² and *Bell Atlantic v. Twombly*.⁸³

Moreover, in accordance with a number of other recent decisions dismissing similar complaints filed by the same plaintiffs' counsel, the Massachusetts District Court concluded that the plaintiffs' boilerplate, conclusory allegations about their claims and the challenged policies also failed to satisfy the requirement that “sufficient facts be alleged to make the claim[s] plausible.”⁸⁴

74 See, e.g., *Hintergerger v. Catholic Health Sys.*, 2009 U.S. Dist. LEXIS 97944 (W.D.N.Y. Oct. 20, 2009); *Gordon v. Kaleida Health*, 2009 U.S. Dist. LEXIS 95729 (W.D.N.Y. Oct. 13, 2009); *Taylor v. Pittsburgh Mercy Health Sys.*, 2009 U.S. Dist. LEXIS 57328 (W.D. Pa. July 7, 2009); *Kuznyetsov v. West Penn Allegheny Health Sys.*, 2009 U.S. Dist. LEXIS 47163 (W.D. Pa. June 1, 2009); *Camesi v. University of Pittsburgh Med. Ctr.*, 2009 U.S. Dist. LEXIS 40571 (W.D. Pa. May 14, 2009); *Fengler v. Crouse Health Found., Inc.*, 595 F. Supp. 2d 189 (N.D.N.Y. 2009); *Colozzi v. St. Joseph Hosp. Health Ctr.*, 595 F. Supp. 2d 200 (N.D.N.Y. 2009); *Hamelin Faxton-St. Luke's Healthcare*, 2009 U.S. Dist. LEXIS 9793 (N.D.N.Y. Jan. 26, 2009); *Ohsann v. Stabler Hosp.*, 2008 U.S. Dist. LEXIS 47074 (N.D. Ala. June 17, 2008); *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516 (D. Md. 2000).

75 *Camesi*, 2011 U.S. Dist. LEXIS 146067; *Kuznyetsov*, 2011 U.S. Dist. LEXIS 146056; *Blaney*, 2011 U.S. Dist. LEXIS 105302; *Cavallaro v. UMass Memorial Health Care, Inc. UMass*, 2011 U.S. Dist. LEXIS 61003 (D. Mass. June 8, 2011); *White, v. Baptist Mem. Health Care Corp.*, 2011 U.S. Dist. LEXIS 52928; (W.D. Tenn. May 17, 2011); *Cason v. Vibra Healthcare*, 2011 U.S. Dist. LEXIS 47160 (E.D. Mich. May 3, 2011); *Manning v. Boston Med. Ctr. Corp.*, 2011 U.S. Dist. LEXIS 19197 (D. Mass. Feb. 28, 2011); *Nakahata v. New York-Presbyterian Healthcare Sys.*, 2011 U.S. Dist. LEXIS 8585 (S.D.N.Y. Jan. 28, 2011); *Frye v. Baptist Mem. Hosp., Inc.*, 2010 U.S. Dist. LEXIS 101996 (W.D. Tenn. Sept. 27, 2010).

76 2011 U.S. Dist. LEXIS 8585 (S.D.N.Y. Jan. 28, 2011).

77 *Id.* at *21.

78 *Id.* at *22.

79 *Id.*

80 2011 U.S. Dist. LEXIS 61003 (COURT CITATION D. Mass. June 8, 2011).

81 Littler represented the defendants in the caselitigation.

82 129 S.Ct. 1937 (2009).

83 550 U.S. 544 (2007).

84 *Cavallaro*, 2011 U.S. Dist. LEXIS 61003, at *22. (quoting *Nakahata v. New York-Presbyterian Healthcare Sys.*, 2011 U.S. Dist. LEXIS 8585 (S.D.N.Y. Jan. 28, 2011)).

The court denied plaintiffs the opportunity to amend their complaint, pointing out that they had already done so twice and that the second amended complaint was filed after the defendants filed their motion for judgment on the pleadings, which alerted plaintiffs to the defects in their complaint. “The clear inference,” the court stated, “is that plaintiffs have made a deliberate choice not to cure the problem.”⁸⁵

The court also dismissed plaintiffs’ ERISA claims because those claims were predicated on the FLSA claims, which were dismissed. For more on ERISA claims in these types of cases, see the discussion in Section III D below.

*Frye v. Baptist Memorial Hospital*⁸⁶ is also instructive. Baptist Memorial Hospital was successful in decertifying a class that included employees from over 200 different departments, spread across three separate locations, despite plaintiffs’ argument that they were subject to a single, uniform policy of automatic deduction of meal periods they either did not receive or that were interrupted. The court agreed that plaintiffs were subject to a uniform meal period policy but explained that class treatment was not appropriate because individualized factual inquiries would be necessary to determine whether each plaintiff was relieved from his or her work duties and not paid for any time spent working. Thus, the district court dismissed the collective action allegations.

The same court recently granted a motion to decertify in *White v. Baptist Memorial Health Care Corporation*.⁸⁷ The ruling is significant because the plaintiffs in that case sought to represent employees who worked at only a single facility. Nonetheless, the court decertified the class explaining that “differences in the Opt-in Plaintiffs’ job duties are highly relevant to their claims that they worked during meal breaks without compensation because their job duties dictated whether and why they experienced missed or interrupted meal breaks.”⁸⁸

Nevertheless, despite these recent successes, the volume of automatic meal period deduction cases that have been filed asserting class-wide claims, and the high cost of defending these types of cases, illustrate the potential risks of payroll systems that make automatic deductions for meal periods without other safeguards to prevent unpaid work time. A policy prohibiting unauthorized overtime or working through meal periods may not be sufficient to reduce the risk of such claims. Employers should also vigorously enforce their policies, including appropriate disciplinary action for hourly and management employees where appropriate, to control unauthorized overtime and should consider implementing systems with manual over-rides or time attestation requirements for time worked during meal periods. Littler has worked directly with KRONOS and other payroll software companies to develop such programs customized for its clients. The last section of this Report provides additional practical guidance to minimize the risk of liability for missed and interrupted lunches and other off-the-clock claims.

2. Travel Time

Compensation for travel time is another issue litigated in FLSA collective actions. Travel time to and from work generally is noncompensable under the FLSA.⁸⁹ In contrast, work completed during a commute that is integral and indispensable to a principal activity of employment is compensable. Travel other than “home to work” or “work to home” creates potential liability problems under the FLSA. Specifically, this issue recently has been litigated in cases involving home healthcare nurses traveling between patient home visits. For example, in *Thomas v. Total Health Home Care Corporation*,⁹⁰ home health workers brought a class action against a Pennsylvania home healthcare company for alleged failure to pay for travel time between the homes of their clients and for failing to compensate them for overtime where the travel time would have resulted in more than 40 hours worked in the workweek. Ultimately, the employer agreed to settle the case for \$2.2 million.

A number of factors are used to determine whether travel time is indeed compensable, including the employees’ activities during travel, the purpose of the travel, and the time of the day during which the travel takes place. The FLSA excludes travel to or from the actual place of “performance of the principal activity or activities which the employees are employed to perform.”⁹¹ The Supreme Court, in *IBP, Inc. v.*

85 Id.

86 *Frye v. Baptist Mem. Hosp., Inc.*, 2010 U.S. Dist. LEXIS 101996 (W.D. Tenn. Sept. 27, 2010).

87 *White v. Baptist Mem. Health Care Corp.*, 2011 U.S. Dist. LEXIS 52928 (W.D. Tenn. May 17, 2011).

88 *White*, 2011 U.S. Dist. LEXIS 52928, at *21. In both *Frye* and *White*, the hospital was successfully represented by Paul Prather who recently joined Littler as a shareholder in its new Memphis, Tennessee office.

89 29 U.S.C. § 254(a)(1).

90 Philadelphia County, Pennsylvania Court of Common Pleas, Case No. 002493 (May Term 2006).

91 29 U.S.C. § 254(a).

Alvarez, interpreted this to mean that “any activity that is ‘integral and indispensable’ to a principal activity is itself a principal activity.”⁹² Thus, employees must be compensated for any work performed during a commute that is “integral and indispensable” to a principal activity of their employment.”⁹³

3. Rounding

Another frequent off-the-clock issue involves “rounding” hours worked. The FLSA allows employers to use rounding for periods of time that cannot as a “practical administrative manner be precisely recorded.”⁹⁴ In addition, the arrangement must average out so each employee is “fully compensated for all the time actually worked.”⁹⁵ In other words, always rounding down but never rounding up violates the FLSA. Thus, for example, if an employer rounds down overtime of less than 15 minutes and does not count the time as work time, the employer should also round up if an employee is less than 15 minutes late to work and also consider the late time as paid work time.

B. Misclassification Issues

Congress enacted the FLSA in 1938 to “eliminate ‘labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers’ and to ensure that employees are fairly compensated.”⁹⁶ The FLSA provides that covered employees shall receive compensation at one-and-one half times the regular rate for every hour over 40 worked during a given week.⁹⁷ There are exceptions to the FLSA’s overtime requirement, however, where an individual is “employed in a bona fide executive, administrative, or professional capacity... as such terms are defined and delimited from time to time by regulations of the Secretary.”⁹⁸ Also, outside sales employees and computer professionals are exempt.⁹⁹ Significantly, exemptions to the FLSA are “narrowly construed against the employers seeking to assert them.”¹⁰⁰ While some employees working in the healthcare industry may qualify for one or more of these exemptions, misclassification of nonexempt employees as exempt is a common basis for collective actions asserting claims for unpaid overtime.

For example, in *Louie v. Kaiser Foundation Health Plan, Inc.*,¹⁰¹ IT employees in jobs entitled Product Specialists, Business Application Coordinators, and Site Support Specialists, alleged that the defendant failed to pay them for overtime, on-call time, and missed meal periods in violation of both California law and the FLSA. The plaintiffs claimed they did not meet the requirements for exempt computer system analysts and computer programmers, and should have been paid overtime for working up to 13 hours per work day in connection with an upgrade to the company’s computer system. They claimed that testing was frequently scheduled during meal periods, early in the morning, or late in the evening to minimize interference with hospital staff. In addition, plaintiffs alleged the Site Support Specialists were required to periodically remain on-call for seven consecutive days during which they were required to remain available 24 hours per day and to respond to technical support calls within 30 minutes. Ultimately, the case settled for a substantial amount, including a significant award of attorneys’ fees to plaintiffs’ counsel.¹⁰²

In another recent wage and hour class action filed against a group health plan, member services representatives claimed they were misclassified as exempt administrative employees and denied overtime in violation of the FLSA and state law.¹⁰³ The plaintiffs also asserted that by failing to pay them overtime, their employer was unjustly enriched and also violated the ERISA because their 401K plan was not credited with overtime pay they should have earned. Although the court dismissed the unjust enrichment and ERISA claims, the wage and hour claims remain pending.

92 *IBP v. Alvarez*, 546 U.S. 21, 37 (2005).

93 *Compare Singh v. City of New York*, 524 F.3d 361, 367-371 (2d Cir. 2008) (holding city employers’ requirement that inspectors carry files during commute does not constitute compensable time worked) with *Lenahan v. Sears Roebuck & Co.*, 266 Fed. Appx. 114, 2008 U.S. App. LEXIS 3798 (3d Cir. 2008) (certifying a nationwide class action for failure to pay wages in connection with time spent by company technicians driving their company-owned van from their home to the first job of the day and back home after the last job). In *Lenahan*, the district court approved and the Third Circuit affirmed a \$15 million settlement to be paid to settle all claims nationwide.

94 29 C.F.R. § 785.47.

95 29 C.F.R. § 785.48(b).

96 *Schwind v. EW & Assocs. Inc.*, 357 F. Supp. 2d 691, 696-97 (S.D.N.Y. 2005) (quoting 29 U.S.C. § 202(a)).

97 29 U.S.C. § 207(a)(1).

98 29 U.S.C. § 213(a)(1).

99 29 U.S.C. §§ 213(a)(1), (15), (17).

100 *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 396-97 (1960).

101 2008 U.S. Dist. LEXIS 78314 (S.D. Cal. Oct. 6, 2008).

102 *Id.*

103 *Miranda v. Group Health Plan, Inc.*, 2008 U.S. Dist. LEXIS 41500 (D. Minn. May 20, 2008).

1. Nurses

The Duties Test

A number of recent wage and hour collective actions have focused on the exemption classification of registered nurses. The FLSA regulations expressly provide that “[r]egistered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption.”¹⁰⁴ However, qualification for this, and every other, exemption depends on the duties performed, not on the title held.¹⁰⁵ To meet the learned professional exemption, an employee must perform work that requires advanced knowledge customarily acquired by a prolonged course of specialized intellectual instruction in a field of science or learning.¹⁰⁶ Accordingly, nurses performing duties that do not require use of their specialized scientific and intellectual education will not qualify for the learned professional exemption.

For example, in a recent FLSA collective action, *Ruggles v. WellPoint, Inc.*, utilization review nurses, case management nurses and medical management nurses working for a nationwide healthcare benefits management company claimed they were misclassified as exempt professionals. They claimed that their jobs, which involved “work[ing] in a call center environment, spending the majority of [the] workday on the telephone with providers, hospitals, or members, collecting and inputting data into a computer, following guidelines in performing ‘pre-certifications’ and/or ‘concurrent reviews’ of medical procedures, or coordinating with providers,” were nonexempt.¹⁰⁷ The case was conditionally certified as an FLSA collective action by the court for purposes of sending notices to a potential class of 500 current and former employees nationwide. However, the court subsequently denied certification on the plaintiffs’ state law misclassification claims under Rule 23 of the Federal Rules of Civil Procedure on the grounds that, in determining nurses’ exempt status, individual issues predominated over common issues:

Critical to the applicability of the professional exemption are considerations of what activities a nurse engages in, whether such work requires advanced knowledge in a field of science or learning, what guidelines or tools a nurse employs, how often she consults them, and in what manner she does so.... As noted, the record shows important variation on these issues.¹⁰⁸

In some circumstances, nurses who perform staff supervisory and recruiting functions may satisfy the duties test of the executive or administrative exemptions. For example, in *Goff v. Bayada Nurses, Inc.*,¹⁰⁹ the court found a staff supervisor/on call supervisor for a provider of in-home nursing care to patients met the executive and/or administrative duties test because her primary duties included overseeing caseload management, responsibility for assuring nursing services were provided in accordance with company standards, scheduling nurses, supervising and evaluating field staff performance, helping with interviewing, hiring, salary determinations and terminations, and documenting incidents. She was also responsible for ensuring that employees under her complied with certification, immunization and authorization requirements.

Again, employers should carefully evaluate the job functions employees perform before making decisions about the exemption status of nurses. Even if the nurse satisfies the duties test, however, that is only half of the equation.

104 29 C.F.R. § 541.301(e)(2) (emphasis added). See also *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 838 (6th Cir. 2002) (stating that plaintiff, a registered nurse, did not dispute the fact that her job duties fit within the FLSA’s professional employee exemption); *Fazekas v. The Cleveland Clinic Found. Health Care Ventures, Inc.*, 204 F.3d 673, 679 (6th Cir. 2000) (holding that plaintiffs — registered nurses making home healthcare visits — were bona fide professionals, exempt from the FLSA’s overtime requirements because their duties required advanced knowledge and discretion); *Richardson v. Genesee County Cmty. Mental Health Servs.*, 45 F. Supp. 2d 610, 615 (E.D. Mich. 1999) (holding that registered nurses paid on a salaried basis fell within the professional exemption to the FLSA’s overtime requirements); *Quirk v. Baltimore County*, 895 F. Supp. 773, 784 (D. Md. 1995) (finding that RNs have traditionally fit within the professional employee exemption); *Davis*, 2004 U.S. Dist. LEXIS 17284, at **15-16 (noting that “[t]he parties do not dispute that, as a general matter, RNs meet FLSA’s duties test”); Opinion Letter, Wage and Hour Division, United States Dep’t of Labor, 2005 DOLWH LEXIS 15, at *4 (2005) (stating that registered nurses may qualify for the minimum wage and overtime exception for bona fide professional employees provided that “all pertinent tests (including payment on a salary basis... are met”).

105 99 C.F.R. § 541.2.

106 29 C.F.R. 541.300.

107 *Ruggles v. WellPoint, Inc.*, 591 F. Supp. 2d 150, 154 (N.D.N.Y. 2008).

108 *Ruggles v. Wellpoint, Inc.*, 272 F.R.D. 320, 339-340 (N.D.N.Y. 2011).

109 424 F. Supp. 2d 816 (E.D. Pa. 2006).

The Salary and Fee Basis Tests

Nurses do not fall within the special medical occupation exception to the salary basis requirement for exemption from overtime and therefore, like all other exempt employees, must be compensated on a “salary or fee basis” in order to qualify as an exempt professional.¹¹⁰ An employee is paid on a “salary basis” if “the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”¹¹¹ Payment on a fee basis is defined by federal regulations as the payment of “an agreed sum for a single job regardless of the time required for its completion.”¹¹² In general, a “fee” is paid as compensation for a “unique” job, as opposed to “a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again.”¹¹³ The issue of whether registered nurses are compensated on a “salary or fee basis” has been the subject of a number of lawsuits.

For example, in *Fazekas v. The Cleveland Clinic Foundation Health Care Ventures, Inc.*, a group of registered nurses who performed home healthcare services and were compensated on a “per-visit” basis challenged their classification as exempt professional employees on the grounds that they did not meet the fee basis test.¹¹⁴ During home healthcare visits, the nurses treated patients, devised a health-care protocol, updated the patient and the patient’s family regarding the patient’s condition, and, at times, supervised the home healthcare visits made by licensed practical nurses.¹¹⁵ The defendant required that each nurse make at least 25 visits per week and be on-call at least 15 hours per week.¹¹⁶ The defendant compensated its nurses on a per-visit basis regardless of the number of hours worked, at the rate of \$30 for each home visit during periods when they were not “on-call,” and \$32 per on-call visit.¹¹⁷ Despite the fact that the employer based the so-called “25/15 Plan” on a 40-hour workweek, the nurses contended that they worked between 50 to 80 hours per workweek.¹¹⁸ Otherwise stated, the nurses claimed they were not paid time-and-a-half for hours worked in excess of 40 in a workweek.¹¹⁹

The nurses conceded that their work met the duty requirements of the professional employee exemption because they consistently exercised discretion and judgment that was predominantly intellectual and varied in character.¹²⁰ The nurses, however, contended that the defendant’s per-visit compensation program did not qualify as payment on a “salary or fee basis.”¹²¹ Addressing this argument, the court first concluded that the defendant complied with the FLSA because it paid the nurses an agreed-upon sum for each visit regardless of the time spent on the visit, as required under 29 C.F.R. section 541.605(a).¹²² Furthermore, the court — relying primarily on a 1992 opinion letter from the DOL — went on to find that the nurses performed “unique” tasks during each home healthcare visit.¹²³ Accordingly, the court held that the nurses were professionals exempt from the FLSA’s overtime requirements because they not only met the duty requirements by possessing advanced knowledge and exercising discretion, but they also were compensated on a fee basis because the defendant paid them an agreed sum for the completion of each “unique” job regardless of the hours spent.¹²⁴ It should be noted, however, that the *Fazekas* court did recognize that “the work of nurses performing home healthcare visits may indeed become merely ‘a series of jobs which are repeated an indefinite number of times’... and in such cases those nurses would not qualify for the professional exemption.”¹²⁵

Two years later, the court in *Elwell v. University Hospitals Home Care Services* distinguished *Fazekas* and held that registered nurses performing home healthcare services who were compensated on both a per-visit and hourly basis did not fall within the professional

110 See 29 C.F.R. § 541.600(e) (“in the case of medical occupations, the exception from the salary or fee requirement does not apply to... nurses”); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1061 (2d. Cir. 1988) (holding that nurses that are not paid on a salary or fee basis do not come within the ambit of the professional employee exemption); *Harrison v. Washington Hosp. Ctr.*, 1979 U.S. Dist. LEXIS 10063, at *8 (D. D.C. Aug. 31, 1979) (holding that registered nurses do not hold licenses for the practice of medicine and, thus, do not fit within the exemption for persons engaged in the “practice of law or medicine”).

111 29 C.F.R. § 541.602(a).

112 29 C.F.R. § 541.605(a).

113 *Id.*

114 204 F.3d 673, 676 (6th Cir. 2000).

115 *Id.* at 674.

116 *Id.* at 675.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 676.

121 *Id.*

122 *Id.*

123 *Id.* at 678.

124 *Id.* at 679.

125 *Id.* (quoting 29 C.F.R. § 541.605(a)).

exemption to the FLSA.¹²⁶ In that case, University Hospitals Home Care Services (“University”) nurses’ job duties included “driving to patients’ homes or places of residence, providing varied skilled nursing services to patients in accordance with ... plans of care for the patients and approved and certified by the patients’ attending physician [and] completing nursing notes and documentation of the services ... provided to patients.”¹²⁷ Like the employer in *Fazekas*, University required home healthcare nurses to make a minimum of 25 visits per week and paid nurses a pre-determined rate per visit.¹²⁸ However, , University paid home healthcare nurses additional hourly pay for staff meetings, in-service training, on-call duty, and infusion visits that lasted longer than two hours.¹²⁹

As in *Fazekas*, there was no dispute that the home healthcare nurse position “required knowledge of an advanced type in a field of science or learning” and that the nurses’ work “required the consistent exercise of discretion and judgment” and, thus, met the duty requirements of the FLSA’s professional exemption.¹³⁰ Rather, the issue was whether University compensated nurses on a “salary or fee basis.”¹³¹ On this point, the plaintiffs conceded that each job was “unique,” but argued that the hybrid flat-fee and hourly compensation scheme did not constitute compensation on a “fee basis” as required by 29 C.F.R. section 541.300(a)(1). The court agreed, concluding that in order for a payment to be fee-based the employer had to pay the employee an agreed sum for a specific job “regardless of the time required for its completion.”¹³²

In reaching its decision, the court found that “a compensation plan will not be considered a fee-basis arrangement if it contains any component that ties compensation to the number of hours worked.”¹³³ The court distinguished *Fazekas* based on the fact that the home healthcare nurses in that case were compensated solely on a fee basis and did not receive hourly payments for any of their duties.¹³⁴ Consequently, the court in *Elwell* held that the professional exemption to the FLSA’s overtime requirements did not apply because home healthcare nurses in that case were not compensated on a “salary or fee basis.”¹³⁵

As stated above, if a registered nurse is not compensated on a fee basis, then he or she must be compensated on a salary basis in order to be considered a bona fide exempt professional.¹³⁶ Whether a registered nurse is paid on an hourly or a salaried basis also has been litigated. For example, in *Davis v. Lenox Hill Hospital*,¹³⁷ a registered nurse brought an FLSA collective action seeking back pay and benefits on behalf of herself and other similarly situated nurses claiming they were paid on an hourly rather than a salaried basis, and, therefore, should have received overtime because they should have been classified as nonexempt employees. The court denied defendants’ motion for summary judgment and held that there were genuine issues of fact as to whether the nurses were compensated on a salary or hourly basis.¹³⁸

In *Davis*, one of the defendants, Access Private Duty Services, Inc. (“Access”), which had contracted with Lenox Hill Hospital to assume certain employer functions, including payment of wages, implemented a new program for all private duty nurses entitled “Elite Corps.” Elite Corps registered nurses (RNs) were guaranteed a minimum number of shifts per workweek at a set salary of “no less than \$600 for the week ... no matter how few days or hours worked.”¹³⁹ Notwithstanding Access’ statements that nurses would be compensated on a salary basis, company documents indicated that RNs were actually paid on an hourly basis.¹⁴⁰ In addition, the court found that the Elite Corps RNs also were subject to deductions from their paychecks for disciplinary infractions such as tardiness and failure to cancel assignments. In the absence of company payroll records or other documents demonstrating that plaintiffs were paid on a salary basis and that their paychecks had not been subject to impermissible deductions, the court concluded that there were genuine issues of material fact as to whether Access compensated registered nurses on a salary or hourly basis.¹⁴¹

126 276 F.3d 832, 840 (6th Cir. 2002).

127 *Id.* at 834-36.

128 *Id.* at 835.

129 *Id.* at 837.

130 *Id.* at 838.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at 840.

135 *Id.*

136 *Harrison*, 1971 U.S. Dist. LEXIS 10063, at *8.

137 2004 U.S. Dist. LEXIS 17284 (S.D.N.Y. Sept. 1, 2004).

138 *Id.* at *16.

139 *Id.* at *6 (emphasis in original).

140 *Id.* at **7-8.

141 *Id.* at **16-17.

2. Nurse Practitioners

No court has squarely addressed whether nurse practitioners meet the duty component of the professional employee exemption to the FLSA's overtime requirements. Likewise, the DOL has not issued an opinion directly addressing whether nurse practitioners fit within the professional employee exemption.¹⁴²

The Department of Labor Occupational Outlook Handbook, however, categorizes nurse practitioners under the general category of “nurses” and describes nurse practitioners as “advanced practice nurses.”¹⁴³ Furthermore, the Occupational Outlook Handbook reports that nurse practitioners must obtain a higher level of education than a registered nurse.¹⁴⁴ Consequently, it is very likely that the duties of nurse practitioners meet the duty requirements of the learned professional exemption. Nurse practitioners are not, however, engaged in “the practice of... medicine or any of [its] branches and, thus, must be compensated on a salary or fee basis in order to be exempt from the Act’s overtime requirements.”¹⁴⁵

3. Nurse Anesthetists

In an opinion letter dated December 29, 1999, the DOL concluded that the position of certified registered nurse anesthetist met the professional exemption.¹⁴⁶ While the DOL did not express an opinion regarding whether certified registered nurse anesthetists must be compensated on a salary or fee basis in order to be exempt, it is very likely that an hourly-compensated nurse anesthetist would fall outside of the professional employee exemption.¹⁴⁷

4. Physician Assistants

Federal regulations provide the following with respect to physicians assistants:

Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.¹⁴⁸

Physicians assistants are not, however, engaged in “the practice of... medicine or any of [its] branches” for purposes of the medical profession exception to the requirement that exempt employees must be paid on a salary or fee basis and, thus, hourly-paid physicians assistants are not exempt from the FLSA’s overtime requirements.¹⁴⁹

¹⁴² *But see* Opinion Letter, Wage and Hour Division, United States Dep’t of Labor, 2005 DOLWH LEXIS 24, at **1-2 (Aug. 19, 2005) (addressing whether nonexempt nurse practitioners paid on an hourly basis would affect the status of exempt nurse practitioners and stating “we will presume that [the duties of a nurse practitioner] otherwise fulfill all the requirements for the professional employee exemption... such as the requirements related to primary job duties...”).

¹⁴³ Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook 2010-11, available at <http://www.bls.gov/oco/ocos083.htm> (last visited Mar. 5, 2010).

¹⁴⁴ *Id.*

¹⁴⁵ *See Belt v. Emcare, Inc.*, 444 F.3d 403, 417 (5th Cir. 2006) (relying on a 1974 Department of Labor (DOL) opinion letter, the 1994 Field Operations Handbook, the DOL’s amicus brief, and the DOL’s Occupational Outlook Handbook including NPs under the “registered nurses” heading and holding that physicians assistants are not engaged in the practice of medicine or any branch thereof, as required under § 541.304); Opinion Letter, Wage and Hour Division, United States Dep’t of Labor, 2005 DOLWH LEXIS 24, at **1-2 (Aug. 19, 2005) (indicating that in order to fall within the professional exemption, nurse practitioners must be compensated on a salary or fee basis).

¹⁴⁶ Opinion Letter, Wage and Hour Division, United States Dep’t of Labor, 1999 DOLWH LEXIS 127, at *4 (Dec. 29, 1999).

¹⁴⁷ *See* Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook 2008-09, <http://www.bls.gov/oco/ocos083.htm> (last visited June 19, 2009) (categorizing nurse anesthetists as “advanced practice nurses” under the general category of nurses); *Belt*, 444 F.3d at 414 (finding persuasive the fact that nurse practitioners were categorized under the general category of nurses and holding that a nurse practitioner must be compensated on a salary or fee basis in order to meet the professional employee exemption). The Occupational Outlook Handbook also categorizes “clinical nurse specialists” and “nurse-midwives” as “advance practice nurses” under the general category of nurses. Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook 2008-09, <http://www.bls.gov/oco/ocos083.htm> (last visited June 19, 2008). As such, it is likely that the above analysis also would apply to these occupations. Notably, the DOL has not issued an opinion letter regarding whether “clinic nurse specialists” or “nurse-midwives” fall within the professional employee exemption.

¹⁴⁸ 29 C.F.R. § 541.301(e)(4); *see also* Opinion Letter, Wage and Hour Division, U.S. Dep’t Labor, 2006 DOLWH LEXIS 36, at *8 (July 24, 2006) (noting that physicians assistants meet the duties requirement for the learned professional exemption because certification requires four years of specialized post-secondary school instruction).

¹⁴⁹ *Cuttic v. Crozer-Chester Med. Ctr.*, 2011 U.S. Dist. LEXIS 90705 (E.D. Pa. Aug. 12, 2011); *Belt*, 444 F.3d at 417 (relying on a 1974 DOL Opinion letter, the 1994 Field Operations Handbook, and the DOL’s amicus brief and holding that physicians assistants are not engaged in the practice of medicine or any branch thereof, as required under § 541.304).

5. Respiratory Therapists

In an opinion letter dated July 24, 2006, the DOL concluded that a hospital's respiratory therapists did not meet the duties requirement of the learned professional exemption.¹⁵⁰ The DOL relied on the fact that a specialized advanced academic degree was not a standard prerequisite for entry into the occupation.¹⁵¹ The DOL further noted that, in the situation presented, the employer's enhanced hiring standards — requiring an Associate's Degree in Applied Science, but preferring candidates with a Bachelor's Degree and requiring specific certifications — did not alter the analysis because the work performed did not require advanced knowledge “customarily acquired by a prolonged course of specialized intellectual instruction.”¹⁵² Addressing the effect of a certifying organization, such as the National Board for Respiratory Care, the DOL stated, “[n]either the identity of the certifying organization nor the mere fact that certification is required is determinative if certification does not, in fact, involve a prolonged course of specialized intellectual instruction.”¹⁵³ Accordingly, the DOL concluded that the hospital's respiratory therapists did not fall within the learned professional exemption to the FLSA.¹⁵⁴

6. Pharmacists

Pharmacists compensated on a “salary or fee basis” have been considered bona fide professionals exempt from the FLSA's overtime requirements.¹⁵⁵ Pharmacists who are not compensated on a “salary or fee basis” will not satisfy the requirements of the professional employee exemption.¹⁵⁶

7. In-Home Care Givers

On December 15, 2011, the DOL's Wage and Hour Division (WHD) issued proposed rules¹⁵⁷ that would revise the FLSA's companionship and live-in worker regulations to limit the types of duties that render a home caregiver exempt from the FLSA, clarify the type of activities and duties that may be considered “incidental” to the provision of companionship services, amend the recordkeeping requirements for live-in domestic workers, and specify that the exemption is limited to care givers employed by the individual, family or household using the services only. Third-party employers, including in-home staffing agencies, would not be entitled to claim the exemption, even if the employee is jointly employed by the third party and the family or household.

8. Misclassification Lessons Learned for Employers

Misclassification of employees can be costly. From a plaintiff's perspective, hospitals and other healthcare employers may make “good targets” for misclassification cases because employers often assume employees who possess degrees or professional certificates automatically qualify as exempt learned professionals under the FLSA. That assumption is not necessarily correct, however, because a degree or certificate does not automatically qualify employees for the learned professional exemption.

As discussed above, the federal regulations that directly address application of the learned professional exemption to registered nurses, licensed practical nurses, and physician assistants indicate that registered nurses and physician assistants generally meet the learned

150 Opinion Letter, Wage and Hour Division, United States Dep't of Labor, 2006 DOLWH LEXIS 36, at *6 (July 24, 2006).

151 *Id.* at *7.

152 *Id.* at *9 (emphasis added); *see also* 29 C.F.R. § 541.300(d) (“[t]he phrase ‘customarily acquired by a prolonged course of specialized intellectual instruction’ restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession”).

153 *Id.* at *8.

154 *See also* Opinion Letter, Wage and Hour Division, United States Dep't Labor, 2005 DOLWH LEXIS 70, at *1 (Nov. 4, 2005) (stating that “respiratory therapists are classified as nonexempt and, therefore, must be paid time and a half for all hours worked over 40 in a week”); Opinion Letter, Wage and Hour Division, United States Dep't of Labor, 1981 DOLWH LEXIS 41, at *2 (Apr. 2, 1981) (concluding that respiratory therapists do not fall within the exemption for bona fide professional employees).

155 *De Jesus-Rentas v. Baxter Pharm. Servs. Corp.*, 400 F.3d 72, 74, 77 (1st Cir. 2005) (holding that pharmacists are exempt from the FLSA's overtime requirements because their work requires knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized study and they consistently exercise discretion and judgment); *Caperci v. Rite Aid Corp.*, 43 F. Supp. 2d 83, 98 (D. Mass. 1998) (holding that salaried pharmacists are professionals exempt from the FLSA's overtime requirements); *Anunobi v. Eckert Corp.*, No. SA-02-CV-0820, 2003 U.S. Dist. LEXIS 18535, at *16 (W.D. Tex. Oct. 17, 2003) (holding that pharmacist was a professional employee because his duties required him to regularly exercise discretion and judgment).

156 *See* 29 C.F.R. § 541.600(e) (“[i]n the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists...”); *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1236 (10th Cir. 2008) (reversing summary judgment as to two pharmacists because genuine issues of material fact existed as to whether Wal-Mart prospectively reduced their salary so frequently such that the salary was the functional equivalent of an hourly wage); *Donovan v. Carl's Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983) (holding that pharmacists paid an hourly rate are not exempt professionals); *Usery v. Associated Drugs, Inc.*, 583 F.2d 1191, 1194 (5th Cir. 1976) (same); *Retail Store Employees' Union, Local 400 v. Drug Fair Cmty. Drug Co.*, 307 F. Supp. 473, 478 (D.D.C. 1969) (same).

157 For more information about the proposed rule, *see* the DOL's website on this issue, which includes a fact sheet on the proposed rule at <http://www.dol.gov/whd/flsa/companionNPRM.htm> (last visited Mar. 2, 2012).

professional duties requirements, whereas licensed practical nurses and other similar healthcare employees (*i.e.*, certified nursing assistants) generally do not qualify as learned professionals.¹⁵⁸ However, employee classification is not governed by job titles and requires review of the employee's actual job duties as opposed to the duties listed in a job description. Attention must also be paid to the method used to compensate employees. Additionally, in assessing employee classifications, employers must take into account state laws that, in some cases, impose different and more restrictive requirements than the FLSA.¹⁵⁹

In sum, employee classification as exempt or nonexempt is a difficult undertaking and one that can have significant monetary consequences. Employers are well-advised to consult with experienced counsel who can assist in reviewing and evaluating job classifications. In addition, as discussed further in IV A below, an opinion of counsel may be relied upon to establish a good faith defense in the event of a lawsuit.

C. Overtime and the Regular Rate

The FLSA requires employers to pay nonexempt employees the minimum wage and one-and-a-half times the employee's "regular rate of pay" for all hours worked over 40 during a workweek.¹⁶⁰ Some employers have mistakenly assumed that "regular rate of pay" is the employee's hourly rate. This assumption is incorrect and may result in costly litigation.

The FLSA and interpreting regulations set forth a detailed and complex scheme to determine what forms of compensation must be included and what may be excluded from the regular rate of pay. An employee's regular rate of pay consists of all remuneration paid to an employee for employment unless specifically excluded.¹⁶¹ Certain payments such as bonus payments that are tied to the percentage of total earnings, premium payments such as overtime,¹⁶² discretionary bonuses,¹⁶³ and payments for holidays when no work is performed,¹⁶⁴ may be excluded when calculating an employee's regular rate of pay under the FLSA.¹⁶⁵ Other payments, however, must be included in an employee's regular rate of pay. For example, non-discretionary bonuses,¹⁶⁶ bonuses based upon quality or quantities of work,¹⁶⁷ stand-by compensation,¹⁶⁸ the value of employer provided meals and lodging,¹⁶⁹ on-call payments and compensation attributable to shift differentials must be included in an employee's regular rate of pay.¹⁷⁰

Many hospital employees, including licensed practical nurses and certified nursing assistants, receive shift differentials for working shifts that are sometimes considered less desirable. For example, a hospital employer may pay licensed practical nurses an additional 20 cents per hour for working the overnight shift (3:00 p.m. to 11:00 a.m.), and an extra 10 cents per hour for working the evening shift (3:00 p.m. to 11:00 p.m.). The additional hourly compensation is commonly referred to as a shift differential. Under the FLSA, shift differential paid to employees is compensation that must be included in the calculation of employees' regular rates of pay.¹⁷¹

The DOL in Fact Sheet #54, entitled "The Health Care Industry and Calculating Overtime Pay,"¹⁷² provides examples of how to calculate the regular rate of pay for an employee who receives a shift differential. One example provided by the DOL is a nurse who earns an hourly

158 29 C.F.R. §§ 541.301(e)(2), (4).

159 Several states, like Illinois, did not change their wage and hour laws to conform to the changes that were made in 2004 to the FLSA regulations governing exemptions. Instead these states continue to use the exemption standards that were modeled after the FLSA regulations that were in effect prior to the 2004 changes.

160 29 U.S.C. § 207(a)(1). Some states, like California, impose additional requirements, such as the requirement that overtime must be paid to a nonexempt employee who works more than eight hours in each workday. CAL. LAB. CODE § 1194.

161 29 U.S.C. § 207(e).

162 29 C.F.R. § 778.210.

163 29 C.F.R. § 778.208 and § 778.211.

164 29 C.F.R. § 778.218(a).

165 29 U.S.C. §§ 207(e)(1), (2).

166 29 C.F.R. § 778.211(b).

167 *Id.*

168 29 C.F.R. § 778.220 and § 778.221.

169 29 C.F.R. § 778.116.

170 29 U.S.C. § 207(e); 29 C.F.R. § 778.207(b); *see also O'Brien v. Town of Agawan*, 350 F.3d 279 (1st Cir. 2003).

171 29 C.F.R. § 778.207(b) ("The Act requires the inclusion in the regular rate of such extra premiums as night shift differentials (whether they take the form of a percent of the base rate or an addition of so many cents per hour)[.]"). *See also Reich v. Interstate Brands Corp.*, 57 F.3d 574 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 699 (1996) (holding that "earned work credits" paid to employees who did not receive two consecutive days off in a workweek were to be included in the calculation of regular rate and pay because the credits were "tied to work schedules that employees dislike.").

172 29 C.F.R. § 778.207(b) ("The Act requires the inclusion in the regular rate of such extra premiums as night shift differentials (whether they take the form of a percent of the base rate or an addition of so many cents per hour)[.]"). *See also Reich v. Interstate Brands Corp.*, 57 F.3d 574 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 699 (1996) (holding that "earned work credits" paid to employees who did not receive two consecutive days off in a workweek were to be included in the calculation of regular rate and pay because the credits were "tied to work schedules that employees dislike.").

rate of \$22, a shift differential of \$1 per hour when she works the evening shift, and a shift differential of \$2 per hour when she works the night shift. During the course of a workweek, the nurse works 16 day shift hours, 16 evening shift hours, and 16 night shift hours, or 48 total hours. In the DOL's example, the employer pays the nurse time-and-a-half her regular \$22 per hour hourly rate for all overtime hours and is violating the FLSA overtime standard. Instead of only paying the nurse time-and-a-half her hourly rate, the employer must calculate the sum of the nurse's total earnings for the week (including \$16 in evening shift differential earnings and \$32 in night shift differential earnings) and divide that number by the hours the nurse worked during the week (48) to determine the nurse's regular rate of pay. After determining the nurse's regular rate, the employer multiplies the regular rate by 1.5 to determine the nurse's overtime rate.

In the DOL example, the employer paid the nurse \$33 (1.5 x \$22) for each overtime hour for a total of \$264 in overtime for the workweek. The employer should have paid the nurse \$34.50 for each overtime hour, or \$276 in overtime wages for the workweek. For that employee alone the hospital could face potential liability of \$3,744 in back-pay (assuming a three-year statute of limitations for a willful violation) and liquidated damages, which double the backpay award. By way of example, extending that liability to a hospital with 100 similarly situated employees, the exposure could exceed \$370,000.

*Mutuc v. Huntington Memorial Hospital*¹⁷³ is an example of the difficulty in applying these rules and calculating the regular rate. In *Mutuc*, 12-hour shift nurses who worked less than 10 hours on a shift were paid an additional hourly amount (called a short shift differential) for each of the hours worked. The purpose of the short shift differential was to encourage 12-hour shift nurses to accept other assignments that were shorter than 10 hours, help offset a loss in pay when hours were decreased due to reduced patient count, and to encourage nurses to attend educational seminars of less than 10 hours. Despite the hospital's positive motive in providing this short shift differential, the court denied the hospital's motion for summary judgment. On appeal, the California court stated that under both California state law and the FLSA, "[w]here different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee — the longer he works the lower the rate — ...the rate actually paid in the shorter or nonovertime [period] is his regular rate for overtime purposes in all weeks."¹⁷⁴

Regular rate calculation mistakes discovered in litigation are especially costly because, under the FLSA, liquidated damages in an amount equal to the compensation for unpaid overtime may be imposed unless the employer can prove that it acted "in good faith" and with "reasonable grounds for believing" that it complied with the FLSA.¹⁷⁵

The decision in *Thomas v. Howard University Hospital*,¹⁷⁶ provides an example of the standard courts have used in determining "reasonable grounds." In that case, the court affirmed the lower court's finding that Howard University Hospital violated the FLSA by failing to include shift differentials and premium rates in employees' regular rates for a two-year period between 1988 and 1990. Hospital policy correctly instructed department heads, supervisors and timekeepers to include shift differentials and premium in employees' regular rates for purposes of overtime calculation, however, the hospital's payroll personnel made coding errors. The court did not accept the hospital's argument that its written policy established the reasonableness of the hospital's efforts to comply with the FLSA. Rather, the court stated that even if, through no fault of management, the payroll department blundered, the essential inquiry in determining the reasonableness defense is not who in the employer's chain of command committed the acts or omissions, but whether the hospital was aware that its acts or omissions caused the employees to be underpaid in violation of the law.¹⁷⁷ Based on the hospital's policy, the court reasoned that it knew of the requirement to include shift differentials and premium pay in employees' regular rates under the FLSA and, therefore, it was liable to affected employees for liquidated damages in addition to back-pay compensation.

There may be ways in which employers can establish compensation plans with pay differentials for different shifts that are legally compliant. In a recent case, the Ninth Circuit Court of Appeals in *Parth v. Pomona Valley Hospital Medical Center*¹⁷⁸ held that a hospital did not violate the FLSA when it implemented an optional 12-hour shift schedule and pay plan in which nurses were given the option of working

¹⁷³ *Huntington Mem'l Hosp. v. Superior Ct.*, 131 Cal. App. 4th 893 (Cal. App. 2d Dist. 2005).

¹⁷⁴ *Id.* at 905 (emphasis in original) (citing 29 C.F.R. § 778.327(b)). The court further stated, "[i]n other words, the hourly rate paid for the identical work during [overtime] hours... cannot be lower than the rate paid for nonovertime hours... Overtime rates cannot be avoided by manipulating the pay for regular hours or otherwise reducing the pay for regular hours to make up for the... overtime rate that will have to be paid." *Id.* (citing 29 C.F.R. § 778.500(b) and *Reich v. Midwest Body Corp.*, 843 F. Supp. 1249, 1251 (N.D. Ill. 1994)).

¹⁷⁵ 29 U.S.C. §§ 216(b), 260.

¹⁷⁶ *Thomas*, 39 F.3d 370 (D.C. Cir. 1994).

¹⁷⁷ *Id.* at 373.

¹⁷⁸ 630 F.3d 794 (9th Cir. Cal. 2010).

a 12-hour shift schedule in exchange for receiving a lower base hourly salary, which at all times exceeded the applicable minimum wage. Under this pay plan, nurses who volunteered for the 12-hour shift schedule made approximately the same amount of money as they made on the 8-hour shift schedule working the same number of hours and performing the same duties. The court rejected the plaintiff's argument that the new compensation plan created an artificially low regular rate for employees working the 12-hour shift to avoid paying overtime. The court reviewed the following factors that the DOL suggested determine whether a reduced rate is "bona fide:" whether it is (1) agreed to by the employee; (2) in place for a substantial period of time; and (3) equal to or in excess of the FLSA's minimum wage. Applying these three factors, the court concluded the reduced hourly rate for the 12-hour shift satisfied the DOL's criteria:

First, the reduced rate was agreed to by the employees through the collective bargaining agreement, in which there appears no evidence of improper influence or inequality of bargaining position. The plan provides employees more scheduling flexibility, allows them to spend less time commuting to work (because they spend fewer days at work), and ensures that [the hospital] does not retain an incentive to ask the nurses to work longer hours. Second, the rate has been in place since 1989 or 1990 (and applied to [the plaintiff] since 1993). Third, the rate paid nurses working the 12-hour shift far exceeds the Act's minimum wage.¹⁷⁹

The court also concluded that the overtime wages were properly calculated according to the standards set forth in the FLSA regulations and the applicable collective bargaining agreement – the regular rate for the first eight hours, time and a half for the next four hours, and double pay for any additional hours for which the nurse volunteered.

As these cases reflect, employers in the healthcare industry must take great care to implement shift differentials and calculate employee regular rates properly especially where employers utilize shift differentials and payment of various forms of incentive compensation. The FLSA regulations regarding what compensation must be included and what compensation may be excluded from the regular rate are fairly complex and detailed. To add further complexity, the method of computing the regular rate may be different under state law. To avoid the potential minefields, employers are well-advised to consult with counsel to verify that they are applying the federal and state rules correctly. Finally, as the result in *Thomas* underscores, it is important for employers not only to have legally compliant policies, but also to conduct periodic audits to ensure those policies are implemented correctly.

D. ERISA Claims

Another new trend in class action litigation is combining ERISA breach-of-fiduciary duty claims with wage and hour claims. In these cases, plaintiffs typically argue that the employer's failure to pay them for all hours worked, including overtime, in violation of the FLSA and/or state wage laws also resulted in lower payments to their accounts in the company's ERISA 401(k) and retirement plans.¹⁸⁰ In some cases, courts have declined to dismiss these ERISA claims, on the grounds that further inquiry into the facts underlying the claim was required and dismissing the claim at the early stage of the proceedings was inappropriate.¹⁸¹

Many of the more recent cases, however, have dismissed these ERISA claims.¹⁸² These courts have generally agreed that decisions regarding employees' compensation are business decisions, not decisions taken by the employer as a fiduciary of its ERISA benefit plans, and, therefore, such decisions do not subject the employer to fiduciary liability under ERISA.¹⁸³ As the court stated in *Lepage v. Blue Cross & Blue Shield of Minnesota*:

¹⁷⁹ *Id.* at 803.

¹⁸⁰ See e.g., *Cavallaro v. UMass Memorial Health Care, Inc.* UMass, 2011 U.S. Dist. LEXIS 61003 (D. Mass. June 8, 2011); *Pruell v. Caritas Christi*, 2010 U.S. Dist. LEXIS 101761 (D. Mass. Sept. 27, 2010); *Henderson v. University of Pittsburgh Med. Ctr. (UPMC)*, 2010 U.S. Dist. LEXIS 1759 (W.D. Pa. Jan. 11, 2010); *Danieli v. IBM*, 2009 U.S. Dist. LEXIS 106938 (S.D.N.Y. Nov. 16, 2009); *Mathews v. ALC Ptnr., Inc.*, 2009 U.S. Dist. LEXIS 106423, at **2-3 (E.D. Mich. Nov. 16, 2009); *Stickle v. SCI Western Mkt. Support Ctr., L.P.*, 2008 U.S. Dist. LEXIS 83315 (D. Ariz. Sept. 29, 2008); *Lepage v. Blue Cross & Blue Shield of Minnesota*, 2008 U.S. Dist. LEXIS 49298 (D. Minn. June 25, 2008); *Maranda v. Group Health Plan, Inc.*, 2008 U.S. Dist. LEXIS 41500 (D. Minn. May 20, 2008); *Rosenburg v. Int'l Bus. Machs. Corp.*, 2006 U.S. Dist. LEXIS 41775 (N.D. Cal. June 12, 2006); *In re Farmers Ins. Exch. Claims Representatives' Overtime Pay Litig.*, 2005 U.S. Dist. LEXIS 42706 (D. Or. Aug. 15, 2005); *Gerlach v. Wells Fargo & Co.*, 2005 U.S. Dist. LEXIS 46788 (N.D. Cal. June 13, 2005).

¹⁸¹ See e.g., *Stickle*, 2008 U.S. Dist. LEXIS 83315 (holding in abeyance plaintiffs' breach of fiduciary duty claim pending the outcome of plaintiffs' FLSA claim); *Rosenburg*, 2006 U.S. Dist. LEXIS 41775, at *15 ("While this is a close call, the court is not entirely persuaded that either of the two approaches is correct for this case at this juncture of the proceedings...Whether IBM assumed fiduciary status, including when and the extent to which it was functioning in the capacity of a plan administrator, will require a searching inquiry into the facts and is therefore inappropriate for resolution on a motion to dismiss"); *In re Farmers Ins.*, 2005 U.S. Dist. LEXIS 42706, at **16-17 (holding in abeyance the decision on plaintiffs' ERISA claims until after a ruling on liability for overtime pay).

¹⁸² See e.g., *Henderson*, 2010 U.S. Dist. LEXIS 1759, at **3-4; *Mathews*, 2009 U.S. Dist. LEXIS 106423, at *3; *Lepage*, 2008 U.S. Dist. LEXIS 49298, at **22; *Maranda*, 2008 U.S. Dist. LEXIS 41500, at *6.

¹⁸³ *Henderson*, 2010 U.S. Dist. LEXIS 1759, at **12; *Mathews*, 2009 U.S. Dist. LEXIS 106423, at **2-3; *Lepage*, 2008 U.S. Dist. LEXIS 49298, at **15, 19; *Maranda*, 2008 U.S. Dist. LEXIS 41500, at *6.

An employer's discretion in determining salaries is a business judgment which does not involve the administration of an ERISA plan or the investment of an ERISA plan's assets. Such a decision may ultimately affect a plan indirectly but it does not implicate fiduciary concerns regarding plan administration or assets. Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits.¹⁸⁴

Perhaps more significantly, in *Henderson v. University of Pittsburgh Med. Center (UPMC)*, the court recognized the danger of allowing ERISA fiduciary duty claims to proceed based on allegations that employees received less pay than they were entitled to under the law.¹⁸⁵ Adopting this approach, the court reasoned, would create a "slippery slope" in which a plaintiff who claimed she was denied a pay increase in violation of federal discrimination statutes could presumably assert a claim under ERISA seeking damages for the difference in the value of her ERISA benefit plan based on what she was paid and what she claimed she should have been paid.¹⁸⁶ "In the end," the court stated, "the undersigned questions the wisdom of interpreting ERISA as a supplemental form of relief for alleged FLSA violations."¹⁸⁷

Courts dismissing ERISA breach of fiduciary duty claims for failure to credit employees for all hours worked have also done so where the plan documents state that benefits under the plan are based on actual compensation paid as reflected in the employees' W-2 forms, and not on hours allegedly worked.¹⁸⁸ As the court explained in *DeSilva v. N. Shore-Long Island Jewish Health System*, where:

the applicable plans did not require contributions to be made based upon hours actually worked, a decision not to credit for all hours worked must be considered a "business decision" that falls outside the scope of the applicable ERISA plan and therefore does not trigger the employers' fiduciary obligations.¹⁸⁹

In addition, the court also found that such plan provisions defeated claims that the employer breached its fiduciary duty by failing to investigate: "Where the plan itself imposes no obligation to credit for such hours or to base benefits determinations on compensation that might be owing to employees, plan administrators do not have an obligation to double-check whether employers are fulfilling their statutory and contractual payment obligations to employees."¹⁹⁰

E. RICO Claims

Plaintiffs in FLSA collective actions have also started to assert claims under the federal RICO Act.¹⁹¹ Most courts that have considered the issue in FLSA collective actions have dismissed these claims for failure to establish all the necessary elements for a RICO violation.¹⁹² Courts in these cases have uniformly rejected plaintiffs' claims that hospitals engaged in fraud (a predicate act under RICO) by mailing false and misleading pay checks or statements that did not include all hours they claim to have worked. As the court in *Cavallaro v. UMass Memorial Health Care, Inc.* stated,

[a]ccording to plaintiffs, the mailed paychecks fraudulently omitted time that they had actually worked, and thus concealed from them the fact that they were not being fully compensated. But if the paychecks were as plaintiffs allege, they did not further defendants' fraudulent scheme; to the contrary, they made the scheme's discovery more likely....Any reasonable employee, recognizing that she worked one hour more than she was being paid for, would be alerted to the problem. Indeed, if it were the employer's object to fraudulently deprive its employee of payment for all time worked, mailing her the paycheck as described would serve only to put the employee of notice of the alleged fraud.¹⁹³

184 *Lepage*, 2008 U.S. Dist. LEXIS 49298, at *16 (quoting *Eckelkamp v. Beste*, 201 F. Supp. 2d 1012, 1023 (E.D. Mo. 2002)), *aff'd*, 315 F.3d 863 (8th Cir. 2002).

185 *Henderson*, 2010 U.S. Dist. LEXIS 1759, at *10.

186 *Id.* and n.6.

187 *Id.*

188 *DeSilva v. N. Shore-Long Island Jewish Health Sys.*, 2011 U.S. Dist. LEXIS 27138 (E.D.N.Y. Mar. 16, 2011); *Kuznyetsov v. W. Penn Allegheny Health Sys., Inc.*, 2010 U.S. Dist. LEXIS 12999, (W.D. Pa. Feb. 16, 2010); *Henderson*, 2010 U.S. Dist. LEXIS 1759, at *PINPOINT CITE; *Camesi v. Univ. of Pittsburgh Med. Cntr.*, 2010 U.S. Dist. LEXIS 1761 (W.D. Pa. Jan. 11, 2010).

189 2011 U.S. Dist. LEXIS 27138, at * 122 (E.D.N.Y. Mar. 16, 2011).

190 *Id.* at * 127.

191 18 U.S.C. §§ 1961-1968.

192 See *E.g.*, *DeSilva v. North Shore-Long Island Jewish Health System, Inc.*, 770 F. Supp. 2d 497 (E.D.N.Y. 2011) 2011 U.S. Dist. LEXIS 27138 (E.D.N.Y. Mar. 16, 2011); *Sampson v. Medisys Health Network Inc.*, 2011 U.S. Dist. LEXIS 12697 (E.D. N.Y. Feb. 8, 2011); *Wolman v. Catholic Health System of Long Island, Inc.*, 2010 U.S. Dist. LEXIS 137392 (E.D.N.Y. Dec. 30, 2010); *Cavallaro v. UMass Memorial Health Care, Inc.*, 2010 U.S. Dist. LEXIS 96558 (D. Mass. July 2, 2010).

193 2010 U.S. Dist. LEXIS 96558, at ** 9-10 (internal citations omitted).

Moreover, as the court recognized in *DeSilva v. North Shore-Long Island Jewish Health System*,

allowing plaintiffs to recover under civil RICO for claims that are, at their core, FLSA claims would thwart the careful and comprehensive scheme established by Congress to remedy wage and hour violations falling under the FLSA's scope. In particular, allowing plaintiffs to pursue a civil RICO claim grounded in the same facts as plaintiffs FLSA claim would, essentially, create a new private right of action that would allow plaintiffs to seek treble damages—instead of merely seeking unpaid wages and liquidated damages—and would render meaningless the Secretary of Labor's right to terminate any private party's suit should the Secretary decide to file a complaint.¹⁹⁴

F. Beware of State Wage and Hour Law

Many states impose wage and hour requirements and penalties in excess of the FLSA. For example, California wage law provides broader protections to employees, giving rise to the following increasingly common claims against employers in the healthcare industry:

- **Overtime:** California Labor Code section 1194 requires an employer to pay employees one-and-a-half times their regular rate of pay for all hours worked over eight in a day or 40 in a week.
- **Meal and Rest Breaks:** California Labor Code section 510 requires employers to provide employees with a 30-minute meal period for each five hour period worked, and a 10-minute paid rest break every four hours. Pursuant to Labor Code section 226.7, a failure to provide such a meal or rest break requires the employer to pay the employee one hour of additional compensation at the employee's regular rate of pay. IWC Order 4-2001 11(D) allows employees in the healthcare industry who work shifts in excess of eight total hours in a workday to voluntarily waive their right to one of their two meal periods. To be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employer must fully compensate the employee for all working time, including any on-the-job meal period, while such a waiver is in effect.
- **Final Pay and Waiting Time Penalties:** California Labor Code sections 202 and 203 require prompt payment on termination, and most plaintiffs will argue that if they were not paid all the overtime they were owed, or if they are owed the meal and/or rest period premium, then their final wages were not correctly paid at the time of termination. So-called "waiting time" penalties amount to 30 days of wages at the employee's last regular rate of pay, and often these penalties far exceed the actual value of the putative class members' claims. Thus, such claims typically depend on the viability of the overtime and meal and rest break claims.
- **Pay Stub Requirements:** California Labor Code section 226(a) requires that certain types of information be included on an employee's pay stub, including among other things, gross wages earned, total hours worked by the employee, all deductions, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. California Labor Code section 226(e) provides that an employee "suffering injury" as a result of a "knowing and intentional failure by an employer to comply" is entitled to the recovery of all actual damages or \$50 for the initial pay period in which the violation occurs and \$100 for each violation in subsequent pay periods, not exceeding an aggregate penalty of \$4,000.
- **Unfair Competition:** Many of the recent putative class action complaints include an alleged violation of California Business and Professions Code section 17200, also referred to as the Unfair Competition Law (UCL). The UCL provides for equitable relief for any "unfair business practice," which includes any violation of the California Labor Code. As such, it is a derivative cause of action dependent upon plaintiff's other claims. The primary effect of alleging a UCL cause of action is that it lengthens the statute of limitations of plaintiff's claims from three to four years.¹⁹⁵
- **California Labor Code Private Attorneys General Act (PAGA) Penalties:** Prior to the enactment of PAGA, for those Labor Code sections that provide for civil penalties, only the California Labor Workforce Development Agency (or its designates, such as the Labor Commissioner) — and no private individual — was authorized to seek such penalties. PAGA made two significant changes to the Labor Code in this respect. First, it established penalties for the violation of every Labor Code section. Second, PAGA allowed an "aggrieved employee," *i.e.*, one who has had his or her Labor Code rights violated, to seek civil penalties in a civil action for Labor Code violations on behalf of him- or herself, as well as other "aggrieved employees." PAGA default penalties, found at Labor Code section 2699(f), are \$100 per employee per pay day for an initial violation and \$200 per employee per pay day for a subsequent violation.

¹⁹⁴ 2011 U.S. Dist. LEXIS CITATION. 770 F. Supp. 2d at 515.

¹⁹⁵ See *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 178-79 (2000).

PAGA penalties apply only if there are no civil penalties specified. PAGA requires an employee to give 75 percent of the penalties that he or she recovers to the State of California. Also, an employee can recover attorneys' fees and costs in a suit under PAGA.

Wage laws in other states also differ from the FLSA in various ways. For example, as mentioned in Section III.A.1 above, in contrast to the FLSA which does not require meal or rest breaks, numerous states require employers to provide meal and rest breaks to employees.¹⁹⁶

Also, the criteria to qualify for an exemption under state overtime law may differ from the criteria under the FLSA. These differences became more pronounced in 2004 when the exemption regulations under the FLSA were modified, and some states, such as Illinois, chose not to revise their regulations to conform to the then-new federal regulations. Instead, they retained the exemption regulations they had, which were modeled after the FLSA regulations that were in effect prior to the 2004 changes.

Another notable difference between the FLSA and some state wage laws, and of particular interest to healthcare employers, is that unlike the FLSA, some states do not allow use of the "8/80 rule."¹⁹⁷ A provision of the FLSA applicable to hospitals and other employers that provide care to the sick or aged who reside on the premises, allows for a 14-day work week instead of a 40 hour workweek for purposes of calculating overtime, with the prior agreement of the employee.¹⁹⁸ Under this "8/80 rule", employees receive overtime for any work in excess of eight hours in a day or 80 hours in a 14-day period.

Some state wage laws also have unique wage and hour laws that differ from the FLSA and other states. For example, New York has a "spread of hours/split shift" law that requires employers to pay nonexempt employees one hour of pay at the basic minimum hourly wage rate, in addition to the minimum wage required, on any day in which the "spread of hours" exceeds 10; there is a split shift; or both.¹⁹⁹ "Spread of hours" is defined as the length of the workday, including working time, meal and rest breaks, and any other time off duty.²⁰⁰

State wage and hour laws may also differ from the FLSA with respect to the statute of limitations applicable to wage and hour law violations. For example, the limitations period for violations of the Pennsylvania Minimum Wage Act, which also governs the overtime requirements under Pennsylvania law, is three years.²⁰¹ Thus, plaintiffs may recover damages for Pennsylvania wage law violations for up to three years preceding the commencement of an action regardless of whether the violation is found to be willful. In addition, New York has a six-year statute of limitations regardless of whether the violation is willful.²⁰²

Damages and penalties for wage and hour violations also differ among the states. Perhaps most notably, Massachusetts employees may recover treble damages, in addition to the costs of litigation and attorneys' fees, as liquidated damages for violations of the state's overtime law.²⁰³ Individuals also may be liable for criminal penalties, including fines of up to \$25,000 and one year in prison for willful violations of certain Massachusetts wage and hour laws.²⁰⁴ A subsequent willful violation may be punished with a fine of up to \$50,000 and two years of prison. Violations lacking willful intent may be punished by a fine up to \$10,000 and six months in prison for the first violation.²⁰⁵ As an alternative to criminal proceedings, the Massachusetts Attorney General may issue a civil citation requiring an employer to pay penalties up to \$15,000 per violation and up to \$25,000 per violation for repeat offenders.²⁰⁶ Each infraction in any given 40 hour workweek may be treated as a separate offense.²⁰⁷ However, in *Cavallaro v. UMass Memorial Health Care, Inc.*, the hospital moved to dismiss plaintiffs' state law overtime claims on the ground that the Massachusetts Fair Minimum Wage Act clearly exempts employees who work "in a hospital, sanatorium, convalescent or nursing home, infirmary, rest home or charitable home for the aged." The court agreed, and granted the hospital's

196 Currently, the following states require meal and rest breaks for adult employees: California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, West Virginia, and Wisconsin.

197 CITATIONS. In addition, whether the 8/80 rule is permitted under Pennsylvania wage law is currently being litigated in two class actions in state court in Pennsylvania. *Turner v. Mercy Health System*, No. 003670, January 2008 Term (Pa. Common Pleas, Phila. Cty.); *Vanston v. Maxis Health System*, No. 005155, June 2008 Term (Pa. Common Pleas, Phila. Cty.). E.g. in *Turner v. Mercy Health Sys.*, 2010 Phila. Ct. Com. Pl. LEXIS 146 (Pa. C.P. 2010), a Pennsylvania lower court held that the state's minimum wage and overtime pay laws do not permit the application of the "8/80" rule.

198 29 U.S.C. § 207(j).

199 12 N.Y.C.R.R. §§ 142-2-4, 142-2.18.

200 *Id.*

201 43 PA. STAT. § 260a(g).

202 N.Y. LAB. § 198.

203 MASS. GEN. LAW. Ch. 151 § 1B.

204 MASS. GEN. LAW. Ch. 149 27C(a)(1).

205 M.G.L. ch. 149 § 27C(a)(2).

206 M.G.L. ch. 149 § 27C(b)(1).

207 *Id.*

motion.²⁰⁸ This decision, which is the first to interpret the overtime exemption for employees of Massachusetts hospitals and other similar healthcare institutions, reflects the importance of carefully assessing state wage laws to determine their scope and any other requirements that may limit their applicability.

Other states are also taking steps to enhance state wage laws. For example, California recently enacted the Wage Theft Prevention Act of 2011,²⁰⁹ which went into effect in January 1, 2012, requires employers to provide written notice to all new employees of the following:

- The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.
- Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.
- The regular payday designated by the employer in accordance with the requirements of the Labor Code.
- The name of the employer, including any “doing business as” (“dba”) names used by the employer.
- The physical address of the employer’s main office or principal place of business, and a mailing address, if different.
- The telephone number of the employer.
- The name, address, and telephone number of the employer’s workers’ compensation insurance carrier.
- Any other information the Labor Commissioner deems material and necessary.

Although the statute only requires the notice be provided to new hires and to employees whose wage-related information has changed, the California Division of Labor Standards Enforcement considers it to be a “best practice” for employers to provide the wage notice to all current employees as well.

At the end of December, 2010, New York enacted a Wage Theft Prevention Act,²¹⁰ which went into effect in April, 2011, requiring employers to give a written notice, containing the same type of information as required in California, to each new hire and to all employees by February 1 each year. The legislation has been controversial, and a bill to repeal it passed the New York State Senate on February 29, 2012.²¹¹ The bill now goes to the State Assembly.

208 *Cavallaro v. UMass Memorial Health Care, Inc.*, No. 4:09-cv-40181, slip op. at 9-10 (D. Mass. December 20, 2010).

209 AB 469; See <http://www.littler.com/publication-press/publication/californias-new-wage-disclosure-notice-and-wage-theft-prevention-act-2>; <http://www.littler.com/publication-press/publication/moving-target-california-dlse-modifies-again-its-faqs-californias-new->

210 Bill No. S8380/A11726; See <http://www.littler.com/publication-press/publication/lame-duck-reform-new-yorks-wage-theft-prevention-act>.

211 <http://www.nysenate.gov/press-release/senate-passes-bill-repeal-massive-mandate-business>.

IV. EMPLOYERS RESPOND

A. Existing Statutory Defenses to Wage and Hour Claims

Since its 1938 enactment, the FLSA has been amended repeatedly to respond to court interpretations and changing work conditions.²¹² The 1947 amendment, known as the Portal-to-Portal Act, established the three affirmative defenses used in modern FLSA suits.²¹³ The first of these avoids liability for an extra year of back wages where the statutory violation is not willful;²¹⁴ the second defense prevents the assessment of liquidated damages in an amount equal to the back wages owed;²¹⁵ and the third is a complete bar to employer liability.²¹⁶

1. Defenses to Third Year of Back Wages and Civil Money Penalties

Under the Portal-to-Portal Act, a plaintiff filing a claim for unpaid wages, overtime, and liquidated damages can recover for the two years prior to the date he files a claim.²¹⁷ If the plaintiff can prove that an employer willfully violated the FLSA, however, the statute of limitations is expanded to three years.²¹⁸ Thus, in litigation, an employer can reduce its liability by one-third if the employer establishes that it did not act willfully. Under the Supreme Court's holding in *McLaughlin v. Richland Shoe Co.*, an employer willfully violates the FLSA if it either knew its actions were prohibited by the FLSA or showed reckless disregard for whether the FLSA prohibited its conduct.²¹⁹ The plaintiff (who may be the Secretary of Labor or a private plaintiff) bears the burden of showing that the defendant's acts were willful.²²⁰ Proof of willfulness requires the plaintiff to show that the defendant acted recklessly, and not just unreasonably, in determining its legal obligation under the FLSA.²²¹

Once an employer has been placed on notice that its payment practices may violate the FLSA, such as when the employer has received advice from the DOL or had a prior investigation that resulted in the finding of a violation, continuing those payment practices without further investigation into the alleged violation could constitute "reckless disregard" of the FLSA.²²² Indeed, some courts have imposed an affirmative obligation on employers to determine that their compensation and timekeeping policies and practices comply with the FLSA.²²³

Statements by the employer may create an inference of willfulness. For example, in *Chao v. A-One Med. Services*, the court found that the FLSA violations by a provider of home health services were willful in part because of statements made by the owner of the company that the company "would go broke" if it had to pay overtime, and if overtime wages "ever became a problem", the company would file for bankruptcy.²²⁴

The DOL also may issue civil money penalties of up to \$1,100 per FLSA violation if it finds the employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the requirements of the Act.²²⁵ The civil penalty regulations state that the employer's conduct will be deemed "knowing" if, among other situations, the employer received advice from a responsible official of the Wage and Hour Division of the DOL to the effect that the conduct in question was unlawful.²²⁶ The conduct will be deemed to be in reckless disregard of the requirements of the FLSA if, among other situations, the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.²²⁷ Although the First Circuit Court of Appeals has criticized the

212 See 29 U.S.C.A. § 201, "Historical & Statutory Notes" (2007) (listing amendments).

213 *Id.* at 905 (emphasis in original) (citing 29 C.F.R. § 778.327(b)). The court further stated, "In other words, the hourly rate paid for the identical work during [overtime] hours... cannot be lower than the rate paid for nonovertime hours... Overtime rates cannot be avoided by manipulating the pay for regular hours or otherwise reducing the pay for regular hours to make up for the... overtime rate that will have to be paid." *Id.* (citing 29 C.F.R. § 778.500(b) and *Reich v. Midwest Body Corp.*, 843 F. Supp. 1249, 1251 (N.D. Ill. 1994)).

214 29 U.S.C. § 255(a).

215 29 U.S.C. § 260.

216 29 U.S.C. § 259.

217 29 U.S.C. § 255(a).

218 *Id.*

219 486 U.S. 128 (1988).

220 *Id.* at 135.

221 *Id.* at 135, n.13.

222 *Reich v. Bay, Inc.*, 23 F.3d 110, 117 (5th Cir. 1994); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1062 (2d Cir. N.Y. 1988).

223 See, e.g., *LaPorte v. General Elec. Plastics*, 838 F. Supp. 549, 558 (M.D. Ala. 1993) ("If GE did not make an effort to determine if the policy violated the FLSA, the failure to make that determination would be reckless.").

224 346 F.3d at 918.

225 29 C.F.R. § 578.3(c)(1).

226 *Id.* at § 578.3(c)(2).

227 *Id.* at § 578.3(c)(3).

regulations, holding that a failure to inquire regarding FLSA compliance is negligent, but not reckless behavior,²²⁸ the regulations remain in effect and no other courts appear to have taken this approach.

2. Section 11 Good Faith Defense Against Liquidated Damages

Valid wage claims under the FLSA can be particularly expensive for employers because any amount of overtime or back wages found due to employees is typically doubled as liquidated damages. Courts normally award liquidated damages in an amount equal to the back wages owed (up to three years of back wages). However, Section 11 of the Portal-to-Portal Act allows the court to reduce the otherwise mandatory liquidated damages:

[i]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that it had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any [lesser] amount thereof.²²⁹

This is the most commonly asserted defense to FLSA claims. It is not, however, a complete bar to liability; it merely reduces the amount of damages owed. The Section 11 good faith defense is usually determined by the court (rather than the jury) and is available if the employer proves that it “acted in subjective good faith” and “had objectively reasonable grounds for believing that the acts and omissions giving rise to the failure [to pay overtime] did not violate the FLSA.”²³⁰ “Good faith in this context requires more than ignorance of the prevailing law or uncertainty about its development.”²³¹ Rather, “[i]t requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them.”²³² The fact that an employer does not purposely violate the FLSA is insufficient to establish that it acted in good faith.²³³ “Nor is good faith demonstrated by the absence of complaints on the part of employees.”²³⁴ Moreover, “simple conformity with industry-wide practice” will not establish good faith,²³⁵ although at least one court has held that conformity with industry practice is at least relevant to a finding of good faith.²³⁶

Accordingly, the Section 11 defense to liquidated damages is available where an employer can prove that it relied on the advice of counsel.²³⁷ To avail themselves of this defense, as well as to minimize the risk of a wage and hour class or collective action, prudent employers should seek legal review of their nonexempt and exempt pay practices, and obtain opinion letters from counsel to support their legal compliance. Employers also may prevail on a Section 11 defense when: (1) uncertainty about the application of the FLSA and lack of controlling precedent causes the FLSA violation;²³⁸ (2) application of the FLSA to the particular employees presents a “fact-intensive issue;”²³⁹ (3) the employer compensates its employees in certain instances more generously than the FLSA requires;²⁴⁰ (4) the employer incorrectly but reasonably believes that it is complying with written guidance from DOL;²⁴¹ and (5) reliance on a DOL investigation.²⁴²

228 See *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998).

229 29 U.S.C. § 260.

230 *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999) (internal quotation marks omitted).

231 *Reich v. So. N. England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997).

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 See *Vega v. Gasper*, 36 F.3d 417, 428 n.9 (5th Cir. 1994) (noting that reliance on industry custom can be relevant but not dispositive under § 11).

237 See, e.g., *Roy v. County of Lexington*, 141 F.3d 533, 548 (4th Cir. 1998) (finding § 11 satisfied where employer relied on advice of counsel); *Featsent v. City of Youngstown*, 70 F.3d 900, 906-07 (6th Cir. 1995) (same); *Hill v. J.C. Penny Co.*, 688 F.2d 370, 375 (5th Cir. 1982) (same); *Garcia v. Allsup's Convenience Stores, Inc.*, 167 F. Supp. 2d 1308, 1316 (D.N.M. 2001) (“an employer establishes a good faith defense to liquidated damages by diligently consulting legal specialists and labor specialists and following their advice”) (collecting cases); cf. *So. N. England Telecomm.*, 121 F.3d at 72 (rejecting § 11 defense, noting that the employer “does not contend that it was relying on the advice of informed counsel”); cf. *Debejian v. Atlantic Testing Labs., Ltd.*, 64 F. Supp. 2d 85, 91-92 (N.D.N.Y. 1999) (no good faith under § 11 where employer made no specific inquiry of counsel regarding applicability of exemption prior to determining that employee was exempt).

238 See *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991) (legal uncertainty can support a § 11 defense provided the uncertainty “actually led the employer who violated the Act to believe that it was in compliance at the time of the violation”); *Hultgren v. County of Lancaster*, 913 F.2d 498, 508-10 (8th Cir. 1990) (“uncertainty about the application of the Act may be considered in determining the appropriateness of liquidated damages”) (collecting cases); *Horan v. King County*, 740 F. Supp. 1471 (E.D. Wash. 1990) (section 11 defense applied in part because “issue presented was one of first impression,” and “statute and regulations [were] uncertain and confusing”).

239 See *Bond v. City of Jackson*, 727 F. Supp. 1516, 1519 (S.D. Miss. 1989).

240 See *Roy*, 141 F.3d at 548.

241 See *Nelson v. Ala. Inst. for Deaf and Blind*, 896 F. Supp. 1108, 1115 (N.D. Ala. 1995); *Schneider v. City of Springfield*, 102 F. Supp. 2d 827, 841 n.9 (S.D. Ohio 1999) (although written guidance did not address employer’s particular circumstances and thus could not be relied upon for § 10 defense, the employer did not, as a matter of law, “act[] unreasonably or in bad faith by inferring from them that it properly compensated its [employees]”).

242 *Horan v. King County, Div. of Emergency Med. Servs.*, 740 F. Supp. 1471, 1482 (W.D. Wash. 1990) (good faith defense applied where employer relied on prior DOL investigation).

3. Section 10 Complete Good Faith Defense

Section 10 of the Portal-to-Portal Act provides a complete bar to FLSA liability if an employer proves that it acted in good faith in conformity with and reliance on written DOL guidance. The purpose of the Section 10 good faith defense is to bar to FLSA liability if the employer has relied in good faith on the Wage Hour Administrator's mistaken or invalid interpretation of the FLSA.

Section 10 provides:

[n]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the FLSA if the employer pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Administrator of the Wage and Hour Division of the DOL], or any administrative practice or enforcement policy of [the Administrator].²⁴³

Under this provision, an employer may rely on Wage and Hour Division Opinion Letters and the Field Operations Handbook.²⁴⁴

Valid Section 10 defenses are rare.²⁴⁵ The Section 10 defense applies only if the employer can prove that it had actual knowledge of and relied on an agency regulation, order, ruling, approval, interpretation, practice, or enforcement policy before making a decision or that it relied on advice of counsel that was premised upon these authorities, rules and policies.²⁴⁶ Also, some courts have held the DOL guidance must provide a clear and unambiguous answer to the employer's particular situation, and not leave the employer "to its own devices to interpret the [FLSA]."²⁴⁷

B. Can Employers Stop Solicitation by Plaintiffs' Counsel?

Employers have been understandably upset by the efforts of plaintiffs' counsel and unions to openly solicit employee claims. Oftentimes, employers faced with plaintiffs' counsel's solicitation efforts wonder whether this type of open solicitation is unlawful or unethical. In determining the propriety of plaintiffs' counsel's websites touting particular class actions and letters by lawyers to potential class action plaintiffs, courts generally focus on the following: the rules of professional conduct for lawyers in the particular jurisdiction, plaintiffs' counsel's First Amendment free speech rights, and the potential for abuse by plaintiffs' counsel seeking to "drum up" business by making false or misleading statements.²⁴⁸

For example, in *Hacket v. Montefiore Health System, Inc.*,²⁴⁹ the Judge assigned to this case, the Honorable Paul A. Crotty, held a hearing and determined that plaintiffs' counsel had posted "false, misleading and deceptive" information on their website. Specifically, Judge Crotty determined that plaintiffs' counsel website falsely stated that he had:

- Granted a motion to certify a class action. No such motion had been filed in this case and Judge Crotty had not certified any class or collective action of current or past employees.

243 29 U.S.C. § 259.

244 See, e.g., *Frank v. McQuigg*, 950 F.2d 590, 598-99 (9th Cir. 1991) (opinion letters are "rulings" for purposes of § 10 defense); *Marshall v. Baptist Hosp.*, 668 F.2d 234, 237-38 (6th Cir. 1981) (same with respect to Field Operations Handbook).

245 U.S. Dept. of Labor Field Operations Handbook, FOH § 52f08 (May 31, 1997). See, e.g., *Frank*, 950 F.2d 590 (§ 10 defense available where improper overtime calculation was consistent with Administrator's Opinion Letter solicited by the defendant); *Heavenridge v. Ace-Tex Corp.*, 1993 U.S. Dist. LEXIS 21129 (E.D. Mich. Sept. 3, 1993). COMPLETE).

246 See 29 C.F.R. §§ 790.14 to 790.19. But see *Int'l Ass'n of Firefighters v. City of Rome*, 682 F. Supp. 522, 532 (N.D. Ga. 1988) ("[T]he Court will not hold that because the written interpretations were not originally relied upon, the City was forever deprived of the benefit of the agency's written advice.... Once the City received such written interpretations, proper reliance upon them is protected by the Portal-to-Portal Act."); *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465, 479 (M.D. Tenn. 1979) ("[I]t would be patently absurd to hold as a general rule that defendants whose pre-existing views happen to comport with administrative pronouncements could never be said to act thereafter in reliance on them."), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981).

247 *EEOC v. Home Ins. Co.*, 672 F.2d 252, 265 (2d Cir. 1982). See also *Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 927 (11th Cir. 1987) ("[a]dministrative interpretations hedged with qualifications, here the caveat that the correct answer depends on the particular circumstances, cannot provide the definitive opinion necessary to raise the statutory bar of section [10]."); *Burnison v. Mem'l Hosp., Inc.*, 820 F. Supp. 549, 558 (D. Kan. 1993) (no § 10 defense based on regulation using terms such as "adequate" and "usually," which raised distinctly factual questions upon which the regulation offers no guidance); but see *Marshall*, 668 F.2d at 238 (section 10 defense allowed based on the employer's reasonable construction of an ambiguous regulation stating that "courts should be hesitant to impose retroactive minimum wage liability on employers in the face of an administrative interpretation that the employer could plausibly interpret as insulating him from liability").

248 *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Hamm v. TBC Corp.*, 597 F. Supp. 2d 1338 (S.D. Fla. 2008); *Frye v. Baptist Mem. Hosp., Inc.*, 2008 U.S. Dist. LEXIS 41511 (W.D. Tenn. May 20, 2008).

249 No. 1:10-cv-02682-PAC (S.D.N.Y. Apr. 26, 2010).

- Concluded that employees had shown they had routinely not been paid for their meal breaks. Judge Crotty made no such ruling.
- Ordered that certain employees should receive notice of this lawsuit. Judge Crotty had not ordered that employees receive notice of this lawsuit.²⁵⁰

Judge Crotty also expressed that it was improper for plaintiffs' counsel to instruct defendant's employees who had visited the website to contact plaintiffs' counsel firm if they did not receive a copy of the notice of this lawsuit, as the Judge had not issued any orders regarding sending notice to defendant's employees. Plaintiffs' counsel apologized to the Court and to the defendant for the content on their website.

The Model Rules of Professional Conduct prohibit in-person, phone, or electronic solicitation of prospective clients for a lawyer's own pecuniary gain and require permissible communications to include the word "Advertising Material."²⁵¹ Many states' rules of professional conduct contain similar prohibitions and requirements, which may be enforced by the courts as well as state bar association ethics committees. For example, in *Hamm v. TBC Corporation*,²⁵² a federal district court in Florida recently issued significant sanctions against one of the most prolific Florida plaintiffs' wage and hour class action firms, the Shavitz Law Group (SLG), for violation of Rule 4-7.4(a) of the Florida ethics code, which prohibits lawyers or their employees from soliciting potential clients when a significant motive for doing so is pecuniary gain. In *Hamm*, the firm had telephoned company employees asking them if they would like to join a lawsuit for "money owed to them" for working through meal periods. The court issued an order: (1) barring SLG from representing any individuals, including any current opt-in plaintiffs, who did not work with any of the named plaintiffs, and from collecting any fees or costs for work performed representing any of these individuals; (2) requiring SLG to formulate and implement a formal written policy on solicitation; and (3) requiring SLG to reimburse defendants for all reasonable fees and costs incurred in connection with their motion for sanctions.²⁵³ The court also forwarded its findings and recommendations to the Florida Bar Association for possible further action against the firm.²⁵⁴

Not all courts take such strong action against plaintiffs' counsel for perceived violations of the ethical rules, however. In a recent wage and hour class action brought against Baptist Memorial Hospital,²⁵⁵ for example, the hospital sought a court order requiring plaintiffs' counsel to cease its mass mailing of solicitation letters to thousands of nurses who were potential class members and to remove a website that the hospital complained contained false and misleading information. Among other things, the hospital complained that the website stated "nurses or hourly employees ... are eligible to join the lawsuit" even though the law requires that employees must be similarly situated in order to join as plaintiffs in a collective action. It also stated:

...by participating in this lawsuit, you will become protected by federal law against any type of retaliation by your employer. However, if you do not participate in this action, or the other protected activities in this statute, you will obviously not be under the protection that federal wage laws provide to you for other actions you may take.²⁵⁶

This arguably implied that employees who did not participate in the lawsuit were forfeiting the protection of federal law and, as a result, would suffer adverse consequences. After the hospital filed its motion, plaintiffs' counsel revised the website.

In assessing the letters and the website, the federal court for the Western District of Tennessee denied the hospital's motion and concluded that there was no need for "a communications ban at this time."²⁵⁷ As to the website, the court found that following the revisions, the website did not contain deceptive or misleading communications, although the court did admonish plaintiffs' counsel to ensure that the website stated that the defendant denies the allegations of the complaint.²⁵⁸ As to the letters, the court agreed with the Tennessee Board of Professional Responsibility ("the Board") that the letters, which stated "if you would like to determine whether you can join the lawsuit, you need to contact our office immediately" and "if you would like more information about the lawsuit including how you can join, you can visit www.baptistvertime.com," were a direct solicitation for pecuniary gain in violation of the Tennessee Rules of Professional Conduct

²⁵⁰ Docket No. 17.

²⁵¹ ABA Model Rules of Professional Conduct and Code of Judicial Conduct, Rule 7.3.

²⁵² 597 F. Supp. 2d 1338 (S.D. Fla. 2009).

²⁵³ *Id.* at 1340.

²⁵⁴ *Id.* at 1341.

²⁵⁵ *Frye v. Baptist Mem'l Hosp., Inc.*, 2008 U.S. Dist. LEXIS 41511 (W.D. Tenn. May 20, 2008).

²⁵⁶ *Id.* at *5.

²⁵⁷ *Id.* at *17.

²⁵⁸ *Id.*

(TRPC).²⁵⁹ The letters also violated the TRPC because they did not contain the words “This is an Advertisement” in conspicuous print on the outside envelope or at the beginning and end of the letter, and the first sentence of the letter failed to state “if you have already hired or retained a lawyer in this matter, please disregard this message.”²⁶⁰ However, because plaintiffs’ counsel mailed a corrected version of the letter to the nurses after being notified by the Board that the letter did not comply with the TRPC, the court found there was no justification for the communications ban requested by the hospital.²⁶¹ Of course, the sanctioned mailing provided yet another opportunity for plaintiffs’ counsel to communicate about the class action with potential plaintiffs.

In determining whether to take action against a plaintiffs’ firm for soliciting potential class members, it is also important to remember that not every state ethics code prohibits solicitation and some state bar associations have issued opinions expressly permitting communications from class action plaintiffs’ lawyers to potential class members. For example, the New York State Bar Association issued an opinion that a lawyer could send a targeted mailing to current and former company employees stating that the lawyer represented clients who intended to bring a class action against the company and inviting similarly situated individuals to participate in the litigation.²⁶²

If an employer does seek sanctions against a plaintiffs’ firm for solicitation or misleading communications with potential plaintiffs, it is important to do so early in the litigation. In a recent wage and hour class action suit brought against WellPoint,²⁶³ a nationwide health benefits company, the company filed its opposition to conditional class certification together with a motion seeking a cease and desist order against plaintiffs’ counsel, Nichols Kaster & Anderson, L.L.P., arguing that plaintiffs’ counsel improperly distributed letters to potential plaintiffs and posted notice on their website, www.overtimerecases.com, that contained false and misleading information. The court recognized plaintiffs’ counsel’s First Amendment rights, but determined that these rights were limited by the prohibition against the dissemination of false and misleading information. Nevertheless, the court stated that such communications could be countered by court-authorized notice providing accurate information to putative class members.²⁶⁴ At that point, because the court had granted conditional certification for the purpose of sending notice of the litigation to potential class members, it declined to take further action other than directing plaintiffs’ counsel to prospectively cease disseminating advertisements to the putative class and remove from its website any notice of the litigation that was inconsistent with the court-approved notice.²⁶⁵

Employers may also be subject to sanctions for inappropriate communications to putative plaintiffs in a class or collective action. For example, a letter by a healthcare services provider to its employees after a FLSA collective action was filed against it resulted in significant sanctions against the provider because the court found the letter had misrepresented many of the issues in the case, mischaracterized the damages available to plaintiffs by ignoring statutory liquidated damages, and suggested that the suit could negatively impact employees’ professional status and job stability.²⁶⁶ In addition to ordering the provider to pay reasonable attorneys’ fees and costs in connection with plaintiffs’ motion, the court ordered that (1) the provider pay the cost of sending a corrective notice drafted by the court to all potential plaintiffs; (2) all potential plaintiffs who were sent the letter would have an extra 30 days to opt-in to the litigation; (3) it would consider allowing putative plaintiffs to opt-in post-verdict; and (4) the provider was enjoined from further unauthorized communications with potential plaintiffs.²⁶⁷ To avoid these potential risks, employers are cautioned to consult with counsel and carefully consider communications they make to their employees if a class or collective action is filed or threatened.

If certification for the purpose of giving notice is granted, employers should also promptly seek to limit communications by plaintiffs’ counsel to potential opt-in plaintiffs. Although employers may be unsuccessful in obtaining a blanket protective order prohibiting plaintiffs’ counsel from all further communications with potential opt-in plaintiffs following the issuance of the court-approved notice, employers may be successful in obtaining an order requiring prior notice of such communications and placing some restrictions on the type and method

²⁵⁹ *Id.* at 16-17.

²⁶⁰ *Id.* at **8.

²⁶¹ *Id.* at *17.

²⁶² New York State Bar Ass’n Comm. Prof. Eth. Op. 676 (1995).

²⁶³ *Ruggles v. Wellpoint*, 591 F. Supp. 2d 150 (N.D.N.Y. 2008).

²⁶⁴ *Id.* at 164.

²⁶⁵ *Id.*

²⁶⁶ *Belt v. Emcare Inc.*, 299 F. Supp. 2d 664, 667 (E.D. Tex. 2003).

²⁶⁷ *Id.* at 669-70.

of communications. For example, in *Taylor v. Pittsburgh Mercy Health Systems*,²⁶⁸ although the court denied the employer's motion for a protective order prohibiting *any* further direct or indirect communications by plaintiffs' counsel with potential class members, the court issued the following restrictions prohibiting plaintiffs' counsel from:

- Engaging in private communications designed to mimic the court-authorized notice or representing that their communications were authorized by the court;
- Engaging in private communications that conflict with the court-authorized notice;
- Initiating telephone or in-person contact with prospective collective action members for the purpose of soliciting them to join the lawsuit; and
- Refraining from communications that coerce putative opt-in plaintiffs into including themselves in the litigation.

As to any additional mailings, the court further ordered plaintiffs' counsel to:

- Advise opposing counsel of the proposed mailing;
- Provide a sample copy of the proposed mailing to opposing counsel and the court by fax; and
- Call opposing counsel and the court to schedule a telephone conference so that the court may consider plaintiffs' proposed course of action.

²⁶⁸ 2009 U.S. Dist. LEXIS 75342 (W.D. Pa. Aug. 25, 2009).

V. PRACTICAL RECOMMENDATIONS

To help minimize the risks described in this Report, it is recommended that healthcare employers evaluate the state of their compliance with state and federal wage and hour requirements with in-house and/or outside counsel. An analysis of this kind can begin by investigating the following questions:

A. Questions Regarding Pay Practices Involving Nonexempt Employees

1. Does the hospital provide nonexempt employees with training on proper timekeeping? If so, what evidence does the hospital have to prove it provided this training to employees?
2. What training or ongoing continuing education does Human Resources, payroll and compensation employees receive on wage and hour laws, investigating wage and hour complaints, retaliation, etc.? Employers spend thousands of dollars on training regarding discrimination and harassment and oftentimes spend very little on wage and hour compliance training even though wage and hour violations pose a greater economic risk than most discrimination claims.
3. What steps does the hospital take to ensure nonexempt employees are properly recording all hours worked? What steps does the hospital take to ensure nonexempt employees understand what it means to record all hours worked?
4. Does the hospital's payroll system permit supervisors to edit time records? If supervisors are permitted to edit time records, have they received training on the types of lawful edits? Does the hospital maintain detailed records showing the amounts and reasons for the edits?
5. Does the hospital pay shift differentials to nonexempt employees? If so, are they included in the regular rate of pay?
6. Does the hospital pay incentive bonuses, commission or other forms of incentive compensation to nonexempt employees? If so, has a determination been made as to whether these amounts should be included in the regular rate of pay?
7. Are nonexempt employees required to review time records, and, if accurate, certify the record is complete and accurate? Have nonexempt employees been trained to know what to do if their reported hours are not complete or are inaccurate?
8. Does the hospital aggregate hours worked for nonexempt employees at different hospitals within the same health system?

B. Questions Involving Exempt Versus Nonexempt Status

1. Has the hospital assessed whether exempt employees are properly classified? If so, what, if any, evidence is available to establish the basis for any claimed exemptions and has the hospital maintained documentation regarding the same?
2. Does the hospital currently utilize any form of review to confirm the duties performed by exempt employees?
3. Does the hospital take any deductions (other than taxes and withholding) from exempt employees' salaries? If so, has the hospital assessed the nature of these deductions and their lawfulness?
4. Has the hospital reviewed its job descriptions, training materials and performance evaluations to determine whether the information in these materials is consistent with any claimed exemptions?
5. Has the hospital assessed whether independent contractors are properly classified as exempt? If so, what, if any, evidence is available to establish the basis for such classifications under federal and state wage and hour, tax, workers' compensation and unemployment laws and has the hospital maintained documentation of the same?

C. Steps Employers Should Consider to Avoid or Minimize Liability

1. Consider eliminating automatic meal period deductions for hourly employees and, instead, require that employees record actual time spent on meal periods.
2. Prohibit employees from eating at their work stations unless the employee is taking a "working lunch" (meaning working while eating). If the employee is taking a working lunch, then the employee must be paid for the time worked.
3. Prohibit employees from reporting to work stations prior to scheduled start time.
4. Discipline employees for not properly clocking in and out or for working overtime without prior authorization.

5. Notify Human Resources or the legal department regarding any employee who is required to travel for work so that the company can determine the proper method of payment for such travel time.
6. Confirm that hourly employees are paid for all required and/or mandatory meetings.
7. Notify Human Resources or the legal department regarding Nurse Managers/Supervisors performing nonexempt duties on weekends and/or alternate shifts.
8. Train employees and managers regarding hours worked (what are they), accurate timekeeping and how to report any problems or concerns.
9. Promulgate clear timekeeping policies, train managers on those policies, and monitor compliance.
10. Periodically reinforce policies and training, including an annual letter sent to employees' homes and by email at work (if available to reach all nonexempt employees) from a senior executive reminding employees of key policies such as anti-discrimination/harassment, ethics, and wage and hour requirements.
11. Use an audit protocol to monitor hours worked reports (which typically involves training internal audit and compliance personnel on how to conduct such audits, document the results and ensure resolution including the payment of back wages, if appropriate).
12. Provide a robust complaint mechanism and conduct thorough investigations with appropriate remedial action.
13. Orient new employees with training on how to properly complete a timesheet or time entry.
14. Assess incentive/bonus programs to ensure these types of programs for managers are not incentivizing managers to act unlawfully.
15. Audit job classifications to ensure that they equate to duties actually performed and that such duties are properly characterized as exempt.
16. Evaluate whether under federal and state law you can restrict employee access to certain types of websites used to solicit class members for employment related class or collective actions.

The peril is great, and preventative medicine can help immeasurably.

Littler Mendelson Offices

Albuquerque, NM
505.244.3115

Anchorage, AK
907.561.1214

Atlanta, GA
404.233.0330

Birmingham, AL
205.421.4700

Boston, MA
617.378.6000

Charlotte, NC
704.972.7000

Chicago, IL
312.372.5520

Cleveland, OH
216.696.7600

Columbia, SC
803.231.2500

Columbus, OH
614.463.4201

Dallas, TX
214.880.8100

Denver, CO
303.629.6200

Detroit, MI*
313.446.6400

Fresno, CA
559.244.7500

Gulf Coast
251.432.2477

Houston, TX
713.951.9400

Indianapolis, IN
317.287.3600

Kansas City, MO
816.448.3558

Las Vegas, NV
702.862.8800

Lexington, KY*
859.317.7970

Long Island, NY
631.293.4525

**Los Angeles, CA
Downtown**
213.443.4300

**Los Angeles, CA
Century City**
310.553.0308

Memphis, TN
901.795.6695

Miami, FL
305.400.7500

Milwaukee, WI
414.291.5536

Minneapolis, MN
612.630.1000

Morgantown, WV
304.291.3004

Nashville, TN
615.383.3033

New Haven, CT
203.974.8700

New York, NY
212.583.9600

Newark, NJ
973.848.4700

Northern Virginia
703.442.8425

Northwest Arkansas
479.582.6100

Orange County, CA
949.705.3000

Orlando, FL
407.393.2900

Overland Park, KS
913.814.3888

Philadelphia, PA
267.402.3000

Phoenix, AZ
602.474.3600

Pittsburgh, PA
412.201.7600

Portland, OR
503.221.0309

Providence, RI
401.824.2500

Reno, NV
775.348.4888

Rochester, NY
585.203.3400

Sacramento, CA
916.830.7200

San Diego, CA
619.232.0441

San Francisco, CA
415.433.1940

San Jose, CA
408.998.4150

Santa Maria, CA
805.934.5770

Seattle, WA
206.623.3300

St. Louis, MO
314.659.2000

Walnut Creek, CA
925.932.2468

Washington, D.C.
202.842.3400

INTERNATIONAL

Caracas, Venezuela
58.212.610.5450

Mexico City, Mexico
52.55.4738.4258

Monterrey, Mexico
52.81.8865.4340

