

Wage Class & Collective Actions: The Basics

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I. ENFORCEMENT CONTEXT

- A. Wage nonpayment in Colorado is estimated at \$750 million per year and \$25–\$47 million in associated tax revenue.¹
- B. In FY 2015, the U.S. Department of Labor (DOL) collected \$247 million in back wages.²
- C. Nearly 9,000 wage and hour cases were filed in the federal U.S. district courts in FY 2015.³
- D. The U.S. Department of Labor has been extremely active recently, resulting in a constantly evolving regulatory framework, with the promulgation of new rules relating to “white collar” exemptions, home care regulations, and administrative interpretations regarding independent contractor status and joint employers.

II. PRE-LITIGATION ISSUES

- A. **Employers:** Respond to complaints immediately, conduct internal audits, and always be on the “lookout” for wage-related issues to prophylactically get ahead of other issues that may be brewing. Wage claims often percolate up from a disgruntled employee who may have a legitimate complaint regarding a workplace issue. If that concern is not resolved before a suit is filed or a complaint is filed with a government agency, it can quickly blossom into a substantial (*i.e.*, expensive) matter in the hands of a motivated plaintiff’s attorney. See Wage Claim Investigation Checklist (p. 17).
- B. **Employees:** Plaintiffs’ counsel: discuss wage issues with all potential clients.
- C. **Damages analyses:** At the outset of any claim, it is important for both parties to try to determine what the potential damages (if any) are under applicable laws.
- D. **Retaliation:** Keep anti-retaliation provisions in mind. See, *e.g.*, 29 U.S.C. § 215(a)(3) (it is unlawful for any person “to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be

¹ Available at: <http://www.coloradofiscal.org/wp-content/uploads/2014/03/Wage-Nonpayment-in-Colorado-Final-1.pdf>

² <http://www.dol.gov/whd/statistics/statstables.htm>

³ <http://www.uscourts.gov/statistics-reports>

instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee”).

III. WAGE AND HOUR BASICS AND THE STATUTORY FRAMEWORK

A. Sources of Law:

- a. FLSA: The Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201 to 219, is governed not only by the applicable statutory law, but also the applicable regulations (Title 29 of the Code of Federal Regulations); the U.S. DOL administrative interpretations⁴; the U.S. DOL Field Operations Handbook⁵; and a significant body of case law across the federal courts.
- b. CWCA: The Colorado Wage Claim Act (“CWCA”), C.R.S. §§ 8-4-101 to 123, the applicable regulations (7 Colo. Code Regs. 1103), and the Colorado Minimum Wage Order (currently “Wage Order No. 32”) regulate wage claims under state law for residents and those working in Colorado.⁶ Additional guidance can be found at the Colorado Department of Labor & Employment (“CDLE”) Advisory Bulletins and Resource Guide.⁷ The Colorado Wage Protection Act⁸ revised the CWCA, effective January 1, 2015, and provides alternative administrative remedies for the processing of claims for wages and compensation under \$7,500 per employee, imposes more stringent record-keeping requirements on employers, subjects employers to stiffer fines, provides for attorneys’ fees for employees paid less than the applicable minimum wage, and revises various statutory definitions and procedures. C.R.S. §§ 8-4-101 – 8-4-118. (Addressed in greater detail below.)

B. Wages and Conduct Regulated:

1. Minimum wage (\$8.31/hour as of Jan. 1, 2016, in Colorado and \$7.25 per hour effective July 24, 2009, under the FLSA);
2. Overtime for over 40 hours in a week (FLSA and CWCA) and for over 12 hours in a day (CWCA);

⁴ <http://www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm>.

⁵ <http://www.dol.gov/whd/foh/>.

⁶ *Abdulina v. Eberl’s Temp. Servs., Inc.*, 79 F. Supp. 3d 1201, 1206 (D. Colo. 2015) (clarifying that the CWCA “applies only to workers in Colorado, and dismissing CWCA claims brought by plaintiff who “did not work in and is not a resident of Colorado”).

⁷ <https://www.colorado.gov/pacific/sites/default/files/Advisory%20Bulletins.pdf>.

⁸ C.R.S. §§ 8-4-101–8-4-118, *as amended by* 2014 Colo. Legis. Serv. Ch. 276 (S.B. 14-005); *see also* 7 Colo. Code Regs. § 1103-7 (2015).

3. A plethora of other potential wage violations: off-the-clock work, rest periods⁹, meal periods, recordkeeping¹⁰, timekeeping, timing of wage payments, fluctuating workweek, calculation of wage payments, tipped employees, server minimum wage, bonuses, exemption status, independent contractor status, volunteers, interns, travel time, timeclock rounding¹¹, on-call time¹², compensatory time, preliminary/postliminary work, donning and doffing, time credits¹³, and payroll deductions. We will address some of these issues in more detail today.

C. Initial Considerations:

1. Jurisdiction:

- a. *FLSA*: Generally, if a business exceeds \$500,000 in gross annual revenue, the *FLSA* will apply due to the broad scope of interstate commerce. 29 U.S.C. §§ 203(r), (s), 206(a) and 207(a). *FLSA* claims can be filed in state or federal court. 29 U.S.C. § 216(b).
- b. *Colorado*: The Wage Order covers only certain industries (retail and service, commercial support service, food and beverage, and health and medical); applies to “employers” as defined in the Wage Order; and governmental entities are excluded from coverage. 7 Colo. Code Reg. § 1103-1:1. The CWCA is not jurisdictionally limited except that its “employer” definition also excludes governmental entities. C.R.S. § 8-4-101 (6); 7 Colo. Code Reg. § 1103-1:2.

2. Statute of Limitations:

- a. *FLSA*: Generally, lawsuits under the *FLSA* must be commenced within two years after the cause of action accrued, “except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.” 29 U.S.C. § 255(a).¹⁴ The employee has the burden of proving the employer acted willfully, meaning the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.”

⁹ See *Lozoya v. AllPhase Landscape Construction, Inc.*, No: 12-cv-1048-JLK, 2015 WL 1757080, at *2 (D. Colo. Apr. 15, 2015).

¹⁰ See, e.g., *Brown v. ScriptPro, LLC*, 700 F.3d 1222, 1230-31 (10th Cir. 2012) (employee’s failure to use employer’s recordkeeping system to report overtime renders failure to pay overtime not an *FLSA* violation).

¹¹ See, e.g., *Corbin v. Time Warner Entm’t*, ___ F. 3d ___, ___, 2016 WL 1730403 (9th Cir. 2016) (affirming summary judgment in favor of employer who rounds timeclock punches to the nearest quarter hour under the *FLSA* and California law, finding that even if the rounding practice had a slight negative impact on the employee).

¹² See, e.g., *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1131 (10th Cir. 2000).

¹³ See 29 U.S.C. § 207(h)(2); 29 C.F.R. § 778.200.

¹⁴ Note a court may toll the applicable statute of limitations, which is permissible in the court’s discretion, under certain circumstances where “the delay between the filing of a complaint and notice to potential opt-in plaintiffs is attributable to something other than “litigation in its normal course.” *Collins v. Dkl Ventures, LLC*, No. 16-cv-00070, 2016 WL 852880, at *3 (D. Colo. Mar. 4, 2016).

Glapion v. Castro, No. 14-cv-01699, 2015 WL 725331, at *37 (D. Colo. Nov. 16, 2015) (dismissing FLSA claims where plaintiff was outside two-year limitation period and failed to prove willfulness).

- b. *Colorado*: “All actions brought pursuant to this article shall be commenced within two years after the cause of action accrues and not after that time; except that all actions brought for a willful violation of this article shall be commenced within three years after the cause of action accrues and not after that time.” C.R.S. § 8-4-122. Additionally, under the Wage Protection Act, there are various timing requirements surrounding an employer’s response to an employee’s demand for wages, which may be made at any time after the wages are due, and subject an employer to potential penalties and fines if the employer fails to timely respond. C.R.S. § 8-4-109(3)(a)-(b).
3. Arbitrability and Class Waivers: Both sides need to determine at the very outset whether there are agreements requiring these claims to be arbitrated, and if so, whether there is a class waiver in the agreement.
4. Collective Bargaining Agreement? If so, pay attention. This can serve as the basis for a motion to dismiss and also can provide clauses that will govern the outcome. See, e.g., 29 U.S.C. § 203(o); *Patton v. Stolle Machinery Co., LLC*, No. 14-cv-3392, 2015 WL 5013668 (D. Colo. Aug. 25, 2015) (granting employer’s motion to dismiss).

IV. WAGE CLASS AND COLLECTIVE ACTIONS: THE BASICS

- A. **Collective Actions**, 29 U.S.C. § 216(b), provide employees with the rights to sue their employer for unpaid minimum wage, unpaid overtime, and/or retaliation on a collective basis. This is similar to a class action, but there are some key distinguishing features.

Practice Point: Collective actions are distinct from class actions and preserve only federal law claims, not state law claims.

1. Standard: An action may be maintained against an employer by “any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” *Id.* As addressed below, “similarly situated” is the crux of the analysis regarding whether or not a collective action may be maintained.
2. Claim Types: minimum wage, overtime, and/or retaliation. *Id.* The most common types of allegations relate to either off-the-clock or misclassification cases.
3. “Opt-In” and Consent: “No employee shall be a party plaintiff to any such 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.” *Id.*; see also 29 U.S.C. § 256(a).

Practice Point: Until a consent is filed, the statute of limitations continues to run against the individual's claim. See 29 U.S.C. § 256(b).

4. **Remedies:** Prevailing plaintiffs may recover the amount of unpaid minimum wages or unpaid overtime compensation, which may be doubled if liquidated damages are awarded. 29 U.S.C. § 216(b); *but see* 29 U.S.C. § 260 (the court may, in its discretion, not award liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation" of the FLSA). Punitive damages may also be available. See *Pina-Belmarez v. Bd. of Cnty. Com'rs of Weld Cnty. Colo.*, No. 11-cv-03179, 2012 WL 2974701, at *7 (the availability of punitive damages under the FLSA "is an issue on which federal courts have not agreed, and the Tenth Circuit has yet to decide the issue.") Mandatory attorneys' fees and costs are assessed against the defendant in any judgment awarded to the plaintiff or plaintiffs. 29 U.S.C. § 216(b).

Practice Point: Expert witness fees are not recoverable. See *Gray v. Phillips Petroleum Co.*, 971 F.2d 591, 594 (10th Cir. 1992).

5. **Conditional Certification and Decertification:** The "similarly situated" analysis is often broken out into two phases.
 - a. **Conditional Certification:** Plaintiff(s) request that the court certify the case as a collective action for purposes of sending notice to putative class members on the basis that they are "similarly situated." After notice issues, putative class members have a period of time to opt-in (join) the suit.
 - (i) Standard: "require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001). This is a low burden. *Chavez v. Excel Servs. Southeast, Inc.*, No. 13-cv-03299, 2014 WL 4651997, at *2 (acknowledging "low threshold" for establishing substantial similarity at the initial notice stage of an FLSA collective action); *see also Turner v. Chipotle Mexican Grill, Inc.*, 123 F. Supp. 3d 1300, 1301 (D. Colo. 2015) ("a proper reading of the FLSA at this stage of collective action proceedings requires little more than the permissive joinder of putative class members, and I reject the premise that collective action certification under 29 U.S.C. § 216(b) must hew to the formalities of a two-step 'certification' process"); *and Beall v. SST Energy Corp.*, No. 15-cv-01741, 2016 WL 286295, at *1, *3 (D. Colo. Jan. 25, 2016) (although the plaintiff's burden at the conditional certification stage "is a minimal one . . . mere conclusory declarations or those based on hearsay or speculation are insufficient to grant conditional FLSA collective action certification"; granting

conditional certification). If conditional certification is denied, then plaintiffs may not pursue claims on a collective basis.¹⁵

- (ii) Notice: If the court grants conditional certification, then it will also authorize notice to the putative class, as defined by the parties and the court.

Practice Point: At the outset of collective action litigation, there are a variety of strategic considerations, including: (1) the propriety (or not) of stipulating to notice; (2) to the extent conditional certification is briefed, the parties may choose to conduct some limited discovery in support of those briefs, so another consideration at this phase is the appropriate structure/content of pre/post-certification discovery and the associated scheduling order(s); (3) the appropriate statute of limitations for purposes of the notice and tolling; (4) the definition of the putative class; (5) contents¹⁶, structure, and dissemination of¹⁷ notice; (6) for larger cases, potentially using a claims administrator for notice dissemination; (7) the parties' respective contact with putative class members; (8) interlocutory appeal generally is not available at the conditional certification/notice phase; (9) potential early partial dispositive motion on issues of law (motion to dismiss¹⁸ or motion for partial summary judgment¹⁹) or Fed. R. Civ. P. 68 Offers of Judgment²⁰; (10) representative/individualized discovery²¹ and the structure of discovery²²; and/or (11) experts.

- b. *Decertification:* At the close of discovery, an employer typically moves to decertify the collective by demonstrating that the named plaintiffs' circumstances are too dissimilar from the putative class such that the case should not proceed on a representative basis. During this "second stage analysis," courts consider the (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001). Courts must also consider whether plaintiffs can show a

¹⁵ *See, e.g., Saarela v. Union Colony Protective Servs., Inc.*, No. 13-cv-01637-MSK-MJW, 2014 WL 3408771, at *3-4 (D. Colo. Jul. 14, 2014) (denying conditional certification).

¹⁶ *See, e.g., Chavez v. Excel Servs. SE, Inc.*, No. 13-cv-03299-CMA-BNB, 2014 WL 4651997 (D. Colo. Sept. 18, 2014) (resolving parties' disputes about notice and directing the parties to confer to resolve about remaining issues).

¹⁷ *See, e.g., Reab v. Electronic Arts, Inc.*, 214 F.R.D. 623, 630-31 (D. Colo. 2002) (notice by first class mail is preferred dissemination method).

¹⁸ *See, e.g., ElHelbawy v. Pritzker*, No. 14-cv-01707-CBS, 2015 WL 5535246, at *13 (D. Colo. Nov. 20, 2015) (granting motion to dismiss because plaintiff failed to plausibly state a minimum wage or overtime claim).

¹⁹ *See, e.g., Perez v. Pinon Mgmt., Inc.*, No. 12-CV-00653-RM-MEH, 2014 WL 5596261, at *1 (D. Colo. Nov. 4, 2014) (granting summary judgment motion); *Haviland v. Catholic Health Initiatives*, 729 F. Supp. 2d 1038 (S.D. Iowa 2010).

²⁰ *See, e.g., Delgado v. Castellino Corp.*, No.13-cv-03379-MSK-MJW, 2014 WL 4339232, at *3-4 (D. Colo. Sept. 2, 2014) (unaccepted Rule 68 offer of judgment cannot moot individual plaintiff's claims).

²¹ *See, e.g., Renfro v. Spartan Computer Servs., Inc.*, No. 06-2284-KHV, 2008 WL 821950 (D. Kan. Mar. 26, 2008) (permitting individual written discovery to each of 136 opt-in plaintiffs and 27 depositions).

²² *See, e.g., In Re Am. Family Mut. Ins. Co. Overtime Pay Lit.*, No. 06-cv-17430-WYD-CBS, 2009 WL 1120293 (D. Colo. 2009) (addressing plaintiffs' failure to respond to written discovery and individualized discovery).

“common policy or plan in violation of the FLSA.” *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273, 1279 (D. Kan. 2012). “[P]laintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs.” *Frye v. Baptist Mem’l Hosp.*, No. 07-2708, 2010 WL 3862591, at *5 (W.D. Tenn. Sept. 27, 2010) (citation omitted). Where there is no policy that violates the FLSA on its face, “courts generally require a showing that the employer’s common or uniform practice was to not follow its formal, written policy.” *Id.*

- (i) Disparate factual and employment settings: different job titles, duties, locations, experiences, shifts, supervisors, policies, damages, etc.
- (ii) Individualized defenses: Analyzing individualized defenses, courts focus on “whether the potential defenses pertain to the opt-in class as a whole or whether, many different defenses will be raised with respect to each individual plaintiff.” *Green v. Harbor Freight Tools USA, Inc.*, 888 F. Supp. 2d 1088, 1103 (D. Kan. 2012) (citations omitted). Here, look to compliance and lawful application of policies and practices, gap time²³, *de minimis* time, actual/constructive knowledge of supervisors, individualized damages, etc.
- (iii) Fairness and procedural considerations: A court may decertify a collective if it is not “confident that proceeding as a class would permit the efficient resolution of the claims in one proceeding.” *Scott v. Raudin McCormick, Inc.*, No. 08–4045–EFM, 2010 WL 5093650, at *4 (D. Kan. Dec. 8, 2010).

Practice Point: If the case is decertified²⁴, opt-in plaintiffs’ claims are dismissed without prejudice and then may only proceed as individual actions; alternates include partial decertification or intervention pursuant to Fed. R. Civ. P. 24. If not, the case can proceed to trial as a collective action.

- B. **Class Actions** are authorized and governed by Rule 23 of the Federal Rules of Civil Procedure (or the corresponding Colorado Rule of Civil Procedure 23) and allow a plaintiff to file classwide claims regarding rights afforded under state law. Class actions are distinct from collective actions in several key ways.
 - 1. **“Opt Out”:** Class members must request exclusion from the class, or else they are bound by the judgment.

²³ See, e.g., 2008 U.S. DOL Opinion Letter FLSA-2008 – 7NA (if the employee’s total wages for the workweek divided by the compensable hours worked is equal to or exceeds the applicable minimum wage for all hours worked, including the time worked because of a missed meal period, then no further compensation is due); *Robertson v. Bd. of Cnty. Comm’rs of Cnty. of Morgan*, 78 F. Supp. 2d 1142, 1159 (D. Colo. 1999).

²⁴ See, e.g., *Creal v. Group O, Inc.*, ___ F. Supp. 3d ___, 2016 WL 98566 (N.D. Ill. 2016) (decertifying variety of unpaid overtime claims); *Ruiz v. Citibank, N.A.*, 93 F. Supp. 3d 279 (S.D.N.Y. 2015) (decertifying off-the-clock claims).

Practice Point: Because the FLSA “opt-in” procedure tends to produce lower participation rates, adding one or more Rule 23 “opt-out” claims increases overall participation rates, making the hybrid action appealing to plaintiffs.

2. **Different Certification Process:** “At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” F.R.C.P. 23 (c)(1)(A).
 - a. **Four requirements for certification:** (1) Numerosity: the class is so numerous that joinder of all members is impracticable; (2) Commonality: “there are questions of law or fact that are common to the class”; (3) Typicality: the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) Adequacy of representation: the representative parties will fairly and adequately represent the interests of the class. F.R.C.P. 23(a).

Practice Point: If Rule 23 claims are filed with FLSA claims, timing of the various certification motions should be coordinated.

V. COMPENSABLE “WORK”

- A. **Off-the-Clock claims:** Off-the-clock claims are frequently filed. It is critical to determine whether the work being performed is compensable, or not.
- B. **Compensable Activities:** Virtually all industries are currently facing a glut of wage lawsuits regarding activities preliminary and postliminary to, or associated with, the workday. Under the FLSA, “principal activities” are those which are integral and indispensable to the work the employee is employed to do and are considered “work.” See 29 C.F.R. § 785.24. Thus, the threshold issue is always whether or not the activities, such as emailing and texting, are considered “work” under the FLSA, such that they are both integral and indispensable to the employee’s principal activities. See, e.g., *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-04 (9th Cir. 2003); see also 29 C.F.R. § 785.7 (“work” constitutes all hours the employee is required to give to his employer, except those that are preliminary or postliminary). Work is not defined under the FLSA. Rather, to determine whether an activity constitutes “work,” courts consider whether the activity is “controlled or required by the employer and pursued for the benefit of the employer.” See, e.g., *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007). Courts also examine whether the employer knew or had reason to know the work was being performed, and how the employer managed the work. See generally 29 C.F.R. §§ 785.11-13.
- C. ***Integrity Staffing v. Busk*, 135 S. Ct. 513 (2014):** In an evolution of this analysis, in 2014, the U.S. Supreme Court determined that for a pre- or post-shift activity to be compensable under the FLSA, it must be an “intrinsic element” of the job, something that an “employee cannot dispense if he is to perform his principal activities.” *Id.* at

517. The court applied this reasoning to the security screenings at issue and determined that the time it took employees to pass through post-shift security screens did not meet this standard. *Id.* at 518-19.

- D. **Training Time, Travel Time, Donning and Doffing:** A similar yet detailed analysis is applied to determine the compensability of training time (29 C.F.R. §§ 785.27-32), travel time (29 C.F.R. §§ 785.35-41), and donning and doffing (29 C.F.R. § 203(o)²⁵).

Practice Point: There are ever-increasing activities that employees claim constitute compensable “work.” Non-exempt employees increasingly have the ability to check their work email remotely (*e.g.*, on their smartphones or home computers); receive after-hours automatic text messages or calls from their employers regarding staffing requests, or from co-workers regarding work; carry work-issued phones or pagers; complete mandatory trainings or competencies outside of working hours; or simply work remotely. And, for the employees who work remotely, they generally have to boot up their computers to work. Similarly, many non-exempt employees may receive calls, texts, pages, or in-person interruptions to their meal breaks. Employees also sometimes wear special protective equipment.

E. **Employer’s Burden:**

1. Employers are responsible for work performed and wage payments; “[i]f the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.” 29 C.F.R. § 785.12.
2. Management “cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.” 29 C.F.R. § 785.13.
3. The U.S. Department of Labor’s spring regulatory agenda in 2015 sought comments “on the use of technology, including portable electronic devices, by employees away from the workplace and outside of scheduled work hours.” No proposed rule on this issue has developed out of this request yet, but it shows the DOL considers these issues to be important.

Practice Point: In this brave new world, it is critical for employers to evaluate which of these tasks their employees are able to do remotely and ensure that, to the extent employees perform such work outside of normal working hours, the employees know how to be compensated for such time and use exception procedures to adjust payroll records.

- F. **Recent case study:** *Allen v. City of Chicago*, No. 10 C 3183, 2015 WL 8493996 (N.D. Ill. Dec. 10, 2015): The court drew a line between compensable and non-compensable

²⁵ Applies only to unionized workplaces.

time the plaintiff police officers spent on the BlackBerrys outside of scheduled work hours:

- a. Compensable: Time spent performing “necessary work,” such as “reaching out to CIs, gathering information on investigations that were heating up, and contacting and reallocating teams of officers in response to a shooting,” as such duties were “necessarily and primarily as part of plaintiffs’ jobs.” *Id.* at *14.
- b. Not Compensable: Time spent “monitoring” their BlackBerrys, because such activity was not “pursued necessarily and primarily for the benefit of the [employer],” analogous to cases where the requirement that an employee carry a radio and respond if necessary does not convert a meal period to compensable time under the FLSA, unless monitoring the radio prevented the employee from using the meal break for his own benefit. *Id.*
- c. Knowledge: Plaintiffs could not recover wages for compensable time spent on their BlackBerrys because they did not prove “that their supervisors invariably knew or should have known when they were working off duty on their BlackBerrys.” *Id.* at *17. Here, the BlackBerry work occurred outside the physical presence of the supervisors, and supervisors were often unaware if an officer was on or off duty when responding to emails. Also, certain alleged compensable time was performed between non-supervisory employees, and therefore there was no way for supervisors to be aware of it. *Id.*
- d. Importance of Systems to Ensure Wage Payments/Corrections to Timekeeping Records²⁶: The City had an established system for employees to request overtime, and the officers could not prove that they were pressured to not submit overtime for work performed on the BlackBerry when up to 120 requests for unspecified overtime work were submitted each day, and supervisors did not require details about the nature of the work performed (*e.g.*, time spent answering emails on a BlackBerry).
- e. Holding: Work was not compensable, and judgment was entered in favor of the employer.

VI. ADMINISTERING UNINTERRUPTED MEAL BREAKS

A. **Standards:**

1. FLSA: Although federal law does not require an employer to provide meal breaks to employees, most employers provide meal breaks pursuant to applicable state laws.

²⁶ See also *White v. Baptist Mem’l Health Care Corp.*, 699 F. 3d 869, 876 (6th Cir. 2012) (autodeduct system is lawful under the FLSA because the employer had no knowledge of meal break work not noted in log books and the employer did not discourage use of the log book).

- And, the FLSA requires any meal breaks provided to be “bona fide.” Specifically, “[t]he employee must be completely relieved from duty for the purposes of eating regular meals. . . The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.” 29 C.F.R. § 785.19(a).
- a. *Tenth Circuit Standard*: In the Tenth Circuit, as well as in other jurisdictions, the “completely relieved from duty” test has transformed into an analysis of whether the meal break is predominantly for the benefit of the employee or employer. See *Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145 (10th Cir. 1992).
 2. Colorado: Employees shall be entitled to an uninterrupted and ‘duty free’ meal period of at least a 30-minute duration when the scheduled work shift exceeds five consecutive hours of work. The employees must be completely relieved of all duties and permitted to pursue personal activities to qualify as a non-work, uncompensated period of time. When the nature of the business activity or other circumstances exist that make an uninterrupted meal period impractical, the employee shall be permitted to consume an “on-duty” meal while performing duties. Employees shall be permitted to fully consume a meal of choice “on the job” and be fully compensated for the “on-duty” meal period without any loss of time or compensation. 7 Colo. Code Regs. § 1103-1:7.

B. Issues:

1. Meal Break Interruptions: Non-exempt employees claim that their meal breaks have been so interrupted that the meal periods are no longer “bona fide,” such that they should be compensated for the entire period.
2. De Minimis: Interruptions that are infrequent or short in duration are likely *de minimis*, although there is no clear regulation or common law providing clear guidance. “When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.” See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946); see also *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1333-34 (10th Cir. 1998) (to determine whether time spent on an activity in the aggregate is *de minimis*, courts examine a variety of factors); *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1057 (9th Cir. 2010) (“the test reflects a balance between requiring an employer to pay for activities it requires of its employees and the need to avoid ‘split-second absurdities’ that ‘are not justified by the actuality of the working conditions.’”) (citations omitted); U.S. DOL Field Operations Handbook Ch. 31 § b(23) (rev. Dec. 15, 2000).

3. Geographic Restriction: “It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.” 29 C.F.R. § 785.19(b).
4. Timekeeping Systems and Automatic Deductions: Some employers track non-exempt employees’ meal break time either with an “automatic deduction” (“autodeduct”) or a “swiping” timekeeping system. Under an autodeduct system, an employee’s meal break, usually 30 minutes, is automatically deducted from that employee’s timekeeping records for the day. Under a swiping system, the employee is responsible for physically clocking out when he takes his meal break, again, usually 30 minutes, and then clocking back in at the end of that break. Both systems are legal; however, the devil is in the details. Specifically, regardless of what timekeeping system is utilized, the employer must offer an exception procedure (such as a log book); train employees and supervisors on this procedure; and compensate for all entries made pursuant to the exception procedure. Many health care employers utilize a log book system for employees to enter “exceptions” (e.g., a missed meal break swipe or under autodeduct, when an employee worked through a meal). It is critical that employers train employees regarding the existence and use of this log book upon hire; reinforce its use for all employees; do not discourage use; and always compensate employees for all proper entries made in the book.
5. Guidance? See copious amounts of case law and the U.S. Department of Labor Field Operations Handbook.

Practice Point: It is advisable that employees take their meal breaks away from their work stations; turn in or turn off work-issued pagers or cell phones during their meal breaks; not be subject to frequent or lengthy interruptions; have access to an exception procedure to ensure compensation if/when the employee’s meal break is interrupted; and regularly train supervisors/employees regarding these issues. Additionally, employers may consider having employees sign acknowledgment forms upon hire that they understand and know where the log book is and will use it, and regularly follow up with employees who do not use it.

VII. THE U.S. DEPARTMENT OF LABOR UPDATES:

A. “White Collar” Exemptions: The U.S. Department of Labor’s Expected Rule Change For Executive, Administrative, and Professional Employees

1. Proposed Rule: On July 6, 2015, in response to a Presidential Memorandum directing the U.S. DOL to update the regulations regarding overtime exemptions, it issued a proposed rule that would change the “white collar” exemption for executive, administrative, and professional employees.²⁷ Specifically, it would raise the required minimum salary for most FLSA exemptions from \$455 to \$970 per week

²⁷ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,516 (proposed July 6, 2015) (to be codified at 29 C.F.R. § 541).

- (\$23,660 to \$50,440 annually, with additional increases thereafter). And the DOL proposes to establish a mechanism for automatically updating the salary and compensation levels going forward. This is aimed at the 40th percentile of weekly earnings for full-time salaried workers.
2. Impact: Accordingly, exempt employees who currently earn less than that \$50,440 threshold will no longer be properly classified as exempt.
 3. Road to Implementation: Note that the proposed rule has been sent to the Office of Management and Budget, which typically takes 30–60 days to review a proposed rule before approving it. Therefore, the final rule could be published in May of this year. However, the House and Senate have introduced the Protecting Workplace Advancement and Opportunity Act, which, among other things, would prevent the DOL from implementing the new overtime rule as currently proposed.²⁸

Practice Point: The DOL expects that the proposed increase salary rule will extend overtime protections to nearly 5 million workers within the first year of its implementation. Because there has been a significant lead up to this change, it is unclear from an enforcement perspective whether there will be any grace period after the new rule becomes effective. Accordingly, now is the critical time for employers to audit exempt employees who earn less than \$50,400 annually to determine proper classification and compliant wage payments on a go-forward basis.

B. Independent Contractors

1. New Guidance Issued July 2015: The DOL essentially indicated that the definition of “employ” is very broad under the FLSA such that most workers will qualify as “employees,” not independent contractors. **“Most workers are employees under the FLSA’s broad definition.”** U.S. DOL WHD Administrator Interpretation Letter FLSA 2015-1 (“The Application of the Fair Labor Standards Act’s ‘Suffer or Permit’ Standard in the Identification of Employees Who Are Misclassified as Independent Contractors”).
2. Considerations under this analysis include:
 - a. Focus on the “ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee).” *Id.*
 - b. A “compelling” factor is whether the work performed is an integral part of the employer’s business. “Work can be integral to a business even if the work is just one component of the business and/or is performed by hundreds or thousands of other workers.” Work can be integral to an employer’s business “even if it is

²⁸ See <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=400422>

performed away from the employer’s premises, at the worker’s home, or on the premises of the employer’s customers.” *Id.*

- c. The “control” factor has always been important, and the DOL clarified that “an employer’s lack of control over workers is not particularly telling if the workers work from home or offsite.” This means a flexible work schedule alone does not make a worker an independent contractor.

Practice Point: The DOL has declared that a vast majority of workers are independent contractors. As such, employers would be well advised to conduct audits of independent contractor relationships to confirm the propriety of those arrangements.

C. Joint-Employer Status

1. The 2015 NLRB decision *Browning-Ferris* broadened the joint-employer rule, which can be argued to apply even to non-unionized workplaces:
 - a. “The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may ‘share’ control over terms and conditions of employment or ‘codetermine’ them, as the Board and the courts have done in the past.” 362 NLRB No. 186 (N.L.R.B. Aug. 27, 2015).
2. On January 20, 2016, the U.S. DOL Wage and Hour Division issued an interpretative memorandum further broadening the joint-employer concept. See U.S. DOL WHD Administrator Interpretations Letters FLSA 2016-1 (“Joint employment under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act”). This guidance indicates that joint employment is significantly broader than certain common law (right to control) determinations had been. Specifically, the DOL provides a horizontal analysis (whether two different businesses share control of an individual worker) *and* a vertical analysis (focusing on the degree of economic dependence the worker has, typically with third-party employment arrangements). Under these tests, it is likely that certain functions that employers routinely outsource likely will support a joint employment finding.
 - a. “When two or more employers jointly employ an employee, the employee’s hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of calculating whether overtime pay is due. Additionally, when joint employment exists, all of the joint employers are jointly and severally liable for compliance with the FLSA.” *Id.*

- b. Liability for joint employers: “In cases where joint employment is established, the employee’s work for the joint employers during the workweek ‘is considered as one employment,’ and the joint employers are jointly and severally liable for compliance, including paying overtime compensation for all hours worked over 40 during the workweek. 29 C.F.R. 791.2(a).” *Id.*

Practice Point: The WHD will apply historical broad rules, guided by the FLSA’s “suffer or permit to work” language, to address the growing complexity of today’s business world. Depending upon the relationship—even if indirect—with an employee or an employee’s employer, an entity may itself be a joint employer subject to liability for FLSA violations.

- A. **Home Care Regulations:** The FLSA’s companionship services exemption²⁹ became a final rule effective October 13, 2015. The regulations generally apply to employees who provide care and protection to individuals who, due to age or infirmity, are unable to care for themselves.³⁰ Although employers had long relied on this exemption to not pay overtime to many home care workers, such workers now must be paid overtime, including many “direct care workers such as certified nursing assistants, home health aides, personal care aides, and other caregivers,” as well as live-in domestic service workers. As such, most employers can no longer properly use the exemption and must pay these employees minimum wage, overtime, and provide the FLSA’s other protections and recordkeeping requirements. Employers—if they have not already—must modify their pay practices to become compliant with these regulations, especially if operating in a state whose requirements are inconsistent with the FLSA’s new requirements.

VIII. THE COLORADO WAGE CLAIM ACT, AS AMENDED BY THE COLORADO WAGE PROTECTION ACT³¹

- A. Effective January 1, 2015, current employees can now bring claims. C.R.S. §§ 8-4-101 (15); 8-4-109(3)(a).
- B. 60-day deadline for written demand eliminated (so 2-year SOL (3 years for willful violations) applies). C.R.S. § 8-4-109(3)(a).
- C. Employees who receive less than the applicable minimum wage are “entitled to” reasonable attorneys’ fees and costs (instead of a court “may” award). C.R.S. § 8-6-118.
- D. The Division and Hearing Officer may impose fines of up to \$50/day per employee who without good faith justification fails to pay wages due within 14 days of a written demand; and must impose a fine of \$250 (per employee, per month, up to a maximum

²⁹ See 29 U.S.C. § 213(A)(15) (2012); 29 C.F.R. §§ 552.3, 552.6, 552.102, 552.109, 552.110.

³⁰ U.S. DOL WHD, Home Care Domestic Service Final Rule Frequently Asked Questions, <http://www.dol.gov/whd/homecare/faq.htm> (last visited Feb. 18, 2016).

³¹ C.R.S. §§ 8-4-101 – 8-4-118, *as amended by* 2014 Colo. Legis. Serv. Ch. 276 (S.B. 14-005); *see also* 7 Colo. Code Regs. § 1103-7 (2015).

of \$7,500) on an employer who fails to respond to a notice of complaint or any other notice from the Division to which a response is required. C.R.S. §§ 8-4-113(1)(a)&(b).

- E. Final paychecks not picked up by employees within 60 days must be mailed to the employee's last known address. C.R.S. § 8-4-109(1)(c).
- F. The Tenth Circuit recently held that a plaintiff can recover both a statutory penalty under the CWCA and liquidated damages under the FLSA, reversing the district court's finding that awarding both would constitute a double recovery. *See Evans v. Loveland Automotive Invests., Inc.*, No. 15–1049, 2015 WL 8479634, at *2 (10th Cir. Dec. 10, 2015).

Practice Point: The CWCA now has a broader application that is more accessible to employees and subjects employers to mandatory fines under certain circumstances.

IX. QUESTIONS?

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Wage Claim Investigation Checklist – Employers

- ✓ **Interviews:** supervisor, person responsible for administering complaining employee's payroll, and/or human resources representative regarding the employee's complaint and applicable policies and practices around the issue.
- ✓ **Identify employee demographics:** employee status (exempt/non-exempt, independent contractor, union/non-union), position, location, pay, etc.
- ✓ **Identify issue(s):** minimum wage, overtime, exemption status, etc.
- ✓ **Legal research:** what are the latest developments around the claim type(s)?
- ✓ **Payroll records and damages exposure analysis:** obtain and review timesheets, payroll records, and any communications relating to same (such as log books); conduct initial estimate of amount owed if allegations are accurate.
- ✓ **Policies and practices:** obtain and review applicable policies (*e.g.*, timekeeping, payroll, overtime, meal breaks, collective bargaining agreement, etc.). Learn what actual current practices are around these policies and issues.
- ✓ **Timeclock practices:** determine how employee keeps time records, and how that timekeeping system work, changes are made to it, etc.
- ✓ **Timeframe:** identify timeframe of employee's issue.
- ✓ **"Similarly situated":** identify how many potentially similarly situated (in terms of issue, position, location, exemption status, etc.) current/former employees exist.
- ✓ **Complaining employee:** what is employee's employment status, history with company, discipline history, etc.
- ✓ **Complaints:** has the employee made complaints about this or related issues before? Have other employees complained about this or related issues?
- ✓ **Solutions:** start brainstorming applicable solutions, if necessary.
- ✓ **Claim status:** confirm whether employee has filed claim or lawsuit.
- ✓ **Insurance:** what, if any, insurance may cover this claim?
- ✓ **Litigation hold:** issue if appropriate.
- ✓ **Attorney-client privilege:** take steps to preserve attorney-client privilege as appropriate and consistent with professional conduct obligations.
- ✓ **Retaliation:** remind client contacts that retaliation is prohibited.

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