

**White Collar Blues:
The Proliferation Of Employee Collective Actions For Unpaid Overtime
Under The FLSA**

Earlier this year, the *Wall Street Journal* reported settlements of employee class actions for \$35 million by SBC Pacific Bell, \$20.2 million by Coca-Cola Bottling Co., and \$22 million by Bank of America Corp.¹ The real news, however, was not the amount of the settlements, but the source of the claims, which was far from what most employers, and even employers' counsel, have come to expect. These headline-grabbing class actions did not involve discrimination claims based on gender, race, age, or disability. Instead, the recent spate of high-profile employee class action suits, reported in the *Wall Street Journal* article and elsewhere, are based on claims of employers' misclassification of employees for purposes of overtime pay under the Fair Labor Standards Act's ("FLSA") so-called "white collar exemptions," which exempts salaried managers, supervisors, or executives from the Act's requirements for the payment of overtime for all hours worked in a week in excess of forty.

The explosion of these types of lawsuits has dramatically altered the employment litigation landscape in a very short period of time. The *Wall Street Journal* article reported that last year the filing of what are technically called "collective actions" under the FLSA had outnumbered class actions alleging employment discrimination.² The same was true for the year 2000.³ One attorney who represents employers has aptly called the FLSA overtime collective action "the complaint *du jour*."⁴ This article focuses on what employers, and their counsel, need to know to try to stay out of the soup.

The high stakes in FLSA overtime class actions should catch the attention of all employers. In July, 2001, a California jury handed a \$90 million verdict to Farmers Insurance Group for failing to pay overtime to 2400 claims adjusters who were classified as exempt

"administrators," but who were found to be non-exempt because their responsibilities were restricted to the routine task of conveying information to supervisors.⁵ Starbucks is reported to be prepared to pay up to \$18 million to all claimants qualifying as class members in order to settle two class actions alleging that the chain denied overtime pay to misclassified managers and assistant managers.⁶ In another case, a retail store chain settled an overtime collective action for \$7.3 million for allegedly misclassifying approximately 1600 salaried employees as managers.⁷ In *Cowan v. Treetop Enterprises, Inc.*, the U.S. District Court ruled on summary judgment that the primary duty of 125 Waffle House employees classified as managers was to perform as grill cooks rather than manage the restaurants, and awarded the workers \$2.4 million (not including interest and attorneys' fees).⁸

The FLSA, enacted by Congress in 1938, provides rules for, among other things, the payment of a minimum wage and overtime to covered workers. Employers are required to pay employees who work more than 40 hours per week overtime of at least one-and-one-half their regular rate of pay unless the employee is "employed in a bona fide executive, administrative, or professional capacity."⁹ In 1954, regulations defining these so-called "white collar exemptions" were promulgated. In general, the exemptions apply to employees who are paid a weekly salary of at least \$250 and whose work primarily requires the management and supervision of others, the exercise of independent judgment, or advanced knowledge or expertise. Sounds simple enough, but proving that the collars worn by an employer's "managers," "supervisors", and other salaried employees are truly white rather than some shade of blue can be a frustrating, and costly, exercise.

Much of the problem stems from the fact that the regulations governing the "white collar" exemptions have remained virtually unchanged since 1954. The definitions and regulations are

therefore clearly out of step with our highly technological service economy that could not have been contemplated when these rules were first drafted nearly half a century ago. For example, many white collar workers now perform directly on computer the work they used to supervise others to perform. Because such employees are no longer supervising others, there may be an argument that they are no longer exempt from overtime pay.¹⁰ Thus, while the service industry economy has promoted flatter organizational structures and greater teamwork among all employees, the antiquated regulations under the FLSA actually discourage employers from allowing their supervisors and manager to roll up their sleeves and help out in areas associated with non-exempt labor. For these and other reasons, a strong argument can may be made that the regulations covering the "white collar" exemptions are sorely in need of reform to reflect the realities of the contemporary workplace. Still, employers who fail to know the currently existing law and take the necessary measures to ensure compliance run the risk of seeing their business add a costly settlement or verdict to the media reports discussed above.

Changes affecting the workplace are not the only factors in the unprecedented increase in FLSA collective overtime actions. The Act's substantive and procedural provisions provide fertile ground for collective actions to take root and grow rapidly. Coming to grips with the recently unprecedented increase in overtime collective actions, therefore, includes an understanding of the Act's remedial provisions, which are intended to facilitate the filing and prosecution of a collective action.

THE BIRTH AND RAPID DEVELOPMENT OF AN FLSA OVERTIME COLLECTIVE ACTION

Coverage and Remedies

Coverage under the FLSA is wide. The Act applies to employees of any "enterprise" engaged in commerce, or in the production of goods for commerce, with gross sales or business

of at least \$500,000.¹¹ The Act employs an expansive definition of "employer" as "*any person* acting directly or indirectly in the interest of an employer in relation to an employee,"¹² which is construed liberally in order to promote the FLSA's broad remedial purposes.¹³ One way in which employers can seek to decrease the likelihood of defending a claim based on violations of the white collar exemptions would be to enlist the assistance of their managers and supervisors in avoiding possible violations, if for no other reason than because those individuals could themselves face individual liability as "employers".

The FLSA's remedy provisions are also broad. Plaintiffs may collect two to three years of backpay, plus "liquidated damages" in an amount equal to the backpay awarded.¹⁴ Liquidated damages are intended not as punitive, but instead, as the Supreme Court has explained, as "compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimates other than by liquidated damages."¹⁵ Finally, an award of reasonable attorneys' fees to a prevailing plaintiff is mandatory under the FLSA.¹⁶ Not surprisingly, there is no provision allowing for an award of attorneys' fees to a prevailing defendant. This, it has been held, reflects Congress' intention to encourage individuals to act as "private attorneys general" and promote the express purpose of the FLSA of ensuring minimum standards for workers.¹⁷

There is a slight ray of hope for employers in the FLSA's rather draconian remedial scheme. An employer that can show "the act or omission" which gave rise to the claim "was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]" can avoid the otherwise mandatory liquidated damages and limit backpay damages to two years instead of three.¹⁸ An employer establishes a good faith defense to an FLSA claim "by diligently consulting legal specialists and labor specialists and following

their advice."¹⁹ Such good faith attempts to comply with the Act also rebut evidence that the violation was "willful", which is a necessary showing for the plaintiff to extend the two-year statute of limitations to three years.²⁰ Still, it should be carefully noted that the good faith defense is not satisfied by merely consulting with counsel or consultants, but also requires "following their advice."

On the other hand, an employer that cannot show that its violation of the FLSA resulted from following the erroneous advice of an attorney or other specialist, is facing up to three years of backpay, doubled by mandatory liquidated damages, plus a mandatory attorneys' fees award, not to mention paying its own attorneys to defend the case. Multiply these potential damages by hundreds or thousands of employees in a collective action, and the threat to the financial life of a company becomes clear. Indeed, even a smaller company that multiplies an individual FLSA claim by tens of employees would probably experience a significant enough "hit" to warrant paying special attention to avoiding such claims.

Not Your Typical (Rule 23) Class Action

In addition to allowing for expansive damages, the Act not only makes it easy to create a formidable collective action, but virtually encourages claims on behalf of as large a group as possible. The Act expressly provides that an employee may bring a claim under the FLSA "in any Federal or State court of competent jurisdiction . . . for and in behalf of himself . . . and other employees *similarly situated*."²¹ Counsel for employers who are accustomed to defending class actions brought under Rule 23 of the Federal Rules of Civil Procedure will quickly be disabused of any similarity between those actions and a collective action under the FLSA. Compared to a Rule 23 class action, an FLSA collective action will typically take shape with lightning speed through early discovery of and notice to potential class members. The defending employer will

normally not be given the opportunity to move to decertify a class until just prior to trial, when all of the members have been notified of the case and given an opportunity to opt-in to the class. The practical effect of apprising potential class members and defining a class at the outset of a lawsuit is to present the employer with an offer to settle that may be hard to refuse: the alternative is to go through the costly effort of defending the suit, and, even if successful, still face the likelihood of a multiplicity of other individual or collective claims filed by employees who have been alerted to the possibility of an FLSA claim. In short, once the cat is out of the bag at the beginning of a collective action under the FLSA, an employer's best option may be to seek settlement with as many potential class members as possible.

Here is how an FLSA collective action exerts so much pressure on employers so fast. Experienced plaintiffs' counsel will issue discovery immediately upon filing suit seeking names and contact information of all individuals who were employed during the three years preceding filing of the suit and who might be even remotely similarly situated to the plaintiffs. Defense counsel may object, but they will almost certainly lose. Courts support early discovery of potential class members because, under the FLSA, a class member must affirmatively opt in to the action in writing,²² unlike a Rule 23 class action, where individuals who receive notice of the suit become and remain class members unless they affirmatively opt out. Under the two-year statute of limitations (extended to three, in the case of willful violations), an employee stands to lose the right to claim unpaid wages for weeks of work that fall outside the limitations period with each passing week that notification of the pending action is delayed. Thus, courts feel a particular duty to notify potential class members as expeditiously as possible. Because of this sense of urgency, courts are likely to disregard almost any objection an employer might raise to the immediate discovery of potential class members.

The Supreme Court established the authority for this approach in *Hoffman-LaRoche, Inc. v. Sperling*.²³ (Although *Sperling* involved a collective action under the Age Discrimination in Employment Act, the ADEA incorporates the provisions of the FLSA governing collective actions.) In *Sperling*, the Supreme Court affirmed the district court's order compelling the defendant employer to produce the names and addresses of all employees similarly situated to the named plaintiffs. The Court held that:

Effectuation of the opt-in provisions [of Section 216(b) of the FLSA] depends on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate. . . . It follows that, once an . . . action is filed, the court has the managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way.²⁴

Relying on *Sperling*, trial courts tend to deal with employer's attempts to bar discovery of potential class members in short order. In *Miklos v. Golman-Hayden Cos., Inc.*, in which the plaintiff claimed that the employer had misclassified her as exempt under the administrative white collar exemption, the trial court granted the plaintiff's motion to compel the employer to produce the names and addresses of all persons at all of the employer's locations who performed the "same job duties" as plaintiff, despite the employer's argument that its 15 offices throughout the United States were all operated completely independently as to the terms and conditions of employment.²⁵ Relying on *Sperling*, the court concluded that, "the position occupied by plaintiff is generally consistent from one . . . office to another," and ordered the employer to answer the discovery within 15 days.²⁶

Once potential class members are identified, the court will either allow the plaintiff to serve notice of the action on all similarly situated employees, or oversee and manage notification itself.²⁷ Counsel for employers can forget about the often rigorous standards for determining

similarly situated status in disparate treatment employment discrimination lawsuits, or for determining whether the elements of "typicality", "commonality" and "adequacy of representation" are satisfied in Rule 23 class actions. Indeed, to say that the burden on plaintiffs to show that potential class members are "similarly situated" employees in an FLSA collective action is "lenient"²⁸ certainly understates the case.

Most courts have adopted a two-step approach, under which, at step one, proposed class members are conditionally certified at the outset of the action for the purpose of facilitating notice.²⁹ At this initial notice stage, courts are typically willing to rely "only on the pleadings and any affidavits which have been submitted" to find that purported class members are similarly situated.³⁰ Indeed, some courts have held that, at the notice stage, plaintiffs need only make substantial allegations that the putative class members were subject to a single decision, policy, or plan that violated the law.³¹

The second step will usually not come until discovery is completed and prior to trial, when the employer is welcome to bring a motion to decertify the class and the court will apply a slightly more rigorous test to determine whether class members are similarly situated than it applied at the initial notice stage.³² Of course, by that time the real damage, from the employer's perspective, may well have been done: the notice stage will have disclosed the employer's possible FLSA violation far and wide, a group of class members will have opted in to the lawsuit, and (almost worse) still other potential class members will have withheld consent and retained claims that could be brought in other individual or collective actions.

The case law demonstrates the ease with which courts allow plaintiffs to cast a wide net at the initial notice stage of an FLSA collective action. In *Harrison v. Enterprise Rent-A-Car*, former "Management Assistants" who had filed a claim for unpaid overtime compensation asked

the court to facilitate notice to "similarly situated" current and former employees throughout the United States.³³ Noting that the burden to show that "potential opt-ins are similarly situated" is, at the notice stage, "not heavy," the court agreed that it could be met by "detailed allegations supported by affidavits."³⁴ The Court therefore held that:

Plaintiffs' [sworn] declarations *suggest[ing]* that Management Assistants for Enterprise perform the same kinds of tasks, under the same kinds of restrictions, and under the same pay provisions. . . . supply an adequate basis from which to conclude, for preliminary purposes, that members of a potential class of Management Assistants would be "similarly situated" with respect to their job requirements and with regards to their pay provisions.³⁵

In response to Enterprise's and the other defendants' argument that Management Assistants performed a range of duties too wide and too diverse to justify plaintiffs' suggestion that they were all "similarly situated," the court stated that "defendants demand too much of the standard, at least at this stage."³⁶ The court reiterated that, for purposes of initial notice, "Plaintiffs need only show a similarity of duties and pay provisions, not an identity thereof."³⁷ The court concluded that, even if subsequent "discovery proves the putative class members to be dissimilarly situated," such leniency was appropriate at the notice stage in order to further the FLSA's remedial purposes.³⁸

In *Krieg v. Pell's Inc.*, a putative collective action brought by the managers of shoe repair stores who claimed that they were deprived of overtime pay in violation of the FLSA, the court approved notice of potentially similarly situated employees on perhaps the most minimal basis imaginable: the affidavit of a former payroll administrator of the defendant stating that managers were paid salary and not paid overtime.³⁹ The court held that, "[t]his evidence is enough to establish a colorable basis that a class of similarly situated employees does exist."⁴⁰

Krieg also demonstrates some of the other ways in which courts are willing to facilitate notice. The court denied the defendant's requests to change the wording in the plaintiff's proposed "Notice" (which the opinion reproduces in its entirety), including a request that the "Notice" not be allowed to state that defendant had been charged with "refusing" to pay overtime when the complaint alleged only that defendant "did not pay" overtime.⁴¹ The court also denied defendant's request for an extension of time to provide the names and addresses of potential class members "because the statute of limitations continues to run and the additional thirty days may preclude some plaintiffs' rights to opt-in."⁴² As *Krieg* illustrates, an employer who has had a collective action filed against it under the FLSA will immediately feel like it has boarded a runaway train. At this initial stage, the only way to stop that train, and mitigate damages, may be to offer a hefty settlement.

As seen in *Krieg*, sometimes as little as a single statement that the plaintiff was not paid overtime will suffice for a court to approve conditional certification and approve notice. In *Kane v. Gage Merchandising Services, Inc.*, the court approved initial notice to a potential 100 persons employed by the defendant employer, a nationwide business that refurbished the interiors of commercial retail stores, based on the named plaintiff's claim that an area manager told him that the supervisors had not been paid overtime because the retail client had refused to compensate the employer for overtime pay.⁴³ The defendant did not help itself, as the court also noted that plaintiff's attorney "contends that counsel for the Defendants told him that there were approximately 50 persons, including the plaintiff, who defendants had . . . treated as exempt employees to whom they were not required to pay overtime compensation."⁴⁴

In a similar case, involving claims that a nationwide group of design, arts, and culinary schools had misclassified "Assistant Directors of Admissions" as exempt from overtime

compensation, the court allowed plaintiff's notice based primarily on plaintiff's affidavit stating that his supervisors had told him that it was the employer's policy not to pay overtime because the position was exempt.⁴⁵ The court's decision that the putative class members were similarly situated was further supported by a statement made by the employer's counsel during a pretrial conference that the employer's assistant directors all performed the same work throughout the country.⁴⁶ The employer did not fare any better in a subsequent ruling on the scope of the opt in notice. In opposition to plaintiffs' proposal to send notice to all individuals employed as Assistant Directors of Admissions "or those with 'similar titles'", the employer argued that notice should be limited to employees who held the position with that specific title.⁴⁷ Without explanation, the court simply "adopt[ed] the plaintiff's view in favor of the more expansive scope of notice."⁴⁸

Courts, however, do not always give plaintiffs unfettered rein at the notice stage of an FLSA collective action. The U.S. District Court for the Eastern District of Arkansas recently limited the scope of an overtime collective action brought by workers' compensation claims adjusters who claimed they were denied overtime based on the employer's misclassification of them as exempt under the FLSA.⁴⁹ The court denied the plaintiffs' request to include 800 adjusters with various job titles located nationwide, noting that the plaintiffs focused on the existence of the exemption among the various job categories, but failed to show that the duties of all class members were sufficiently similar.⁵⁰ The effect of the ruling, according to the employer's counsel, was that notice may include as few as 12 current and former workers' compensation adjusters working at the facility where plaintiffs were employed, rather than the 800 adjusters nationwide sought by plaintiffs.⁵¹ Still, the restraint exercised by the court in that case is the exception rather than the rule.

The only consolation for a employer defending a collective action is that, after early notice to potential class members, it will be "free to challenge the scope of the class, if appropriate, by filing a motion for decertification."⁵² Yet the ability to file a motion to decertify at the close of discovery will not necessarily provide employers with the sense that they have really been given a second bite at the class certification apple. In *Moss v. Crawford & Co.*, seventy-four individuals opted in to a collective action brought by the defendant insurance company's employees claiming that they did not fall under any of the white collar exemptions to the payment of overtime.⁵³ The defendant filed a motion to decertify after deposing twenty-four class members.⁵⁴ The court denied the motion despite a showing by defendant of differences in the plaintiffs' job duties, geographic location and hourly billing rates.⁵⁵ After denial of a motion to decertify, an employer can expect to soon find itself seated in a courtroom at trial.⁵⁶

The Employer's Burdensome Burden At Trial

An employer that finds itself at trial defending a full-blown FLSA collective action for overtime pay cannot expect to see its prospects improve. That is because, unlike with most civil causes of action, the heaviest burden of proof in such a case rests on the defending employer. Because the FLSA is a remedial statute, the exemptions are narrowly construed against the employer trying to assert them.⁵⁷ The employer must prove that each employee is exempted by "plain and unmistakable evidence."⁵⁸ The employer must also show that each employee meets each and every requirement for the exemption.⁵⁹ The elaborately detailed regulations defining the white collar exemptions are given "the force and effect of law,"⁶⁰ and are granted great weight by courts in deciding FLSA cases.⁶¹

For the defendant unable to meet these considerable burdens, the determination of damages can be nothing short of harrowing. Backpay awards will be based on the number of

actual overtime hours for which the class members were not compensated. Because, however, the employer regarded the class members as exempt, it is unlikely to have any records of the hours worked. Absent records of hours worked, a court is free to accept an employee's unsupported testimony as to the hours worked.⁶² The employer's failure to rebut such testimony with actual records may result in an award based on the employee's credibility, even though the calculation of damages is only approximate.⁶³ Worse yet for defendants, in a collective action, damages can be awarded to all class members based on the representative testimony of a few,⁶⁴ again, particularly where the employer failed to maintain records of the uncompensated work.⁶⁵

As employer's defense counsel in the *Cowan* case has stated, basing damages on representative testimony represents "a nightmare" for employers and their attorneys.⁶⁶ In *Cowan*, according to counsel, plaintiffs had advanced 8 class members out of 125 opt in plaintiffs to represent the class.⁶⁷ However, for the purpose of determining damages, plaintiffs offered a different group of 10 employees who testified that they worked between 80 and 100 hours per week.⁶⁸ The final verdict of \$2.4 million (less attorneys' fees) was based on an average of 89 hours per week for the entire group.⁶⁹

THE BEST DEFENSE: PREVENTION

Clearly, an FLSA overtime collective action based upon misclassification under the white collar exemptions is likely to represent a losing proposition for the defending employer from start to finish. From the provisions and policy supporting early discovery of and notice to potential class members, to the slim likelihood of successfully moving to decertify the class at the close of costly discovery, to the unfriendly burden of proof imposed on the employer to avoid liability, to the nightmare of determining damages in the likely absence of records of hours worked (not to mention liquidated damages in the absence of good faith, and mandatory

attorneys' fees), the defending employer will feel like it is being buried beneath a regulatory landslide.

Fortunately, however, what is true for most areas of employment and labor law also applies to FLSA collective actions based on overtime for misclassification: the three most important things for the employer, to paraphrase the old adage about real estate, are “prevention, prevention, prevention.” The employer that regards the FLSA, and the white collar exemptions in particular, as antiquated legislation that has fallen into disuse is the employer who is inviting plaintiff's class counsel to expand the lucrative proliferation of collective actions to its business. While there is ample reason to complain that the white collar exemptions are out of touch with the current realities of the workplace, they remain, for the time being, the law. Until they are reformed, it behooves employers to focus on prevention.

Know The White Collar Exemptions

The first step in preventing a white collar exemption collective action for nonpayment of overtime is, not surprisingly, knowing the exemptions. This, however, requires more than being vaguely aware that, "any [salaried] employee employed in a bona fide executive, administrative, or professional capacity" is exempt from the FLSA's requirement for overtime pay.⁷⁰ The devil is in the provisions detailing and interpreting these exemptions, including federal regulations, Department of Labor Wage and Hour Division rulings, and, of course, the relevant case law.

What all of this critical material makes clear is that employers must avoid the common pitfall of complacently believing that just because an employee is salaried, or because a job title or description seems to fall under one of the exemptions, the employee is therefore exempt. Once any claim for violation of the white collar exemptions is filed, the outcome is going to be determined by the duties actually performed by the employee or employees claiming the

violation.⁷¹ An employee's actual duties (which may change), therefore, must be the focus in determining whether he or she is to be treated as exempt in the first place.

It is beyond the scope of this article to provide an exhaustive discussion of each of the white collar exemptions. The following is intended to highlight the key elements of the FLSA white collar exemptions and describe some common pitfalls that can result in misclassification. Employers should keep in mind that, in addition to the FLSA, they must ensure compliance with the overtime laws of the states in which they operate, which may set more stringent requirements than the FLSA. Indeed, while a federal court in California recently determined that an insurance claims adjuster was indeed exempt from overtime pay under the FLSA's administrative exemption, it held that she still might be entitled to overtime under the state law administrative exemption.⁷² It has been claims of violations of such state laws that have resulted in some of the staggering settlements and verdicts identified at the outset of this article, including the \$90 million California jury verdict against Farmers Insurance Group.

Under the FLSA, an employee will fall within the white collar exemptions if he (1) is paid at least \$250 weekly on a salary basis, and (2) satisfies the requirements for each exemption.⁷³ Because any inquiry under this two-part test could end for failure to satisfy the "salary" prong, without ever reaching whether duties performed qualify for the exemption, a brief overview of the salary requirement is in order.

An employee is paid on a "salary basis" if he "regularly receives each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of [her] compensation, which amount is not subject to reduction because of variations in the qualify or quantity of work performed."⁷⁴ Pay deductions may be made for absences of a day or more for personal reasons or illness, but, under the so-called "no docking rule," pay deductions for

absences of less than a day are prohibited.⁷⁵ Indeed, a requirement that an employee work at least eight hours in a day "strongly suggests" that the employer views the employee as an hourly, rather than as a salaried employee.⁷⁶ If employees are paid on a salary basis of at least \$250 per week, the first prong is satisfied for each of the white collar exemptions. Employees paid a salary of less than \$250 may still be able to satisfy the salary prong, although they are subject to a more rigorous test for determining whether their job duties fit the exception (the so-called "long tests") than those earning at least \$250 weekly (the "short tests").⁷⁷ The consequences of this arcane rule are somewhat counterintuitive: an employee who earns **less** than \$250 per week must actually be performing **greater** managerial duties to be considered exempt. For purposes of this discussion of the white collar exemptions, however, it is assumed that the employee earns a salary of at least \$250 per week.

An employee falls under the "executive exemption" if his or her primary duty is managing the business or a recognized division of the business, and he or she typically directs the work of two or more employees.⁷⁸ A "primary duty" is one that occupies at least 50 percent of the employee's time (this applies to all white collar exemptions).⁷⁹ Examples of "managing" are interviewing, hiring and training employees; appraising employees for purposes of promotion; handling employee complaints and grievances and disciplining employees; determining techniques to be used; and providing for employees' safety.⁸⁰

An employee fits the "administrative exemption" if his or her primary duty involves the "performance of office or nonmanual work directly related to management policies or general business operations", and requires the exercise of "discretion and independent judgment."⁸¹ The exercise of discretion and independent judgment basically means:

[T]he comparison and the evaluation of possible courses of conduct and acting or making a decision after the various

possibilities have been considered. The term . . . implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.⁸²

This exemption is limited to employees "who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers" as opposed to mere production work.⁸³ By way of example, "the cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations," while "the bank teller does not."⁸⁴ Whereas "bookkeepers, secretaries, and clerks," are clearly excluded from the exemption,⁸⁵ "tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers" are included.⁸⁶

The "professional exemption" applies to employees whose primary duty involves work that requires advanced knowledge in a field of science or learning that is typically acquired by prolonged specialized study (such as lawyers, doctors, scientists, engineers and certified public accountants); or that involves imparting knowledge (by teaching, tutoring, instructing, or lecturing); or requires theoretical and practical application of highly-specialized knowledge in connection with computer systems and software; and requires the consistent exercise of discretion and judgment.⁸⁷ It also includes work requiring invention, imagination, or talent in a recognized field of artistic endeavor.⁸⁸

These brief descriptions of the white collar exemptions only scratch the surface of the information that employers must command to ensure that salaried employees being treated as exempt under the white collar exemptions are indeed engaged in duties that justify the exemption. The Department of Labor offers assistance through its website to help guide employers through the maze of regulations and decisions for the purpose of ensuring compliance

with the FLSA.⁸⁹ Employers should, however, not hesitate to direct questions to labor and employment attorneys and other specialists. In doing so, companies will not only be able to better navigate the treacherous waters of the FLSA exemptions, but, if hit with a collective action for unpaid overtime, they at least may be able to avoid a “willful” violation finding.

A brief view at the following illustrative cases shows how finely courts draw the lines between exempt and non-exempt employees, and how an inadvertent misclassification might form the thin wedge of a collective action that could make an employer a target for such a case. In *Ale v. Tennessee Valley Authority*, employees who had worked at the defendant's nuclear plants filed suit claiming that the employer had willfully eliminated their overtime pay.⁹⁰ The defendant argued that the employees fell under the FLSA's white collar executive exemption. The court ruled that the plaintiff shift supervisors did not qualify for the executive exemption because they did not set or adjust the hours of work, determine which employees manned which posts, or train employees.⁹¹ Although the shift supervisors spent some of their time supervising others, the supervision was not managerial in nature because they had no control over the people they supervised, such as apportioning work, recommending promotions, disciplining employees, and determining techniques or material to be used.⁹² In short, supervision was not the shift supervisors' primary duty; instead, their primary responsibility was performing clerical duties, such as calling people to come to work and doing the payroll.⁹³

Ale also involved the administrative exemption. In that context, the court ruled that because a training officer inherited all of his lesson plans from previous instructors, and did not use any discretion and independent judgment in updating lessons according to new regulations and in teaching specific predetermined procedures, the exemption did not apply.⁹⁴ Security lieutenants also failed to fall within the exemption, because their decisions were so closely

determined by established guidelines that they did not exercise any independent judgment.⁹⁵ Although lieutenants had the authority to allow a sick officer to man a post near the bathroom, such decisions did not qualify the lieutenants as administrators because they did not involve "matters of significance."⁹⁶

In *Barth v. Wolf Creek Nuclear Operating Corp.*, although nuclear systems engineers prioritized work orders, managed system performance, performed trending studies, and prepared certain reports, the court found those duties to be closer to production than administrative work, because they showed little, if any, involvement with the employer's general policies, financial operations, or personnel or business management, all of which are components of exempt administrative duties.⁹⁷ The court in *Barth* also rejected the defendant's arguments that the employees were exempt under the professional exemption. Because the majority of the employees performed most of their duties in strict accordance with standardized written procedures from which they almost never deviated, applied only rote applications of previously established procedures to troubleshooting, and operated under the expectation of immediate intervention by their supervisor, it was not clear that their work required the consistent exercise of discretion and judgment necessary to satisfy the professional exemption.⁹⁸

Audit Job Duties Regularly And Establish A "Good Faith" Defense

The next step in maintaining compliance with the FLSA is understanding that this is an on-going responsibility. Employers must constantly review the actual work being performed by employees to ensure that the duties justify continued status under the white collar exemptions. If this indispensable task is too burdensome for an employer, he should consider retaining counsel or other consultants to perform periodic audits of the duties of each position for which exempt status is sought or claimed. It would not be excessive to conduct such an audit every two or

three years, as the law is constantly determining what constitutes compliance with the exemptions. An employer who weighs the cost of preventative audits against the settlements and verdicts resulting from collective overtime actions, not to mention the costs of defending such suits, will probably find that the investment is money well spent. Furthermore, in the event of a suit, the fact that the employer sought and followed the advice of an attorney or labor specialist will help establish a good faith defense, as noted above.

Make The Review Of Job Duties Part Of Every Employee's Job

In reviewing job duties, employers should go straight to the source and enlist the assistance of their own employees. Asking employees believed to be exempt to document their actual duties periodically will help employers determine whether the employees continue to fall under exemptions. In *Demos v. City of Indianapolis*, one of the plaintiffs, a city employee, was held to be an exempt administrative employee while her primary job duties as a project manager required her to exercise independent judgment in performing various problem-solving tasks.⁹⁹ However, for a period in which she served primarily as a secretary to her superior, the lack of discretion and independent judgment required for the job took her outside the exemption.¹⁰⁰ Likewise, although the defendant in *Ale* was able to show that one of the plaintiffs had developed procedures sufficient to place him within the administrative exemption, the employee had ceased to perform those duties prior to the time relevant to the case, at which point his work consisted merely of making typographical corrections to documents.¹⁰¹

Managers and supervisors should also be asked to help employers monitor the work and duties of employees treated as exempt. As noted earlier, because of the expansive definition of "employer" under the FLSA, individual managers should be informed that by helping ensure

compliance, they are not only protecting the business, but also guarding against potential liability that they could be forced to shoulder individually.

Review Job Descriptions, Employment Policies and Guidelines

Because courts focus exclusively on the duties actually performed by an employee during the time relevant to an overtime claim, job titles, descriptions, resumes and the like are not going to help an employer defend a claim where they are not borne out by the record of the employer's actual job duties. The regulations themselves, which state that a "title alone is of little or no assistance in determining . . . [an employee's] exempt or nonexempt status under the regulations,"¹⁰² illustrate the disdain with which job titles are likely to be met. The regulation continues: "Titles can be had cheaply and are of no determinative value."¹⁰³ An employer's characterization of an employee's activities through an employer-created job description is similarly suspect.¹⁰⁴ The bottom line is that "the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities, and salary meet all the requirements of the appropriate section of the regulations[.]"¹⁰⁵ In *Barth*, the defendant argued that "engineering" was expressly included as one of the learned professions under the professional exemption.¹⁰⁶ The defendant, however, also admitted that it did not require its engineering specialists to have an engineering degree, and plaintiffs testified that their duties could be performed by anyone with a high school degree or on-the-job training.¹⁰⁷

Even the employee's own resume will be viewed with suspicion when it comes to determining his or her actual job duties. In *Ale*, the employer pointed to the plaintiff employee's resume, which stated that he was "'solely responsible for all of the training of current officers, new officers, and members of the security staff' and that he was 'solely responsible for all writing . . . , rewriting, and updating of lesson plans[.]'"¹⁰⁸ The court, however, found that, although the

plaintiff was "theoretically responsible for writing lesson plans," he never in fact did so, but rather inherited all of his lesson plans from previous instructors.¹⁰⁹ Similarly, although his job included training, the plaintiff taught very specific procedures that did not require or involve any discretion or judgment on his part.¹¹⁰

This race for the bottom on the part of plaintiffs underscores one of the adverse consequences of the FLSA. As such cases as *Barth* and *Ale* demonstrate, for the purposes of a collective action, employees are actually encouraged to devalue their roles and contributions by asserting that anyone with a high school diploma could do their jobs or that they never exercise any meaningful judgment or discretion in performing their duties. In other words, the employee who shows the least initiative and motivation stands a better chance to prevail on an overtime claim, but will hardly be perceived as a frontrunner for advancement and promotion.

Although written documentation may not necessarily help an employer defending an overtime collective action, there is no question that it could hurt. Employers should make sure that they are not shooting themselves in the foot by requiring employees to perform duties that render them non-exempt. Regular reviews of written procedures and job descriptions are necessary to ensure that employers are not creating ammunition that could be turned against them. Asking employees to draft and revise their own job descriptions could also be invaluable in shedding light on potential trouble spots, as long as the exercise is not approached in the self-serving context of writing a resume.

Maintain Time Records For All Employees

As a final step in "preventive maintenance," employers should implement certain measures for mitigating the effects of a lawsuit should one occur despite all best efforts. As discussed above, once liability is imposed against a employer for non-payment of overtime to

employees found to be non-exempt, the failure to have kept accurate records of hours worked, including overtime, can be devastating when the court turns its attention to the determination of damages. Employers, therefore, may be well-advised to monitor or require all employees to record all hours worked.

Employers should not worry that requiring employees to keep records of their time worked will be used against them to raise an inference that the employees were treated as hourly workers. Noting that "there may be myriad reasons to require employees to record their work time," the court in *Demos* stated that, "[t]ime-keeping alone does not show that these employees were non-exempt."¹¹¹ As is well-known by every judge, especially those who must determine attorneys' fees, lawyers, who are clearly classified as exempt, are often required to record their time for client-billing purposes.¹¹²

In this area, short-cuts should not be trusted as reliable. The increased use of electronic badges since 9/11 may appear to provide a convenient means to determine the comings and goings of employees. But, as some have observed, this is hardly a reliable indicator of hours worked, and is also subject to abuse.¹¹³

CONCLUSIONS

No doubt many would suggest that the best way to stem the tide of headline-making overtime collective actions would be to reform the very provisions of the FLSA and related regulations that seem out of step with the modern-day workplace. Indeed, with the exception of an exemption for computer professionals,¹¹⁴ the regulations regarding the white collar exemptions have remained basically unchanged since they were first issued in 1954. Changes in technology and the flat organizational structure of many service industry businesses clearly require a careful review of the regulations' definitions of the primary duties that constitute the

white collar exemptions. The \$250 benchmark for "highly salaried" employees subject to the "short tests" for the white collar exemptions, established in 1975,¹¹⁵ is also out of line with the economic reality of the current workplace. In *Barth*, plaintiffs adroitly noted that the \$250 standard was "outdated", "perilously close to minimum wage", and thus "no longer a good proxy for the determination of white collar status."¹¹⁶

Tammy D. McCutchen, the current administrator of the Labor Department's Wage and Hour Division, recently announced that she is in the process of drafting a notice of proposed rulemaking intended to update the criteria for meeting the white collar exemptions.¹¹⁷ McCutcheon claims that the Bush administration considers her proposal a high priority.¹¹⁸ She is therefore confident that the time is ripe for reform, given the alarming increase in overtime collective actions based on misclassifications under the white collar exemptions; support from within the DOL by professionals who regard the regulations as "vastly overdue for revision"; and the fact that the regulations, virtually untouched for some 50 years, do not reflect the modern-day workplace.¹¹⁹

Despite her optimism, however, McCutchen acknowledges that the history of attempts to update the white collar exemptions, dating back to the Carter administration, have been "long and tortured" and, ultimately, unsuccessful.¹²⁰ Even with a Congress that, after the recent midterm elections, should be cooperative with the Republican Bush administration, there is obviously no guarantee that revision of the FLSA white collar exemptions will remain one of the administration's "high priorities" that result in fresh legislation.

Unless and until revision of the white collar exemptions becomes a reality, employers must resolve to strive to comply with the law as it now exists. Compliance is admittedly an arduous task and one that requires a constant commitment to preventative measures, such as

those outlined above. Reports of employers who have fallen beneath the path of an overtime collective action, however, should serve as a wake up call for employers to ensure that the collars on their exempt employees are truly white rather than just a paler shade of blue.

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ENDNOTES

¹ Michael Orey, *Lawsuits Abound From Workers Seeking Overtime Pay*, Wall Street Journal, May 30, 2002 at B1.

² *Id.*

³ David Borgen, "Recent Developments Under The Fair Labor Standards Act (FLSA): Collective Actions, Class Actions, And The Administrative Exemption," 682 PLI/Lit 317, 323 (September, 2002).

⁴ *See* n.1, above.

⁵ 133 Daily Lab. Rep. at A-12 (July 12, 2001).

⁶ 122 Daily Lab. Rep. at C-1 (June 25, 2002).

⁷ 19 BNA Daily Lab. Rep. A-4.

⁸ *Cowan v. Treetop Enterprises, Inc.*, 120 F. Supp.2d 672 (M.D. Tenn. 1999) (liability) and 163 F. Supp.2d 930 (M.D. Tenn. 2001) (damages).

⁹ 29 U.S.C. § 213(a)(1).

¹⁰ *See* 122 Daily Law. Rep. at C-1 (June 25, 2002)

¹¹ 29 U.S.C. §§ 203(s)(1)(A), 206(a), 207(a)(1).

¹² 29 U.S.C. § 203(d) (emph. added).

¹³ *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983).

¹⁴ 29 U.S.C. §§ 216(b), 255, 260.

¹⁵ *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

¹⁶ 29 U.S.C. § 216(b).

¹⁷ *Laffey v. Northwest Airlines*, 746 F.2d 4, 11(D.C. Cir. 1984)

¹⁸ 29 U.S.C. §§ 255, 260.

¹⁹ *Garcia v. Allsup's Convenience Stores, Inc.*, 167 F. Supp.2d 1308, 1316 (D.N.M. 2001) (employer who relied upon information provided by former Department of Labor employee and labor attorney in implementing pay method that violated FLSA established good faith defense) (citations omitted)).

²⁰ *Id.*; 29 U.S.C. § 255(a).

²¹ 29 U.S.C. § 216(b) (emph. added).

²² 29 U.S.C. § 216(b)

²³ 493 U.S. 165 (1989).

²⁴ *Id.* at 170-71.

²⁵ 2000 WL 1617969 (S.D. Ohio), *1 - *2.

²⁶ *Id.* at *2.

²⁷ *See Mooney v. Aramco Servs., Inc.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995); *Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D. N.J. 1988); *Schwed v. General Elec. Co.*, 159 F.R.D. 373, 375 (N.D.N.Y. 1995).

²⁸ *Mooney*, 54 F.3d at 1213-14.

²⁹ *Id.*

³⁰ *Id.* at 1214.

³¹ *Id.* at 1214 n.8.

³² *Id.*

³³ 1998 WL 422169 (M.D. Fla.) (page references not available).

³⁴ *Id.* (citing *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096-97 (11th Cir. 1996)).

³⁵ *Id.*

³⁶ *Id.* (citing *Mooney*, 54 F.3d at 1213-14; *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997) ("The burden on the plaintiffs is not a stringent one, and the Court need only reach a preliminary determination that potential plaintiffs are 'similarly situated.'"))

³⁷ *Id.* (citing *Grayson*, 79 F.3d at 1096; *Tucker v. Labor Leasing, Inc.*, 872 F. Supp. 941, 947 (M.D. Fla. 1994) ("To be similarly situated courts have held positions need not be identical, but similar."))

³⁸ *Id.* (quoting and citing, *Krueger v. New York Tel. Co.*, 1993 WL 276058 at *2 (S.D.N.Y. July 21, 1993 ("[E]ven if plaintiffs' claims turn out be meritless or, in fact, all the plaintiffs turn out not to be similarly situated, notification at this stage, rather than after further discovery, may enable more efficient resolution of the underlying issues in this case."))

³⁹ 2001 WL 548394 (S.D. Ind.) at *1.

⁴⁰ *Id.*

⁴¹ *Id.* at 2.
⁴² *Id.* at 3.
⁴³ 138 F. Supp.2d 212, 213-15 (D. Mass. 2001).
⁴⁴ *Id.* at 215.
⁴⁵ *Harrington v. Education Management Corp.*, 2002 WL 1009463, *2 (S.D.N.Y. 2002)
⁴⁶ *Id.*
⁴⁷ *Harrington v. Education Management Corp.*, 2002 WL 1343753 *2 (S.D.N.Y. 2002).
⁴⁸ *Id.*
⁴⁹ 214 Daily Lab. Rep. at A-2 (November 5, 2002)
⁵⁰ *Id.*
⁵¹ *Id.*
⁵² *Kane*, 138 F. Supp.2d. at 215.
⁵³ 201 F.R.D. 398 (W.D. Penn. 2000).
⁵⁴ *Id.* at 400.
⁵⁵ *Id.* at 411.
⁵⁶ *Kane*, 138 F. Supp.2d. at 214 (citation omitted).
⁵⁷ *Cowan*, 120 F. Supp.2d at 687 (citations omitted).
⁵⁸ *Id.* (citations omitted).
⁵⁹ *Id.* (citations omitted).
⁶⁰ *Id.* (quoting *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)).
⁶¹ *Id.* (citing *Walling v. Wall Wire Products*, 161 F.2d 470, 475 (6th Cir. 1947), *cert. denied*, 331 U.S. 828 (1947)).
⁶² *Reich v. Waldbaum*, 833 F. Supp. 1037, 1041 (S.D.N.Y. 1993), *rev'd in part on other grnds. by* 52 F.3d 35 (2nd Cir. 1995).
⁶³ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946).
⁶⁴ *Cowan*, 120 F. Supp.2d at 687 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 685 (1946)).
⁶⁵ *Id.* (citing *Martin v. Deiriggi*, 985 F.2d 129, 132 (4th Cir. 1992)).
⁶⁶ "FLSA: Attorneys Discuss Strategies For Bringing, Defending FLSA Collective Action Lawsuits," 156 Daily Lab. Rep. at C-1 (August 13, 2002).
⁶⁷ *Id.*
⁶⁸ *Id.*
⁶⁹ *Id.*
⁷⁰ 29 U.S.C. § 213(a)(1).
⁷¹ *See, e.g., Cowan*, 120 F. Supp.2d at 691-92.
⁷² 175 Daily Lab. Rep. A-9 (September 10, 2002).
⁷³ 29 C.F.R. § 541.
⁷⁴ 29 C.F.R. § 541.118(a).
⁷⁵ 20 C.F.R. § 541.118(a)(2)-(3).
⁷⁶ *Demos v. City of Indianapolis*, 126 F. Supp.2d 548, 553 (S.D. In. 2000) (citing *Yuen v. U.S. Asia Commercial Dev. Corp.*, 974 F. Supp. 515, 524-25 (E.D. Va. 1997) *aff'd by* ____ F.3d ____ 2002 WL 1991347 (7th Cir. 2002)).
⁷⁷ 29 C.F.R. § 541.1-3.
⁷⁸ 29 C.F.R. § 541.1(a)-(b).
⁷⁹ 29 C.F.R. § 541.103.
⁸⁰ 29 C.F.R. § 541.102.
⁸¹ 29 C.F.R. § 541.2.
⁸² 29 C.F.R. § 541.207(a).
⁸³ 29 C.F.R. § 541.205(a).
⁸⁴ 29 C.F.R. § 541.205(c)(1).
⁸⁵ 29 C.F.R. § 541.205(c)(1).
⁸⁶ 29 C.F.R. § 541.205(d).
⁸⁷ 29 C.F.R. § 541.3
⁸⁸ *Id.*
⁸⁹ *See* www.dol.gov/dol/compliance.
⁹⁰ 268 F.3d 680 (6th Cir. 2001).
⁹¹ *Id.* at 692.
⁹² *Id.*

⁹³ *Id.*
⁹⁴ *Id.* at 690.
⁹⁵ *Id.*
⁹⁶ *Id.* (citing 20 C.F.R. § 541.207(a)).
⁹⁷ *Barth v. Wolf Creek Nuclear Operating Corp.*, 125 F. Supp.2d 437, 440 (D. Kan. 2000).
⁹⁸ *Id.* at 442.
⁹⁹ 126 F. Supp.2d at 561-62.
¹⁰⁰ *Id.*
¹⁰¹ *Ale*, 269 F.3d 680 at 690.
¹⁰² 29 C.F.R. § 201(b)(1).
¹⁰³ *Id.*
¹⁰⁴ *Demos*, 126 F. Supp.2d at 559 (citing *Cooke v. General Dynamics Corp.*, 993 F. Supp. 56, 61 (D. Conn. 1997)).
¹⁰⁵ *Id.*
¹⁰⁶ *Barth*, 125 F. Supp.2d at 441 (citing 29 C.F.R. § 541.301(e)(1)).
¹⁰⁷ *Id.*
¹⁰⁸ *Ale*, 269 F.3d at 690.
¹⁰⁹ *Id.*
¹¹⁰ *Id.*
¹¹¹ *Demos*, 126 F. Supp.2d at 555.
¹¹² *Id.*
¹¹³ "Wage & Hour: As Overtime Lawsuits Renew FLSA Debate, Attorneys Advise Learning The Wage Law," 122 Daily Lab. Rep. at C-1 (June 25, 2002)
¹¹⁴ 29 U.S.C. § 213(a)(17)
¹¹⁵ *Demos*, 126 F. Supp.2d at 552 n.2 (citing 40 Fed. Reg. 7092 (1975)).
¹¹⁶ *Barth*, 125 F. Supp.2d at 439.
¹¹⁷ "FLSA: DOL Moving To Propose By January Revisions To FLSA White Collar Exemptions," 203 Daily Lab. Rep. at A-11 (October 21, 2002).
¹¹⁸ *Id.*
¹¹⁹ *Id.*
¹²⁰ *Id.*