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OVERTIME & MINIMUM WAGE REQUIREMENTS
Considerations Under Federal and New York State Law

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This paper provides an overview of overtime and minimum wage requirements under both federal and New York state law. This paper is, of course, not exhaustive of all requirements under either set of laws, but rather covers some of the more important provisions and highlights more current issues. The paper also provides suggestions for steps an employer may take in order to minimize exposure to wage-and-hour claims, which have sparked significant interest as of late, especially in the form of class or collective actions.

I. CALCULATING OVERTIME RATES & MINIMUM WAGE REQUIREMENTS

A. Considerations Under Federal Law

The Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"), requires employers to pay non-exempt employees overtime at a rate of 1 ½ times their "regular rate" of pay for all work performed in excess of 40 hours per week. 29 U.S.C. § 207(a)(1). In order to properly calculate overtime rates, employers must consider a variety of factors. In the first instance, the employer must determine whether the employee is even entitled to overtime pay, or whether the employee qualifies as an exempt employee under the FLSA. Once the employer concludes that the employee does indeed qualify for overtime, the employer must then determine the proper calculation for overtime payments, paying heed to what compensation should be included in the calculation of the employee's regular rate, and how to properly incorporate such compensation under the FLSA.

1. Do Your Employees Need To Be Paid Overtime? FLSA Exemptions

The overtime requirements of the FLSA are subject to a number of exemptions. *See* 29 U.S.C. § 213. The so-called "white collar" exemptions tend to be the exemptions most frequently discussed. Pursuant to the statute, the FLSA overtime requirements do not apply to

> [A]ny employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary ….)

29 U.S.C. § 213(a)(1). In 2004, the U.S. Department of Labor issued final regulation fleshing-out the scope of the "white collar" exemptions as they apply to executive employees, administrative employees, professional employees, computer employees, and outside sales employees. Pursuant to the regulations, job titles alone are insufficient to establish exempt status; a determination of exempt status must be made on (a) the employee's salary and (b) whether he or she performs the requisite duties for the particular exemption. 29 C.F.R. § 541.2. Moreover,

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the regulations exclude a number of employees who do not qualify for the "white collar" exemptions. *See* 29 C.F.R. § 541.3.

a. Salary Requirements

As an initial matter, in order to qualify as an exempt executive, administrative, or professional employee under section 213(a)(1), "an employee must be compensated on a *salary basis* at a rate of not less than $445 per week … exclusive of board, lodging, or other facilities." 29 C.F.R. § 541.600(a) (emphasis added).[1] (Note that these salary requirements do not apply to the outside sales employee exemption. *See* 29 C.F.R. § 541.500(c).) Though "the shortest period of payment that will meet this compensation requirement is one week[,]" the salary requirement can also be met by way of equivalent amounts of salary paid for periods of longer than one week (*i.e.* $910 biweekly; $985.83 semimonthly; $1,971.66 monthly). 29 C.F.R. § 541.600(b). But, in the case of computer employees (discussed below), the salary requirement "may be met by compensation on an hourly basis at a rate of not less than $27.63 an hour …." 29 C.F.R. § 541.600(d). Employees who earn less than $455 per week are guaranteed overtime. *See* 29 C.F.R. § 541.600. Employees with total annual compensation of at least $100,000 (with at least $455 per week on a salary or fee basis) are deemed exempt if they "customarily and regularly perform[]" (as defined below) any one or more of the functions of an executive, administrative, or professional employee. 29 C.F.R. § 541.601(a).

An employee is paid on a "salary basis" if the employee "regularly receives each pay period … a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a). Stated alternatively, subject to certain exceptions, "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked … An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available." *Id.*

The regulations provide that the following deductions from pay are exceptions to the general rule, noted above, that an employee must receive his or her full salary to satisfy the salary basis test:

- Deductions for absences from work for one or more full days for personal reasons other than sickness or disability. 29 C.F.R. § 541.602(b)(1).

- Deductions for absences of one or more full days occasioned by sickness or disability, including work related accidents, if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability. 29 C.F.R. § 541.602(b)(2). Such deductions may be made before the employee has qualified under the plan, policy, or practice, and after

[1] "Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605" 29 C.F.R. § 541.600(1).

the employee has exhausted the leave allowance there under. *Id.* Deductions for absences may also made if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law. *Id.*

- Employers cannot make deductions for absences of an exempt employee due to jury duty, attendance as a witness, or temporary military leave. 29 C.F.R. § 541.602(b)(3). The employer can, however, offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption. *Id.*

- Deductions for penalties imposed in good faith for infractions of safety rules of major significance. 29 C.F.R. § 541.602(b)(4).

- Deductions for unpaid disciplinary suspensions of one or more full days imposed (a) pursuant to a written policy applicable to all employees, and (b) in good faith for infractions of workplace conduct rules. 29 C.F.R. § 541.602(b)(5).

- An employer may pay a proportionate part of an employee's full salary for time actually worked in the first and last week of employment. 29 C.F.R. § 541.602(b)(6).

- An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family Medical Leave Act; an employer may pay a proportionate part of the full salary for time actually worked. 29 C.F.R. § 541.602(b)(7).

An employer who makes improper deductions will lose the exemption (1) during the time period in which the improper deductions were made, and (2) for employees working in the same job classification for the same manager responsible for the actual improper deductions, if the facts demonstrate that the employer did not intend to pay employees on a salary basis. 29 C.F.R. § 541.603. The regulations explain that an "actual practice" of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. 29 C.F.R. § 541.603(a) (providing a series of factors to consider when determining whether an employer has an actual practice of making improper deductions). The regulations further provide that "isolated or inadvertent" deductions will not result in a loss of the exemption if the employer reimburses the employee. 29 C.F.R. § 541.603(c).

The regulations do provide a type of safe harbor for employers, pursuant to which the exemption will be not be lost for improper deductions if:

- The employer has a clearly communicated policy that prohibits the improper pay deductions specified in section 541.602(a) of the regulations;

- The policy includes a complaint mechanism;

- The employer reimburses employees for any improper deductions;

- The employer makes a good faith commitment to comply in the future; and

- The employer does not willfully violate the policy by continuing to make improper deductions.

29 C.F.R. § 541.603(d). According to this provision, "[t]he best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's intranet." *Id.*

b. Duty Requirements

Once an employer determines that an employee satisfies the salary threshold discussed above, the employer must next determine whether the employee performs exempt duties, which is a two-fold determination. The employee must not only perform exempt duties under one of the white collar exemptions described below, but he or she must do so with a specified degree of regularity depending upon the employee's salary.

(1) Primary Duty Test

Generally, in order for an employee to qualify for an exemption, the employee must meet the compensation requirement discussed above (at least $455 per week on a salary basis), and the employee's "primary duty" must be the performance of exempt work. 29 C.F.R. § 541.700. The regulations define "primary duty" as "the principal, main, major or most important duty that the employee performs … based on all the facts in a particular case, with the major emphasis on the employee's job as a whole." *Id.* The regulations further provide a series of factors to consider when assessing an employee's "primary duty": (a) the relative importance of the exempt duties as compared with other types of duties; (b) the amount of time spent performing exempt work; (c) the employee's relative freedom from direct supervision; and (d) the relationship between the employee's salary and the wages paid to other employees for the kind of non-exempt work performed by the employee. *Id.* The regulations note that although the amount of time spent performing exempt work can be a "useful guide," "[t]ime alone … is not the sole test[;] employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." *Id.*

(2) Customarily and Regularly Standard

As noted above, employees whose total compensated is at least $100,000 (with at least $455 per week on a salary or fee basis) qualify for an exemption if they "customarily and regularly perform[]" any one or more of the functions of an executive, administrative, or professional employee. 29 C.F.R. § 541.601(a). The statute defines "customarily and regularly" as "a frequency that must be greater than occasional but which … may be less than constant[,]" which would include "work normally and recurrently performed every workweek[,]" but not "isolated or one-time tasks." 29 C.F.R. § 541.701.

c. The White Collar Exemptions

(1) Executive Employees

Under the regulations, an employee employed in a bona fide executive capacity under section 213(a)(1) of the FLSA is any employee:

- Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- Who customarily and regularly directs the work of two or more other employees; and
- Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

29 C.F.R. § 541.100. This exemption also covers any employee who (a) owns at least a bona fide 20-percent equity interest in the enterprise, regardless of whether the business is a corporation or other organization, and (b) is actively engaged in its management. 29 C.F.R. § 541.101. An employee who performs concurrent duties, *i.e.*, both exempt and non-exempt work, may still qualify for the exemption if the requirements are otherwise met. 29 C.F.R. § 541.106. For example, "an assistant manager in a retail establishment may perform work such as serving customers … but performance of such non-exempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves." 29 C.F.R. § 541.106(b).

(2) Administrative Employees

Under the regulations, an employee employed in a bona fide administrative capacity under section 213(a)(1) of the FLSA is any employee:

- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200. The regulations provide a non-exhaustive list of examples of work "directly related to management or general business operations[:]" tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network; internet and database administration; legal and regulatory compliance. 29 C.F.R. § 541.201(b). The regulations further expand on how to determine whether an employee "exercise[s] discretion and independent judgment" (*see* 29 C.F.R. § 541.202), and provides examples of exempt administrative positions. *See* 29 C.F.R. § 541.203.

(3) Professional Employees

Under the regulations, an employee employed in a bona fide professional capacity under section 213(a)(1) of the FLSA is any employee:

- Whose primary duty is either as a:
    - Learned professional, which requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
    - Creative Professional, which requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.300. The professional employee exemption also applies to teachers, lawyers, and doctors. 29 C.F.R. §§ 541.303-304.

(i) Learned Professionals

The regulations explain that, for purposes of the learned professional exemption, "knowledge of an advanced type" is work that is "predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work … Advanced knowledge cannot be attained at the high school level." 29 C.F.R. § 541.300(b). The regulations also note that the phrase "customarily acquired by a prolonged course of specialized intellectual instruction" "restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession." 29 C.F.R. § 541.300(d). However, the regulations explain that "the word 'customarily' means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as [] degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction." *Id.* Such as, for example, "the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry." *Id.* The regulations go on to provide specific examples of learned professionals. *See* 29 C.F.R. § 541.300(e).

(ii) Creative Professionals

The regulations explain that, for purposes of the creative professionals exemption, recognized fields of artistic or creative endeavor include music, writing, acting, and graphic arts. 29 C.F.R. § 541.302(b). The requirement that the employee's primary duty involve "invention, imagination, originality or talent" distinguishes creative professional work from "work that primarily depends on intelligence, diligence and accuracy." 29 C.F.R. § 541.302(c). The regulations go on to provide examples of professions that satisfy the creative professionals exemption. *Id.*; *see also* 29 C.F.R. § 541.302(d) (regarding journalists).

(4) Computer Employees Exemption

Computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field can qualify for the professional exemption, provided that:

- The employee is compensated on a salary or fee basis at a rate of at least $455 per week or $27.63 per hour; and

- The employees primary duty consists of:

    - The application of systems analysis techniques and procedures, including consulting with uses, to determine hardware, software, or system functional specifications;

    - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to uses or system design specifications;

    - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

    - A combination of the above, the performance of which requires the same level of skills.

29 C.F.R. § 541.400.

(5) Outside Sales Employee

An employee employed in the capacity of outside salesman for purposes of section 13(a)(1) of the FLSA is an employee:

- Whose primary duty is:

    - Making sales (within the meaning of section 3(k) of the FLSA); or

    - Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

- Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500. Note that the salary requirements, discussed above, do not apply to the outside sales employee exemption. 29 C.F.R. § 541.500(c).

2. How to Calculate Overtime Payments - What to Include in an Employee's Regular Rate

An employee's "regular rate" for purposes of calculating overtime under the FLSA is not simply the employee's hourly wage or salary. Under the FLSA, an employee's "regular rate" is an average hourly rate comprised of "all remuneration for employment paid to, or on behalf of, the employee," including commissions, performance bonuses, and shift differentials. 29 U.S.C. § 207(e). This "regular rate" is, however, subject to several statutory exclusions. *See* 29 U.S.C. § 207(e)(1)-(8). All forms of compensation that do not fall into one of the following statutory

exclusions must be included in the calculation of the employee's regular rate (*See* 29 C.F.R. § 778.200(c)):

- Gifts, including payments in the nature of gifts made at Christmas time or other special occasions;

- Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause;

- Reasonable payments for traveling or other expenses incurred by an employee in the furtherance of the employer's interest and properly reimbursable by the employer, and any similar payments to an employee that are not made as compensation for hours of employment;

- Discretionary bonuses, payments made under a profit-sharing scheme or savings plan, or talent fees;

- Contributions to bona fide plans for providing old-age, retirement life, accident, or health insurance or similar benefits for employees;

- Premium pay for hours worked by the employee in excess of eight in a day or in excess of the maximum workweek applicable to such employee or in excess of the employee's normal working hours or regular working hours;

- Premium pay for work on Saturdays, Sundays, holidays, regular days of rest, or on the sixth or seventh day of the workweek where the premium pay rate is not less than 1 ½ times the rate established in good faith for like work performed in nonovertime hours on other days;

- Premium pay pursuant to an applicable employment contract or collective bargaining agreement for work outside the hours established in good faith by the contract or agreement as the basic, normal, or regular workday or workweek where the premium rate is not less than 1 ½ times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; and

- Certain stock options, stock appreciation rights, and bona fide employee stock purchase programs.

See 29 U.S.C. § 207(e)(1)-(8).

a. Special Considerations

(1) Bonuses & Gifts

Bonuses are generally included in the regular rate, but there are exceptions, such as for truly discretionary bonuses. *See* 29 U.S.C. § 207(e)(3)(a). A bonus is discretionary if the employer "retain[s] discretion both as to the fact of payment and as to the amount until a time

quite close to the end of the period for which the bonus is paid." 29 C.F.R. § 778.212(b). Stated alternatively, if "[t]he employee has no contract right, express or implied, to any amount[,]" the bonus is discretionary. *Id.* "If the employer promises in advance to pay a bonus, [the employer] has abandoned [any] discretion with regard to it." *Id.* Under this standard, the following types of bonuses are not considered discretionary (*i.e.*, must be included in the regular rate):

- A bonus promised to an employee upon hiring or as part of a collective bargaining agreement (such as longetivity payments). *See* 29 C.F.R. § 778.211(c); *O'Brien v. Town of Agawam*, 350 F.3d 279, 295-96 (1st Cir. 2003) (holding that an annual lump sum payment based on length of service cannot be excluded, noting "[b]onuses that are explicitly promised to employees – as longetivity payments are in the CBA – must be included in the employee's regular rate."); *see also Theissen v. City of Maple Grove*, 41 F. Supp. 2d 932, 938 (D. Minn. 1999); *Local 359 Gary Firefighters v. City of Gary*, 1995 WL 934175 at *7 (N.D. Ind. Aug. 17, 1995); *but see Moreau v. Klevenhagen*, 956 F.2d 516, 521 (5th Cir. 1992) (holding that annual longetivity pay need not be included in the regular rate where there was no policy or promise to make the payments and the amount of the payments were determined annually).

- A bonus announced to motivate employees to work more steadily, rapidly, or efficiently, or to remain with the employer, are not considered discretionary under the FLSA. *See* 29 C.F.R. § 778.211(c); *Haber v. Americana Corp*., 378 F.2d 854, 856 (9th Cir. 1967); *Wang v. Chinese Daily News, Inc.*, 435 F. Supp. 2d 1042, 1056-57 (C.D. Cali. 2006).

- Attendance bonuses. 29 C.F.R. § 778(c); *Landaas v. Canister Co.*, 188 F.2d 768, 771 (3d Cir. 1951) (holding that attendance bonus provided for in a collective bargaining agreement must be included in the regular rate of pay.

Moreover, the fact that the employer labels the bonus as "discretionary" in an employee handbook or collective bargaining agreement is not controlling; courts applying the discretionary bonus exception will consider all the facts and circumstances to determine whether an implied contract exists or whether the employee has a reasonable expectation that a bonus will be received. *See, e.g., Chao v. Port City Group*, 2005 WL 3019779 (W.D. Mich. Nov. 10, 2005); *Herman v. Anderson Floor Co.*, 11 F. Supp. 2d 1038, 1042 (E.D. Wis. 1998); *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780 (2d Cir. 1946).

Gifts are also generally excludable from the regular rate. *See* 29 U.S.C. § 207(e); 29 C.F.R. § 778.212(b). Christmas bonuses, or other "special occasion" bonuses can be viewed as the classic example of excludable gifts. Even though these types of gifts are paid with a degree of regularity, they may be excluded nonetheless: "A Christmas bonus paid (not pursuant to a contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category." 29 C.F.R. § 778.212(c). By contrast, if the payment is measured by or dependent upon hours worked, production, or efficiency, or if it is paid pursuant to a contract, it is not a gift for purposes of the FLSA and must be included in the overtime pay calculations. *See* 29 U.S.C. § 207(e); 29 C.F.R. § 778.212(b). In addition, a gift that is "so substantial that it can

be assumed that the employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift." 29 C.F.R. § 778.212(b).

If a bonus is calculated on a weekly basis, such as a weekly productivity bonus, the amount of the bonus can simply be included in an employee's compensation for the week, and any overtime due can be included in the employee's weekly paycheck. If, however, the calculation of a bonus is deferred over a period of time longer than a week, "the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained." 29 C.F.R. § 778.209. When the time arrives that the amount of the bonus is determined, "it must be apportioned back over the workweeks of the period during which it may be said to have been earned." *Id.*

(2) Payments for Nonwork Hours

As noted above, the regular rate does not include "payments for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar causes … and other similar payments to an employee which are not made as compensation for his hours worked." 29 U.S.C. § 207(e)(2). For example, employers may exclude from the regular rate payments for bona fide meal times provided that there is an agreement between the employee and employer that such meal times will not be treated as hours worked. *See* 29 C.F.R. § 778.320(b); *see also Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 909 (9th Cir. 2004); *Reich v. Lucas Enterps. Inc.*, 1993 WL 307080 at *3 (6th Cir. Aug. 12, 1993).

The FLSA regulations define several of the terms related to "payments made for occasional periods when no work is performed" that can be excluded from the regular rate. For example, "failure of the employer to provide sufficient work" refers to situations where, for example, employees would "normally be working but for such a factor as machinery breakdown, failure of affected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer." 29 C.F.R. § 778.218(c). It does not, however, refer to ordinary temporary layoff situations or any type of routine, recurrent absence. *Id.* "[O]ther similar causes" include absences such as those due to "jury service, reporting to a draft board, attending a funeral of a family member, [and] inability to reach the workplace because of weather conditions." 29 C.F.R. § 778.218(d).

The phrase "other similar payments to an employee which are not made as compensation for his hours of employment" can be a cause for confusion. The regulations explain that "other similar payments" must be "'similar' in character to the payments specifically described in Section 207(e)(2)[,]" and then goes on to list a non-exhaustive list of examples: (1) sums paid to an employee for the rental of his truck or car; (2) loans or advances made by the employer to the employee; and (3) the cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities. 29 C.F.R. § 778.224. Employers have met with varying degrees of success when trying to fit numerous types of payments into the "other similar payments" exception. *See, e.g., Featsent v. City of Youngstown*, 70 F.3d 900, 904-05 (6th Cir. 1995) (holding that education bonuses and longevity pay were not excludable as "other similar payments."); *Bakerv. Barnard Constr. Co.*, 146 F.3d 1214, 1217-19 (10th Cir. 1998) (holding that return travel time associated with refueling and restocking welding rigs was "integral and indispensable" to employees' principal activities and,

thus, could not be excluded from the regular rate as "other similar payment"); *Utility Workers Union of Am. v. S. Cal. Edison Co.*, 83 F.3d 292, 295-96 (9th Cir. 1996) (holding that supplements to disabled employees' wages with additional payments when those employees are placed in lower-paying jobs due to disability must be included in the regular rate pay when calculating the employees' pay for overtime purposes under the FLSA).

(3) Voluntary Extra Compensation

Certain employers, such as those in the healthcare, retail, and manufacturing sectors, offer employees extra compensation for working odd hours or other undesirable shifts. Payment in the form of a shift differential – that is, an additional amount per hour for working at certain times – must be included in the calculation of the regular rate. *See* 29 C.F.R. § 778.207(b). Three types of such extra compensation are, however, excluded, and may be credited towards overtime compensation due under the FLSA. *See* §§ 207(e)(5)-(7); 207(h)(1)-(2).

(i) Premium Pay for Hours in Excess of Daily or Weekly Standard

The FLSA provides that bonus compensation paid for hours an employee works over and above a set daily or weekly standard number of hours is excluded from the regular rate calculations:

> Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be.

29 U.S.C. § 207(e)(5). The exception applies where the employer pays an overtime-type premium, on a contractual basis, for work in excess of a fixed number of hours in a day or week. *See, e.g., Acton v. City of Columbia*, 436 F.3d 969, 979 (8th Cir. 2006) (holding that sick leave buy-back payments do not qualify for this exception); *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 108 (9th Cir. 1975); *Laboy v. Alex Displays, Inc.*, 2003 WL 21209854 at *4 (N.D. Ill. May 21, 2003); *Parisi v. Town of Salem*, 1997 WL 228509 at *2 (D.N.H. Feb. 20, 1997). The exception does not apply, however, if the extra compensation is based, at least in part, on criteria other than work beyond regularly scheduled hours, even if the employee must typically work overtime to receive the payment. *See, e.g., Brock v. Two R. Drilling Co. Inc.*, 789 F.2d 1177, 1179 (5th Cir. 1986) (finding Section 207(e)(5) inapplicable where employer's premium payment was conditioned not only on overtime hours worked, but also on factors such as reporting to work on time, arriving in proper physical and mental condition, assembling personal attire properly, and remaining on the property between shifts); *Bell v. Iowa Turkey Growers Co-op.*, 407 F. Supp. 2d 1051, 1057-58 (S.D. Iowa 2006) (finding Section 207(e)(5) inapplicable where sixth day premium payments were made regardless of the number of hours previously worked).

The FLSA regulations further provide that employers may not arbitrarily divide employees' regular hours in a simple attempt to deflate the regular rate. For example, Section 207(e)(5) does not apply where an employer pays an 8-hour employee's first four hours at a lower rate and the last four hours at a higher "overtime' rate. *See* 29 C.F.R. § 778.202(c).

(ii) Premium Pay for Work on Weekends and Other "Special Days"

Similarly, under the FLSA, extra compensation for work on weekends and special days is excluded from the regular rate in some cases:

> Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days.

29 U.S.C. § 207(e)(6). It is noteworthy that this premium pay exclusion applies only if the premium rate is at least 1 ½ times the rate established in good faith for similar work performed in nonovertime hours. *See* 29 C.F.R. § 778.203(a); *Bell*, 407 F. Supp. 2d at 1059-60; *Reich v. Interstate Brands Corp.*, 57 F.2d 574, 578 (7th Cir. 1995). The exclusion also only applies where the premium is "paid because work is performed on the days specified and not for some other reason." 29 C.F.R. § 778.203(d). By way of example, if the extra compensation is only paid when an employee receives less than 24 hours notice that the employee must work a weekend, the extra compensation would not qualify for the exclusion because the premium is "imposed as a penalty upon the employer for failure to give adequate notice to compensate the employee for the inconvenience of disarranging his [or her] private life." *Id.*

(iii) "Clock Pattern" Premium Pay

"Clock pattern" overtime payments are also excluded from regular calculations when such payments are made pursuant to a contractual obligation:

> Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section [)], where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

29 U.S.C. § 207(e)(7). It is worth highlighting that this exception applies only if (a) the payments are made pursuant to an employment contract or collective bargaining agreement, and (b) the contract provides that the premium rate is not less than 1 ½ times the rate established in good faith by the agreement for similar work performed during the workday or workweek. *Id.* For purposes of this FLSA exclusion, the agreement may be written or oral. *See* 29 C.F.R. § 778.204(c). If the agreement is written but parties' practice differs from the written terms, there may be questions of fact as to whether the parties have modified the written contract by conduct. *See id.*

(4) Overtime Payments for Salaried Non-Exempts: The Fluctuating Work Week

For situations in which an employer pays a non-exempt employee on a salary basis, instead of by the hour, the method of calculating the employee's regular rate and overtime rate varies depending upon how many hours the salary is intended to cover. If an express or implied agreement between an employer and employee provide that the employee's salary is compensation for a standard 40-hour workweek, the employee's regular rate for overtime purposes would be the employee's salary divided by 40, assuming the employee earns no other compensation for the workweek. *See* 29 C.F.R. § 771.113. The overtime payment due would equal 1 ½ times this regular rate multiplied by all overtime hours. *Id.*

If the employer and employee share a clear mutual understanding that the salary will provide base compensation for all hours worked – not simply the first 40 – the FLSA's Fluctuating Workweek ("FWW") calculation method may be available. Under the FWW method, there are two significant changes in the manner in which overtime is calculated. First, the employer determines the employee's regular rate for a week by dividing the salary by all hours worked because the salary provides all straight time pay. *See* 29 C.F.R. § 778.114(a). Second, the overtime pay due equals ½ this regular rate times the overtime hours; again because the employee has already received straight time pay for these hours from salary. *Id.* Employer's should note, however, that the FWW method is only available if the employee receives his or her full salary in any week that the employee performs any work. *See* 29 C.F.R. § 778.114(a). Stated alternatively, employers who desire to use the FWW method are extremely limited in the ability to make deductions from employees' salary for absences or other reasons.

For example, a non-exempt employee with a $200 weekly salary works 50 hours in a particular workweek, and the employee's salary is intended to cover only a standard 40 hour workweek. The employee's regular rate is $5.00 per hour; $200 weekly salary divided by standard 40 hour workweek. The employee's overtime pay for this 50 hour workweek is $75; $5.00 regular rate times 1 ½ 10 overtime hours. The employee's gross compensation is $275. Under the FWW, the gross compensation is only $220. The employee's regular rate is $4.00 per hour; $200 salary divided by 50 hours. The employee's overtime pay is $20; $4.00 regular rate times ½ times 10. The difference will only increases as an employee works more overtime hours. If the employee worked 60 hours, his overtime pay under the first method would be $150 (total compensation of $350) and under the FWW it would be $33 (total compensation of $233).

(5) Calculating Overtime in Light of Commission Payments

Commission payments made to non-exempt employees must be included in regular rate calculations, which can be difficult depending upon the frequency with which commissions are paid. Because employers often do not pay commissions on a weekly basis, but rather on a monthly, quarterly, or even yearly basis, the employer cannot pay overtime due on the commission until the commission itself is calculated and paid. *See* 29 C.F.R. § 778.119. Once the commission is calculated and paid, the employer must allocate the commission back over the workweeks of the period (month, quarter, year, etc.) during which it was earned, and must pay additional overtime for weeks in the period during which the employee worked more than the standard maximum hours. *Id.*

For example, where an employee earns commissions on a monthly basis, the commission payment must be multiplied by 12 and then divided by 52 to get the amount of commission allocable to a single week during the month. *See* 29 C.F.R. § 778.120(a)(1). Where an employee earns commissions based on a specific number of weeks, such as every 4 weeks, the commission payment must be divided by that number of weeks. *Id.* Once the amount of commission allocable to each week has been ascertained, the regular rate for an overtime week is calculated by dividing the allocated commission amount by the total number of hours worked in that week. *See* 29 C.F.R. § 778.120(a)(2). Additional overtime due is calculated by multiplying ½ this amount by the number of overtime hours worked in the week. *Id.*

3. Federal Minimum Wage

Pursuant to a spending bill signed by President Bush on May 25, 2007, the federal minimum wage for covered non-exempt employees is $5.85 per hour effective July 24, 2007, subject to certain exceptions. This rate goes up to $6.55 per hour effective July 24, 2008, and $7.25 per hour effective July 24, 2009. Many states, such as New York, have their own minimum wage laws and a higher minimum wage.

B. Considerations Under New York Law

The New York wage-and-hour laws are found in Articles 6, Payment of Wages, N.Y. LAB. LAW §§ 190 *et seq.*, and 19, Minimum Wage Law, N.Y. LAB. LAW §§ 660 *et seq*. of the New York Labor law. The Commissioner of the Department of Labor (the "Commissioner") has also issued regulations and orders, which the Commissioner is empowered by statute to do both at the Commissioner's discretion and the recommendation of the wage board. *See* N.Y. LAB. LAW § 655-56; 199. Employers should take note that these regulations and wage orders are often industry specific and may impose additional burdens on employers in certain industries. The following is a highlight of some of the differences imposed under New York's wage-and-hour laws.

1. Minimum Wage Laws

New York's Minimum Wage Act is found at Article 19 of the New York labor statutes. N.Y. LAB. LAW § 660 *et seq.*[2] As of January 1, 2007, New York requires employers to pay "employees" at least $7.15 for each hour worked. The statute defines "employees" as "any individual employed or permitted to work by an employer in any occupation," and then goes on to list a series of exceptions, including, among others, baby sitters, farm laborers, executives, administrators, and professionals, outside salespeople, taxicab drivers, etc. N.Y. LAB. LAW § 651. The regulations provide clarification as to who qualifies for these exceptions. *See* 12 N.Y.C.R.R. § 142-2.14.

[2] Note that Article 19-A contains separate provisions governing the Minimum Wage Standards for Farm Workers, the provisions of which are not encompassed by this presentation. N.Y. Lab. Law §§ 670-683.

a. Credits and Allowances and Other Offsets for the Minimum Wage

The regulations provide that employers may consider certain allowances for meals, lodging and tips as part of the minimum wage. 12 N.Y.C.R.R. § 142-2.5 As of January 1, 2007, not more than $2.45 per meal and not more than $3.05 per day of lodging may be considered part of the minimum wage. *Id.* § 142-2.5(a)(1). Tips and gratuities may be considered part of the minimum wage subject to certain conditions:

- Tips have customarily and usually constituted part of an employee's pay in the particular occupation.

- Substantial evidence is provided that the amount the employee received in tips is at least the amount of the allowance claimed. An example of such substantial evidence includes a statement signed by the employee that he actually received tips in the amount of the allowance claimed.

- The allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record.

Id. § 142-2.5(b)(1). As of January 1, 2007, the allowance for tips shall not exceed $1.10 an hour for an employee whose weekly average of tips received is between $1.10 and $1.75 per hour, and not more than $1.75 per hour for an employee whose weekly average of tips received is $1.75 per hour or more. *Id.* § 142-2.5(b)(2). Pursuant to the regulations, there shall be no allowance for tips or gratuities where the employee's weekly average of tips is less than $1.10 an hour. *Id.*

The regulations also provide that, as of January 1, 2007, when an employer furnishes a house or apartment and utilities, a fair and reasonable amount may be allowed not to exceed the lesser of either "the value of prevailing rentals in the locality for comparable facilities" or $5.70 per day. 12 N.Y.C.R.R. § 142-2.5(a)(2).

The regulations prohibit an allowance against the minimum wage for the supply, maintenance and/or laundering of required uniforms. 12 N.Y.C.R.R. § 142-2.5(c). Furthermore, if the employee purchases a required uniform, the employer must reimburse the employee for the cost of the uniform by the next regularly scheduled pay date. *Id.* If the employer does not launder and maintain required uniforms, the employer must pay the employee between $4.25 and $8.90 per week, depending upon the amount of hours work, for laundering and maintenance of the required uniform; such reimbursements are in addition to the mandatory minimum wage. *Id.*

2. Overtime Requirements Under NY Law

Unlike other jurisdictions, New York's overtime wage rate is not contained in a statute, but in a regulation, which sets the overtime wage at 1 ½ times the employee's regular rate. *See* 12 N.Y.C.R.R. § 142.-2.2. The New York regulation generally adopts the exemptions set forth in the FLSA. 12 N.Y.C.R.R. § 142-2.2. The New York regulations do impose additional requirements not found in the federal statute: (a) call-in pay; (b) split-shift pay; and (c) spread of hours pay.

a. Call-In Pay

Whenever an employer requests or permits an employee to report to work, the employee is entitled to pay at the basic minimum hourly wage for the lesser of either (a) four hours pay, or (b) the number of hours in the regularly scheduled shift. 12 N.Y.C.R.R. § 142-2.3.

b. Split-Shift Pay

Under the regulations, an employee is entitled to an additional hour's pay at the basic minimum hourly wage rate whenever there is a "split-shift," or when there is both a split-shift and the spread of hours exceeds 10 hours (defined below). 12 N.Y.C.R.R. § 142-2.4. A "split-shift" is "a schedule of daily hours in which the working hours required or permitted are not consecutive, exclusive of meal periods of one hour or less." 12 N.Y.C.R.R. § 142-2.17.

c. Spread of Hours Pay

The regulations provide that an employee is entitled to an additional hour's pay at the basic minimum hourly wage rate if the spread of hours exceeds 10 hours, or the spread of hours exceeds 10 hours and there is a split-shift (defined above). 12 N.Y.C.R.R. § 142-2.4 The regulations define the "spread of hours" as "the interval between the beginning and end of an employee's workday," including working time, meal and other breaks periods. 12 N.Y.C.R.R. § 142-2.18.

This regulation has been construed rather strictly by the Southern District of New York in *Doo Nam Yang v. ACBL Corp.*, 427 F.Supp. 2d 327 (S.D.N.Y. 2005). Previously, the New York Department of Labor had issued a private party opinion letter stating:

> If the weekly wages actually paid to an employee equal or exceed the total of: (i) 40 hours paid at the basic minimum wage rate; (ii) overtime paid at the particular employee's overtime rate; and (iii) one hour's basic minimum wage rate for each day the employee worked in excess of 10 hours, then no additional compensation is due.

427 F.Supp. 2d at 339. The plaintiff in *Yang*, an employee of a jewelry company, brought suit for spread of hours pay, and the court found that the plaintiff had indeed worked a substantial number of days in excess of ten hours. The court rejected the defendant's reliance on the Department of Labor opinion letter, holding that the letter was an interpretation of law not entitled to deference, noting that the language of the regulations do not dictate this exception. *Id.* at 339-40.

The *Yang* court's interpretation is not without dispute, and other New York federal district courts have declined to follow the ruling in *Yang* and have given deference to the Department of Labor's interpretation. *See, e.g.*, *Jenkins v. Hanac, Inc.*, 493 F. Supp. 2d 556 (E.D.N.Y. 2007) (collecting cases); *Almeida v. Aguinaga*, 500 F.Supp. 2d 366 (S.D.N.Y. 2007). Indeed, the New York Appellate Division, Second Department, has given deference to the Department of Labor's interpretation, finding that it is "neither unreasonable nor irrational, nor is

it in conflict with the plain meaning of the promulgated language." *Seenaraine v. Securitas Sec. Servs. USA, Inc.*, 830 N.Y.S.2d 728, 729 (2d Dep't 2007).

3. Other Requirements

a. Limits on Deductions

New York prohibits deductions from employees' pay except for (a) those required by law, and (b) those that are for the benefit of the employee and expressly authorized in writing by the employee, a copy of which must be maintained by the employer. N.Y. LAB. LAW § 193(1). Deductions that are for the benefit of the employee include payments for insurance premiums, pension or health and welfare benefits, charitable contributions, payments for U.S. bonds, and union dues. *Id.* The regulations further provide that wages shall not be reduced by expenses incurred by an employee in carrying out duties assigned by an employer, in addition to providing examples of prohibited deductions: (1) for spoilage or breakage; (2) for cash shortages or losses; (3) fines or penalties for lateness, misconduct or quitting by an employee without notice. N.Y.C.R.R. § 142-2.10.

b. Meal and Rest Breaks

New York law regarding hours of labor is found at Article 5, Title 1 of the New York Labor Law. N.Y. LAB. LAW §§ 160 – 169A. Section 162 sets forth the following meal and rest break requirements:

- Every person employed in or in connection with a factory shall be allowed at least sixty minutes for the noonday meal.

- Every person employed in or in connection with all other establishments covered by the statute shall be allowed at least thirty minutes for the noonday meal.

- Every person employed for a period or shift starting before 11 a.m. and continuing later than 7 p.m. shall be allowed an additional meal period of at least twenty minutes between 5 and 7 p.m.

- Every person employed for a period or shift of more than six hours that starts between 1 p.m. and 6 a.m. shall be allowed a meal break midway between the beginning and end of the shift as follows:

    - At least sixty minutes for a meal period when employed in or in connection with a factory; or

    - Forty-five minutes for a meal period when employed in or in connection with all other establishments covered by the statute.

It is the position of the New York Department of Labor that these meal requirements apply to all categories of workers, including white collar management staff. *See* Division of

Labor Standards Guidelines, Department of Labor, Meal Periods (1994).[3] The Department of Labor will permit a shorter meal period – not less than 30 minutes – as a matter of course and without any special application by the employer. *Id.* A meal period of not less than 20 minutes may be granted by special permit after an investigation by the Department of Labor, but only in special or unusual circumstances. *Id.* An application for meal periods of less than thirty minutes is available at the New York Department of Labor website.[4] The Department of Labor recognizes that in certain circumstances it may be customary for an employee to eat on the job without being relieved when the employee is the only person on duty or the only person in a specific occupation. However, the Department of Labor will consider such an arrangement a violation of the statute unless the employee voluntarily consents; an uninterrupted meal break must be afforded to every employee who requests one. *Id.*

New York law generally requires employers to give all employees at least 24 consecutive hours of rest in any calendar week, though there are exceptions. N.Y. LAB. LAW § 161. For a forty dollar fee, an employer may obtain a variation from this requirement where it imposes practical difficulties or unnecessary hardships, provided that the commissioner finds "the spirit of the act [will] be observed and substantial justice [will be] done" if the variation is granted. *Id.*

(1) New Meal and Rest Break Penalties

Violations of New York's meal and rest break provisions, including the day-of-rest in seven provision, may be subject to criminal prosecution under N.Y. LAB. LAW § 213, with a maximum fine of $100 for the first offense. Effective January 14, 2008, violations of the meal and rest break provisions, N.Y. LAB. LAW §§ 161-162, will be included as punishable offenses under N.Y. LAB. LAW § 218, with a potential administrative fine of up to $1,000 for the first offense, $2,000 for the second offense, and $3,000 for the third.

c. Recordkeeping and Posting

New York labor laws impose various administrative requirements on employers regarding recordkeeping and posting of notices. *See, e.g.*, N.Y. LAB. LAW § 161; § 195(4); §§ 650-665; *see also* 12 N.Y.C.R.R. § 142-2.6 – 2.8. Generally, New York employers must establish and maintain payroll records (to include hours worked, gross and net wages, and deductions) for each employee for three years (N.Y. LAB. LAW § 195(4)), in addition to a variety of record keeping requirements under the Minimum Wage Act. N.Y. LAB. LAW §§ 650-665. Beyond this, the commissioner has issued minimum wage orders for specific industries that impose even more detailed record keeping requirements. *See, e.g.*, N.Y.C.R.R. § 142.-2.6 (detailing ten separate pieces of information to be included in payroll records every covered employer must maintain for at least six years). Thus, it behooves employers to confirm the recordkeeping requirements for their specific industry.

New York law also imposes notice and posting requirements, including items such as a statement with each payment of wages detailing gross wages, deductions and net wages, and, if

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[3] The New York Department of Labor's interpretation of Section 162 of the New York Labor law is available at http://www.labor.state.ny.us/workerprotection/laborstandards/employer/meals.shtm.

[4] http://www.labor.state.ny.us/formsdocs/wp/ls284.pdf#page=1.

requested by an employee, an explanation of how the wages were calculated, notice to employees of employer policies on wage payments and benefits, sick leave, vacation, personal leave, holidays, and hours, notice of a change in pay days, and specific notice regarding termination. N.Y. LAB. LAW § 195. In addition, employers are required to post certain posters regarding New York Labor law. *See, e.g.*, N.Y. LAB. LAW §§ 661 (requires posting of the New York minimum wage poster); § 198-d (requires certain employers to post copies of Labor Law Sections 193 and 196(d) regarding illegal deductions from wages and tips); 12 N.Y.C.R.R. § 142-2.8.

Compliance with these administrative requirements is mandatory, and employers who fail to properly do so face stiff penalties. *See* N.Y. LAB. LAW § 662(c) (failure to "keep the required records," "furnish such records," or "hinder or delay the commissioner," or a falsification of records is a class B misdemeanor for each day of violation); *see generally* § 196.

4. Enforcement and Remedies

Both individual employees[5] and the commissioner are entitled to bring an action to enforce New York's wage-and-hour laws. *See* N.Y. LAB. LAW §§ 198; 663. In either scenario, if the employee prevails, in addition to an award of the amount underpaid, a court may award costs and attorney's fees. N.Y. LAB. LAW §§ 198 (1), (1-a); 663. Additionally, where the court finds that "the employer's failure to pay the wages required … was willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of wages found to be due" will be awarded to the employee. N.Y. LAB. LAW § 198 (1-a); *see also* N.Y. LAB. LAW § 663.

In addition to damages, employers who violate the provisions of the New York labor statutes also face potential civil and criminal penalties. A civil fine of $500 will be imposed by the commissioner in a civil action against employers who fail to pay wages as required by New York labor law. N.Y. LAB. LAW § 197. It is a class B misdemeanor in New York for an employer to (1) fail to pay the required minimum wage, and (2) "discharge or in any other manner discriminate[] against any employee" because the employee has (a) made a complaint to the employer or commissioner regarding possible violations of the wage-and-hour laws; (b) instituted a proceeding for violations of the wage-and-hour laws; or (c) testified or is about to testify in an investigation proceeding. N.Y. LAB. LAW § 662(1).

Moreover, the commissioner has the power to "institute proceedings on account of any criminal violation," (N.Y. LAB. LAW § 196 (1) (c)) with criminal penalties to be assessed as follows:

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[5] The statutes do not require an employee to go through state administrative procedures before commencing a civil action. *See generally* N.Y. LAB. LAW §§ 198; 663.

Further, an employee who files a complaint regarding the payment of wages shall be notified of the anticipated process of the complaint, including investigation, potential civil and criminal penalties, and collection procedures, and, in the event criminal penalties are sought, shall be notified of the outcome of the prosecution. N.Y. LAB. LAW § 199-a.

- For the first offense, the employer "shall be guilty of a misdemeanor … and upon conviction … shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year." N.Y. LAB. LAW § 198-a (1).

- If an employer commits a subsequent offense within six years of its conviction for any prior offense, the employer "shall be guilty of a felony … and upon conviction … shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense." *Id.*

Note that the Commissioner, however, is not required to institute criminal prosecutions in every instance, "but he shall be deemed with discretion in such matters." N.Y. LAB. LAW § 196 (2).

The New York labor law generally provides for a six-year statute of limitations for violations of its provisions, including claims for wages, benefits, and wage supplements. N.Y. LAB. LAW §§ 198; 663.

5. Current Issues:

a. Second Circuit Seeks Clarification on Definition of "Employee"

The U.S. Court of Appeals for the Second Circuit recently deferred a ruling in *Pachter v. Bernard Hodes Group Inc.*, No. 06-3344, in light of uncertainty over state law as to whether an executive is an "employee" under New York's wage law, and if so, whether deductions from commissions are permissible under New York law. The plaintiff, Elaine Patcher, worked as an account representative with the title of vice president at a recruitment, marketing, and staffing services company. The plaintiff received commissions based on client billings and a service fee. According to detailed monthly commission statements, these commissions were subject to deductions including costs for an assistant, travel expenses, and penalties and account problems.

Before the trial court, plaintiff challenged the deductions as prohibited deduction from employee wages under New York Law. The defendant countered that, as an executive, plaintiff was not an employee under New York law, and further, that the so-called deductions were not taken from the commissions but used to calculate commissions in the first instance.

On appeal, the Second Circuit pointed to the New York Court of Appeals decision in *Gottlieb v. Kenneth D. Laub & Co.*, 82 N.Y. 2d 457 (1993), as the source of the confusion over who qualifies as an "employee" under New York law. In that opinion, the New York high court implied in dicta that, when it comes to service as an executive, manager, or administrator, there are categorical limits on who is considered an "employee" under New York labor law. State and federal courts are split on the proper interpretation of *Gottlieb*, creating uncertainty as to the proper interpretation of state law in the eyes of the Second Circuit.

The Second Circuit also found a lack of definitive guidance as to when a commission is "earned" by an employee under New York law. According to the Second Circuit, the New York courts have not addressed whether the common law approach – namely that commissions are earned upon sale in the absence of an agreement to the contrary – applies under New York law.

According to the Second Circuit, if the common law approach does apply, the deductions to plaintiff's commission likely occurred after the sale and were likely improper.

Employers should take note of the pending clarification by the New York Court of Appeals on these two very important issues.

b. Commissioned Salespersons Terms of Employment Should Be in Writing

Effective October 16, 2007, Section 191(c) of the New York Labor Law has been amended to require that the terms of employment of for commissioned salespersons be included in a written document signed by both the employer and the employee. The document must detail how wages, salary, drawing account, commissions, and other monies earned and payable are calculated, as well as what monies are earned and payable in the event the employment is terminated. The document must be retained by the employer for at least three years and be made available to the Department of Labor upon request. It behooves New York employers to strictly comply with these requirements because the law will now presume that the employee's recitation of the terms of the commission agreement is correct if the agreement is not reduced to writing.

II. FLSA COLLECTIVE ACTIONS VS. FRCP 23 CLASS ACTIONS

Although individual actions are permitted under the wage-and-hour laws, there has been significant interest recently in class and collective actions. *See, e.g.*, Michael Orey, *Does Your Boss Owe You Overtime? Wage Wars*, BUSINESS WEEK, October 1, 2007, at 50. There are certain noteworthy differences in the way in which cases proceed under state versus federal law. Suits brought pursuant to the FLSA may be certified only under 29 U.S.C. § 216(b) and proceed on an opt-in basis only, known as a collective action, meaning that a putative class member is bound by the judgment only if he or she affirmatively elects to be part of the case. *See Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 992 (C.D. Cal. 2006). In order to ensure potential plaintiffs are aware of the suit and have an effective opportunity to opt-in, courts are authorized to facilitate the issuance of notice of the action to potential plaintiffs before resolving the ultimate certification question. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170-72 (1989). Once notice has been issued, there is discovery and the court determines whether to certify the class, which requires the plaintiff to present sufficient evidence that he or she is "similarly situated" to putative class members. *See* 29 U.S.C. § 216(b); *see also Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 264 (D. Conn. 2002) (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995)).

Suits brought pursuant to state law are governed by Federal Rule of Civil Procedure Rule 23. Rule 23 differs from section 216(b) in certain significant aspects. Under Rule 23, plaintiffs must satisfy a multi-prong test: joinder is impractical; there are questions of law and fact common to the class; the plaintiff's claims are typical of those of the class; the plaintiff and his or her counsel will be adequate class representatives; class proceedings are superior to all other methods of resolving the matter at issue. *See* Fed. R. Civ. P. 23(a) & (b)(3). Rule 23 class actions are opt-out cases, and this test is designed to protect the due process rights of absent class members. In such opt-out cases, when a class is certified, a class member will be bound by any judgment unless he or she affirmatively declines to participate in the matter. *See Edwards*, 467 F. Supp. 2d at 989.

III. PREVENTATIVE MEASURES FOR EMPLOYERS

Employers should take heed to the wage-and-hour law requirements of both state and federal law, and note any industry specific requirements that may apply to them. There are certain basic steps employer can take to minimize their exposure to wage-and-hour claims. For example, many wage claims involve allegations that the employer has mischaracterized employees as exempt from federal or state overtime and minimum wage requirements. To minimize exposure to such claims, some suggested steps include:

- Informing employees of their employment status at the time of hiring (*e.g.* salaried exempt, non-salaried non-exempt);
- Reviewing job duties and ensure that exempt employees maintain job duties commensurate with the test for the applicable exempt classification;
- Ensuring that all exempt employees are properly paid on a salary basis; and
- Reviewing all policies relating to salary deductions or "docking" that may jeopardize employees' exempt status; and
- Reimbursing employees as soon as possible for inadvertent mistaken wage deductions.

In addition, many cases involve allegations that employees have been forced or pressured to work off-the-clock. Employers who wish to minimize exposure to such claims should consider the following:

- Review all time-reporting mechanisms and policies to ensure compliance with applicable law;
- Ensure that employer's policies on time keeping, lunch and break times are in a written form that can be understood by all employees;
- Require non-exempt employees to punch in immediately before beginning work and punch out upon completing work, and to do the same before unpaid meal breaks;
- Require employees to review and sign their time cards or time records and initial any changes;
- Institute an overtime policy providing that any work by a non-exempt employee in excess of forty hours in the workweek will be paid at the appropriate overtime rate; and
- Enforce all such policies once they are enacted.

Employers should also consider developing an employee-complaint system to address FLSA violations. Such a system will allow the employer to identify and resolve issues before they develop into litigation. Finally, employers contemplating an audit to review compliance with applicable wage-and-hour laws should also review how such audits are conducted. Audits

may be conducted internally, by human resources, by an outside consulting group, or by counsel, and may be comprehensive or focused on discrete issues. Employers should note that non-privileged audit results can come into play in class litigation. *See, e.g., Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 330 (N.D. Cal. 1992) (admitting documentary and testimonial evidence of employer's affirmative action efforts to prove knowledge of disparities and discriminatory attitudes in class action race and sex discrimination suit). Employers, therefore, should be cautious when considering what type of review is necessary.