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**THE FAIR LABOR STANDARDS ACT AND
PROFESSIONAL EMPLOYMENT ON CAMPUS**

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I. INTRODUCTION – WHY THE CHANGES?

On March 13, 2014, President Obama signed a memorandum to “modernize and streamline” the Department of Labor’s white-collar exemptions at 29 C.F.R. Part 541, which were last revised in 2004. According to the President, “[o]vertime is a pretty simple idea. If you have to work more, you should get paid more.” The President specifically emphasized that there should be an increase in the minimum salary requirements for the white collar exemptions’ salary basis tests. A White House press release referred to the current salary basis requirements as “outdated,” noting that the threshold has been modified only twice in the last 40 years.

Accordingly, the White House intends for the changes to:

- Update existing protections in keeping with the intention of the Fair Labor Standards Act.
- Address the changing nature of the American workplace; and
- Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.

In response to the President’s directive, the Department conducted extensive fact-gathering, hearing from a wide range of stakeholders from employees to employers, from unions to business organizations, and government to private enterprise. On July 6, 2015, following this outreach, the Department published its Notice of Proposed Rulemaking, inviting comments to the proposed rules. While the Department originally indicated an intent to finalize the regulations in late 2015 or early 2016, it is now expected that the regulations will be issued in late 2016.

As the Department noted in its proposed rules: The Department has long recognized the salary level test as “the best single test” of exempt status. If left at the same amount over time, however, the effectiveness of the salary level test as a means of determining exempt status diminishes as the wages of employees entitled to overtime increase and the real value of the salary threshold falls.” The proposed rules are estimated to extend overtime benefits to almost 5 million white collar workers under their current salary structures.

A. Expected Areas of Change

1. Duties Test
2. Minimum Salary Level
3. Computer Exemption

The Department is particularly interested in updating the salary level test to make it current. In this regard, the department intends to (1) set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers; (2) increase the total annual compensation required to exempt highly compensated employees (HCEs) to the 90th percentile of weekly earnings of full-time salaried workers; and (3) establish a mechanism to automatically update salary and compensation levels annually to ensure that they reflect increases in salaries.

B. Process To Effectuate Change

1. Proposed Notice of Rulemaking
2. Give public generally between 30 and 90 days to file comments
3. After close of public comment period, DOL reviews and responds to comments before publishing
4. Note that in 2004, DOL received over 75,000 comments to its proposed regulations and spent 13 months reviewing the comments before publishing the final rule.

II. THE CURRENT WHITE COLLAR EXEMPTIONS

A. Overview

1. “White Collar” Exemptions:
 - a. The so-called “white-collar” exemptions dispense with the FLSA’s overtime pay requirement for those employees who are properly classified as executives, administrators, professionals and outside salespersons.
 - b. To qualify for the exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week.
 - c. Job titles do not determine exempt status.
 - d. In order for an exemption to apply, an employee’s specific job duties and salary must meet all of the requirements of the Department of Labor’s regulations.
2. Overview of Categories and Duties Tests

a. Executive Exemption: To qualify all of the following criteria must be met:

- 1) The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
- 2) The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- 3) The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- 4) The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

b. Administrative Exemption: To qualify all of the following criteria must be met:

- 1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- 2) The employee's primary duty must be 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
- 3) The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

c. Learned Professional Exemption: To qualify all of the following criteria must be met:

- 1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
 - a. Note, as discussed below, the salary level does not apply to teachers, lawyers and doctors.
- 2) The employee's primary duty must be the performance of

work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

- 3) The advanced knowledge must be in a field of science or learning; and
- 4) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

d. Creative Professional Exemption: To qualify all of the following tests must be met:

- 1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- 2) The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training;
- 3) The primary duty requirement that the employee be engaged in work requiring invention, imagination, originality or talent is generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, and novelists; and
- 4) A "recognized field of artistic or creative endeavor" generally includes fields such as music, writing, acting and the graphic arts.

e. Computer Employee Exemption: To qualify all of the following tests must be met:

- 1) The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- 2) The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing

the duties described below;

- 3) The employee's primary duty must consist of:
 - a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - b. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - d. A combination of the aforementioned duties, the performance of which requires the same level of skills.
- f. Outside Sales Exemption: To qualify all of the following tests must be met:
 - 1) The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
 - 2) The employee must be customarily and regularly engaged away from the employer's place or places of business.
- g. Highly Compensated Employees: Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

3. Job Classifications Presumed to Fall Outside of Exemption

Although the DOL continues to emphasize that job titles are not dispositive of exempt status, certain classes of employee are presumed to fall outside the scope of the white-collar exemptions, such as manual laborers, non-management employees in production, maintenance, construction, and similar occupations, public safety personnel (e.g., police officers, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, and emergency medical technicians), and trainees.

B. Other Necessary Conditions

1. Salary Basis Test

- a. Absent a statutory occupational exception, such as is applicable to practicing teachers, lawyers, and physicians (as discussed below), in order to be classified as exempt, a white collar employee must receive the full salary for any week in which he performs any work without regard to the number of days or hours worked. 29 CFR § 541.602(a).
- b. This predetermined amount of compensation may not be reduced due to variations in the quality or quantity of the work performed. Except where expressly permitted by the regulations, employers may not make any deductions from the predetermined amount paid to exempt white collar employees. This prohibition, however, is subject to the general rule that an employee need not be paid for any workweek in which the employee performs no work. 29 CFR § 541.602(a).
 - i. Public agencies, such as public universities, may make deductions of pay for absences within a workweek due to a budget-required furlough. In that event, the employee shall not lose his or her exempt status except for that week in which the pay is reduced. 29 C.F.R. § 541.710(b).
- c. The Tenth Circuit has held that the salary basis test is not violated by a reduction in salary that is attendant to a shortening of the workweek, for example from five days to four, based on the demands of the business unless the salary changes are “done with such frequency that the salary is the functional equivalent of an hourly wage.” Summary judgment would therefore be foreclosed where “a jury could find that [the employer] was changing base hours so frequently in order to reflect the actual hours worked and, thus, in effect paid [the plaintiff] as an hourly employee.” *Archuleta v. Walmart Stores, Inc.*, 543 F.3d 1226, 1236 (10th Cir. 2008).
- d. Also deemed inconsistent with the salary basis requirement was an employer’s practice of reducing base salary to recoup bonus “overpayments” occasioned by a drop in performance level below a certain monetary threshold.

2. Compensation Standards

- a. In most, but not all cases, exempt white-collar status turns on both a duties and a compensation requirement.

- b. However, there is no compensation requirement for the following classifications of employees:
 - 1) Outside salespersons or “business owners”;
 - 2) Teachers;
 - 3) Licensed and practicing lawyers; or
 - 4) Licensed and practicing physicians, including medical practitioners engaged in an internship or residence program.
 - a. The term “physicians” is broadly defined to encompass general practitioners and specialists, osteopathic physicians, podiatrists, dentists, and optometrists.
 - b. Veterinarians have been found to be professionals involved in the practice of medicine, and therefore need not be paid on a salary basis, but courts have held that physician assistants and nurse practitioners do not qualify for the salary basis exception applicable to “physicians.”
- c. Highly Compensated Employees
 - 1) The 2004 amendments to the Part 541 regulations defining and delimiting the white-collar exemptions established a streamlined test for “highly compensated” employees who perform one or more executive, administrative, or professional duties.
 - 2) To qualify, an employee must receive \$100,000 per annum, or a proportionate amount for shorter periods of time. The \$100,000 amount may include commissions, nondiscretionary bonuses, and other nondiscretionary payments, but does not include board, lodging, or fringe benefits.
 - 3) Payments to an employee for separate services provided solely as an independent contractor are not properly included in the calculation of total earnings.
 - 4) There is a special “topping-up” payment rule, so that “if the employee’s total annual compensation does not total at least [\$100,000] by the last pay period of the 52-week period, the employer may, during the last pay period or

within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level.”

- 5) Because “[a] high level of compensation is a strong indicator of an employee’s exempt status,” a detailed analysis of a highly compensated employee’s job duties is unnecessary.
- 6) To qualify for the exemption, an employee meeting the compensation requirement need only “customarily and regularly” perform one or more of the exempt functions of an executive, administrative or professional employee.

C. Permissible Deductions

1. Absence for a Full Day or More

- a. In certain situations, salary deductions are permissible and will not defeat exempt status. For example, deductions from salary may be taken “when an employee is absent from work for one or more full days for personal reasons, other than sickness or disability.” 29 CFR § 541.602(b)(1).
- b. Deductions are also appropriate for absences of a day or more due to sickness or disability, including work-related accidents, so long as the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation to make up for the loss of salary.

2. Absences Due to Penalties Imposed for Safety Infractions

- a. Also permissible are salary deductions for penalties imposed “in good faith for infractions of safety rules of major significance,” which is defined narrowly to include only “those [rules] relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.” 29 CFR § 541.602(b)(4).
- b. The operative regulation, as modified in 2004, further provides that “[d]eductions from pay of exempt employees may be made for disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules,” provided the suspension is “imposed pursuant to a written policy applicable to all employees.” 29 CFR § 541.602(b)(5).

3. Terminal Week of Employment

“An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee’s full salary for the time actually worked in the first and last week of employment.” 29 CFR § 541.602(b)(6).

4. Unpaid FMLA Leave

Likewise, “[a]n employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act” but rather “may pay a proportionate part of the full salary for time actually worked.” 29 CFR § 541.602(b)(7).

D. Impermissible Deductions

1. An employee will not be considered to be paid on a salary basis if deductions from his or her predetermined compensation are made for absences occasioned by operating requirements of the business.
2. Nevertheless, because the salary basis test is subject to the general rule that exempt employees need not be paid for any week in which they perform no work, employers may make deductions for furloughs or temporary layoffs of an entire workweek.
3. Deductions for absences associated with the fulfillment of a civic obligation, such as jury duty, attendance as a witness, or temporary military leave, are impermissible.
4. Because reductions in pay due to the quantity of work performed are incompatible with exempt status, deductions from salary for absences of less than one day are generally not permitted under the salary basis regulations.

E. Safe Harbor

1. 2004 Safe Harbor Amendment

As amended in 2004, the regulations include a “safe harbor” provision whereby an employer may preserve an exemption notwithstanding that improper deductions were made, and regardless of the reason for the improper deductions, by maintaining a clearly communicated policy prohibiting deductions proscribed under the salary basis test.

2. Safe Harbor Policy

- a. To take advantage of this “safe harbor,” the employer’s policy must include:
 - 1) a complaint procedure;

- 2) employees must be reimbursed for any improper deductions; and
 - 3) the employer must make a good faith commitment to comply in the future.
- b. An employer that “willfully violates the policy by continuing to make improper deductions after receiving employee complaints” cannot invoke the safe harbor provision and loses the exemption “during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.” 29 C.F.R. § 541.603.

F. Executive Exemption

1. Duties Test

As set forth above, in order to be deemed “employed in a bona fide executive capacity,” an employee must, in addition to meeting the compensation form and amount requirements:

- 1) Have as his or her primary duty managing the enterprise in which the employee is employed, or a customarily recognized department or subdivision thereof;
- 2) Customarily and regularly direct the work of two or more other employees; and
- 3) Have the authority to hire and fire other employees, or make suggestions and recommendations that are given particular weight as to hiring, firing, advancement, promotion, or any other change of status of other employees.

2. Management Duties

Traditional management activities include: interviewing, selecting, and training employees; setting and adjusting employees’ rates of pay and hours of work; directing employees’ work; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for purposes of recommending promotions or other changes in status; handling employee complaints and grievances; imposing discipline; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, or tools to be used or merchandise to be bought, stocked, and sold; controlling the flow and

distribution of materials or merchandise and supplies; providing for the safety of the employees or the company's property; budget planning and control; and, monitoring or implementing legal compliance measures.

3. “Primary Duty of Managing”

- a. In addition to the time spent on exempt tasks, the relevant factors in the primary duty analysis “include, but are not limited to: the relative importance of the exempt duties as compared with other types of duties; ... the employee's relative freedom from direct supervision; and 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.” 29 CFR § 541.700.
- b. To qualify for the executive exemption, the employee must manage either the enterprise itself or “a customarily recognized department or subdivision thereof.” The phrase “customarily recognized department or subdivision” is intended to distinguish between a “mere collection of employees assigned from time to time to a specific job or series of jobs,” on the one hand, and a “unit with permanent status and function,” on the other. It is not required that the department or subdivision be physically located within the employer's establishment, or even be a fixed location. Nor is it essential that there be continuity of subordinate personnel: “An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units.” 29 CFR § 541.103.
- c. Executive exemption cases involving managers and assistant managers of retail establishments are commonplace and often turn on whether the employees' primary duty is management.

In a comprehensive opinion on the point, the Eleventh Circuit determined in *Morgan v. Family Dollar Stores, Inc.*, that there was ample evidence to support a jury's determination that Family Dollar's store managers did not qualify for the executive exemption. The Eleventh Circuit cited evidence that the plaintiffs spent 80 to 90% of their time performing nonexempt, manual labor, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors and bathrooms, which in turn, supported a finding that these tasks were more important to Family Dollar than the store managers' exempt tasks. The store managers rarely exercised discretion because virtually every aspect of the stores' daily operations was controlled

by an operations manual or directives issued by district managers, such that “the combination of sweeping corporate micromanagement, close district manager oversight, and fixed payroll budgets left store managers little choice in how to manage their stores and the primary duty of performing manual, not managerial, tasks.” 551 F.3d 1233, 1271 (11th Cir. 2008).

4. Customarily and Regularly Direct the Work of Two or More Other Employees

- a. An exempt executive must “customarily and regularly” direct the work of two or more other employees.
- b. “Customarily and regularly” means a frequency “greater than occasional” and includes work that is “normally and recurrently performed every workweek,” although the frequency of such work may be “less than constant.” 29 CFR § 541.701.
- c. Two or more other employees means “two full-time employees or their equivalent.”
 - 1) An employee who merely assists the actual manager and only supervises two or more employees in the actual manager’s absence does not meet this requirement.
 - 2) Supervisory responsibility may be distributed among multiple executives, but hours worked by a subordinate employee cannot be credited to more than one executive.

5. Authority With Respect to Personnel Matters Are Given Particular Weight

- a. In order to qualify for the executive exemption, a purported executive must have authority to hire or fire employees, or have particular weight given to his or her suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status.
- b. It is not necessary that the executive be empowered to make the final decision regarding another employee’s change in status in order to satisfy the “particular weight” requirement.
- c. Relevant factors include: whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such recommendations are made or requested; and the frequency with which such recommendations are relied upon.

G. Administrative Exemption

1. Duties Test

- a. As set forth above, in order to be deemed “employed in a bona fide administrative capacity,” an employee, in addition to meeting the compensation form and amount requirements, must meet the following duties test:
 - 1) Have the primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers;
 - 2) Have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance; and
 - 3) Perform office or non-Manual work directly related to management or general business operations.
- b. “Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as 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; and similar activities.” 29 CFR § 541.201(b).
- c. Exempt functions also include “work directly related to the management or general business operations of the employer’s customers,” such as advising or consulting. 29 CFR § 541.201(c).

2. The Administrative/Production Dichotomy

- a. The regulations in effect codify the so-called “administrative/production dichotomy,” which the DOL considers a “relevant and useful tool in appropriate cases to identify employees who should be excluded from the [administrative] exemption.” 69 Fed. Reg. 22122, 22141 (Apr. 23, 2004).
- b. The Fourth Circuit has observed that “[a]lthough the administrative-production dichotomy is an imperfect analytical tool in a service-oriented employment context, it is still a useful construct.” *Desmond v. PNGI Charles Town Gaming, LLC*, 564 F.3d 688, 694 (4th Cir. 2009).
- c. In a case involving underwriters, the Second Circuit noted that,

“[t]he line between administrative and production jobs is not a clear one, particularly given that the item being produced ... is often an intangible service rather than a material good. Notably, the border between administrative and production work does not track the level of responsibility, importance, or skill needed to perform a particular job.... What determines whether an underwriter performed production or administrative functions is the nature of her duties, not the physical conditions of her employment.” *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 533 (2d Cir. 2009).

- d. Generally speaking, “non-manufacturing employees can be considered ‘production’ employees in those instances where their job is to generate (i.e., ‘produce’) the very product or service that the employer’s business offers to the public.” *Desmond*, 564 F.3d at 694. However, even where an employee bears responsibility for producing his own employer’s product, his or her role may still be administrative in nature if the duties performed are ancillary to the business of his employer’s customers.
- e. A case involving investigators employed by a firm specializing in insurance defense investigations for insurance companies, third-party administrators and law firms is illustrative of the point. The investigators were responsible for conducting claims investigations, and hence produced the product offered by their employer, i.e., investigatory reports. However, the primary duty test for the administrative exemption was still met because investigations were not the core business of the firm’s clients. For example, the firm’s “insurance company clients are in the business of writing and selling insurance policies. The duty of conducting claims investigations is merely ancillary to producing and selling insurance policies, and thus falls on the administrative side of the ‘administrative-production dichotomy.’” *Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 903 (D. Minn. 2010).

3. Retail & Service Settings

- a. In a retail or service establishment setting, promoting sales is an administrative function but actual sales work is not.
- b. This distinction was at issue in *Reiseck v. Universal Communications of Miami, Inc.*, where the Second Circuit, addressing the exempt status of advertising salespersons, explained that “[a]n employee making specific sales to individual customers is a salesperson, while an employee encouraging an increase in sales generally among all customers is an administrative employee.” 591 F.3d 101, 107 (2d Cir. 2010). The Court

determined that although the plaintiff was responsible for developing new accounts with the goal of increasing sales generally, and hence engaged in promotional work, her “primary duty was to sell advertising space to clients.” *Id.* Consequently, the administrative exemption was inapplicable.

4. Discretion and Independent Judgment

- a. “In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.” 29 CFR § 541.202(a).
- b. The exercise of discretion and independent judgment “implies that the employee has authority to make an independent choice, free from immediate direction or supervision,” even if such choices are subject to review at a higher level. 29 CFR § 541.202(c). So long as the employee possesses the requisite authority to act independently, the discretion and independent judgment requirement may be met even if he or she exercises that discretion conservatively.
- c. The term “matters of significance” refers to the “level of importance or consequence” of the work performed, and not whether an employee’s failure to perform certain duties will cause the employer to experience financial losses.
- d. The “discretion and independent judgment” requirement will not be satisfied by the mere use of skill in applying “well-established techniques, procedures or specific standards described in manuals or other sources.” 29 CFR § 541.202(e).
- e. Among the factors to consider in determining whether an employee meets the “discretion and independent judgment” prong of the administrative exemption are: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the

employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

- f. A pair of Circuit Court decisions involving pharmaceutical representatives offer a useful illustration of the distinction between those employees who exercise sufficient discretion and independent judgment to satisfy the requirements of the administrative exemption and those who do not. In the more recent of these cases, *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), the Second Circuit concluded that Novartis' strict oversight and detailed work assignments precluded reps from exercising the degree of discretion or independent judgment in matters of significance necessary to qualify as exempt administrative employees. Specifically, the Court emphasized that Novartis dictated how many times reps visited each physician, promoted certain drugs, and held promotional events, and prohibited reps from going outside of their scripts to answer physicians' questions. Also of importance to the Court was the fact that the reps had no input on Novartis' marketing strategy or the "core messages" that drove their sales presentations. Novartis reps' interactions with doctors, the Court observed, were predicated largely on skills gained or honed during training sessions run by Novartis and were not the product of independent thinking.
- g. By contrast, in *Smith v. Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010), the Third Circuit Court of Appeals determined that a Johnson & Johnson pharmaceutical sales rep exercised sufficient discretion and independent judgment to meet the requirements of the administrative exemption. The Third Circuit based its decision on the facts that the rep at issue was "required ... to form a strategic plan designed to maximize sales in her territory" and she functioned without direct supervisory oversight.

H. Professional Exemption / Learned Professional

1. Duties Test

Generally, the learned professional exemption applies where:

- a. the individual's primary duty involves work requiring advanced

knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

- b. which advanced knowledge is in a field of science or learning; and
- c. is customarily acquired by a prolonged course of specialized intellectual instruction.

2. Work Requiring Advanced Knowledge

- a. “Work requiring advanced knowledge” is predominately intellectual in character and entails the consistent exercise of discretion and judgment as opposed to work involving routine mental, manual, mechanical, or physical work.
- b. The requisite advanced knowledge cannot be obtained at the high school level and must generally be applied for purposes of analyzing, interpreting or making deductions from varying facts or circumstances.

3. “Consistent Exercise of Discretion and Judgment”

- a. The “consistent exercise of discretion and judgment” requirement is similar to, but “less stringent” than, the “discretion and independent judgment” standard of the administrative exemption.
- b. Generally, an employee who carries out his or her duties in a mechanical or routine manner and lacks authority to make independent decisions in performing those duties will not meet the consistent discretion and judgment requirement.

4. Field of Science or Learning

- a. The term “field of science or learning” connotes an occupation with “recognized professional status as distinguished from the mechanical arts or skilled trades.....” 29 CFR § 541.300(c).
- b. Examples include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, physical, chemical or biological sciences, and pharmacy.

5. Customarily Acquired By a Prolonged Course of Study

- a. The term “customarily acquired” means that “specialized academic training is a standard prerequisite for entrance into the profession.”

29 CFR § 541.300(d).

- b. The exemption “is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.” Id.
- c. However, the learned professional exemption would not apply to occupations in which “most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.” Id.

6. Professions that “Generally Meet” Duties Test

- a. According to the DOL, professions that “generally meet” the duties requirements for the exemption include registered or certified medical technologists; registered nurses (but not licensed practical nurses); dental hygienists; physician assistants; accountants (but not accounting clerks or bookkeepers); chefs (including sous chefs) with four-year culinary arts degrees; certified athletic trainers; and licensed funeral directors and embalmers with specialized college degrees.
- b. On the other hand, paralegals generally do not qualify as learned professionals unless they possess advanced specialized degrees in other professional fields and apply their advanced knowledge in that field when performing paralegal functions.

I. Creative Professional

1. Duties Test

An artistic or creative professional is exempt if his or her primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor, such as music, writing, acting, and the graphic arts. Work which can be produced by a person with only general manual or intellectual ability and training is not of the creative professional variety.

2. Applicability to Journalists

The field of journalism presents unique considerations because journalists’ duties vary along a spectrum from the exempt to the nonexempt. In general, though, journalists who simply collect, organize, and record information, or do not contribute a unique or creative interpretation or analysis, are unlikely to be exempt.

J. Teachers

1. Duties Test

- a. A teacher is exempt where his or her primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge, and he or she is employed and engaged in this activity as a teacher in an educational establishment.
- b. Correctional facilities, day care centers, and church operated schools may constitute educational institutions within the meaning of the teaching exemption.

K. Computer Professionals

1. Duties Test

- a. To qualify for the computer professional exemption, an employee's primary duty must entail:
 - 1) The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
 - 2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - 3) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
 - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.
- b. The computer professional exemption is limited to systems analysts, programmers, software engineers, and other similarly skilled workers in the computer field.
- c. It is not enough that an employee's work is highly dependent on, or facilitated by, computers, as is often the case with a drafter or engineer.
- d. The exemption is likewise inapplicable to employees engaged in the manufacture, repair, or maintenance of computer hardware and related equipment.

L. Outside Sales Exemption

1. Duties Test

To qualify for the outside sales exemption, an employee's primary duty must consist of making sales or obtaining orders or contracts for the performance of services or the use of facilities when consideration will be paid for the services or facilities by clients or customers. The exemption also extends "to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 CFR § 541.501(d).

2. "Making Sales"

- a. The term "making sales" is defined to include the "transfer of title of tangible property; in certain cases, transfer of tangible and valuable evidences of intangible property; and sales transactions such as sales, exchanges, contracts for sale, shipment for sale, or other disposition." 29 CFR § 541.501(b).
- b. The concept of "making sales" has been put to the test in a series of cases initiated by pharmaceutical representatives, who are generally responsible for calling on physicians and other potential users of the employer's product offerings (i.e., prescription drugs), providing brochures and other sources of product information, as well as samples, explaining the product's uses and benefits, and encouraging the health care provider or health care institution to prescribe the drug being promoted. Due to legal restrictions on the sale of prescription drugs, however, pharmaceutical representatives do not actually sell product. A number of district courts have nevertheless determined that pharmaceutical reps qualify for the outside sales exemption; as one court explained, the reps may not "sell" in a technical sense, but they "make sales in the sense that sales are made in the pharmaceutical industry."
- c. However, in *In re Novartis Wage and Hour Litigation*, the Second Circuit concluded otherwise. According "controlling" deference to the Secretary of Labor's reading of the operative regulation, the Court of Appeals explained that, "where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or regulations, made a sale." 611 F.3d at 154.

3. Tasks incidental to sales activities

Tasks that are incidental to and performed in conjunction with sales activities, such as writing sales reports, updating sales or display catalogs, and planning or scheduling sales itineraries and attending sales conferences, is considered exempt sales work.

4. “Away from the employer’s place or places of business”

- a. Sales primarily made from any fixed site, home, or office, used by the employee on an ongoing basis as a sales headquarters or for telephone solicitation, whether or not the employer is the owner of the site, are not “outside” sales.
- b. However, sales made from “hotel sample rooms” while the employee is traveling, or at a trade show of short duration, may be considered outside sales.

5. Promotion Work

- a. Work in the nature of promoting sales is not considered exempt sales work unless it is incidental to and in conjunction with the employee’s own sales activities.
- b. Examples of promotion activities include setting up displays and posters, removing damaged or spoiled stock, rearranging merchandise, or replenishing stock by replacing old with new merchandise.
- c. Exempt work includes promotion activities undertaken by the employee in the course of obtaining additional sales orders. Thus, when a salesperson is engaged in the promotion of goods, services, or facilities for the very purpose of supporting his or her own sales, the promotion activities are considered exempt sales work for the purposes of determining the employee’s primary duty.

III. PROPOSED CHANGES TO THE CURRENT REGULATIONS

A. Minimum Salary Threshold for White Collar Exemptions:

1. Current Salary Threshold Under FLSA

\$455/week (\$23,660/year). 29 C.F.R. § 541.600.

2. State Salary Threshold Requirements

Some states presently have salary minimum requirements higher or different than required under federal law.

a. New York

- 1) Applicable only to executive and administrative exemptions; does NOT apply to professional exemption: \$656.25/week (\$34,125/year).
- 2) On December 31, 2015, this will increase to \$675/week (\$35,100/year). 12 N.Y.C.R.R. § 142-2.14.
- 3) These salary thresholds under New York law are inclusive of board, lodging, other allowances and facilities. *Id.* Thus, unlike under federal law, in New York, an employer may include the value of room and board in determining whether a particular employee meets the salary threshold.

- b. California requires exempt employees to be paid at least two times the minimum wage (presently set at \$10/hour). Thus, exempt employees in California must earn at least \$800/week or \$41,600/year.

3. Proposed Change to the Salary Threshold Under New Regulations

- a. 40th percentile of earnings of full-time salaried employees
- b. \$970/week (\$50,440/year).
- c. This would impact 5-10 million workers, most significantly in the retail and hospitality industries.

B. Highly Compensated Employee (HCE) Salary Threshold:

1. Current HCE Threshold

- a. \$100,000 total annual compensation
- b. Established in 2004 regulations.

2. Proposed HCE Threshold

- a. 90th percentile of earnings of full-time salaried employees
- b. \$122,148 annually [corresponds to increase in the consumer price index [CPI] from 2004 to 2013.

C. Annual Update of the Salary Levels:

1. The Department proposes updating the salary thresholds annually

2. “The Department believes that regularly updating the salary and compensation levels is the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP [executive, administrative, professional] employees.”
3. Updates will be determined either by maintaining the percentile of earnings or by updating the amounts based on changes in the CPI [consumer price index].

D. White Collar Duties Tests

1. Current Duties Test Currently Applied Under FLSA:
 - a. The principal, main, major or most important duty (“primary duty”) that the employee performs must be of a nature that qualifies for the exemption.
 - b. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.
2. Possible Changes to the Duties Test Under the New Regulations:
 - a. Presently, the Department is seeking comments with respect to the duties test. The following represent potential changes that are being considered.
 - b. Whether the employee is engaged in exempt duties at least 50 percent (or another specifically defined percentage, i.e. 40% or 30%) of their work time.
 - 1) This would result in a significant limitation on a manager’s ability to perform non-exempt work concurrently with management, and could even impact the ability of a manager to engage in hands-on work for training purposes.
 - 2) This change would bring the duties test closer in line with states that require exempt duties to be performed a certain percentage of time. For example, California presently requires employees to perform exempt-qualifying duties to be performed at least 50% of their work-time to meet the duties test.
 - c. Requirement that an administrative employee’s work be related to management “policies” (as opposed to management of general business operations). This significantly narrows the applicability of the exemption.

IV. OVERVIEW OF EXEMPTION AUDIT STRATEGIES AND CONSIDERATIONS

A. Audit Process

1. Review Job Titles/Job Descriptions

- a. Employees' job titles are not determinative; however, they are often helpful in classification audits. DOL will normally associate a certain job title to certain duties. Thus, employers should consider changing job titles, if necessary, to avoid common non-exempt titles such as clerk, administrative assistant, Help Desk, bookkeeper, etc.
- b. The first step should be to determine which exemption(s) apply and review duties test for those exemptions (see above). Then, ask:
 - 1) Are the duties accurate? How old are the job descriptions? When was the last time they were reviewed and/or revised by either the supervisor or the employee? The job descriptions are only helpful if they are accurate.
 - 2) Do exempt employees' job descriptions accurately describe the primary job duties of their positions as exempt? Compare duties to language in regulations describing exempt type duties for specific exemptions.
 - 3) Do employees sign off on their job descriptions? Potential red flag: If different people now hold the position than when the job description was written. Ideally, employers should require employees to certify that they have read and understand their job description.
 - 4) Are duties in job descriptions referenced in job evaluations?
 - 5) Does the employee exercise discretion and independent judgment with respect to matters of significance? Identify language in the job descriptions that reflect discretion and independent judgment to matters of significance?
- c. Executive Exemption
 - 1) For executive exempt employees common description of primary duties should include: supervising, directing, evaluating, hiring, discipline or termination (or recommendations of such).

- 2) Does the employee customarily and regularly direct the work of at least two (2) or more other full-time employees or their equivalent? (If relying on executive exemption).
- 3) Does the employee have the authority to hire or fire other employees, or are the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees given particular weight?

Make sure job description indicates these are important duties of the position. They should probably appear first.

- 4) Is the employee responsible for a division or sub-division of the company?
- 5) Common non-exempt descriptions for executive work: performs management and supervisory functions "when necessary"; "in the absence of X"; or "under supervision".

d. Administrative Exemption

- 1) Descriptions of employees should emphasize the employee's ability to exercise discretion and independent judgement, such as their authority to formulate and implement policies, and responsibilities relating to the management or operations of the business.
- 2) Common non-exempt descriptors for administrative work: scheduling, filing, maintaining, reviewing established procedures and policies, processes, etc. These duties suggest little discretion and judgment over matters of significance.

e. Samples of Exempt Employee Job Descriptions

- 1) Good - "Duties include: develop work schedules for all staff technicians and make adjustments as needed to accommodate changing workloads; evaluate staff productivity, efficiency, and other specific work quality performance indices; audit work completed by in-house staff and take corrective actions where necessary; perform staff performance evaluations and make decisions regarding merit increases or promotions; interview potential new hire candidates and make hiring decisions; initiate disciplinary actions and counsel employees when required. . . ."

- 2) Good - “Directs and manages the financial programs and supporting information systems of the company, including budgeting, financial reporting and audit coordination; Participates as a member of the executive management team to establish and implement short and long-range organizational goals, objectives, policies and operating procedures. Provides strategic consultation to management on financial issues, including financial analyses and projects, cost identification and allocation and revenue and expense analysis; Actively monitors the company’s business results and provide feedback to management for improvements to the business, not necessarily limited to financial areas; Develops business-related rapport with management team and become a resource of information and advice. Ensures that the Accounting Department effectively supports business operations and goals; Directs the implementation of strategic business and/or operational plans, projects, programs and systems, as appropriate to the finance and accounting objectives of the company; Establishes, maintains and implements financial and accounting record systems and procedures to ensure that all financial transactions are recorded according to generally accepted accounting principals (GAAP); Actively oversees and coordinates the preparation of financial statements, financial reports, special analyses and information reports; Presents reports and recommendations for programmatic and fiscal changes to management; Oversees the supervision of accounting personnel, which includes work allocation, training, problem resolution, performance evaluation, and recommendation for personal actions; Motivates employees to achieve peak performance and productivity; Constantly monitors financial operations to ascertain control deficiencies and implement corrective internal controls; Supports the internal audit team and external auditor’s efforts to test and verify controls; Actively oversee the cash management, invoicing, credit/collections and accounts payable functions of the company; Monitors the disbursement and collection of funds for proper authorization and control; Develops good budgeting and benchmark techniques to identify potential problem areas; Communicates and encourages compliance with company policies and procedures, and ethical business conduct, through motivation and leadership.”
- 3) Good - “Participates, as a member of the executive management team, in general business planning by assisting in the development and implementation of

operating plans and strategies, budgets, short and long term goals and general management policies; analyzes operational problems and develops action plans to resolve them; helps oversee hiring, firing and discipline of employees; plans, distributes, directs and oversees work; evaluates performance and provides counseling and guidance; helps monitor compliance with legal requirements and company policies. . . .”

- 4) Good - “Maintains the Company’s system of accounts; keeps books and records on all Company transactions and assets; assists in preparation of budget; conducts financial forecasts; maintains other planning and control procedures, and analyzes and reports on variances; prepares financial statements for [Company] and branch offices; reconciles all general ledger accounts; maintains costing system for inventory; works with banks, insurance brokers, accountants and lawyers on behalf of the Company; responsible for hiring, disciplining and terminating accounting department staff; directs and assigns work, supervises and evaluates performance and provides training for accounting staff. . . .”
- 5) Bad – “Handles financial emergencies under supervision; supervises when necessary; performs managerial functions; oversees others; evaluates risk; reviews [Company’s] financial statements; reports to supervisor(s).”

f. Administrative Exemption: Typical Non-Exempt Employee Job Descriptions:

“Greets all visitors; opens all mail and distributes it; mails invoices to customers; enters daily check receipts in e-mail for distribution to sales, accounting, management and credit; answers all incoming calls and takes messages or transfers to appropriate person; ensures sufficient funds are in the postage meter for outgoing mail; types letters; takes outgoing mail and Federal Express envelopes to pick-up locations.”

1. Issue: Where is the discretion and judgment over matters of significance?

“Pick orders from warehouse inventory; sort incoming shipments for proper storage; load and unload trucks, as directed by manager; receive and unload shipments, as directed; clean facility, as directed.”

2. Issue: Where is the administrative work? Non-manual and office work?

“Provides full secretarial and administrative support, including dictation, transcription, screening and fielding telephone calls and handling correspondence; manages ongoing projects and upcoming events as assigned; greets guests; organizes breakfasts and lunches hosted by [Company]; handles requests from customers for certificates of insurance; updates insurance policies per amendments; maintains employee manuals and job description files, and distributes as required; daily filing of correspondence and other documents. . . .”

3. Issue: Where is the discretion and judgment over matters of significance? Using established protocol and procedures not sufficient.

“Prepares bi-weekly shipment status reports for commercial agreement suppliers; inputs and/or calculates expenses pertaining to each commercial agreement shipment; prepares liquidation report when appropriate; prepares monthly reports indicating all liquidated and non-liquidated shipments; inputs data for bi-weekly payroll for transmittal to payroll service; assists payroll (as back-up); maintains personnel records; administers 401(k) program – enrollment, termination, loan program; maintains records for Company credit cards; assists accounts payable (as back-up); prepares various reports and schedules as requested. . . .”

4. Issue: Where is the discretion and judgment over matters of significance? Using established protocols and procedures not sufficient.

“Collects fees for fines, licenses or permits issued, bail or documents filed and issues receipts; processes payments in various forms, i.e., cash, credit, money orders, electronic payments and transfers; prepares record of daily cash reports for review by supervisor; maintains files and records related to cash receipts and financial transactions either manually or through computer software;

maintains files for pending license or permit applications; answers routine questions of the public in person, by telephone or via email correspondence related to payment of fines, licenses or permits issued, bail, etc.; may prepare bank deposits; uses computer applications such as spreadsheets, word processing, calendar, e-mail and database software in performing work assignments.”

5. Issue: Where is the discretion and judgment over matters of significance? Using established protocols and procedures not sufficient.
 - i. “Answers telephones; accepts assignments from supervisor; performs banking functions as directed; uses necessary software programs; handles mail.”
 - ii. “Maintains inventory of supplies; computerizes the inventory; orders supplies; organizes storage facility; coordinates deliveries of supplies; communicates with Company personnel regarding need for additional supplies. . . .”

B. Review Performance Reviews

1. Importance of Evaluations for Determining Exempt Status
 - a. Job evaluations are usually a very good indicator (or should be) of employees’ primary duties.
 - b. Do performance evaluations reflect importance of exempt work? In other words, is the employee being rated on “primary” exempt work duties?
 - c. Do employees sign their job evaluations and acknowledge the duties expected of them? Are those duties consistent with that of an exempt position?
 - d. Do the job evaluations relate to the job descriptions? They generally should.
2. Examples of Job Evaluations Supporting Exempt status:

- a. “Great job on that research project for the CEO. You really found excellent compensation studies.”
 - b. “Good job managing your department. The department’s attendance, productivity and morale has improved dramatically over the past year.”
 - c. “Good job working with the board to develop a clear vision for the special project.”
 - d. “Although you developed a written strategic plan, it did not include measurable goals and objectives consistent with the organization’s mission.”
 - e. “Your recommendations for new programs and business lines were well researched and presented.”
 - f. “You failed to conduct performance evaluations of those under your supervision.”
3. Job evaluations potentially indicating non-exempt status:
- a. “Great job answering the phones so quickly.”
 - b. “You have gotten much better using Microsoft Word.”
 - c. “You show great enthusiasm when greeting visitors at the front desk.”
 - d. “You seem to have an attitude when asked to make copies.”
 - e. “Wonderful job loading the truck so efficiently.”
 - f. “You have improved your organizational skills, especially your maintenance of personnel files.”
 - g. “Very good progress eliminating data inputting mistakes.”
 - h. “Excellent job catching mistakes from the established protocol.”

C. Supervisory Interviews

1. Questions to Ask Supervisors
 - a. Have they reviewed the job description?
 - b. When was the last time?
 - c. Do they agree they are accurate?

- d. Are there personality and/or operational differences between employees in the same job title?

2. Determine Level of Independent Discretion and Judgment Supervisor Perceives

Supervisory interviews can be particularly helpful with respect to auditing administrative exempt employees because this exemption relies on independent judgment and discretion which often turns on how much discretion and judgment a particular supervisor gives to an employee.

- a. How much oversight is there?
- b. How much discretion do they really have?
- c. Do they have a budget?
- d. Do they submit reports with recommendations?
- e. How often is the supervisor “looking over the shoulder” of the employee?

3. Administrative Exemption

- a. Ask supervisors how often they follow the recommendations of an exempt administrative employee?
- b. What evidence do we have reflecting these facts?
- c. Do we have interview notes?
- d. Do they sign off on post-interview submissions on applicants?

4. Executive Exemption

- a. Ideally, these employees should be part of the hiring / firing process.
- b. Is there evidence of their involvement?
- c. If they do not make ultimate decision to hire or fire, how often are their recommendations followed on these issues?
- d. Review records to determine these answers.
- e. For example, if recommendations to hire/fire/discipline followed 10% of time in last 5 years – red flag!

D. Employee Interviews/Employee Self-Assessment

Should You Interview the Employee?

1. Whether or not you should interview the actual employees is a highly fact sensitive matter. Analyze pros and cons of doing so.
2. Do employee interviews indicate that the duties actually performed by employees match the duties expected of them according to their job descriptions?
3. Do employees complete a self-assessment form? If so, do they identify their biggest projects?
4. Potential downside: Raising a potential issue with misclassification. Will employees start asking tough questions?

E. Review of Payroll Records

1. To ensure compliance with the salary basis test, employers should review payroll records and confirm that all employees classified as exempt are paid at least \$455 (or \$600 if executive or administrative in NY) per week (or \$27.63 per hour if computer professional).
2. If they are not getting paid at least the applicable amount, ask why. Is it because of a permissible deduction?
3. Employers should also compare payroll records, Wage Theft Prevention Act notices, offer letters, etc., for consistency.

F. Who Is Involved Internally?

The following Departments should be involved when conducting a Wage & Hour Audit:

1. Human resources – familiarity with company policies and procedures, including employee job descriptions and duties; experienced and skilled in conducting internal investigations, including gathering evidence and appropriate documentation and conducting witness interviews.
2. Legal – knowledge as to whether certain pay practices are legal and can ensure audit is performed accurately and completely.
3. Payroll – access to and control over payroll records; familiarity with company’s pay practices.
4. Information technology - make sure the company's information technology department sets up proper document retention procedures during the audit.

5. Operations: Supervisors are key personnel to properly conduct most wage and hour audits.

G. Use of Outside Counsel

1. Primary Benefits of Using Outside Counsel to Assist in Conducting Audits:

- a. If an audit uncovers a potential issue and the employer receives an opinion letter from outside counsel which analyzes and concludes that a certain pay practice is legal, the opinion letter may help establish a “good faith” defense in certain jurisdictions.
- b. Using an attorney may help create attorney-client privilege for certain communications involved in the audit, as well as work product privilege for others.
- c. Attorneys can help identify specific wage and hour laws that may be different than federal law. This is particularly true for employers with locations in multiple states.
- d. Depending on the facts, it may be better not to document certain conclusions. An attorney can help assess whether to document or not with potential litigation in mind.
- e. Experienced wage and hour attorneys are able to identify potential “red flags” that often exist reflecting common wage and hour issues.

2. Applicability and Protection of the Attorney Client Privilege

- a. To protect the attorney-client privilege, outside counsel can explain to each interviewee that the questions are being asked for purposes of providing legal advice to the company and, therefore, the conversation should be kept confidential.
- b. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
 - 1) The Supreme Court determined that the attorney-client privilege applies to communications between a company employee and the attorney if:
 - a. The communication involves information necessary for the attorney to provide legal advice to the company;

- b. The communication and information relate to matters within the employee's scope of employment;
 - c. The employee making the communication was aware that the information was being shared with the attorney in order to provide the organization with legal advice; and
 - d. The communication was kept confidential and not disseminated beyond employees who, considering the corporate structure, need to know its contents.
- 2) "The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Upjohn*, 449 US at 395-96 (internal quotations and citations omitted).
- 3) In the corporate setting, according to the *Upjohn* test, attorneys can gather information from any employee witnesses and the privilege belongs to the company, not the individual employee. Employees being interviewed by counsel should therefore be given an "*Upjohn* warning," explaining:
- a. That the lawyer represents the company, not the individual;
 - b. That communications between the employee witnesses and the company's attorneys are privileged; and
 - c. That the privilege belongs to the company and not the individual employee, so the employee has no control over whether the company waives the privilege.
- c. Employers should be sure to designate appropriate communication as work-product or protected by the attorney-client privilege.
- d. However, it is important to understand that simply copying counsel on communications by itself is not enough to invoke the attorney-client

privilege. Documents created by attorneys or at an attorney's direction during an internal FLSA audit must meet the following requirements to be protected work product:

- 1) They must have been created in anticipation of litigation;
 - 2) An articulable claim that is likely to lead to litigation (i.e., a notice of investigation by the DOL) has arisen;
 - 3) The documents must contain more than a bare recitation of facts; and
 - 4) The documents must be permeated with the attorney's own words, opinions, and impressions. See *Hickman v. Taylor*, 329 U.S. 495 (1946).
- e. Remember to only share protected communication with higher level management who can bind the company.
 - f. Action items should reflect they were done at the direction of counsel.
3. Attorney involvement does not necessarily mean the attorney needs to conduct the entire audit. Every employer is concerned about legal costs and experienced wage and hour attorneys can provide effective guidance on how HR can conduct and help flesh out issues along the way and/or review conclusions depending on the scope and target of the audit. For example, attorneys often prepare memos on the "how to" conduct a certain type of wage and hour audit which might include preparing a script for HR to use when interviewing supervisors to identify potential off-the-clock activities.

V. **TRANSITION ISSUES**

So you've determined there is a misclassification issue. Now what? There are a number of issues that must be considered in determining the appropriate transition strategy, if any, to now properly reclassify these positions.

A. **Should the Employer Voluntarily Offer Back Pay?**

1. **Statute of Limitations Considerations**

- a. FLSA: 2 years (nonwillful) / 3 years (willful).

A violation is willful if the employer knew its conduct violated the FLSA, or the employer showed reckless disregard for whether its actions complied with the FLSA. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Under this standard, if the

employer acts unreasonably, but not recklessly in determining its obligations under the FLSA, the resulting actions would not be considered willful. Although we have limited information as to the facts surrounding the initial classifications, we are not currently aware of any facts that would suggest the potential misclassifications were willful.

b. NYLL – 6 years (longest in country)

1) The statute of limitations under the NYLL, however, is six years. Therefore, if the Employer's primary objective is maximum insulation from potential lawsuits and it elects to make back wage payments, it should do so for the full six year period.

2) That said, it is not uncommon for employers making voluntary back wage payments to do so only for a two year period. If only two years of back wage payments are made, there would continue to be exposure for an additional four years under state law. Of course, if a prospective change is made to reclassify, damages under state law would continue to diminish moving forward.

2. Should the Employer Require Employees to Sign Releases?

a. An important consideration in determining whether to make back wage payments is to understand the issues associated with the enforceability of any release. Generally speaking, private settlement agreements releasing FLSA claims are not enforceable unless DOL supervised or court approved.

b. However, in *Martin v. Spring Break '83 Productions, LLC*, 688 F.3d 247 (5th Cir. July 24, 2012), the Fifth Circuit recently enforced an agreement settling claims under FLSA, even though the settling parties never received approval from the District Court, and the agreement was reached without DOL supervision.

c. A similar result occurred in *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608 (W.D. Tex. 2005), where the District Court held a private compromise of claims under the FLSA was permissible where there exists a bona fide dispute as to liability. Notwithstanding these cases, the Employer should be aware that any private settlement agreement with employees waiving substantive FLSA rights would most likely not be enforceable in the Second Circuit.

d. Although private releases of FLSA are generally unenforceable, releases of NYLL claims are generally enforceable under *Matter of ABC v. Roberts*, 61 N.Y.2d 244 (1984), provided they are made in

compliance with the Roberts criteria set forth therein and the agreement was made with “complete absence of duress, coercion or bad faith.”

- e. Additionally, even though the release may ultimately be found unenforceable, certain language in the settlement agreement may help the Employer defend itself against any subsequent lawsuits. For example, the settlement agreement might have affirmative acknowledgements about the number of hours worked that might be used to preclude employees from subsequently claiming they worked more hours.
- f. The settlement agreement should also have language in it that any settlement payments would be used to offset any other liability found due under the FLSA and NYLL if the releases are found to be unenforceable. It would also be advisable to breakdown any settlement amount into both back wages and liquidated damages to help preclude subsequent claims that employees are also entitled to liquidated damages.
- g. These are only a few examples of issues that would need to be explored if an employer elected to require a signed release in exchange for back wage payment. Employers should work with counsel to discuss how such an agreement could be drafted and presented to the impacted employees in a way to maximize chances for enforceability under both federal and state law.
- h. Because of the enforceability question under the FLSA, some employers decide to make back wage payments without requiring a signed settlement agreement. The hope is that employees who are receiving monies they did not expect and without being presented with a legal document (i.e., the settlement agreement) would be less likely to seek advice of counsel to question the amount. This strategy is likely more effective for smaller groups of employees.

3. How Should Back Pay Damages Be Calculated?

a. Half-Time Method

One method, which favors employers, is that damages are calculated by using the “half time” method whereby the salary is divided into all hours worked to obtain an hourly rate and one-half this hourly rate is owed for all hours worked over 40 per week. The concept is that since the salary was intended to compensate the employee for all hours of work, regardless of how few or many, the straight time component has already been paid, thus leaving only the “half time” owed for overtime. See *Urnikis-Negro v.*

American Family Property Services, 616 F.3d 665 (7th Cir. 2010), cert. denied, 131 S.Ct. 1484 (2011); *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35 (1st Cir. 1999); *Martin v. Tango's Rest., Inc.*, 969 F.2d 1319 (1st Cir. 1992); *Mahew v. Wells*, 125 F.2d 216 (4th Cir. 1997); *Missel v. Overnight Motor Co.*, 126 F.2d 98 (4th Cir.), judgment aff'd, 316 U.S. 572 (1942); *Cox v. Brookshire Grocery Co.*, 919 F.2d 354 (5th Cir. 1990); *Bumpus v. Continental Baking Co.*, 124 F.2d 549 (6th Cir. 1941) cited with approval in *Missel*, 316 U.S. at 580; The Wage & Hour Division of the U.S. Department of Labor, as chronicled in *Urnikis-Negro*, 616 F.3d at 682 n. 9.

- b. Time and One-Half Method
 - 1) The other method, which favors employees, is that time and one-half is owed for all hours worked over 40 per week. Under this method, the salary is divided into 40 hours to obtain an hourly rate, and then time and one-half this hourly rate is owed for all hours worked over 40. The math usually works out so that the time and one-half method produces damage calculations greater than two-thirds of the half time method. See, e.g., *Kadden v. Visualex, LLC*, 2012 U.S. Dist. LEXIS 136475 (S.D.N.Y. 2012); *Rainey v. American Forest & Paper Ass'n*, 26 F. Supp. 2d 82 (D.D.C. 1998); *Dingwall v. Friedman Fisher, 5 Associates*, 3 F. Supp. 2d 215 (N.D.N.Y. 1998).
 - 2) Furthermore, recently, the District of Connecticut rejected the Seventh Circuit's analysis in *Urnikis-Negro*, concluding that the FLSA regulation was a codification of *Missel*, as opposed to a separate basis for analysis of the halftime damages calculation. *Hasan v. GPM Investments, LLC*, 2012 U.S. Dist. LEXIS 121048 (D. Conn. Aug. 27, 2012).
- c. The time and one-half method usually works out to produce damage calculations greater than two-thirds of the half-time method.
- d. To use the half-time method as a measure of damages, the misclassified employee's salary must have been intended to compensate the exempt employee for all hours worked. An employer would most likely lost the benefit of this calculation if there was evidence showing that the salary was only intended to cover a 40-hour workweek (or some other designated workweek) (e.g., an offer letter stating "Your salary is to compensate you for a regularly scheduled 40 hour workweek").

- e. In addition, the cases supporting the half-time method of calculation involve employees who have been misclassified solely on the “duties” test of the exemption. There does not appear to be any suggestion in these cases that the “salary basis” or “salary threshold” tests for exempt employees were violated. Thus, the use of this half-time method should only be for employees who satisfy the salary basis and salary threshold test under federal and state law.
- f. While there is case law support for the half-time method of calculation, there is some risk that employers utilizing this method to make back way payments could have their settlements rejected by a court or the DOL. Such a finding might further compound the problems associated with the enforceability of any settlement agreement and affect the amount of liquidated damages such employees might be entitled to.

4. Liquidated Damages

- a. Under the FLSA, an employee is entitled to liquidated damages in the amount of double the back pay unless the employer can establish a “good faith” defense to the violation. 29 U.S.C. § 216(b).
- b. To establish a “good faith” defense in a misclassification case, the employer usually needs to show it relied on some formal guidance for making the classification decision. Under the FLSA, employees are presumed entitled to liquidated damages as they are compensatory in nature as opposed to punitive. Because liquidated damages under the FLSA are compensatory, pre-judgment interest is not usually available.
- c. If an employer cannot find evidence to support a good faith defense, in order to provide full relief, an employee should also be paid liquidated damages. *In D.A. Sheltie, Inc., v. Gang*, 328 U.S. 108 (1946), the Supreme Court held that liquidated damages cannot be bargained away by bona fide settlement of disputes over coverage. It is not uncommon, however, for employers not to pay liquidated damages in a voluntary settlement.
- d. Employers should also be mindful of New York’s Wage Theft Prevention Act (“WTPA”). Prior to its enactment, employees were entitled to 25% liquidated damages under the NYLL for willful violations. However, like the FLSA, the WTPA now imposes a 100% liquidated damages unless the employer can establish a good faith defense.

- e. There is a conflict between a federal and state court decision on whether the increased penalty provision of the WTPA applies retroactively. In *Ji v. Belle World Beauty, Inc.*, 2011 N.Y. Misc. LEXIS 5032 (Sup. Court New York County 2011), the court held the penalties applied retroactively. However, in *Wicaksono v. XYZ 48 Corp.*, 2011 WL 2022644, n. 2 (S.D.N.Y. 2011), Judge Lewis A. Kaplan of the United States District Court, Southern District of New York, adopted a Report and Recommendation of Magistrate Judge James C. Francis IV and ruled that the WTPA should not be given retroactive effect, and thus applied the liquidated damages provisions under New York Labor Law as they existed at the time of the defendant's violations.

5. Should Employers Make Payments to Former Employees?

- a. Another issue to consider in determining if back wage payments should be made is whether to make such payments to former employees.
- b. Most employers generally are not willing to voluntarily make payments to former employees, and since each day that passes reduces such liability, there are fiscal reasons supporting this approach.
- c. Moreover, former employees are generally more likely to bring a suit, for obvious reasons, than would be current employees.
- d. However, the risk is that by not making payments to former employees, these individuals represent a continuing source of exposure.

6. Should the Employer Involve the DOL to Supervise the Settlement?

- a. If the employer's primary goal is to eliminate any possibility of liability, the only ways to accomplish this would be to have the United States Department of Labor ("USDOL") supervise the settlements, or essentially work out a settlement with a plaintiff's attorney whereby a complaint would be filed so the resolution would be court supervised.
- b. Important Considerations of this Approach
 - 1) As a policy decision, the USDOL has become reluctant to supervise private settlement agreements.
 - 2) The process moves slowly, as it requires an auditor to interview and send questionnaires to employees and review our calculations.

- 3) The USDOL would also most likely insist on back wage payments to both current and former employees during a two year period, and could request payments to be extended back three years, if it determines violation to be willful.
- 4) This could potentially drive employees to seek out private attorneys, which could lead to a single plaintiff or collective/class action before the USDOL settlement process is approved.
- 5) The USDOL may require a complaint be filed with a consent judgment, which would make this information public, for any plaintiffs' lawyer to see.

B. Transition Issues Relating to Union Employees

1. Any prospective changes need to be negotiated with the misclassified employee's union.
2. If members of the union have recently complained about working long hours without any additional benefit, this could present an opportunity to open dialogue about implementing an overtime provision that would comply with the FLSA without necessarily raising the misclassification directly.
3. If a collective bargaining agreement is being negotiated, overtime can be raised as a response to addressing employees concerns or can be couched in terms of recruiting and retention. If the union agrees to an overtime provision and the issue of (mis)classification is not raised, it would present an excellent opportunity to avoid any subsequent lawsuit since the union would be "blessing" the conversation and correcting any misclassification moving forward.
4. If the union directly raises classification issues during negotiations, the employer could use the union to facilitate settlement agreement with its members and the union's involvement would reduce the likelihood a private lawsuit would be initiated. Employees may feel that the union made sure their rights were being protected and thus less prone to seek private counsel.

C. Prospective Change - New Employees Only

1. Some employers may elect only to make new employees non-exempt and to maintain the exempt status of current employees. Although under this strategy, the existing liability (assuming that the employees are ultimately determined to be misclassified) continues with pre-existing employees, it stops the accrual of additional new liabilities.

2. This strategy may make more sense if the specific job experiences a high turnover ratio whereby in a relatively short time period, there would eventually be no employees in this position still working in the exempt category.
3. However, this approach may potentially be used as evidence of a “willful” finding as the DOL or a plaintiff’s attorney could argue that it demonstrates the employer “knew” about the misclassification but failed to do anything about it for existing employees.
4. Thus, employers choosing this option should create an entry level tier to justify lower/different compensation between new and existing employees.
5. Another issue to consider if using this approach is the rate at which new employees will be paid. If the objective is to pay new employees the same or close to the same compensation current employees are paid, it will need to determine the appropriate hourly rate (or salary) combined with the projected overtime to arrive at the rate (assuming minimum wage is met).
6. There are also potential labor relations issues with this strategy as there will be two groups of employees performing the same work but being compensated differently, which may result in questions by both the new and current employees that may be difficult to answer.

D. Reclassification

1. The proposed changes to white-collar exemptions presents an excellent opportunity for an employer to reclassify employees it determines are misclassified.
2. There may be some benefit to transitioning employees in smaller groups, at separate times. By focusing on smaller groups, an explanation of the change may be tailored to address specific facts that may be relevant to some groups and not others. A single, large transition would most likely raise numerous questions and create a greater likelihood that employees will turn to the DOL or private attorneys with questions.
3. Some employers have successfully justified a reclassification on a compensation survey or similar project whereby the employer points to recruiting and retention efforts for making the change.
4. To the extent that transition strategies will be implemented with smaller groups, it makes sense to focus on the jobs that present the greatest risk of misclassification. Often in misclassification cases, there are arguments on both sides. To the extent there are clear cut cases that certain employees are non-exempt with little arguments to the contrary, these groups should be transitioned first.

5. Explanation to Employees – stick to the script!
 - a. Cite to the proposed changes to white-collar exemptions that may require employees to be reclassified as nonexempt and overtime eligible.
 - b. Compensation survey (recruiting and retention reasons)
 - c. Opportunity to earn more money (overtime)
 - d. Change in leadership/supervisors (if you are making more individuals supervisors to fit certain positions under the exemptions)
 - e. New Employee Handbook is being issued that will feature changes in policies and procedures
 - f. Be honest – conducted an audit and trying to correct a mistake and do the right thing
6. Educate supervisors on script and protocol questions!
7. Ultimately, the employer needs to decide which group of employees should be transitioned and whether it wants to make back wage payments.

E. Compensation Change

1. The simplest method to compensate a non-exempt employee would be to set an hourly rate.
2. The FLSA generally does not restrict how an employer pays an employee provided that overtime is computed correctly utilizing whatever compensation plan is agreed upon. For example, an employer may wish to transition certain employees to a fluctuating workweek method of compensation. If there are varying overtime fluctuations on a weekly basis, this method may help limit overtime liability. See 29 C.F.R. § 778.114(a).
3. As described above, there is generally nothing that prohibits an employer from “backing” into an hourly rate whereby the hourly rate with estimate overtime would approximate the current compensation, assuming minimum wage is met.

F. Changing Duties

1. Another possible strategy is to simply strengthen the argument that certain groups of employees are exempt by adding additional responsibilities and duties. As you know, whether an individual is exempt is a highly fact

sensitive inquiry that focuses on actual duties.

2. For the administrative exemption, much of the litigation focuses on whether certain duties require the exercise of independent judgment and discretion over matters of significance.
3. For the executive exemption, consider adding subordinates and management duties.
4. For certain groups of employees, it may be worth exploring to see if additional duties can be added to comfortably satisfy the test. Some groups of employees might be given supervisory responsibilities over subordinate groups, thus creating an argument that they are executive exempt employees.
5. It is important to note, however, that such additional job duties come with raises or promotions.

VI. EXEMPTIONS IN HIGHER EDUCATION INSTITUTIONS

Colleges and universities often struggle with unique challenges in determining whether or not certain job positions are exempt. This portion of the outline addresses some common job positions in the academic setting and discusses relevant authority on their exempt status.

A. Executive Exemption

1. Head Coaches / Assistant Coaches – Head coaches will usually meet the duties test of the executive exemption. Assistant coaches, particularly at larger institutions with significant sport programs may also be able to meet the duties test of the exemption, although assistant coaches should be reviewed with more scrutiny.
2. Officers / Deans / Executive Deans – These positions will usually meet the duties test of the executive exemption.
3. Directors / Coordinators – The duties of these positions may not be consistent from one institution to another but they may meet the duties test of the executive exemption depending on their actual duties and responsibilities.

B. Administrative Exemption

1. IT Support Specialists – IT employees may be covered under the computer exemption but, if not, employers sometimes rely on the broader administrative exemption. Although DOL is generally skeptical that IT specialists meet this exemption and courts have found it does not apply, it

remains a fact-specific inquiry. See *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574 (6th Cir. 2004) (technical computer employee not exempt because primary duty was maintenance of computer system and thus not related to the administrative operation of the business).

2. Administrative and Executive Assistants – It is clear that “clerical” duties generally do not meet the administrative exemption. Thus, the Administrative exemption generally does not apply to an employee responsible for “performing duties that involve clerical or secretarial work, recording or tabulating data, and performing other mechanical repetitive and routine work.” WH Admin. Op. FLSA 2005-8. However, DOL regulations state that executive assistants to senior administration who have been delegated genuine authority to act on behalf of the administrator by, for example, controlling access to the administrator, independently drafting correspondence on his/her behalf, and arranging travel schedules, can be exempt Administrative personnel. Specifically, 29 C.F.R. § 541.203(d) states:

An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

DOL cautions, however, that this example “should not be read to expand the administrative exemption to include secretaries or other clerical employees.” *Id.* Generally speaking, only administrative assistants to high level officers may realistically be classified as exempt under the administrative exemption. This inquiry is highly fact-sensitive and one executive assistant may be exempt while another is not based on the working relationship between the executive assistant and officer. Certain administrative assistants to high level administration officials might qualify as exempt positions but administrative assistants to lower level titles would most likely, in terms of practicality and legality, be more problematic.

3. Assistant Coaches – Certain assistant coaches may qualify for the administrative exemption. For example, administrative duties might include recruiting, establishing game schedules, financial planning and budgeting, procurement and purchasing, public relations, marketing, compliance, facilities management, and fundraising. An assistant coach who is also a member of a university or association committee, or leading a group of employees involved in a special project might qualify. The assistant coach must exercise discretion and independent judgment as to significant matters. Thus, recruiting work is not likely to qualify if it involves using objective standards established by the head coach to assess candidates who have been pre-selected by the head coach. However, if the

assistant coach plays a pivotal role in determining which schools to visit, which students to recruit and offer scholarships to, and how to recruit those students, the exemption may be available.

4. Educational Establishments and Administrative Functions – In addition to the standard Administrative exemption described above, the regulations contain special rules for educational institutions, including K-12 schools and institutions of higher education. Educational administrative employees must have as their primary duty “administrative functions related to academic instruction or training in an educational establishment or department or subdivision thereof.” This means “work related to the academic operations and functions in a school rather than to administration along the lines of general business operations.” The regulations specify that eligible employees include:
 - a. Superintendent or other head of an elementary or secondary school system and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program;
 - b. Principal and any vice principals responsible for the operation of an elementary or secondary school;
 - c. Department heads in institutions of higher education responsible for the administration of the Mathematics Department, the English Department, the Foreign Language Department, etc.;
 - d. Academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements and other employees with “similar responsibilities;”
 - e. Academic Administrative Personnel Exemption - Academic advisors and “intervention specialists” may fall under the academic administrative personnel exemption. For example, DOL has found Academic Advisors and Intervention Specialists exempt where the employees’ primary duties involved assisting students in academic pursuits by aiding them in their class selection, educational goals, and graduation requirements. See DOL Opinion Letter, FLSA 2005-42. Specifically, the primary responsibilities of the exempt Academic Advisors and Intervention Specialists were described as:
 - (i) orienting students regarding admissions, placement testing, registration processes, policies, procedures, sources and programs;
 - (ii) reviewing academic records, placement tests and other

standardized test results with students in order to develop course selections consistent with their career choices and degree requirements, and (iii) developing a term-by-term schedule and an outline for a program of study. By contrast, in another opinion letter, DOL found admission counselor recruiters not exempt because, among other things, they spent majority of time away from campus recruiting, making high school visits, facilitating campus visits, and their primary responsibility was to “sell” student and parents to college. See USDOL Opinion Letter, 1999 WL 776054.

Job positions that will generally qualify for the academic exemption: college/university administrators involved with faculty and curriculum; department administrators; lab administrators; academic counselors advising students on academics, administering testing.

Job positions that will generally not qualify for the academic exemption: social workers; psychologists; food service managers; dieticians; enrollment / admission counselors; recruiters.

C. Professional Exemption

An employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed is an exempt professional regardless of compensation. The salary basis test does not apply to teachers. There is no requirement that teachers have an advanced degree.

1. Assistant Coaches - Depending on the duties actually performed by assistant coaches, they may potentially be exempt under a number of exemptions: academic administrator, executive, administrative, professional and/or teacher exemptions. As always, this analysis is very fact-sensitive. December 1, 2008 USDOL opinion letter concluded that “Assistant Athletic Instructors” (AAIs) at an institution of higher education are exempt under the teacher exemption. According to the opinion, the AAIs’ teaching duties comprise at least 50% or more of their time and include instruction of physical health, team concepts and safety. The AAIs work under the supervision of a head coach and are responsible for designing instructions for individual student-athletes and for team needs and have a great deal of independent discretion and judgment as to the manner and method of teaching. It is worth noting that DOL specifically mentioned that the job description contained many non-exempt teaching duties such as developing recruitment strategies, recruiting and follow-up on prospective students, researching and targeting high schools and athletic camps as sources for potential student-

athletes and visiting high schools and athletic camps to conduct student interviews. However, DOL assumed, based on the employer's representation, that 50% or more of the time was spent on exempt teaching duties, and therefore sufficient to support the conclusion that the AAIs' primary duties were teaching.

2. Graduate Teaching Assistants / Graduate Academic Assistants – In opinion letters date June 7, 1967 and June 28, 1994, as well as its 1993 Field Handbook, the Wage and Hour Division opined: “where graduate students in a graduate school are engaged in research in the course of obtaining advanced degrees and where the research is performed under the supervision of a member of the faculty in a research environment provided by the institution under a grant or contract, we will not assert an employee-employer relationship exists between the students and the school, or between the student and the grantor or contracting agency, even though the student receives a stipend for his or her services under the grant or contract.” Graduate assistants will likely gain employment status in either of the following circumstances:
 - a. Their work is not generally required as part of their degree programs.
 - b. They are paid wages for their work. Note that many states give collective bargaining rights to academic student employees. In the event, such students are organized under a collective bargaining agreement, they will most likely be considered employees under the FLSA as their agreements contemplate compensation, a key attribute of employment. See *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

D. Residential Assistants [RAs]

It has been long held that RAs are not usually considered employees for purposes of the FLSA. See *Marshall v. Regis Educational Corporation*, 666 F.2d 1324 (10th Cir. 1981). The circumstances supporting this determination were: the RAs lived in the dormitories, assisted employees, actively participated in the development and implementation of programs intended to enhance on-campus living experience and in maintaining discipline in their assigned halls. In exchange, they received reduced room rates, use of a free telephone, and a \$1,000 tuition credit. The college prevailed by showing that the RA program was educational and the compensation was in the form of financial aid.