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Wage & Hour Developments: A Year in Review

2023

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Introduction

This 2023 Year in Review looks at significant wage and hour developments, including agency action, U.S. Supreme Court developments, important appellate court decisions, and state legislative and regulatory changes, including new state minimum wage rates for 2024.

The U.S. Department of Labor (DOL) was active in 2023, proposing and finalizing regulations and stepping up enforcement activity. A proposed rule sharply increasing the salary threshold for employees subject to the Fair Labor Standards Act's (FLSA) "white-collar" exemptions could have the most significant impact on U.S. workplaces. The DOL has set an April 2024 target date for release of a final rule. The DOL, however, continues to face pushback from the business community on its rulemaking, in the form of ongoing court challenges. Litigation challenging the new rule, once issued, is likely. As the year ended, DOL also put the finishing touches on another long-awaited rule — the regulations addressing independent contractor status under the FLSA. Those regulations are scheduled to go into effect in 2024, but they too will be subject to litigation.

The U.S. Supreme Court issued a decision interpreting the "salary basis" provisions of the white-collar regulations. The Court also granted petitions for *certiorari* on legal questions that, when resolved, may profoundly affect the authority of all federal agencies, including the DOL. This term, the justices take up the "*Chevron*" doctrine, under which federal courts grant considerable deference to federal agency regulations. If the Court ultimately overrules the doctrine or limits its reach, DOL's authority to interpret the FLSA and other statutes through rulemaking could be sharply curtailed.

Federal circuit courts of appeal also issued noteworthy precedential decisions on an array of wage and hour issues.

State and local legislatures and regulatory bodies adopted measures imposing new legal obligations on employers, including pay transparency requirements and further erosion of the "tip credit" for employers of workers who customarily receive tips.

Here is an overview of the most noteworthy wage and hour developments from 2023.

Reach out to your Jackson Lewis attorney for more information or guidance on any of the topics in this report.

U.S. DOL Activity

DOL Issues Proposed White-Collar Exemption Rule

The DOL published a proposed rule on Sept. 7, 2023, which, if adopted, will increase the minimum salary for the executive, administrative, and professional (EAP) or white-collar exemptions from minimum wage and overtime pay requirements under the FLSA. The rule proposes increasing the salary threshold from $684 per week ($35,568 per year) to $1,059 per week ($55,068 per year), which would be a 55% increase from the current level that became effective in January 2020 during the Trump Administration. The DOL also stated the actual salary threshold could even be higher depending on when the final rule is issued, as it will be based on earnings data as of the date the final rule takes effect. This could lift the operative salary floor to more than $60,000 annually.

The annual compensation level for highly compensated employees also will increase, by 34%, from the current $107,432 per year to $143,988 per year (or even higher, based on earnings data in effect when the final rule is issued).

The DOL also proposed automatic updates to the salary thresholds every three years to reflect current earnings data (but it would be able to temporarily delay a scheduled automatic update if warranted by unforeseen economic or other conditions).

The proposed rule does not make any changes to the EAP duties tests or the salary basis requirement, the two other prongs required under the regulation for the white-collar exemption to apply. According to the DOL, even with its proposed change to the salary threshold, the duties test will remain the determining factor in deciding exempt status for almost three-quarters of salaried white-collar employees.

The DOL estimates that 3.4 million currently exempt employees who earn at least $684 per week but less than the proposed salary level of $1,059 per week would be entitled to overtime pay. In addition, according to DOL, the proposed increase to the highly compensated salary floor would affect 248,900 employees who are currently exempt.

April 2024 target date for final rule. On Dec. 6, 2023, the DOL unveiled its semi-annual regulatory agenda, which sets an April 2024 date for release of the final rule. Whether the DOL will meet its April 2024 target date remains to be seen. The agency will have to review more than 33,000 comments received in response to its notice of proposed rulemaking and address substantive comments in the final rule.

It is also uncertain how closely the final rule will conform to the proposed rule. The DOL's proposed rule stated the rule would become effective 60 days after publication of a final rule (the minimum timeframe mandated for "major" rules under the Congressional Review Act).

Further complicating matters for employers as they seek to evaluate their options for compliance with the rule change is the possibility of a legal challenge (and possible injunctive relief barring enforcement pending the challenge), including questions about the agency's authority to impose the salary threshold increase, as well as its authority to implement automatic updates to those thresholds.

Can DOL even *set* a salary floor? Meanwhile, pending in the U.S. Court of Appeals for the Fifth Circuit is a lawsuit challenging the authority of the DOL to impose *any* salary threshold for the white-collar exemptions.

In *Mayfield v. Department of Labor*, a Texas fast-food franchise operator is challenging the 2020 final rule issued during the Trump Administration setting the salary minimum currently in effect. In enacting the FLSA, Congress directed the DOL to "defin[e] and delimit[]" the scope of the "EAP," or white-collar, exemption and to modify the criteria "from time to time by regulations." U.S.C. § 213(a)(1). The DOL's salary level test has been in place since the original 1938 regulation was issued. The plaintiff argues that the agency lacked statutory authority to impose *any* salary level requirement for the white-collar exemptions to apply because the statutory text does not include a salary threshold. The plaintiff argues that Congress authorized the DOL only to define the duties that would satisfy the exemption. The plaintiff also contends that if Congress *had* empowered the DOL to set a salary floor, it would constitute a violation of the nondelegation doctrine because imposing such a threshold is an essentially legislative action assigned solely to Congress.

In a Sept. 20, 2023, decision, *Mayfield v. United States DOL*, 2023 U.S. Dist. LEXIS 168054, a federal court in Texas awarded summary judgment to the DOL, concluding the agency had authority to adopt a salary floor as a factor in defining the exemption. The court rejected the plaintiffs' challenge under the Administrative Procedure Act, finding that the rule was entitled to "*Chevron*" deference. That analysis, however, may be on shaky grounds if the Supreme Court overrules *Chevron*.

The court also rejected the plaintiff's argument that imposing a salary requirement implicated the "major questions doctrine," under which administrative agencies must be able to point to "clear congressional authorization" when they assume power to regulate matters of vast "economic and political significance.'" The U.S. Supreme Court reinvigorated the doctrine as a vehicle for challenging federal regulations in its 2022 decision in *West Virginia v. EPA, 142 S. Ct.* 2587. (The complaint in *Mayfield* was filed within weeks of the justices' decision.) The district court in *Mayfield* concluded the salary level test was not a major question because the matter to be regulated was not of "vast economic and political significance." It also concluded the estimated long-term costs of the rule did not create the kind of stark economic impact that would restrict Congress from delegating the matter to a regulatory agency under the major questions doctrine.

The plaintiff in *Mayfield* filed an appeal in the Fifth Circuit on Oct. 10, 2023 (No. 23-50724).

Independent Contractor Rule Finalized

DOL released its long-anticipated final rule revising the standard for determining whether a worker is an employee or independent contractor under the FLSA.

The final rule formally rescinds the independent contractor rule issued in 2021 by the DOL during the Trump Administration. The new final rule adopts a six-factor "economic realities" test that, according to DOL, allows consideration of independent contractor status based on the "totality of the circumstances" of the working relationship. These factors are:

- Opportunity for profit or loss depending on managerial skill;
- Investments by the worker and the potential employer;
- Degree of permanence of the work relationship;
- Nature and degree of control;
- Extent to which the work performed is an integral part of the potential employer's business; and
- Skill and initiative.

The final rule, published in the Federal Register on Jan. 10, 2024, is slated to take effect on March 11, 2024. Legal challenges are expected.

DOL Remains Silent on Joint-Employer Rule

Absent from the DOL's December semi-annual agenda was any mention of a joint-employer rule. Talk of whether the DOL would engage in such rulemaking has resurfaced, particularly in light of the final rule issued by the National Labor Relations Board in October 2023 (and now set to take effect Feb. 26, 2024). However, DOL leadership has indicated such a rule is not currently in the works, and the latest rulemaking agenda confirms there is no agency action at this time.

Joint-employer rulemaking has been in limbo since July 2021, when the agency rescinded a final rule on "Joint Employer Status Under the Fair Labor Standards Act" issued during the final year of the Trump Administration. The DOL did not propose a replacement rule, instead stating that "the Department will continue to consider legal and policy issues relating to FLSA joint employment before determining whether alternative regulatory or subregulatory guidance is appropriate."

DOL Leadership Ups and Downs

Su nomination fails. The nomination of Acting Secretary of Labor Julie Su to serve as permanent secretary of labor was returned to the White House after failing to garner sufficient support to clear a path to confirmation by the full Senate.

President Joe Biden nominated Su to serve as labor secretary last spring. She had served as deputy secretary of labor since July 2021. But her nomination only narrowly cleared a vote in the Senate Committee on Health, Education, Labor, and Pensions (HELP). With her chances of success before the full Senate uncertain, her nomination was not brought to the floor.

Republican committee members (and a few other detractors) opposed Su's nomination due in part to her tenure as head of California's Labor & Workforce Development Agency and, before that, as California labor commissioner. In the latter role, Su implemented use of the controversial "ABC" test for determining whether a worker is an employee or independent contractor. Republicans on the HELP Committee had sought assurances that Su would not attempt to implement the ABC test at the federal level and that the DOL would not undertake rulemaking on a joint-employer test. During the Committee hearing on her nomination, Su plainly stated that, in her view, the DOL had no intention of seeking to implement the "ABC" test or of issuing a new joint-employer rule.

President Biden renominated the embattled Su for the post on Jan. 8, 2024.

Looman gets the nod. The Senate, however, confirmed Principal Deputy Administrator Jessica Looman as head of the Wage and Hour Division (WHD), a key leadership role at the DOL. The WHD enforces the FLSA's minimum wage, overtime pay, recordkeeping, and child labor provisions, as well as other employment standards and worker protections under other statutes.

Since Jan. 20, 2021, Looman had been serving as the principal agency administrator, a role designated to permit her to lead the WHD while her nomination was pending without triggering litigation. She had been in the position of acting administrator of the WHD since June 2021 but, because of regulatory requirements for agency nominees, her official title was removed while she continued to work during the nomination process. An effort late last year to have Looman confirmed through unanimous consent failed.

Looman first was nominated in August 2022 and made it out of the Committee late in 2022, but the full Senate did not hold a vote before expiration of the last Congressional term. Biden renominated her in early 2023. In October, the Senate approved Looman's nomination by a 51-46 vote.

Other DOL Developments

WHD reports big numbers in FY 2023. WHD recovered more than $274 million in back wages and damages for more than 163,000 U.S. workers in the fiscal year ending Sept. 30, 2023, DOL announced in a Dec. 7, 2023, blog post. This is despite what Looman asserts are "historically low staffing levels" at the agency.

WHD also provided compliance assistance to employers and information to employees about their rights under federal law to more than 450,000 people — a five-year high, according to Looman.

Child labor enforcement. The DOL beefed up child labor enforcement significantly in 2023. On Feb. 27, 2023, the agency launched a National Strategic Enforcement Initiative on Child Labor, including the formation of a DOL-led Inter-Agency Taskforce to Combat Child Labor Exploitation with the Department of Health and Human Services (HHS) and other federal agencies. As part of the initiative, the DOL said it would increase enforcement down the supply chain to hold all employers accountable for child labor law violations. It has asked Congress to increase civil monetary penalties for violations from the currently $15,138 per child penalty.

In August 2023, DOL announced it would fully enforce the "hot goods" restrictions on shipping goods in interstate commerce that were produced in a facility where oppressive child labor occurred. In a Nov. 28, 2023, Field Assistance Bulletin to its regional administrators, the WHD instructed the regions that child labor penalties for nonserious injuries and non-injury violations were to be assessed on a per-*violation*, rather than on a per-child basis (its previous practice).

In FY 2023, WHD concluded 955 child labor investigations of violations affecting nearly 5,800 youth workers and assessed more than $8 million in penalties for child labor violations. Reporting on its vigorous enforcement efforts earlier in the year, the DOL announced in a July 20, 2023, release that their investigations "reflect a 44 percent increase in children found employed in violation of federal law and an 87 percent increase in penalties assessed from the same time period in the previous fiscal year."

Partnerships with other agencies. In addition to its HHS partnership, the DOL has entered into a formal agreement with the Equal Employment Opportunity Commission (EEOC) to collaborate and share information with the intention of improving both agencies' enforcement efforts. Based on a Memorandum of Understanding (MOU) signed by agency officials on Sept. 13, 2023, the DOL and EEOC are "forming this partnership to encourage greater coordination between them through information sharing, joint investigations, training and outreach."

This means that some typical DOL audits and investigations could lead to investigations by the EEOC under, for example, the Equal Pay Act, Title VII of the Civil Rights Act, and Title I of the American With Disabilities Act. It also signals that the agencies are gearing up for more enforcement activity. Under the MOU, if the DOL finds evidence of suspected discrimination in pay or other terms and conditions of employment while conducting an audit of an employer's payroll and private records, the DOL can pass the information to the EEOC. The agency also will advise the employee who brought the charge or complaint that the employee may be able to file a charge or complaint with the other agency, and provide contact information to that end, as well as materials prepared by the other agency, including about their rights under statutes enforced by the other agency, and remedies for violations.

"In appropriate cases," according to the MOU, "the agencies will determine whether to conduct coordinated investigations of matters arising within both agencies' jurisdictions."

PUMP Act guidance. The DOL published internal guidance for agency officials responsible for enforcing the FLSA's "pump at work" provisions, including those enacted under the 2022 Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act). The PUMP Act was adopted along with the Pregnant Workers Fairness Act in December 2022.

Field Assistance Bulletin No. 2023-02 provides employers a glimpse into how the WHD understands and will enforce the rights available to most employees under the FLSA, which requires reasonable break time and a place to express breast milk at work for a year after a child's birth.

Employees are entitled to breaks every time they need to pump. The length and frequency of breaks will vary by employee. Employers and employees may agree to a schedule based on the employee's need to pump, but the agency advises that employers cannot require employees to comply with a fixed schedule. The agency also reminds employers that an employee's needs and break schedule may require adjustment over time.

Time for pump breaks may be unpaid, unless otherwise required by federal, state, or local law. Employers should pay careful attention to the FLSA's standard requirements for counting and compensating hours worked.

New Obligations for Federal Contractors

Contractor minimum wage hike on appeal. On April 27, 2021, President Biden issued an Executive Order Increasing the Minimum Wage for Federal Contractors. The executive order (EO 14026) raised the minimum wage to $15 per hour for employees of entities that contract with the federal government who work on or in connection with a covered federal government contract. The DOL issued regulations implementing the EO and the Federal Acquisition Regulatory Council amended the federal procurement regulations accordingly. The $15 minimum wage took effect Jan. 30, 2022, with increases to be published annually. The current federal contractor minimum wage is $16.20 per hour.

In a September 2023 decision, a federal court ruled that the president exceeded his authority under the Procurement Act when he issued EO 14026. *Texas v. Biden*, 2023 U.S. Dist. LEXIS 171265 (S.D. Tex. Sept. 26, 2023). The court barred enforcement against the plaintiffs, the states of Louisiana, Mississippi, and Texas, which routinely contract with the federal government directly and as subcontractors. On Nov. 27, 2023, the Biden Administration filed an appeal. The case, *State of Texas. v. Biden*, No. 23-40671, is pending in the Fifth Circuit.

This case is one of several lawsuits seeking to invalidate EO 14026. In *Arizona v. Walsh,* 2023 U.S. Dist. LEXIS 2649 (D. Ariz. Jan. 6, 2023), a federal court dismissed litigation brought by a coalition of five states (Arizona, Idaho, Indiana, Nebraska, and South Carolina). The court found the president did *not* exceed his authority under the Procurement Act and the Act did not violate the non-delegation doctrine by granting this authority. The court also held the EO and final rule did not violate the

Spending Clause. An appeal is pending in the U.S. Court of Appeals for the Ninth Circuit. Oral argument in State of *Nebraska v. Walsh*, No. 23-15179, is scheduled for Feb. 6, 2024.

Davis-Bacon Act rule challenged. The DOL's final rule Updating the Davis-Bacon and Related Acts (DBRA) Regulations took effect Oct. 23, 2023, ushering in the most significant changes to the regulations in four decades. The final rule is estimated to impact over one million U.S. workers. The DBRA applies to federal contractors and subcontractors performing on contracts in excess of $2,000 for construction, alteration, or repair of public buildings or public works and requires employees be paid no less than local prevailing wages and fringe benefits for corresponding work on similar projects in the area.

Among the rule changes, the DOL redefined the term "prevailing wage" and returned to a three-step process for determining what the prevailing wage will be for certain classifications in certain geographic areas. First, if the majority of workers in the classification in the area (both union and non-union) are paid the same rate, that rate will be the prevailing wage. Second, if no majority rate exists, then the wage rate paid to at least 30% of workers in the classification in the area will be the prevailing wage. Third, if no wage rate is paid to at least 30% of workers, then the weighted average rate in the classification is considered the prevailing wage. This modification in calculating the prevailing wage (or wage floor) will likely lead to higher pay for employees.

The final rule also adds provisions for periodically adjusting certain non-collectively bargained rates; allowing the DOL to adopt wage rates set by state and local governments under certain circumstances; and codifying the requirement that fringe benefits should be annualized. An anti-retaliation provision, additional remedies for violations, and increased recordkeeping requirements also were added.

On Nov. 7, 2023, two separate legal challenges were filed in Texas federal courts by construction industry groups seeking to bar enforcement of the rule. The plaintiffs claim the DOL exceeded its power by expanding the reach of the DBRA to other types of workers not previously covered under the Acts' provisions, such as truck drivers and flaggers, and bring more kinds of construction projects under the DBRA's coverage.

The cases are *Associated Builders and Contractors of Southeast Texas, Inc. v. Su*, pending in the Eastern District of Texas, No. 1:23-cv-00396; and *Associated General Contractors of America v. U.S. Department of Labor*, in the Northern District of Texas, No. 5:23-cv-00272.

U.S. Supreme Court News

Justices: Employees Paid a "Day Rate" Are Entitled to Overtime Pay

The U.S. Supreme Court ruled that an employer's day-rate pay structure did not satisfy the "salary basis" component of the FLSA's white-collar exemptions. Therefore, an oil rig worker who earned more than $200,000 per year, and unquestionably met the other requirements of the executive exemption, was entitled to overtime pay. *Helix Energy Sols. Group, Inc. v. Hewitt*, 143 S. Ct. 677 (Feb. 22, 2023).

The plaintiff worked as a supervisor on an oil rig, working month-long periods or "hitches." He worked about 84 hours per week during a hitch and was paid $963 for every day that he worked. He was paid every two weeks, and his compensation amounted to his daily rate times the number of days he had worked in the pay period. He did not earn overtime pay. He filed suit, alleging that he was improperly classified as a "bona fide" executive exempt from overtime.

Under DOL regulations, to qualify for the white-collar exemptions: (1) the employee must be paid on a "salary basis"; (2) the employee's salary must be at least $684 per week; and (3) the employee must perform the required duties associated with the exemption. The parties conceded that prongs 2 and 3 were satisfied; the dispute was whether the plaintiff's daily-rate pay met the salary basis requirement.

Being paid on a salary basis means that an employee regularly receives a predetermined amount of compensation each pay period on a weekly (or less frequent) basis, and that the employee's pay is not reduced because of variations in the quality or quantity of their work. That is, under the applicable DOL rule at 29 C.F.R. § 541.602(a), employees must be paid the full salary for any week in which they perform work, irrespective of the number of days or hours worked, for the exemption to apply.

The company argued that the salary basis test was met because the plaintiff was paid every two weeks and his pay always exceeded the minimum salary threshold for any week in which he worked. However, the Court rejected this interpretation. What matters for purposes of the salary basis test is not how often paychecks are distributed but the unit used in computing pay. Writing for a 6-3 majority, Justice Elena Kagan observed, "[a]n employee paid on an hourly basis is paid by the hour, an employee paid on a daily basis is paid by the day, and an employee paid on a weekly basis is paid by the week — irrespective of when or how often his employer actually doles out the money."

There is a "special rule" at 29 C.F.R. § 541.604(a) in which the salary basis test is satisfied for workers whose compensation is "computed on an hourly, a daily or a shift basis." However, it was undisputed the compensation scheme here did not meet the necessary conditions for this provision to apply. The majority also rejected the employer's argument that those conditions were inapplicable to employees for whom the "highly compensated employee" rule applied.

Concluding that the day-rate basis on which the plaintiff was paid did not satisfy the regulatory salary basis requirement, the Court affirmed the *en banc* decision of the Fifth Circuit that the FLSA exemption did not apply.

A larger issue in play. In a dissenting opinion, Justice Brett Kavanaugh pointed to the larger question of whether the DOL's salary basis test is consistent with the FLSA. The FLSA mandates only that an individual be employed in a "bona fide" executive, administrative, or professional "capacity," *i.e.*, perform the duties of such a position, for the exemption to apply. The salary basis test and minimum salary test are not set forth in the text of the statute, they are products of agency rulemaking and are increasingly facing legal challenge.

"[I]t is questionable whether the Department's regulations — which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid — will survive if and when the regulations are challenged as inconsistent with the Act," Justice Kavanaugh wrote. "[W]hether in [the plaintiff's] case on remand or in another case, the statutory question remains open for future resolution in the lower courts and perhaps ultimately in this Court." (Indeed, as noted above, that very question is pending in the Fifth Circuit.)

SCOTUS to Review Standard for Agency Deference

A case outside of the employment law context may have a significant impact on wage and hour law — particularly, the extent to which DOL regulations interpreting the FLSA are entitled to deference by courts.

The U.S. Supreme Court has granted *certiorari* to consider two cases involving Commerce Department regulations on fishery management in federal waters under the Magnuson-Stevens Act. Under the statute, the National Marine Fisheries Service (NMFS) may require vessels to "carry" federal observers onboard to enforce the agency's regulations. The NMFS regulation goes further — requiring domestic vessels to pay the salaries of those monitors, which can eat up 20% of their revenue. The U.S. Court of Appeals for the District of Columbia Circuit upheld the NMFS rule. *Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. Aug. 12, 2022). In doing so, the appeals court applied principles of "*Chevron*" deference, as set forth in the Supreme Court's 1984 decision in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43. If a court determines that the *Chevron* framework applies to a particular agency action, then the court must defer to the agency's "reasonable interpretation" of the statute in question, a low burden for upholding a challenged agency action.

The petitioners have urged the Supreme Court to overrule *Chevron* outright. In the alternative, petitioners want the justices to at least limit the doctrine's reach by clarifying that statutory silence on a particular issue does not create ambiguity sufficient to warrant *Chevron* deference to an agency's interpretation of the issue.

The magnitude of the case before the Court is reflected in the fact that some 50 amicus briefs have been submitted to the Court. The U.S. government has urged the Court to uphold *Chevron*. Amicus arguing in support of *Chevron* generally cite the longstanding reliance interest and that *stare decisis* principles warrant keeping the doctrine intact. One brief, submitted by the Lawyers' Committee for Civil Rights, references the FLSA specifically and notes "[i]t is unlikely that DOL could implement regulations that give full force to [the law's] statutory guarantees as swiftly, successfully, and effectively without the backdrop of and reliance on *Chevron* deference[.]"

The Coalition for a Democratic Workplace, on the other hand, submitted a brief urging the Court to overturn *Chevron*. The organization says the doctrine has enabled federal agencies to interpret their power expansively. The Coalition pointed to the National Labor Relations Board in particular, saying that *Chevron* has enabled "an unworkable track record of frequent flip-flopping by the Board," leaving an "ever-changing federal labor law regime." Given its rulemaking track record in recent years under changing presidential administrations, the same might be said of the DOL.

The Supreme Court heard oral argument in *Loper Bright* and a related case, *Relentless, Inc. v. Department of Commerce* (No. 22-1219), on Jan. 17, 2024.

Federal Appellate Decisions

FLSA Exemptions

PTO deductions are not "salary." In an issue of first impression, the U.S. Court of Appeals for the Third Circuit held that paid time off (PTO) is not a form of salary under the FLSA. Therefore, deductions from an exempt employee's PTO balance do not violate the salary basis test for the white-collar exemption. *Higgins v. Bayada Home Health Care Inc.*, 2023 U.S. App. LEXIS 6124 (Mar. 15, 2023).

Full-time, salaried registered nurses for a home health care entity were required to meet weekly productivity minimums. These minimums are expressed in points, with each point equating to work tasks like patient visits (and thus to hours worked). When a nurse exceeds their productivity minimum, they are paid more. Conversely, when a nurse falls short of the weekly minimum, the employer reduces their PTO balance based on expected-versus-actual points earned.

An employee may request an increase or decrease in their weekly productivity minimums, with a corresponding increase or decrease in salary, but the company does not deduct from an employee's guaranteed base salary if they lack sufficient PTO to cover a productivity point deficit. On the contrary, an employee's salary would only be reduced if they took a voluntary day off without sufficient PTO to cover it.

In a proposed collective action, the employees contended that the reductions in their PTO balance constituted an improper salary deduction, converting them from exempt employees to nonexempt hourly employees; therefore, they were entitled to overtime pay. The district court granted summary judgment for the company, finding a meaningful difference between PTO and salary.

FLSA white-collar regulations provide that an employee is paid on a "salary basis" when they "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Importantly, the employee "must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked," and repeated deductions based on the quality or quantity of an employee's work may transform the employee's pay from salary-based to hourly.

On appeal, the Third Circuit affirmed the district court's dismissal. The Third Circuit concluded that PTO deductions do not violate the salary basis regulations because, "when an employer docks an employee's PTO, but not her base pay, the predetermined amount that the employee receives at the end of a pay period does not change." Here, there was no evidence the employer ever reduced any employee's guaranteed salary if their PTO was exhausted.

Application of "reasonable relationship" test. The "reasonable relationship" test for determining whether employees are paid on a salary basis (for purposes of determining exempt status) does not apply to employees compensated on a hybrid salary-plus-hourly plan, the U.S. Court of Appeals for the Tenth Circuit held, upending a jury verdict below in the employee's favor. *Wilson v. Schlumberger Tech. Corp.*, 2023 U.S. App. LEXIS 24005 (Sept. 11, 2023).

Under the reasonable relationship test, an employee's weekly guaranteed pay must be "roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." But the test applies only to employees who receive their base pay on an hourly, daily, or shift basis; it does not apply to employees who receive their base pay as a salary and then receive additional compensation on an hourly, daily or shift rate, the appeals court held.

The key factor to satisfying the salary basis prong of the white-collar exemption analysis is the fixed nature of the base salary. In this case, the plaintiff's total compensation varied from pay period to pay period; however, he was paid the same guaranteed base salary every two weeks, and the base salary was not based on his hours, days, or shifts of work. The Tenth Circuit panel held that, to satisfy the overtime exemption, under the relevant subsection of the salary basis regulations, the reasonable relationship requirement is triggered only when an employee's actual base pay varies from week to week based on how many shifts he works.

Burdens of Proof, Pleading

Burden of proof to show exemption? An employer must prove the applicability of an exemption from overtime with "clear and convincing" evidence, the U.S. Court of Appeals for the Fourth Circuit held. *Carrera v. E.M.D. Sales, Inc.*, 2023 U.S. App. LEXIS 19308 (July 27, 2023). In so ruling, the three-judge panel adhered to circuit precedent; it acknowledged, however, that the "clear and convincing" standard may no longer be valid in light of an intervening (but not directly conflicting) opinion from the U.S. Supreme Court. Nevertheless, that standard must be followed absent a contrary ruling by the Supreme Court or the full court of appeals, the panel explained.

In an overtime action brought by sales representatives for a food distribution company, the employer asserted that the plaintiffs were exempt under the "outside sales" exemption, which applies to employees whose "primary duty is [] making sales" and who "customarily and regularly" work away from the employer's place of business in performing that primary duty.

According to the plaintiffs, circuit precedent required the defendant to establish the outside sales exemption by "clear and convincing" evidence. The defendant, however, cited the Supreme Court's decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), in which the Court rejected the notion that FLSA exemptions must be interpreted narrowly. It adopted a "fair reading" standard for such exemptions. *Encino Motorcars* signaled that a "preponderance of the evidence" standard was appropriate, the employer contended. The district court agreed with the plaintiffs, noting that *Encino Motorcars* did not mention evidentiary burdens of proof and thus that Fourth Circuit precedent dictated application of the "clear and convincing" standard.

The court of appeals acknowledged that *Encino Motorcars* supported the defendant's argument. Ultimately, however, the court was bound by circuit precedent. Because an appellate court "do[es] not lightly presume that the law of the circuit has been overturned," and because — as the district court had concluded — there is a distinction between the burden of evidentiary proof required to establish the factual questions relevant to an FLSA exemption and statutory interpretation of the legal scope of that exemption, it is "entirely possible" to read Fourth Circuit precedent "harmoniously" with *Encino Motorcars*, the appeals court held.

Nevertheless, the panel suggested that further review might be appropriate. It noted, "Perhaps this court will want to revisit the appropriate evidentiary standard for FLSA exemptions in light of the Supreme Court's reasoning in *Encino Motorcars* and what can be extrapolated from it. But that is a choice that belongs to the *en banc* court [of appeals] rather than this panel." However, on Aug. 22, 2023, the full Fourth Circuit denied the employer's petition for *en banc* rehearing in a brief order, leaving in place the panel decision.

Ultimately, the Supreme Court may have to resolve an ongoing circuit court split regarding the proper evidentiary burden for establishing an FLSA exemption. The employer in this case petitioned for *certiorari* on Sept. 8, 2023. The U.S. Supreme Court has not decided whether it will take up the case. However, on Dec. 11, 2023, the Court invited the U.S. solicitor general to file a brief to express the U.S. government's view on the matter.

Burden to show hours worked absent records. The Fifth Circuit held that window blinds installers satisfied their prima facie burden to establish that they worked unpaid overtime hours when the defendant did not maintain time records. *Flores v. FS Blinds, LLC,* 2023 U.S. App. LEXIS 17692 (July 12, 2023). The plaintiffs asserted that they worked 70 hours per week on average; however, the defendant had classified the installers as independent contractors and did not maintain time records of their work. The plaintiffs presented testimony that they worked between 11-17 hours a day on average, some of which was corroborated by testimony from the defendant. The plaintiffs also produced work orders reflecting jobs they finished during a typical week. This was enough to satisfy the lenient evidentiary burden set out by the U.S. Supreme Court in its 1946 decision in *Anderson v. Mt. Clemens Pottery Co.*, a three-judge panel found.

The district court had granted summary judgment in the defendant's favor, concluding that the workers offered nothing more than "unsubstantiated assertions" to support their overtime claims. However, the appeals court said, the district court erroneously applied the more stringent, "definite and certain evidence" standard that applies in overtime cases where the employer has maintained proper time records. Under the *Mt. Clemens* standard, when time records are lacking, employees can offer a representative sample of employees regarding the number of hours worked to estimate unpaid work time; the burden then shifts to the employer to disprove that evidence.

In this case, the defendant pointed to testimony by plaintiffs showing their pay varied week-to-week; however, the plaintiffs never claimed to have worked 70 hours every week, they "have consistently maintained that they worked an average of 70 hours per week," the appeals court explained. Therefore, the defendant's "broad-brush contention that Plaintiffs could not possibly have worked 70 hours every week does not in itself overcome Plaintiffs' overtime allegations."

The appellate panel reversed a district court's grant of summary judgment in favor of the defendant on the workers' overtime action. Still to determine on remand, however, was whether the installers, in fact, were independent contractors — in which case they would not be entitled to overtime anyway.

Pleading standard for overtime claims. Addressing the amount of specificity required in a complaint to properly assert an unpaid overtime claim under the FLSA, the U.S. Court of Appeals for the Second Circuit held that employees need merely assert that they were regularly scheduled to work overtime hours for their retail employer, not which specific weeks they worked overtime. *Herrera v. Comme Des Garcons Ltd.*, 2023 U.S. App. LEXIS 27385 (Oct. 16, 2023). "Where the plaintiffs plausibly allege that they worked more than [40] hours per week as part of their regularly scheduled workweek, they have adequately stated a claim under the FLSA and need not list the specific workweeks during which they worked more than [40] hours," the three-judge panel explained.

The plaintiffs worked for an upscale retail store as floor managers, assistant floor managers, and sales managers. Notwithstanding their job titles, however, they asserted that their duties were not managerial, and they were misclassified as exempt. They sought compensation for their overtime hours worked, including time spent working through their lunch periods. The district court dismissed their claims as insufficiently pleaded, finding that it relied on "inference upon inference" to reach the conclusion that they worked more than 40 hours in a week. The panel vacated the lower court's order, finding that the decision below "reflects too crabbed a reading" of the plaintiff's complaint.

Plaintiffs are required to provide "some degree of 'specificity'" when pleading an overtime claim, the appeals court explained, referencing relevant Second Circuit precedent. "To satisfy that standard, plaintiffs must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours," the appeals court said. "Nothing more is required." The appeals court also observed, "It would generate voluminous, tedious complaints and compel plaintiffs to record their work schedules with a level of precision and care at odds with our admonition that plaintiffs in FLSA cases are not obligated 'to keep careful records and plead their hours with mathematical precision.'" The court therefore rejected the notion that its holding would spur a flood of FLSA litigation.

"Regular Rate" Issues

No varying the regular rate of pay. In a decision reviving a security guard's claim for overtime pay, the Eleventh Circuit reiterated that employers may not pay employees an artificially low regular rate of pay to avoid paying the proper amount of overtime. *Thompson v. Regions Security Services, Inc.,* 67 F.4th 1301 (May 18, 2023).

The plaintiff usually worked 40 hours per week at a rate of $13.00 per hour. However, his employer then began to schedule him for about 20 additional hours per week. It continued to pay his regular hourly rate, which corresponded to an overtime rate of $19.50 for the additional hours beyond 40 per week, as required under the FLSA. After about six months, without explanation, the employer reduced his regular hourly rate to $11.15, with a corresponding hourly overtime rate of $16.73. For the next eleven or so months, the employee worked between 55 and 75 hours a week at this reduced hourly rate. The employer then returned him to a 40-hour per week schedule and increased his pay rate to its original $13.00 per hour.

The outcome turned on the meaning of the term "regular rate," the appeals court explained, in reversing a district court decision dismissing the suit. Under the FLSA, the regular rate is the hourly rate for all non-excludable compensation that an employee receives for a 40-hour workweek. Here, arguably, the employee had two different hourly rates – $13.00 and $11.15 – that could qualify as his regular rate. However, Section 778.500 of the Department of Labor's FLSA regulations provides that an employee's regular rate cannot "vary from week to week inversely with the length of the workweek." This restriction prevents an employer from indiscriminately manipulating an employee's hours and pay rate to effectively avoid paying time-and-a-half for overtime, the appeals court explained.

Health insurance opt-out fees not includible. County firefighters and law enforcement officers who opt out of employer- or union-provided health insurance coverage receive a monetary credit each pay period, minus an "opt-out fee" that goes toward the costs of maintaining the insurance plans. Although the final credit received in their pay is part of their regular rate of pay for purposes of calculating overtime pay due, the employer did not include in the regular rate of pay the amount withheld as an opt-out fee. The Ninth Circuit held this was proper as the opt-out fees were correctly excluded under a statutory exception for health plan contributions. *Sanders v. County of Ventura,* 2023 U.S. App. LEXIS 31641 (Nov. 30, 2023).

Firefighters and law enforcement officers receive a flexible benefit allowance every pay period, which they can use toward premiums for the county-sponsored health plan or union-sponsored plan. Those who opt out of coverage are also entitled to this monetary "flex credit" each pay period; however, a portion of this credit is deducted as a fee that the employer uses to fund the health plans.

The flex credit appears on employees' pay stubs as "earnings," and the opt-out fee appears as a "before tax deduction." After the county subtracts the opt-out fee from the flex credit, it pays the balance to employees in cash. The opt-out fee (and, thus, the residual cash payment to employees who opt out) varies from year to year. The county treated the net cash payment to opt-out employees as part of their regular rate of pay when calculating their overtime compensation; however, the county did not include the value of the opt-out fee in the regular rate calculation.

A federal court held that the opt-out fee was excluded correctly under 29 U.S.C. § 207(e)(4), which excludes from the regular rate "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing health insurance." According to the plaintiffs, the exception outlined in § 207(e)(4) did not apply because they had opted out of the health insurance offerings — so the opt-out fee was not used to support their health care. However, the appeals court explained that the statutory provision does not require that contributions be made for a particular employee's benefits but "for employees" generally. The opt-out fees, in this case, also were used for employees who chose to participate in one of the available health plans.

"When an employer, as here, decides to allow employees to retain some portion of an unused health insurance credit, it can permissibly structure the program to prop up the employee health plans without treating the full amount of the health credit as part of the FLSA regular rate of pay," the appeals court wrote. It affirmed summary judgment in the employer's favor in this overtime collective action.

Free hotel rooms properly excluded. The Ninth Circuit held that a hotel chain properly excluded the value of complimentary hotel rooms when calculating employees' regular rate of pay when computing their overtime rate. *Hartstein v. Hyatt Corp.*, 82 F.4th 825 (9th Cir. 2023). The FLSA excludes from the regular rate "other similar payments" not made as compensation for an employee's hours of employment, and the free hotel rooms fell within this exception.

The employer offers full-time employees up to 12 nights a year of free hotel stays (and up to six nights a year for part-time workers). A group of hotel employees who were laid off in 2020 as a result of the COVID-19 pandemic brought this class and collective action alleging, among other claims, that the employer violated the FLSA by failing to compensate them for the value of the hotel rooms. They argued the free rooms were a form of "employee remuneration," asserting that the yearly hotel room benefit amounted to a nondiscretionary bonus which should have been factored into the regular rate.

The federal district court awarded summary judgment to the employer, finding that free stays were properly excluded from the regular rate. A three-judge Ninth Circuit panel affirmed. It explained that "although the hotel room policy has some characteristics of a nondiscretionary bonus — it 'promises in advance' that employees are entitled to the free hotel rooms and does not give [the company] discretion whether to give them — the policy falls under the plain language of the regulation governing discounts on employer-provided retail goods and services."

The panel also addressed an issue of California law. It found that the California Labor Code's prompt payment provisions require employers to pay accrued vacation pay immediately to employees who are laid off, even if the layoff is intended to be temporary, if there is no specific return date within the normal pay period. Under these circumstances, the layoff is a discharge that triggers the prompt payment requirement. The employer violated the provision by failing to pay the accrued vacation pay until the employees were formally terminated, several months after initial layoff.

Off-the-Clock Issues

Is donning, doffing integral, indispensable? The Third Circuit held that a federal district court applied the wrong legal test when it found that oil rig workers were not entitled to pay for the time they spent changing into and out of protective gear. *Tyger v. Precision Drilling Corp.*, 2023 U.S. App. LEXIS 21374 (3d Cir. Aug. 16, 2023). The appeals court reversed the district court's grant of summary judgment to the employer in a wage suit brought by oil rig workers.

The Third Circuit panel rejected the Second Circuit's test (adopted by the court below absent Third Circuit guidance), which asks whether the protective gear is meant to protect against dangers that "transcend ordinary risks." Instead, the Third Circuit adopted a multi-factor test that "mirrors those of most of our sister circuits," under which changing into some clothing that is generic and guards against ordinary risks might be compensatory, thus broadening the scope of compensable activity.

Even though changing into gear might be considered "work," the Portal-to-Portal Act provides that certain activities "which are preliminary to or postliminary to" an employee's "principal activity" are nonetheless non-compensable under the FLSA. Based on U.S. Supreme Court precedent, activities that are "integral and indispensable" to an employee's principal activity, however, are compensable. At issue here was whether the time that oil rig workers spent donning and doffing flame-retardant coveralls, steel-toed boots, hard hats, and other required safety gear was integral and indispensable to their principal activity of drilling for oil and gas.

Applying the Second Circuit test, the district court found the risks to the oil rig workers were "ordinary, hypothetical, or isolated." As a result, it held changing into protective gear was not integral or indispensable to oil drilling. The Third Circuit vacated the decision. It provided three key factors for courts to consider when deciding whether changing gear is intrinsic, or "integral," to workers' principal activity: (1) location (if changing typically takes place at the worksite and there is no "meaningful option" for workers to change at home, then it is "more likely to be integral to the work"); (2) regulations (donning and doffing protective gear is more likely integral to workers' principal activity when specific regulations mandate its use); (3) type of gear (the more specialized the gear, the more likely changing in and out of it is integral; however, even "generic gear" can be intrinsic to workers' principal activity and should not be categorically ruled out).

As for whether changing gear is "indispensable," the appeals court explained an activity is "indispensable" if the employee cannot safely and effectively perform the work without changing into the gear. While the activity may not be technically necessary to do the job, if it is "reasonably" necessary to perform the job safely and effectively, then it is indispensable.

The appeals emphasized that this is a fact-intensive inquiry, not well-suited to bright-line rules. Moreover, the de minimis doctrine still applies, meaning that workers need not be paid when the donning and doffing activity takes mere minutes.

Time-rounding impact weighed in aggregate. A hospital system's time-rounding policy which, in the aggregate, resulted in wage underpayments to employees violated the FLSA, the U.S. Court of Appeals for the Eighth Circuit held. *Houston v. St. Luke's Health Sys., Inc.*, 2023 U.S. App. LEXIS 20944 (Aug. 11, 2023). On its face, the rounding policy was outcome-neutral, and some employees were even overcompensated on the whole, their time having been rounded upward. In practice, however, records showed that most employees were underpaid in the long run.

DOL regulations allow employers that use automated timekeeping systems to round employees' start and end times to make it easier to compute employees' work hours and compensation. However, the rule provides that the practice cannot result in "systematic or routine underpayment 'over a period of time' for work performed." In this case, records showed that while the rounding was advantageous to some employees, nearly two-thirds of employees lost work time due to the rounding policy.

"No matter how one slices the data, most employees and the employees as a whole fared worse under the rounding policy than had they been paid according to their exact time worked," the appeals court wrote. "We would be hard-pressed to say that the rounding policy has 'average[d] out' over the long run such that it did not result in undercompensation."

The employer argued that a ruling in favor of the employees would "nullify the rounding regulation altogether." It would simply be too burdensome for employers to adopt a rounding policy because employers effectively would have "to perpetually audit that policy across various lookback periods" in order to ensure that on balance, the practice is outcome-neutral. The Eighth Circuit panel observed that "the rounding regulation does not require rounding; it permits it." The panel reversed a trial court's grant of summary judgment in the employer's favor on the employees' FLSA and unjust enrichment claims.

Compensation for non-compensable duties. If an employer adopts a contract or custom of paying for pre- or post-shift activities that are not compensable under the FLSA, it can impose conditions on such pay, the U.S. Court of Appeals for the Seventh Circuit held. *Meadows v. NCR Corp.*, 2023 U.S. App. LEXIS 26442 (Oct. 5, 2023). In this case, the employer's practice of paying for off-the-clock incidental activities was contingent on employees recording their time spent on those activities. The district court erroneously disregarded this requirement; therefore, the appeals court vacated the lower court decision denying the employer's motion for a new trial following a jury verdict for the plaintiff on his overtime claim.

The employer's written policy instructs employees to record their time electronically and states that they are to work only during their regular shifts; off-the-clock work is prohibited. However, if an employee works overtime despite this policy, the company pays for the overtime — provided the employee records the time in the timekeeping system.

The plaintiff worked as a customer engineer servicing point-of-sale systems and ATMs in the field. He performed pre- and post-shift activities such as reviewing email, mapping the service route, reviewing work orders, responding to work calls, and making sure his company-provided van was stocked with needed parts. Pursuant to the written policy, the plaintiff was paid for unauthorized overtime that he recorded but he was not paid for time he did not record. He filed suit seeking compensation for his unrecorded overtime.

The district court concluded his off-the-clock activities were not integral and indispensable to his principal activities of servicing the employer's POS systems; rather, they were incidental to his commute in a company vehicle. However, the court said the time may be compensable if the employee could prove that the employer had a practice of paying for the incidental activities. At issue was FLSA Sec. 254(b), which provides that otherwise non-compensable preliminary or postliminary activities are compensable if the employer has agreed to pay for them through an express contractual provision or through "a custom or practice in effect [] at the time of such activity."

A jury rendered a verdict for the employee and the court denied the employer's motion for a new trial. In the district court's view, the company "could not escape liability by imposing a recording requirement on its custom of paying for [ ] incidental activities because [it] had constructive knowledge of those activities."

The Seventh Circuit, however, found the activities were merely incidental to the employee's commute in the field and not integral and indispensable to his principal activities. Therefore, the activities were compensable only if the employer had adopted a contract, custom, or practice of payment. If the employer had any "custom or policy" for Sec. 254(b) purposes, though, it was a policy of paying for incidental activities only when the time was recorded, the appeals court said.

According to the appellate panel, the district court erroneously concluded that, since the employer "chose to compensate these activities in one instance, it had to compensate them in all instances." It added that failure to acknowledge the requirements of an employer's policy "would turn an employer's discretion to pay for incidental activities into a trap, with the predictable consequence that employers will cease paying for incidental activities altogether."

Procedural Rulings

Another blow to "conditional" certification. In a highly anticipated decision, the U.S. Court of Appeals for the Sixth Circuit ruled that in deciding whether to authorize sending notice of a collective action to other workers under the FLSA, district courts within the circuit must not use the lenient, two-step procedure commonly used by courts in a majority of circuits. *Clark v. A&L Homecare & Training Ctr., LLC*, 2023 U.S. App. LEXIS 12365 (May 19, 2023). Instead, the Sixth Circuit will require the plaintiffs to demonstrate a "strong likelihood" that other employees are similarly situated before court-approved notice may be sent to employees who are in fact similarly situated.

The FLSA allows plaintiffs to pursue claims as a collective action if they can show there are other, "similarly situated" employees who allegedly suffered the same conduct giving rise to a violation of the law. For years, many federal courts have applied the two-stage conditional certification approach introduced in *Lusardi v. Xerox Corp.* (a 1983 decision from a New Jersey federal court). Under this framework, courts grant conditional certification, and authorize notice of the suit, based on a minimal showing that potential plaintiffs are similarly situated. Consequently, courts have routinely granted conditional certification with minimal or no pretrial discovery — relying on the complaint allegations alone — and authorizing dissemination of notice to potential class members.

The Sixth Circuit never formally adopted *Lusardi*, but district courts within the circuit generally followed the approach. In *Clark*, a divided circuit panel expressly rejected the framework. It held that district courts should require the plaintiffs to demonstrate a "strong likelihood" that other employees are similarly situated.

This standard, the court wrote, will "confine the issuance of court-approved notice, to the extent practicable, to employees who are in fact similarly situated." It likened its new approach to the standard applied by courts when making the "provisional" determination whether to grant a preliminary injunction.

The Sixth Circuit is the second federal court of appeals to reject the familiar two-step framework for conditional certification. In *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (2021), the Fifth Circuit rejected the standard approach.

No tolling after dismissal without prejudice. A named plaintiff who files an FLSA collective action, and whose individual claims are dismissed without prejudice because the district court lacks jurisdiction over the plaintiff's former employer, is not entitled to tolling of the statute of limitations of those claims. Therefore, when the plaintiff subsequently refiled those claims in the proper district court after the maximum limitations period had expired, those claims were rightly dismissed with prejudice by the second court, held the U.S. Court of Appeals for the Eleventh Circuit. *Wright v. Waste Pro USA, Inc.*, 2023 U.S. App. LEXIS 14692 (June 13, 2023).

The plaintiff filed his individual claims and a putative collective action in the U.S. District Court for South Carolina. The district court held it lacked personal jurisdiction and dismissed the plaintiff's claims without prejudice. In August 2019, he refiled his claims in a Florida federal court. The FLSA provides for a two-year statute of limitations, or at most a three-year limitations period for "willful" claims. Because the plaintiff last worked for Waste Pro in November 2015, all of his claims would be untimely unless the Florida court concluded that the limitations period was tolled during the pendency of his claims in South Carolina. The Florida court concluded that his claims were not tolled and that no basis existed for equitable tolling of the limitations period. Therefore, the court dismissed his claims with prejudice.

The Eleventh Circuit affirmed the dismissal. It held that his claims were not tolled during the pendency of the South Carolina case because that case and his subsequent lawsuit in Florida were separate cases. "For purposes of a limitations period, an action that is dismissed without prejudice is ordinarily treated as never filed," noted the Eleventh Circuit, and "[s]uits under the [FLSA] are not an exception to that rule." Therefore, he was obligated to file his claims in Florida within the maximum three-year limitations period if they were to have a chance of survival. The court of appeals distinguished the plaintiff, as a named plaintiff in the South Carolina lawsuit, from those who joined the lawsuit only as "opt-ins" to the collective action.

As to equitable tolling, that extraordinary remedy might have been available if the plaintiff had no adequate remedy at law. Here, however, he had two such legal options: He could have filed a "placeholder" complaint in Florida to preserve his claims during the limitations period while the South Carolina case proceeded, or he could have filed an appeal of the South Carolina court's dismissal order. He did neither. Thus, his claims were properly dismissed.

Tipped Employee Updates

The legal terrain around tips, tip credits, and tip pools continues to shift. Litigation, legislation, and rulemaking at the federal, state, and local levels addressing how employees who customarily earn tips must be compensated continue apace.

DOL Tip Rule in Effect While Under Challenge

The FLSA requires employers to pay non-exempt employees minimum wage (currently, $7.25 per hour) but treats "tipped employees" differently. Because tipped employees receive substantial compensation through tips, the FLSA permits employers to pay them a direct wage of $2.13 per hour and take a "credit" for the tips received by the employee to satisfy the remaining portion ($5.12 per hour) of the minimum wage.

On Oct. 28, 2021, the DOL issued a final "dual jobs" rule setting limits on the amount of time tipped employees — who customarily and regularly receive at least $30 a month in tips — can spend performing work that is not "tip-producing work" and still allow an employer to take the "tip credit" against the FLSA's minimum wage requirements. The "80-20" provision disallows the tip credit when tipped employees spend more than 20% of their time performing related but non-tipped duties. A tip rule introduced during the Trump Administration would have eliminated the 80-20 provision. However, the Biden Administration issued a replacement rule reviving the 80-20 rule and adding a "30-minute" rule, which bars employers from taking the tip credit when a tipped employee spends more than 30 continuous minutes performing work that is not considered tip-producing work.

Two industry groups filed suit in a federal district court in Texas seeking a nationwide injunction to prevent the DOL from enforcing the 2021 rule. The district court refused to enjoin the rule pending the legal challenge. The Fifth Circuit found that the district court abused its discretion in finding no evidence of irreparable harm to employers were the rule to take effect, noting that the yearly compliance costs, by the DOL's own estimation, amounted to $177 million for employers. Therefore, it reversed the denial of preliminary injunctive relief in an April 28, 2023, decision.

On remand, however, the district court once again refused to enjoin the rule and issued a decision on the merits upholding the agency action after concluding that the final tip rule "was a permissible construction of the FLSA." On Aug. 7, 2023, the industry groups filed an appeal. The case is back at the Fifth Circuit, where the DOL has asserted that its 2021 regulation simply codifies 35 years of extant agency guidance.

The case is *Restaurant Law Center v. U.S. Department of Labor*, No. 23-50562.

Municipalities Phase Out Tip Credit

State and local legislatures continued to pass measures to phase out the tip credit (or subminimum wage) in their jurisdictions:

The **Chicago** City Council on Oct. 6, 2023, voted to eliminate the subminimum wage, phasing out the tip credit in stages over a five-year period starting July 1, 2024. By July 1, 2028, employers of covered employees working within the city will not be able to take a tip credit of any amount. The standard minimum wage rate in effect at that time will apply to all employees. However, servers and other employees in customarily tipped occupations will still be entitled to earn and retain their tips.

The **District of Columbia's** Tip Credit Elimination Act, passed by voters in November 2022, took effect after its effective date was postponed to May 2023. The first step in the eventual elimination of the tip credit was taken on May 1, when the hourly minimum wage for tipped employees in D.C. increased from $5.35 to $6.00. On July 1, 2023, the hourly minimum wage increased to $8.00. The tip credit will be reduced incrementally until 2027, at which point it will be eliminated altogether and the base wage for tipped workers will match D.C.'s full minimum wage. The D.C. government is aggressively enforcing the measure.

Meanwhile, the D.C. Office of the Attorney General (OAG) has sent letters to the district's 2,400 restaurants and bars addressing the use of service charges (which some hospitality employers have adopted in response to the eroding tip credit). While D.C. law does not prohibit (or even define) service charges, or how restaurants may use such fees, the OAG has taken the position that service charges must "be clear and transparent" and that the failure to clearly disclose their intended use to customers violates the District's Consumer Protection Procedures Act.

Revised Tip Pool Provisions

Revised **Colorado** Overtime and Minimum Pay Standards (COMPS) Order #39 restricts those employees who may lawfully be included in a tip pool to employees "who perform significant customer-service functions in contact with patrons," regardless of whether customers tip those workers directly.

New Hampshire's tip pooling law (R.S.A. 279:26-b) was amended to eliminate the requirement that a tip pooling program be implemented only at the request of employees. An added provision requires employers to document "agreed upon" tip pooling practices.

Utah S.B. 73, which took effect on May 3, 2023, amended the Minimum Wage Act to allow employers to include non-tipped employees in a bona fide tip pooling or sharing arrangement.

Additional Tipped Employee Developments

Colorado Overtime and Minimum Pay Standards (COMPS) Order #39 also was amended with revisions to the definition of tipped employee as "any employee who regularly receives more than $1.64 per hour in tips" (averaged over any pay period permitted by state law). Previous COMPS Orders defined covered workers within certain "occupations" and earning at least $30 per month in tips. The new COMPS order also provides that tips are not included in the regular rate of pay for overtime purposes. (Minimum wage tip credits, however, are included.)

A **Colorado** appeals court has ruled that a banquet server who received a significant amount of his pay from a cut of a mandatory 22% service charge assessed to banquet guests was not a tipped employee under Colorado law, because the service charge was not a tip. The court also held that the state's equivalent of FLSA's 7(i) exemption for "sales employees" was not applicable to banquet servers, and so the server was not exempt from overtime under state law. *Brennan v. Broadmoor Hotel*, 2023 Colo. App. LEXIS 896 (Colo. App. Jun. 15, 2023).

Connecticut law provides no private right of action for violations of a recordkeeping regulation for restaurant industry employers that take the tip credit against the minimum wage for employees who "regularly and customarily" receive tips, the Connecticut Appellate Court held. The particular recordkeeping provision at issue was since amended, so the employer's technical error was no longer a violation. The important takeaway, though, was that such recordkeeping errors, when they do occur, are not actionable. The court declined to interpret the regulation to allow a windfall for a purely technical violation with no wage harm. *Nettleton v. C & L Diners, LLC*, 2023 Conn. App. LEXIS 136 (Conn. App. June 6, 2023).

The appellate court also rejected the trial court's ruling that all "side" work performed by servers "away from the tables" was nonservice work — for which the employer could not take a tip credit against the minimum wage — as a matter of law. The appeals court found several of the tasks (*e.g.*, handling takeout orders) were nonservice work as a matter of law. As for most of the tasks, however, a complex, fact-intensive inquiry was needed to determine whether they are incidental to or related to serving food or drinks to patrons (and therefore can be counted as service work) or segregable as nonservice duties.

Amendments to Connecticut's regulations governing recordkeeping requirements for tipped employees now make clear that the only claim for which an employee may bring a private right of action is a claim alleging a substantive violation of the recordkeeping provisions.

Pay Transparency

The recent proliferation of state and local salary and pay transparency legislation continued unabated in 2023. Of the laws already in effect, the specific disclosure requirements vary by statute — adding to the complexity, for national employers, of complying with these measures — and legislation is being introduced in additional jurisdictions at a steady clip. The following provisions were enacted or amended last year.

Colorado

The Colorado legislature has passed the Ensure Equal Pay for Equal Work Act, amending the state's Equal Pay for Equal Work Act (enacted in 2019) to clarify and enhance an employer's obligations under the law. Under the state's pay transparency law, an employer must include specific compensation information such as the hourly rate or salary or range of the hourly rate or salary when posting a job opening, along with a general description of the benefits and other compensation applicable, and the date the application window is expected to close (the application window disclosure must be updated if it is extended). Under the revisions, which took effect Jan. 1, 2024, the pay transparency requirements also require written notice to Colorado employees of all "job opportunities" within the employer's organization (replacing "promotional opportunities," as the statute originally provided), regardless of whether the opportunity would qualify as a promotion, lateral transfer, or demotion for most existing employees. A "job opportunity" is defined as a current or anticipated vacancy or newly created position for which the employer is considering a candidate or candidates or interviewing a candidate or candidates or that the employer externally posts. The definition of "job opportunities" under the amended law does not include "career progression" or "career development" opportunities, which are defined terms in the Act and related guidance.

District of Columbia

The District of Columbia Council passed the Wage Transparency Omnibus Amendment Act of 2023 on Dec. 19, 2023. The Act would require employers to provide the minimum and maximum projected salary or hourly rate in all job listings and position descriptions; and disclose to applicants before the first interview the "schedule of benefits, including bonuses, healthcare and other wellness benefits, stocks, bonds, options, equity, and nonmonetary remunerations" an employee may receive.

While the bill must withstand mayoral and congressional review, as well as be budgeted for by the Council, the targeted effective date is June 30, 2024.

Hawaii

Hawaii SB 1057, which took effect Jan. 1, 2024, requires employers with at least 50 employees to disclose an hourly rate or salary range on job listings that reasonably reflects the actual expected compensation to be paid for the position. The law does not require disclosure of other components of pay (such as benefits) as other state laws require. The requirement applies only to external job postings.

Illinois

Illinois Governor J.B. Pritzker signed a new law on Aug. 11, 2023, that amends the Illinois Equal Pay Act (IEPA) to mandate pay transparency in job postings for most Illinois employers. The provision will apply to positions that either are physically performed in the state or positions that report to a supervisor or worksite in Illinois. The law will go into effect on Jan. 1, 2025.

The amendments make it unlawful for an employer with at least 15 employees to fail to include the pay scale and benefits for a specific job in a job posting in Illinois. Unlike pay transparency laws in other states, employers can satisfy this requirement by including a hyperlink to a publicly viewable webpage that includes the relevant pay scale and benefits. "Pay scale and benefits" is defined broadly as the "wage or salary, or the wage or salary range, and a general description of the benefits and other compensation, including, but not limited to, bonuses, stock options, or other incentives the employer reasonably expects in good faith to offer for the position." In determining the pay scale, employers should look to any previously determined range for the position, the actual range of others currently holding equivalent positions, or the budgeted amount for the position.

New York

The New York State Pay Transparency Law took effect Sept. 17, 2023, imposing new obligations related to job advertisements on covered employers in the state. In any advertisement for a job, promotion, or transfer opportunity, covered employers must include the minimum and maximum annual salary or hourly range of compensation that the employer in good faith believes to be accurate at the time of the posting. For commission-only positions, a general statement that compensation will be based on commission may satisfy the disclosure requirement. The requirements of the statute apply to advertisements for jobs, promotions, or transfer opportunities that "will physically be performed, at least in part" in New York, as well as jobs "that will physically be performed outside of New York but report to a supervisor, office, or other work site in New York."

The state pay transparency law also requires employers to keep and maintain necessary records to evidence compliance with the statute, including, but not limited to, the history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions, if they exist.

Employers in New York City have already had a job advertisement salary disclosure requirement, as the municipality's pay transparency law went into effect Nov. 1, 2022. There are distinctions between the two provisions, however. In addition to New York City, other localities in New York (Albany County, Ithaca, and Westchester County) have enacted similar legislation. The state pay transparency law does not preempt other local laws or regulations. In fact, Westchester County amended its law to eliminate language that it is preempted by state law.

Washington

The state of Washington's Equal Pay and Opportunities Act (EPOA), which took effect on Jan. 1, 2023, requires employers in the state to affirmatively disclose in job postings the wage scale or salary range and a general description of all benefits and other compensation being offered.

The Washington law is especially challenging for employers because it allows a private right of action for violations and provides for actual and statutory damages of $5,000 per applicant, as well as fees and costs, for violations. Consequently, more than 50 class action suits have been filed so far alleging employers in the state failed to provide the required salary information in their job advertisements, in violation of the EPOA. The majority of these cases are still pending.

Other State and Local Updates

Alabama

No withholding for overtime. The Alabama tax code is temporarily modified to provide that all overtime pay received by full-time hourly wage-paid employees for hours worked above 40 in a workweek are excluded from gross income, and therefore are exempt from Alabama state income tax and not subject to withholding. The change was enacted under an Alabama Department of Revenue rule that took effect Dec. 3, 2023. The temporary exemption applies for tax years beginning on or after Jan. 1, 2024, through June 30, 2025.

The exemption will not apply to salaried (FLSA-exempt) employees or workers paid under alternate payment methods (*e.g.*, piece-rate). Commissions and bonuses paid in addition to an hourly wage are not excluded. Only hours actually worked will qualify; paid time off and holiday pay do not count toward hours worked for purposes of determining 40 hours per week.

The rule imposes reporting requirements on employers during the exemption period. Employers must report to the state department of revenue the total aggregate amount of overtime paid in the tax year, and the total number of employees who received overtime pay by Jan. 31, 2024. Starting with the tax year beginning on Jan. 1, 2024, employers are required to supplement their initial report on a monthly or quarterly basis.

California

Alternative Labor Code enforcement. From Jan. 1, 2024, until Jan. 1, 2029, AB 594 authorizes public prosecutors to sue for certain violations of the California Labor Code independently of the state's Department of Labor Standards Enforcement. AB 594 also nullifies any agreements that limit an employee's right to sue on behalf of themselves or in a representative action. AB 594 also permits the recovery of penalties by the employee as a statutory penalty or as a civil penalty in an action for willful misclassification.

Fast Food Council redux. In a compromise between fast-food companies and labor unions, California has enacted AB 1228, which establishes a Fast Food Council, effective Jan. 1, 2024, empowered to recommend minimum standard for hours and other working conditions for fast-food chains. AB 1228 will raise the minimum wage for workers at national fast-food chains to $20 an hour effective April 1, 2024. The Council may raise the minimum wage for fast food chains annually beginning Jan. 1, 2025, by no more than 3.5% or the annual average change to the U.S. Consumer Price Index for Urban Wage Earners and Clerical Workers, whichever is lower.

National fast-food chains are defined as those with at least 60 limited-service establishments nation-wide "that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services," with limited or no table service. Bakeries that produce bread on the premises and sell it as a standalone menu item are exempt.

Raises for healthcare workers. SB 525 enacts a multi-tiered statewide minimum wage schedule for healthcare workers employed by certain covered healthcare facilities. The new law establishes a comprehensive minimum wage schedule for "covered health care employees," outlining schedules depending on how a facility is classified. The law applies to "covered health care employee," which also encompasses a broad array of positions, from patient care roles, like nurses and physicians, to support positions, such as janitors and clerical workers. The first wave of minimum wage increases will take effect June 1, 2024.

Pay for food handler certification. California Health and Safety Code requires food handlers to obtain a food handler card within 30 days of hire and maintain a valid card for the duration of their employment. To obtain a food handler card, an individual must complete a food handler training course and examination that meets certain requirements. SB 476, which took effect Jan. 1, 2024, requires food facility employers to pay an employee for any cost associated with the employee obtaining a food handler card, considering the time it takes for the employee to complete the training and certification program to be compensable as "hours worked." Moreover, employers must reimburse for necessary expenditures, and employees must be relieved of all other work duties while taking the training course and examination.

A food handler is defined as an individual who is involved in the preparation, storage, or service of food in a food facility, other than an individual holding a valid food safety certificate or an individual involved in the preparation, storage, or service of food in a temporary food facility.

"Willful" or "knowing and intentional" violations. In May 2022, the California Supreme Court issued a decision holding that extra pay for missed meal and rest periods constitutes "wages" and therefore must be reported on statutorily required wage statements under Labor Code section 226 and paid within statutory deadlines when an employee separates from employment under Labor Code section 203. *Naranjo v. Spectrum Security Services, Inc.*, 13 Cal. 5th 93 (2022). The California Supreme Court then remanded the matter to the California Court of Appeals to resolve whether the employer had acted "willfully" in failing to timely pay employees premium pay, and whether its failure to report missed-break premium pay on wage statements was "knowing and intentional" to allow recovery of penalties for the violation. The Court of Appeals ruled in the employer's favor on both counts. *Naranjo v. Spectrum Security Services, Inc.*, 2023 Cal. App. LEXIS 143 (Cal. App. Feb. 27, 2023).

The underlying suit was a class action alleging meal period violations. The plaintiffs sought not only premium wages for the violations but also waiting time penalties and penalties for failure to provide accurate wage statements. Addressing the open questions in the case on remand, the appeals court held that substantial evidence supported the trial court's finding that the employer had presented defenses at trial in good faith for its failure to pay meal premium to departing employees and therefore its failure was not "willful" so as to entitle employees to waiting time penalties. As for alleged wage statement violations under Labor Code 226, the appeals court also held that because the employer had a good-faith belief that it was in compliance with wage statement requirements, the trial court was precluded from finding the violation was "knowing and intentional" and awarding penalties.

In its decision, the appeals court reiterated that the regulations interpreting the California statute for waiting time penalties do not conflict with the statute but act to define terms not defined in the statute. The regulations specifically state that a "good faith dispute" that any wages are due occurs when an employer presents a defense, based on law or fact which if successful, would preclude any recovery on the part of the employee. The appeals court also interpreted the "knowing and intentional language" when it comes to penalties as being willful based on similar language in other statutes that willful is intentional and rejected some federal district court interpretations to the contrary.

The California Supreme Court will take up the case once again, however, to consider whether an employer's good faith belief that it complied with section 226 precludes a finding that its failure to report wages earned was knowing and intentional. The supreme court granted the plaintiff's petition for *certiorari* on May 31, 2023 (Docket No. S279397). The *Naranjo* case is one of several important California wage-hour cases pending on the California Supreme Court docket.

Colorado

COMPS Order #39 in effect. Under COLORADO OVERTIME AND MINIMUM PAY STANDARDS (COMPS) Order #39, effective Jan. 1, 2024, the "one-minute rule" at 1.9.1 is amended to adopt federal de minimis factors for tasks of "under one minute" rather than "one minute or less." The definition of "time worked" includes an activity (or combination of multiple activities consecutively) of less than one minute.

Amended Rule 1.9.1 provides: "whether an employer must compensate an activity (or combination of multiple activities consecutively) of less than one minute depends on the balance of the following factors, as shown by the employer: (A) the difficulty of recording the time, or alternatively of reasonably estimating the time; (B) the aggregate amount of compensable time, for each employee as well as for all employees combined; and (C) whether the activity was performed on a regular basis."

According to the Colorado Department of Labor and Employment, the one-minute rule "always was to exclude tasks measured in seconds, rather than minutes." The purpose of the rule was to ensure that various tasks that were initially covered by federal wage law, but then excluded by the federal Portal-to-Portal Act, are compensable under Colorado law.

Hawaii

Equal pay protections. Effective Jan. 1, 2024, the Equal Pay law is altered to ban pay discrimination on the basis of "any protected category" set forth in the Hawaii Fair Employment Practices Act.

General contractor wage liability. Under Act 47, effective June 1, 2023, general contractors may be liable for unpaid wage debts owed by subcontractors, including interest owed, for the performance of work included in the contract between the general contractor and owner. The general contractor's liability does not extend, however, to penalties, consequential or liquidated damages, or any benefit, fringe benefit, or contribution claims. The law applies to private construction work in the state.

The law also provides that upon request by a general contractor to a subcontractor (and any lower-tier subcontractors under contract with the subcontractor), the subcontractor shall provide payroll records of employees providing labor on the construction job.

Illinois

Equal pay for temp workers. On Aug. 4, 2023, Governor J.B. Pritzker signed into law the Temp Worker Fairness and Protection Act (TWFPA), which makes significant amendments to Illinois' Day and Temporary Labor Services Act (DTLSA). The amendments impose expansive new duties on employers who rely on temporary and day laborers, including the addition of an equal pay provision requiring temporary workers to be paid as much as comparable direct-hire employees.

Under the "equal pay for equal work" provision, a day or temporary laborer assigned to work at a third-party client for more than 90 calendar days must be paid the same rate of pay and equivalent benefits as the lowest-paid directly hired employee of the client with the same level of seniority and performing comparative work. Comparative work means work that requires "substantially similar skill, effort, and responsibility." If no such comparator exists, the laborer must be paid the rate of pay and equivalent benefits of the lowest-paid employee of the client with the closest level of seniority.

The staffing agency may pay the hourly cash equivalent of the "actual cost" of benefits in lieu of providing benefits required under the TWFPA; however, the TWFPA provides no guidance as to how to calculate this cash equivalent. The TWFPA does not apply to temporary or staffing agency workers who perform duties of a "clerical or professional nature" (pursuant to the DTLSA's exclusion of such workers in its definition of "day and temporary labor," which remains unchanged).

On the request of the staffing agency, third-party clients must timely provide all necessary information regarding the job duties, pay, and benefits of its directly hired employees to facilitate the staffing agency's compliance. Failure to do so constitutes a notice violation. An aggrieved party may recover compensatory damages, an additional amount up to $500 for each violation, and attorneys' fees and costs.

The TWFPA initially was to take effect on the day the Governor signed the legislation. However, on Nov. 9, 2023, the Illinois General Assembly passed a measure to delay its effective date until April 1, 2024.

State high court to consider inclusion of bonus. In *Mercado v. S&C Elec. Co.*, 2023 IL App (1st) 220020, the First District Appellate Court addressed the question of whether the trial court properly dismissed plaintiffs-employees' class action against their employer, where the plaintiffs alleged that the defendant violated the Illinois Minimum Wage Law by calculating overtime that failed to include certain bonuses and incentive payments that the plaintiffs received (*i.e.*, failing to include these in calculating the plaintiffs' regular rate of pay). In affirming the trial court's decision, the appellate court held that bonuses that are not measured by or derived from hours worked are excluded from calculating rate of overtime pay for hourly workers.

On Sept. 27, 2023, the Illinois Supreme Court granted leave to appeal this appellate court's decision. The appeal to the Supreme Court remains pending. On Dec. 20, 2023, the Illinois Department of Labor and Attorney General filed a joint amicus brief seeking reversal of the appellate court's decision.

Evanston fair workweek law. The city of Evanston, Illinois has adopted an ordinance requiring certain employers in designated industries to give workers a 14-day notice of schedule changes and compensate them with "predictability pay" if any changes occur less than 14 days before the first scheduled shift. Evanston's Fair Workweek Ordinance took effect on Jan. 1, 2024.

The ordinance requires employers to give advance notice of work schedules; requires payment of predictability pay if an employer changes a work schedule less than 14 calendar days before the first shift of a workweek starts; creates a "right to rest" and allows employees to decline to work scheduled hours that begin less than 11 hours after their last shift ended; requires employers to provide new employees with a good-faith estimate of the employee's work schedule for the first 90 days of employment; and requires employers to offer additional shifts of work to its own employees or long-term, temporary employees, if they are qualified to do the work, before offering the work to temporary or seasonal workers.

Employers are covered under the ordinance if they directly or indirectly (including through the services of a temporary services or staffing agency) employ or exercise control over 100 or more employees and are primarily engaged in a covered industry. Covered industries are hospitality, retail, warehouse service, manufacturing, building services, and food service and restaurants. Franchisees with fewer than 100 employees but are associated with a franchisor or a network of franchises with more than 30 locations globally also are covered.

A "covered employee" is a person who performs at least two hours of work during a period of seven consecutive days within the geographic boundaries of the City of Evanston and qualifies for minimum wage under the Illinois minimum wage law.

The ordinance mandates additional recordkeeping requirements for employers, imposes civil fines for violations, provides a private right of action for employees, and includes anti-retaliation provisions.

Maine

Pay frequency exemption. Maine's pay frequency statute requires that employees be paid "at regular intervals, not to exceed 16 days." 26 MRSA §621-A, sub-§1. Under an amendment to the statute that took effect Sept. 19, 2023, salaried employees are exempt from this requirement. Members of an employer's family, employees of limited liability partnerships, and employees of S corporations are also now exempt from this requirement.

Pay equity protections. Maine's Equal Pay Law (26 MRS 628) was amended by L.D. 1703, signed on June 22, 2023 to prohibit pay discrimination on the basis of race. Before the amendment expanding the law, the measure had only barred pay discrimination on the basis of sex.

Massachusetts

Disputed commissions were not wages. The U.S. Court of Appeals for the First Circuit affirmed a Massachusetts district court's decision on summary judgment that an employer did not violate the Massachusetts Wage Act (MWA) or state common law when it adjusted commission incentives allegedly due a former salesperson, in accordance with the clear terms of his contract. *Klauber v. VMWare, Inc.*, 2023 U.S. App. LEXIS 21936 (Aug. 11, 2023). The commissions had not become "due and payable" and they did not meet the definition of wages within the meaning of the Wage Act. The contract was also not unenforceable under the MWA's "special contract" provision.

A former salesperson for a computer software company filed suit in state court (which was removed to federal court) alleging that the defendant unlawfully reduced an earned $429,000 commission payment to $209,000, and separately denied him a $32,000 commission to which he was entitled. The plaintiff was paid a salary as well as commissions. His commission agreement expressly stated that the company's sales leadership had sole discretion to adjust the commission payments for "exception transactions" and, for sales valued at more than $10 million, commissions had to be authorized by the sales compensation committee. These were the types of "atypical transactions" at issue. Given these contractual conditions on commission payment, the district court found that the disputed commissions were not wages to which he was entitled within the meaning of the MWA.

A three-judge panel affirmed. "It is clear that the terms and conditions agreed to by the parties set valid contingencies that had to be met before a commission could be earned," the appeals court explained. "Until those contingencies were satisfied, any potential commissions did not become due and payable and, thus, did not qualify as 'wages' within the purview of the Wage Act."

The appeals court also affirmed the district court's finding that the commission contract was enforceable under the MWA. The plaintiff contended that the contract left the employer with "unfettered authority" to withhold his commissions. Under the contract, however, commissions could be adjusted only for exception transactions, and these transactions were defined by specific criteria. "So viewed," the panel wrote, "the fact that there was discretion in the calculation of commission adjustments for that limited class of transactions does not allow the company the free rein over commissions that the plaintiff ascribes to it."

Michigan

Supreme court hears voter referendum dispute. During the summer of 2018, Michigan voters approved two ballot initiatives for the fall ballot. The Improved Workforce Opportunity Wage Act significantly raised Michigan's minimum wage and gradually eliminated the tip credit for tipped employees. The Paid Medical Leave Act would expand employer obligations to provide paid sick leave. The initiatives went to the Michigan legislature, who were to: (1) Reject the initiatives, in which case they would be placed on the November 2018 ballot for the voters to either approve or disapprove; (2) Adopt and enact them without any modifications; or (3) Propose an alternative, which would then be placed on the ballot alongside the initiative, with the option receiving the most votes becoming law.

The Michigan legislature adopted and, within the same legislative session, amended the ballot initiatives, revising key provisions in the process—and eliminating the ability of the voters to decide on either the original ballot initiatives or the amended versions passed by the legislature. The Michigan Court of Claims held that the legislature's actions violated the Michigan Constitution. The court voided the amended laws adopted by the legislature and ordered reinstatement of the ballot initiatives as originally presented.

However, in January 2023, the Michigan Court of Appeals reversed that decision, concluding that the legislature did in fact possess such authority. The Michigan Supreme Court granted *certiorari* to address (1) whether the legislature violated the Michigan Constitution when it enacted the voter initiatives into law and then amended those laws in the same legislative session, and (2) if so, whether the voter initiatives remain in effect. On Dec. 7, 2023, the Supreme Court heard oral argument. The case is *Mothering Justice et al. v. Attorney General and State of Michigan,* No. 165325.

Unless the Michigan Supreme Court rules otherwise, the Michigan minimum wage remains at $10.33 per hour and the tipped employee minimum wage remains at $3.93 per hour (as of Jan. 1, 2024). Under the current paid sick leave law, covered employers must provide eligible employees with a maximum of 40 hours of paid sick time, with such employees accruing one hour of sick leave for every 35 hours worked.

Minnesota

Construction worker wage protection. Minnesota's Construction Worker Wage Protection Act (CWWPA), which took effect Aug. 1, 2023, holds contractors liable for unpaid wages, fringe benefits, penalties and liquidated damages owed to construction workers by a subcontractor under the contractor. The law provides that a contractor can request payroll records to review payment of wages and fringe benefit contributions, and related information from subcontractors, which are then required to provide the requested information and records within 15 days of the request.

CWWPA does not apply to prevailing-wage projects or to contractors or subcontractors that are a signatory to a collective bargaining agreement with a building and construction trade labor organization that contains an unpaid wages grievance procedure as well as a provision for collection of unpaid fringe benefit contributions. The CWWPA also does not apply to home improvement contracts or to construction work on single-family homes.

Nevada

Payment of wages to laid-off workers. Under the Nevada Final Pay Law, an employee who is discharged must immediately be paid wages and compensation earned and unpaid at the time of discharge. If an employer fails to pay the discharged employee's wages within three days after the wages become due, then the wages and compensation accrue at the same rate until the wages are paid, or for 30 days post-discharge (whichever is less).

SB 147, which took effect July 1, 2023, amended the law so that these provisions also apply to employees who are temporarily laid-off (*i.e.*, placed on "nonworking status"). The statute defines "nonworking status" as "the temporary layoff of an employee whereby the employee remains employed and may be called back to work at a future date."

The definition of "nonworking status," and thus the immediate payment requirement, does not apply to employees who are placed on suspension pending an investigation or placed on suspension pursuant to a disciplinary action. Nor does it apply to employees who are placed on-call for available work or who are approved to take a leave of absence.

New Jersey

Temp "Bill of Rights." New Jersey's recently enacted "Temporary Workers' Bill of Rights" provides temporary workers significant rights regarding their employment through temporary help service firms. Most of the law's provisions, including its wage and hour requirements, took effect Aug. 5, 2023.

The Bill of Rights applies to temporary laborers that contract for employment with a "temporary help service firm," defined as any person or entity who employs individuals for the purpose of assigning those individuals to assist the firm's customers in the handling of temporary, excess, or special workloads and which is responsible for the payment of wages or salaries, federal social security taxes, state and federal unemployment insurance, and workers' compensation insurance.

Under the Bill of Rights, temporary laborers in certain "designated classification placements" who are assigned to work for third-party clients may not be paid less than the same average rate of pay and equivalent benefits as a permanent employee of the third-party client performing the same or substantially similar work. "Designated classification placement" means an assignment of a temporary laborer by a temporary help service firm to perform work in certain occupational categories such as construction laborers, food preparation and serving, building and grounds cleaning and maintenance, production, personal care and service, installation, maintenance, and repair occupations. The law also requires temporary help service firms provide temporary laborers with information, in writing, regarding the assignment on forms prepared by the New Jersey Department of Labor as well as obligations on the third-party client to provide information to the temporary help service firms to help determine the appropriate wage rates for the temporary laborers. Violations of these requirements subject the firm to penalties of up to $5,000. Also, if a laborer is contracted to work at a third-party client's worksite but is not used by the third-party client, the laborer will be paid by the temporary help service firm for at least four hours of pay at the agreed-upon rate. The firm can avoid this by contracting for the laborer to work at another location during the same shift. Even then, the firm must pay the laborer a minimum of two hours of pay at the agreed-upon rate.

Upon request by the laborer, the firm must hold all daily wages of the laborer and make weekly, bi-weekly, or semi-monthly payments in a single check or, if requested by the laborer, through direct deposit. The right to request weekly, bi-weekly, or semi-monthly checks must be posted in a conspicuous place at any firm that makes daily wage payments.

Among other wage protections, whenever wages are paid to a temporary laborer, the temporary help service firm must provide the laborer a detailed itemized statement that includes the name, address, and telephone number of each third-party client at which the temporary laborer worked; the number of hours worked by the temporary laborer at each third-party client each day during the pay period; the rate of pay for each hour worked, including premium rates or bonuses; the total pay period earnings; and the amount and purpose of each deduction made from the temporary laborer's compensation. The firm also must provide each laborer an annual earnings summary not later than February 1 of each year. The firm must give laborers notice of the availability of the annual earnings summary, either by including a notice at the time of wage payment or by posting a notice in a conspicuous place in the public reception area.

New York

Minimum wage for app drivers. New York City is the first major U.S. city to implement a minimum pay rate for app-based restaurant delivery workers. Delivery platform companies operating in New York City must pay delivery workers the minimum pay rate of at least $17.96 per hour after industry challenges to the measure were unsuccessful.

Under the new regulations, apps that pay for all the time a worker is connected to the app (*i.e.*, time waiting for trip offers and trip time) must pay at least $17.96 per hour (approximately $0.30 per minute), not including tips. This rate will increase to $19.96 per hour when it is fully phased in on April 1, 2025, with an annual adjustment for inflation. Apps that pay only for trip time (*i.e.*, time from accepting a delivery offer to dropping off the delivery) must pay at least approximately $0.50 per minute of trip time, not including tips. Apps will have some flexibility under the new rules. They can choose how to pay workers the minimum rate. They can pay delivery workers per trip, per hour worked, or develop their own formulas.

Larceny charges for wage theft. Employers found to have committed minimum wage or overtime violations face stiffer penalties after the New York Penal Law was amended to add "wage theft" to the types of activities included in the crime of larceny.

Under the new law, effective Sept. 6, 2023, employers can be charged with larceny if they do not pay wages at the minimum wage rate and overtime rate, or the promised wage rate (if greater), to an employee for work performed. The law allows aggregation of all nonpayments or underpayments to one person from one person into one larceny count. The law also allows aggregation of all nonpayments or underpayments from a workforce (defined as a group of one or more persons who work in exchange for wages) into one larceny count.

"Clerical worker" redefined. Governor Kathy Hochul signed a bill amending the definition of "clerical and other worker" under the New York Labor Law. The legislation, which takes effect on March 13, 2024, modifies the minimum weekly earnings that a bona fide executive, administrative, or professional employee must receive to be excluded from the category of "clerical and other worker," increasing that amount from $900 to $1,300 per week. Only employees who meet the revised exclusion can be subject to mandatory direct deposit.

Additionally, those who meet the revised exclusion threshold are excluded from the provisions of the Labor Law providing the right to seek recovery of "benefits or wage supplements" (which include, but are not limited to, reimbursement for expenses; health, welfare, and retirement benefits; and vacation, separation, or holiday pay). The Department of Labor's current wage claim form also excludes employees who meet this definition from seeking recovery for any wage claims through the state.

Extra working hours for nurses. Under two amendments to its law regulating consecutive hours of work for nurses (Labor Law Section 167), New York has established monetary penalties for violating the law and placed reporting requirements and other restrictions on healthcare employers that require nurses to work beyond their regularly scheduled hours.

Section 167 restricts healthcare employers from requiring nurses to work beyond their scheduled work hours (with certain exceptions, such as emergencies, or when a nurse is actively engaged in a surgical or medical procedure and their continued presence is needed to ensure the health and safety of the patient). A March 3, 2023, amendment (Assembly Bill 970) requires a healthcare employer to self-report to the New York State Department of Labor (NYSDOL) and Department of Health when it mandates additional work hours under one of the exceptional circumstances, if that mandate exists for at least 15 days in a month. In addition, the March amendment provides that a healthcare employer that requires additional work hours under one of the exceptions for at least 45 days in any consecutive three-month period must submit an explanation for its need to do so and must provide an estimate of when the circumstances requiring the extra work hours will end.

A December 2022 amendment to Section 167 established monetary penalties for violations of the Section, to be assessed by the NYSDOL. Those penalties are $1,000 for a first violation, $2,000 for a second violation within 12 months, and $3,000 for subsequent violations within 12 months. The March 2023 amendment made these monetary penalties permissive, rather than mandatory. The December 2022 amendment also required the employer to pay the affected nurse(s) a 15% premium for the hours worked in excess of their scheduled hours. The March 2023 amendment eliminated the percent premium payment to employees. However, it added a civil penalty of not more than $500 for violation of the new reporting requirements.

Pay frequency lawsuits. New York employers continued to be targeted with frequency-of-pay lawsuits alleging "manual workers" were not paid weekly. Such lawsuits can result in liquidated damages equal to one-half of the alleged "late" paid wages. Hundreds of lawsuits were filed following a decision from the Appellate Division, First Department, in 2019 holding that violations are subject to a private right of action. *Vega v. CM & Assocs. Constr. Mgmt., LLC*, 107 N.Y.S.3d 286, 287-88 (1st Dept. 2019). But, in April 2023, the Appellate Division, Second Department, heard oral argument on the same issue and, in January 2024, it rejected that holding and held, relying in part on an intervening decision from the New York Court of Appeals, that no private right of action exists for selecting the wrong frequency of pay — *i.e.*, paying biweekly instead of paying weekly. *Grant v. Glob. Aircraft Dispatch, Inc.*, 2024 NY Slip Op 00183 (App. Div. 2nd Dept., Jan. 17, 2024).

North Carolina

Local measures preempted. In the most recent budget passed in September 2023, the North Carolina General Assembly included a prohibition of any local ordinances adopted by counties or municipalities establishing minimum wage, overtime, or leave laws that are different from the North Carolina Wage and Hour Act (NCWHA). Any such laws adopted by counties or municipalities are unenforceable.

Puerto Rico

Employment Law Reform restored. The First Circuit affirmed a federal district court's decision that declared null and void legislation reversing in part Puerto Rico's 2017 Employment Law Reform. *Financial Oversight Board v. Hernandez Montañez et al.*, 2023 U.S. App. LEXIS 20868 (Aug. 10, 2023).

The 2017 Puerto Rico Employment Law Reform was the most significant transformation to Puerto Rico's employment landscape in decades. Among the law's sweeping changes were provisions addressing daily overtime pay, flexi-time agreements, and "makeup time" (allowing an employee to work up to 12 hours in a day to make up time missed for personal reasons during the week without incurring overtime obligations).

Puerto Rico Act 41-2022, enacted in the summer of 2022, reversed the 2017 reforms in part, changing the rules governing meal periods, weekly day of rest, vacation and sick leave accrual, and the way the annual Christmas bonus is accumulated, among others. However, on March 3, 2023, a federal court ruled Act 41-2022 violated federal law and, as such, declared it null and void ab initio and enjoined the Governor and any other individuals from taking steps to help private parties enforce Act 41-2022.

However, the Puerto Rico Government appealed the decision to the First Circuit, which affirmed in whole the lower court's decision to nullify Act 41-2022. The petition for panel rehearing and for rehearing *en banc* was denied on Sept. 21, 2023. Consequently, Puerto Rico employment laws continue to be governed by the 2017 Employment Law Reform.

Rhode Island

Penalties for wage payment violations. The Rhode Island Payment of Wages Act has been amended to allow for criminal felony penalties against employers, or their agents, who knowingly and willfully commit wage and hour violations; and civil penalties against employers, as well as criminal penalties against construction industry employers who misclassify employees as independent contractors. The amendment became effective Jan. 1, 2024. Each pay period in which an employer failed to timely pay wages is a separate civil offense.

Pay equity law. Effective Jan. 1, 2023, Rhode Island's Pay Equity Law broadened pay discrimination protections beyond sex to include race, color, religion, sexual orientation, gender identity or expression, disability, age, and national origin.

South Carolina

Notice of wage deductions. The Fourth Circuit held that the South Carolina Payment of Wages Act (SCPWA) does not require an employer to provide detailed advance notice of the amount of wage deduction to satisfy the statutory notice requirements for taking deductions from pay. *Sawyer v. Tidelands Health Asc, LLC*, 2023 U.S. App. LEXIS 14880 (June 15, 2023) (unpublished).

A registered nurse who was discharged from the defendant hospital filed suit asserting a number of claims, including that her employer violated the SCPWA by deducting $261.71 from her final paycheck toward the balance of her outstanding hospital bill, in accordance with the Wage Deduction Policy (WDP) she agreed to pursuant to her employment.

The SCPWA requires employers to provide employees with notice at the time of hire of the normal hours and wages, time and place of payment, and the deductions to be made from wages. The plaintiff alleged that the WDP was not compliant on its face because it did not provide notice of the amount of the deduction to be taken and the time that the deduction would be taken. When she signed the policy upon hire, she argued, she could not have known the amount of deduction the employer would take because she had not incurred the debt, and she would not know when the deduction would be taken because, upon hire, employees typically don't know when their last date of employment will be.

The district court awarded summary judgment in the hospital's favor, finding that the WDP was sufficient notice under the statute because the policy explains how it calculates deductions and provides a list of examples of deductions it may take, including the "cost of patient services rendered." The Fourth Circuit panel affirmed, holding that a generic notice provided to employees at the time of hire that the employer reserved the right to deduct certain financial obligations from the employee's final pay was sufficient, even if the debt for which the deduction was taken had not yet been incurred at the time of notice.

Virginia

Subminimum wage for employees with disabilities. The state of Virginia will eliminate the subminimum wage for individuals with disabilities under legislation signed by Governor Glenn Youngkin on April 12, 2023. Employers will be required to pay individuals with disabilities the standard minimum wage rate. However, employers that employed individuals with disabilities prior to July 1, 2023, and were authorized to pay a subminimum wage to those employees prior to July 1, 2023, under an FLSA certificate exemption, are grandfathered in through July 1, 2030, when the exclusion is eliminated entirely.

Washington

Tukwila labor ordinance. The City of Tukwila, Washington, has enacted a Labor Standards Ordinance including a "Fair Access to Additional Hours of Work" provision, effective July 1, 2023, which requires covered employers to offer additional hours of work to qualified part-time, non-exempt employees before hiring new employees or subcontracting out the work (including to temp or staffing agencies). Employers need not offer additional work if the additional hours would amount to overtime and require compensation at the overtime rate.

A "covered employer": 1) employs at least 15 employees regardless of where those employees are employed, or 2) has annual gross revenue over $2 million generated within the city limits of the City of Tukwila. Enforcement provisions impose posting, recordkeeping, and certification requirements and include a private right of action. Also, the municipality may issue citations, order injunctive relief, or deny, suspend, or revoke the business license of employers that violate the ordinance.

The ordinance also increases the minimum wage (in phases, for mid-sized employers).

Wisconsin

Unpaid lunch break was lawful. The Seventh Circuit held that an employee's meal periods were not compensable under Wisconsin's Wage Payment and Collection Laws, even though she was clocked out for less than 30 minutes, when the employer provided a one-hour period free from duties and instructed employees to take the full meal period. *Wirth v. RLJ Dental, S.C.*, 2023 U.S. App. LEXIS 2503 (Jan. 31, 2023).

The employer, a dental office, closes each day for lunch from 1:00 p.m. to 2:00 p.m. Employees were expected to take an hour-long lunch break during this time, and were free to leave the office. The employer's handbook clearly states employees were to clock out for the lunch hour and that lunch periods are unpaid. However, one employee regularly clocked out for less than 30 minutes, even though her duties did not prevent her from taking a lunch hour. She was repeatedly told to take full lunch breaks but ignored these instructions, saying she did some "research" and found out that she could not be forced to take the full lunch period. Despite the handbook violations, the employer paid the employee for the entire time she was clocked in during the lunch hour on the 89 occasions she did not take the full one-hour lunch period. The employee sued, arguing that the employer had to pay her for the entire break period, including the time she was clocked out and admittedly not working.

Under Wisconsin law, employers must pay employees for breaks less than 30 minutes. However, they need not compensate employees for meal periods of 30 minutes or more, provided that the employee is completely relieved from duty. Here, the employee tried to transform her non-compensable meal period into a compensable rest period by taking less than 30 minutes. The district court found the employer did not violate the law, and the appeals court affirmed, finding that the employer was not obligated to pay the employee for the time she was off the clock.

As the three-judge panel explained, the employee's election to take a break of less than 30 minutes is not determinative. "The Wisconsin regulatory scheme focuses on what the employer provided, not what the employee elected." Because the employer provided 30 minutes or more for lunch during which the employee was fully relieved from duty, it had no obligation to pay the employee for the time she was off the clock.

Minimum Wage Increases

The following state minimum wage increases went into effect Jan. 1, 2024, unless otherwise noted. States marked with an asterisk (*) also have city or other local minimum wage increases for 2024. Several states have different minimum wage rates for youth workers, or workers in specific industries. Contact a Jackson Lewis attorney for details on local or non-standard minimum wage rates.

Alaska	$11.73
Arizona*	$14.35
California*	$16.00
Colorado*	$14.42
Connecticut	$15.69
Delaware	$13.25
Dist. of Columbia	$17.00 (as of 7/1/23)
Florida	$12.00 (as of 9/30/23)

Hawaii	$14.00
Illinois*	$14.00
Maine*	$14.15
Maryland*	$15.00
Michigan	$10.33
Minnesota*	$10.85 (Large employers)
	$8.85 (Small employers)
Missouri	$12.30
Montana	$10.30 (Large employers)
Nebraska	$12.00
Nevada	$11.25 (w/out health insurance)
	$10.25 (w/health insurance)
New Jersey	$15.13
	$13.73 (Small employers)
New Mexico*	Las Cruces $12.36
New York*	$15.00
Ohio	$10.45 (Large employers)
Oregon*	$14.20 (as of 7/1/23)
Puerto Rico	$9.50 (as of 7/1/23)
Rhode Island	$14.00
South Dakota	$11.20
Vermont	$13.67
Washington*	$16.28

Minimum Salaries for the White-Collar Exemptions

The following state minimum annual salaries for the Executive, Administrative, and Professional (white-collar) exemptions became effective on Jan. 1, 2024. Contact a Jackson Lewis attorney for additional details.

Alaska
$938.40 ($48,796.80/year)

California
$66,560/year

Colorado
$1,057.69/week ($55,000/year)

Maine
$816.35/week ($42,450.20/year)

New York

- $1,200/week ($62.400/year) in New York City and Nassau, Suffolk & Westchester Counties
- $1,124.20/week ($58,458.40/year) in the remainder of the state

[Applicable to Executive and Administrative exemptions only; Professional exemption follows federal law]

Washington
$1,302.40 ($67,724.80)

Thank you for your interest in the

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Contacts

Jeffrey W. Brecher

Principal and Office Litigation Manager

Long Island

631-247-4652

Jeffrey.Brecher@jacksonlewis.com

Justin R. Barnes

Office Managing Principal

Atlanta

404-586-1809

Justin.Barnes@jacksonlewis.com

Lisa A. Milam

KM Attorney

Chicago

312-787-4949

Lisa.Milam@jacksonlewis.com