306:Hot Topics in Wage & Hour Law

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Faculty Biographies

Catherine F. Duclos

Catherine F. Duclos is currently deputy general counsel for Thomson Inc. based in Indianapolis. Thomson, along with its subsidiaries, is a leading manufacturer and distributor of consumer electronic products, including televisions, satellite set-top boxes, stereo equipment, DVD players, cable modems, telephones, and professional video equipment. Its products, which are sold in more than 100 countries, include such brands as RCA, Jensen, Acoustic Research, Grass Valley, and Technicolor. Thomson has over 70,000 employees worldwide.

Ms. Duclos has spent her entire legal career practicing in the area of employment law. After law school, she immediately joined the labor and employment law firm of Fisher & Phillips in Atlanta, where she focused her practice on representing employers in discrimination and wage and hour litigation. Ms. Duclos, along with several other attorneys, left the firm to open a new practice representing individuals in employment litigation.

Ms. Duclos received a BS from Indiana University School of Business and JD, cum laude, from Indiana University School of Law.

Melinda Socol Herbst

Melinda Socol Herbst is currently chief counsel/senior vice president-employment at Met Life in New York City managing a team of attorneys providing coverage for the global enterprise with respect to all aspects of employment advisory and litigation matters, in addition to executive compensation, ERISA, and employee benefits plans and related litigation.

Prior to joining Met Life, Ms. Socol Herbst was senior vice president/executive director, associate general counsel at Morgan Stanley managing a team of attorneys providing employment, litigation, and regulatory/compliance support to a variety of global business units. She spent 12 years in private practice, including at the law firm of Davis Polk and Wardwell before going in-house to Morgan Stanley.

She has published several articles relating to employment issues and is a regular speaker at internal and external industry/bar association conferences.

Ms. Socol Herbst received her BA, summa cum laude and Phi Beta Kappa, from City College of New York and her JD from Fordham University Law School.

Martha M. Rose

Martha M. Rose is corporate counsel for Clear Channel Communications. Her responsibilities include providing legal counsel in the areas of labor and employment law for a geographic region of 20 states. In addition, she manages all litigation which arises in that region.

Prior to joining the Clear Channel legal department, Ms. Rose practiced with a labor and employment boutique in Fort Worth, and served as in-house counsel for several years for Plains Cotton Cooperative Association in Lubbock, Texas.

She graduated with honors from Texas A&M University and received her JD from the University of Texas, School of Law. Ms. Rose is board certified in labor and employment law in the state of Texas.

ACC WAGE & HOUR HOT TOPICS

Melinda S. Herbst

Martha M. Rose

Catherine F. Duclos

Background and Overview of Significant Changes

- Background and Overview of Significant Changes (Possible Side-By-Side Comparison Chart) – DOL changes after 50 years- while intended to create less uncertainty, it is likely that will cause increased litigation at the outset.
- Senate passed the Amendments but guaranteed overtime to certain jobs; Senator Harkin's Bill to grandfather current non-exempt positions also making its way through Senate – status?

A. Compensation Tests – Minimum Salary basis to maintain exempt status.

B. Salary Basis Test raised for executive, administrative, professional and computer exemptions from $150 or $170 a week to $455 a week ($23,660 a year) Raised from $425/week in Proposed Rule) . For computer exemption still minimum of $27.63/hour. No compensation test for outside sales employees.

C. Highly Compensated Employee Exemption – automatic exemption if employee guaranteed minimum $100,000 a year total comp (including bonuses/commissions) but must "customarily and regularly" perform any one or more of the exempt duties/responsibilities of an executive, administrative or professional employees" (raised from $65,000 in Proposed Rule).

D. Salary Docking Permitted for salaried exempt employees for unpaid disciplinary suspensions of one or more full days for violating clearly communicated written workplace conduct rules/policies applicable to all employees (eg. Safety rules; harassment policy/workplace violence). Salaried employees on FMLA leave do not have to be paid for intermittent absences.

E. Expanded "Safe Harbor" and Window of Correction – Protects job 's exempt status even if employer has made isolated and inadvertent improper deductions provided that once discovered, employer avails themselves of "window of correction" and the affected employees are reimbursed salary. Instead of losing exemption across the board, employer will lose exemption only for employees from whom improper salary deductions made and only for time period thereof. "Safe Harbor" provision permitted by new regulations permits employer to shift burden to employees to identify and seek correction of improper deductions. To take advantage, employer must have clearly communicated written policy prohibiting improper pay deductions and a complaint mechanism to bring claims for improper deductions to employers' attention. Provided that employer reimburses employees therefore and makes good faith commitment to comply in future, employer will not lose exemption for any employees unless employer willfully violates by continuing improper deductions after employee complaints. Regs suggest policy be provided at time of hire, in employee handbook or by posting on employer Intranet. (Provide sample policy/language).

F. Additional pay permitted for exempt employees working beyond 45 hours a week (ie straight time or bonus pay).

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Exempt Duties Tests Changed

A. For all exemptions, defines "primary duty" as the principal, main, major or most important duty performed, not necessarily duty employees spends more than 50% of time performing. Employees required to customarily and regularly perform the essential duty of the applicable exemption "Customarily and regularly" defined as with a "greater frequency than occasional but which, of course, must be less than constant."

B. Various Exemption Tests Modified – "Short" and "Long" Duties Tests Replaced.

1. Executive Exemption – Continues requirement that primary duty be management of enterprise, recognized dep't or subdivision and customarily and regularly direct work of 2 or more people; and (new) must have authority to hire or fire , or make recommendations as to hire, fire, advancement or change of status of other employees given particular weight. "Particular weight" depends upon whether it is part of employees' duties to make such recommendations; frequency with which such recommendations sought and followed. Employee can qualify and still perform both exempt and non-exempt duties if meets primary duty definition.

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2. Administrative Exemption – Attempts to eliminate "discretion and independent judgment" prong failed in final version. Under new reg, primary duty must be performance of office or nonmanual work directly related to management or general business operations of employer or its customers and must include exercise of discretion and independent judgement with respect to matters of significance (Give Examples of jobs generally meeting new test – HR Managers; Team Leaders of major business projects; insurance claims adjusters; Financial Services Industry Employees who assess customers' needs and advise on relative merits of investment options (not just sells financial products); Executive Ass'ts to senior executives; purchasing agents who bind company; Examples of non-exempts: routine inspectors/examiners/comparison shoppers). "Discretion and Independent Judgment re Matters of Significance" – primary duty must include comparison and evaluation of possible courses of conduct and acting or making decision after possibilities considered and work is significant, substantial, important or of consequence; Can also include recommendations and decisions can be reviewable by others. Inquiries for employer to assess: whether employee has authority to commit employer in matters of significant financial impact or to waive or deviate from established policies/procedures without prior approval or can negotiate and bind company on significant matters; is involved in planning business objectives; investigates and resolves matters of significance on behalf of management and represents company in handling complaints/arbitrations or resolving grievances. Can exercise discretion/independent judgment if consults manual or technical materials for guidance but not if manual prescribes employee's discretion to deal with circumstances.

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3. Learned Professional Exemption – primary duty of work requiring advanced knowledge in field of science or learning customarily acquired by prolonged course of specialized intellectual instruction – NOT mechanical arts/skilled trades (could include specialized paralegals; dental hygienists; funeral directors/embalmers; executive chefs; certified athletic trainers). New "Creative Professional Exemption" expanded to include work requiring originality, in addition to work requiring invention, imagination or talent in a recognized field of artistic or creative endeavor. Teachers have separate Learned Professional exemption.

4. Computer Employee Exemption – same – primary duty consists of application of sytems analysis techniques/procedures, including consulting with users to determine hardware, software or system functional specifications; design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; design, documentation, testing, creation or modification of computer programs relating to machine operating systems; or a combination of aforementioned duties, the performance of which requires the same level of skills. (does not include repair or manufacture of computer hardware or related equipment).

5. Outside Sales Exemption – prior test which limited time employee could perform non-sales work deleted; Now primary duty is making sales or obtaining orders or contracts for services and employee customarily and regularly engaged away from employer's place of business in performing primary duty. (expressly excludes employees who sell by mail or Internet unless means are simply adjunct to personal calls on customers).

C. Assess applicability of state law exemption definitions which may differ from and be more stringent than new federal rules. Only those states with laws incorporating federal definitions by reference will automatically change to the new exemption definitions; others may retain current definitions. (eg, California are not incorporating new exemptions; Illinois enacted statute giving employees benefit of higher salary threshold but retain FLSA regulations as they previously existed in other respects; A number of other states have not changed current laws to incorporate or conform with new federal regulations so employers will have to apply exemptions affording greater protection to employees).

Recommended Actions For Employers

- Recommended Actions For Employers – Rules currently to take effect on August 23, 2004 (120 Days after publication of new Rules in Federal Register)

A. Review employee payroll for compliance with higher salary basis level. Identify any currently classified exempt positions paid below new salary basis of $23,660 a year (choice of either raising salary and making exempt or if salary remains, treating as non-exempt entitled to overtime).

B. Review payroll for possible Highly Compensated employees (any currently classified non-exempt position paid minimum guaranteed total compensation of $100,000. a year should be changed to exempt status).

C. Review payroll practices for salary levels, partial day salary deductions and other salary basis test violations. Fix violations if exist and consider making restitution for up to at least 2 years under window of correction.

D. Implement Safe Harbor Provision if Prepared to Correct Problems and Address Complaints.

E. Consider training for HR and Payroll/Compensation Departments.

F. Review all currently classified executive exemption positions to assess whether employees have hire/fire authority or whether their input in those matters given weight.

G. Review all borderline exempt and non-exempt positions (their job duties and compensation package) in anticipation of Final Rules to determine whether employees are properly classified and are eligible/ineligible for overtime pay.

H. In particular, review occupations that new regulations now seek to clarify

I. Utilize FLSA amendments as opportunity to correct and reclassify workers to exempt or non-exempt status entitled to overtime and subject to record keeping requirements; Easier to reclassify now due to government rule changes without raising "red flags" to employees. Might consider broader self-audit at direction of law department or outside counsel.

J. Document any reclassifications, including reasons (how duties do or don't meet tests).

K. In anticipation of Final Rule, communicate changes in white collar exemptions to appropriate HR, management, support and line staff.

L. As needed, revise policies, procedural manuals/employee handbooks (hard copy and on-line) to communicate changes including disciplinary and salary docking/deductions policies.

M. Suggestions for how to communicate reclassifications to affected exempt/non-exempt employees.

Impact of FLSA Amendments

A. Creation of greater certainty under federal law through further clarification of exemptions and rules

B. Increased wage claims/litigation after implementation until further guidance given.

C. Depending upon company/industry, many employees will change job classification and exempt/non-exempt status for first time in 55 years.

D. Increase/decrease in employer payroll costs.

Wage & Hour Class Actions: Learning The Basics Spotting The Issues

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Lawsuits Abound From Workers Seeking Overtime Pay

By Michael Orey

WHAT DO insurance-claims adjusters, chicken processors and copy-machine technicians have in common?

They are among tens of thousands of workers round the country who lawsuits claim were heated out of overtime pay by their employers. mployment attorneys say the number of these ases has exploded recently, partly because plain- ffs' lawyers, seeing the potential for big payouts, ave rushed to file claims on behalf of large roups of employees.

Last year, the number of so-called collective ac- ions brought under the Fair Labor Standards Act, he federal statute that sets wage and hour rules, ex- eeded the number of class actions alleging job dis- rimination. "It's the complaint du jour," says avid Ross, an attorney in the New York office of eyfarth Shaw, which represents employers.

The stakes can be high. Last year alone, SBC ommunications Inc.'s SBC Pacific Bell settled a uit for $26 million, Coca-Cola Bottling Co. of os Angeles settled a suit for $20.2 million, and Bank of America Corp. settled a suit for $22 million. In July, a state-court jury in Oakland, Calif., hit a Farmers Insurance Group unit with a $90 million verdict for failing to pay overtime to 2,400 of its claims adjusters in the state. (Farmers is appealing.) Farmers also faces claims in federal district court in Portland, Ore., on behalf of its adjusters nationwide.

Wal-Mart Stores Inc. is defending overtime cases in 28 states. And in March, Minolta Business Solutions Inc. was sued in federal district court in New York by technicians seeking to represent people who service copy machines.

Overtime rules have been on the books since the 1930s, generally requiring payment of time-and-a-half to anyone working more than 40 hours a week. Laws in many states contain additional protections. The federal law, however, carves out dozens of exemptions for certain workers, including those deemed "managerial," "administrative" or "professional."

Plaintiffs' lawyers say companies improperly categorize employees to save on labor costs. "If you walk into to a lot of chain restaurants, you'd be astonished at how many 'managers' they have, most of whom are waiting on tables," says Richard Seymour, a Washington, D.C., attorney who represents workers. Similar disputes have arisen in newsrooms, including that of The Wall Street Journal, published by Dow Jones & Co. The issue often involves whether reporters are considered professionals. Camille Olson, a Seyfarth attorney who represents newspapers, says the answer depends on whether a paper is national or regional and how much a reporter's duties involve such things as analysis and expertise.

Farmers Insurance classified its claims adjusters as "administrators," when in fact, plaintiffs maintained they were more like production workers, with little discretion in how they did their work. This year, a New Jersey state appeals court found that Pepsi Bottling Group Inc. had improperly failed to pay overtime to delivery-truck drivers and customer representatives in New Jersey. The company had classified these employees as "outside" sales people, another exempted category under the overtime law. Spokeswoman Kelly McAndrew says

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All Work, No Extra Pay

Workers who may be exempt from overtime laws under the Fair Labor Standards Act

- Beekeepers
- Holly-wreath weavers
- Truck drivers who cross state lines
- Seasonal amusement park workers
- All agricultural workers
- Retail salespeople whose commission earnings equal one and a half times the current federal minimum wage

Source: Department of Labor

Question of the Day: Is overtime dispensed fairly in your workplace? Visit WSJ.com/QuesDon to vote.

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Wage & Hour Class Actions = $$$ Exposure

- Farmers' Insurance Judgment = $90,000,000
- Pacific Bell Settlement = $35,000,000
- Starbucks Settlement = $18,000,000
- Pizza Hut Settlements = $10,000,000

Collective & Class Actions:

- "Collective" Wage & Hour Actions Arise Under The FLSA
- "Class" Wage & Hour Actions Are Typically A Creature Of State Substantive Law (though the action may be brought in federal court);

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Collective vs. Class Actions:

- Class Actions Can Be Bigger (even though only state-wide)
- State-Wide Class Actions Can Lead To Greater Exposure
- ΠΠ's Attorneys Sometimes Prefer Class Actions

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Class Actions Can Be Bigger:

- Employees Must Affirmatively "Opt-Out" of Class Actions. They Must Affirmatively "Opt-In" to Collective Actions

The distinction between opt-in and opt-out classes is crucial. **Under most circumstances, the opt-out class will be greater in number, perhaps even exponentially greater. Opt-out classes have numbered in the millions.** The aggregation of claims, particularly as to class actions, profoundly affects the substantive rights of the parties to the litigation. . . . **Aggregation affects the dynamics of discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants.**

De Asencio v. Tyson Foods, 342 F.3d 301 (3rd Cir. 2003)

Greater Exposure – Class Claims:

- State Law Remedies Can Be Greater
- State Law Statutes of Limitation Can Be Longer
- State Wage & Hour Laws Can Be More Difficult For A Large Corporation To Comply With

The "Collective" Action

- FLSA = Two Hurdles For Plaintiff Class Action Lawyers
  - An employee may bring suit under the FLSA for himself and others that are "**similarly situated**." AND…
  - "No employee shall be a party plaintiff . . . unless he gives his **consent** in writing . . . ."

    29 USC § 216(b).

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Similarly Situated Employees

- What Are "Similarly Situated" Employees under the FLSA?
  - Different Courts Have Different Standards.
    - See Bayles v. American Medical Response of Colorado, 950 F.Supp. 1053 (D. Colo. 1996) (discussing different standards)
  - *Review The Law Of The State Or Circuit In Which The Case Is Set. The Standard Is Generally Lower Than For Class Actions.*

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Similarly Situated - (cont.)

- Some Common Factors In Determining Whether Employees Are "Similarly Situated"
  - Only a "Modest Showing" initially required for preliminary notice to a putative class
  - Employees Subject To Common Policy or Practice
  - Employees Face Similar Factual Circumstances

The Similarly Situated Requirement (cont.)

- Additional Factors concerning the Similarly Situated Requirement (addressed at the close of discovery)
  - The disparate factual and employment settings of the class
  - Employer defenses that are individual to each plaintiff
  - Fairness & Procedural concerns

Employee Consent In Collective Actions (or *Opting Into The Action*)

- How Does Consent Happen?
  - Solicitation Of Employees During The Course of a Union Organizing Campaign
  - Notice To Employees Pursuant To Court Order (after a plaintiff has made the initial showing that other employees are similarly situated);" **and**…

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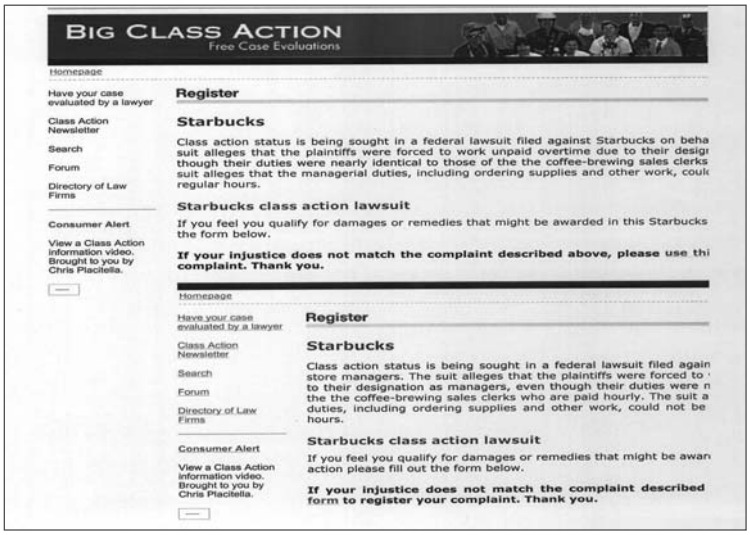
The Internet!



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Employer Communications During Opt in Period

- Prior to an employee opting-in, employer communications to employees may be permissible if the communication:
  - Does not undermine the Court's Notice;
  - Does not threaten retaliation (and potentially disclaims retaliation); and
  - is not otherwise inappropriate
    - *Parks v. Eastwood Insurance Services*, 235 F.Supp.2d 1082 (C.D. Cal. 2002)

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The Class Action Test

- **Numerosity** (joinder impracticable)
- **Commonality** (common questions of law and fact)
- **Typicality** (named plaintiffs typify the class)
- **Adequacy of Representation** (named plaintiffs can represent the class); and (usually)

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Class Action Test – (cont.)

- Common questions of law and fact predominate; and
- Class Action is superior method of adjudicating the controversy.
  - *Federal Rule of Civil Procedure* 23

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Some Areas Of Class Action Exposure

- Failure To Pay Overtime/Minimum Wage
- Miscalculation Of Wage Rates
- Improper Incentive Pay

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Failure To Pay Overtime/Minimum Wage

- Employees improperly classified as "independent contractors" (e.g., sales persons; delivery persons; exotic dancers (believe it or not!))
- Employees improperly classified as exempt (e.g., managers and management assistants at retail stores, IT professionals, salespersons (outside vs. inside))

Failure To Pay Overtime

- "Exempt" Employees Not Paid On A Salary Basis (who thereby lose their exempt status)
- Non-exempt Employees Not Paid For Work "Off the clock"

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Failure To Pay The Appropriate Wage

- The Employee's Regular Rate Of Pay Not Properly Calculated For Overtime Purposes
- Employees Do Not Receive Required Meal Or Lunch Breaks

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Improper Incentive Pay

- Profit-based incentive pay plans that improperly deduct for employer costs in determining the amount of the profit (in California)
- Commission plans that improperly "charge-back" employee commissions on canceled sales

Strategies For Mitigating Exposure

- Change the problematic policy as part of a larger change in employment policies.
- Settle With Affected Employees
- Create, where appropriate, an "exempt premium pay policy."
- *Remember: Fixing The Problem Starts The Statute Of Limitations Running!*

29 U.S.C.A. § 216

Title 29. Labor

Chapter 8. Fair Labor Standards (Refs & Annos)
§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of

such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

Any person who violates the provisions of section 212 of this title or section 213(c)(5) of this title, relating to child labor, or any regulation issued under section 212 or section 213(c)(5) of this title, shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 206 or 207 of this title shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be--

(1) deducted from any sums owing by the United States to the person charged;
(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or
(3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section

554 of Title 5, and regulations to be promulgated by the Secretary. Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

PLAINTIFF'S ATTORNEY
THE LAW OFFICES OF PLAINTIFF'S ATTORNEY
San Francisco, CA

Attorneys for Plaintiff
Peter Plaintiff

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Peter Plaintiff, Plaintiff, vs. Defendant Co. , Defendant.	Case No.: **NOTICE OF LAWSUIT UNDER THE FAIR LABOR STANDARDS ACT**

NOTICE OF LAWSUIT UNDER THE FAIR LABOR STANDARDS ACT

TO: Present and Former Employees of Defendant Co. Who Performed the Job of "Outside Salesperson" Within the Past Three (3) Years.

RE: Fair Labor Standards Act Lawsuit Filed Against Defendant Co.

I. INTRODUCTION

The purpose of this Notice is to inform you of the existence of a collective action lawsuit in which you potentially are "similarly situated" to the named Plaintiff, to advise you of how your rights may be affected by this suit, and to instruct you on the procedure for participating in this suit if you decide that it is appropriate and should you choose to do so.

II. DESCRIPTION OF THE LAWSUIT

Plaintiff Peter Plaintiff ("Plaintiff") has brought this lawsuit against Defendant Co. ("Defendant") on behalf of himself and all other past and present employees of Defendants who have not been paid overtime wages for hours worked in excess of forth (40) hours a week.

Plaintiff claims that he is entitled to recover unpaid overtime pay for the three (3) years before this suit was brought because he claims that the actions of Defendants were willful. Plaintiff also seeks an additional equal amount as liquidated damages and/or prejudgment interest, attorneys' fees and costs. This lawsuit is currently in the early pretrial stage. Defendant has denied Plaintiff's allegations.

III. WHO MAY JOIN THE LAWSUIT?

The named Plaintiff seeks to sue on behalf of himself and also on behalf of other employees with whom he is similarly situated. Specifically, Plaintiff seeks to sue on behalf of any and all employees who are or have been, at any time within the past three (3) years from the date the employee returns the attached Notice Of Consent To Become A Party Plaintiff form, employed as an "Outside Salesperson," who may have worked more than 40 hours in any one or more individual work weeks, and whose job duties included selling widgets to Defendants' customers.

If you are a current or former employee of Defendant as described above, your right to participate in the lawsuit and how you join the lawsuit is described below.

IV. YOUR RIGHT TO PARTICIPATE IN THIS SUIT

If you fit the above definition you may join this suit (that is, you may "opt in" to the lawsuit) by filling out, signing and mailing and delivering the attached Notice Of Consent To Become A Party Plaintiff form to Plaintiff's counsel at the following address:

DEFENDANT CO. LITIGATION
ATTN: Plaintiff's Attorney
The Law Office of Plaintiff's Attorney
San Francisco, CA

postmarked or delivered no later than July 15, 2002. If you fail to return the Consent form to Plaintiff's counsel by this time, you may not be able to participate in this lawsuit. That means you bear the risk of any non-delivery or delay in delivery of the Consent form.

If you file a Consent form, your continued right to participate in this suit may depend upon a later decision by the District Court that you and other Plaintiffs are actually "similarly situated" in accordance with federal law.

IV. EFFECT OF JOINING THIS SUIT

If you choose to join in the suit, you will be bound by the Judgment, whether it is favorable or unfavorable. While this suit is proceeding, you may be required to respond to written questions, sit for depositions, testify in court, or any combination of those things.

The attorneys for the class Plaintiff may be entitled to receive the payment of attorneys' fees and costs from Defendant in this lawsuit should there be a recovery or judgment in Plaintiff's favor. If there is no recovery or judgment in Plaintiff's favor, you will not be responsible for any attorneys'

fee. If there is a recovery, the attorneys for the class will receive a part of any settlement obtained or money judgment entered in favor of all members of the class. By joining this lawsuit, you designate the class representatives as your agents to make decisions on your behalf concerning the litigation and the method and manner of conducting this litigation. These decisions and agreements made and entered into by the representative Plaintiff will be binding on you if you join this lawsuit.

VI. NO LEGAL EFFECT IN NOT JOINING THIS SUIT

If you choose not to join this suit, you will not be affected by any judgment or settlement rendered in this case, whether favorable or unfavorable to the class. If you choose not to join in this lawsuit, you are free to file your own lawsuit.

VII. NO RETALIATION AGAINST YOU IS PERMITTED

Federal law prohibits Defendant from discharging you from employment or taking any other adverse employment action against you because you have exercised your legal right to join this lawsuit or because you have otherwise exercised your rights under the Fair Labor Standards Act.

VIII. YOUR LEGAL REPRESENTATION IF YOU JOIN

If you choose to join this suit and you return the Notice Of Consent To Become A Party Plaintiff form by July 15, 2002, your interests will be represented by the named Plaintiff through her attorneys as counsel for the class. Counsel for the class is:

Plaintiff’s Attorney
The Law Office of Plaintiff’s Attorney
San Francisco, CA

Further information about this Notice or the deadline for filing a Consent form or other questions about this lawsuit may be obtained by writing or telephoning Plaintiff's counsel at the number and address stated above.

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THIS NOTICE AND ITS CONTENTS HAVE BEEN AUTHORIZED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. THE FEDERAL DISTRICT COURT HAS TAKEN NO POSITION IN THIS CASE REGARDING THE MERITS OF PLAINTIFF'S CLAIMS OR OF DEFENDANTS' DEFENSES. OTHER THAN TO REVIEW THE COURT FILE OR THIS CASE, DO NO CONTACT THE COURT OR THE CLERK OF THE COURT DIRECTLY.

Dated: May, 2002

THE LAW OFFICES OF
PLAINTIFF'S ATTORNEY

By _____
PLAINTIFF'S ATTORNEY

(Cite as: 950 F.Supp. 1053)

United States District Court,
D. Colorado.

Brett L. BAYLES, Michael P. Frey, Jeralyn Johansen, Steven J. Nelson, Jeffrey S. Turner, James Reynolds, Steve Dunn, on behalf of themselves and others similarly situated, Plaintiffs,
v.
AMERICAN MEDICAL RESPONSE OF COLORADO, INC., a Delaware corporation, Defendant.

Civil Action No. 94-B-2300.

Dec. 31, 1996.

Ambulance service employees brought class action alleging that employer violated Fair Labor Standards Act (FLSA) by failing to pay them overtime compensation and deducting meal time and sleep time from hours worked during 24-hour shifts. Following order granting partial summary judgment for employer, 937 F.Supp. 1477, employees moved for reconsideration of such order, and employer renewed its motion to decertify class or, in the alternative, for subclasses and separate liability verdicts. The District Court, Babcock, J., held that: (1) employees' meal times during 24-hour shifts were not spent predominantly for benefit of employer; (2) employer did not act willfully in failing to pay overtime compensation to dispatchers, for purposes of determining limitations period; (3) evidence was sufficient to support finding that ambulance drivers made trips to airport; and (4) employees could not proceed collectively with overtime claims.

So ordered.

West Headnotes

[1] Federal Civil Procedure 2498
170Ak2498 Most Cited Cases

Issues of material fact existed as to whether ambulance service followed its stated policy of allowing employees 45 minutes for meals during 24-hour shifts, precluding summary judgment on claims for meal time compensation in FLSA action. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[2] Labor and Employment 2318
231Hk2318 Most Cited Cases
(Formerly 232Ak1288 Labor Relations)

Ambulance service employees' meal times during 24-hour shifts were not spent predominantly for the benefit of employer, for purposes of FLSA, where employees had no duties during meal time beyond being on call and staying close to their ambulances. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[3] Labor and Employment 2371
231Hk2371 Most Cited Cases
(Formerly 232Ak1479 Labor Relations)

Ambulance service did not act willfully in failing to pay overtime compensation to dispatchers, for purposes of determining limitations period for FLSA action; service presented evidence that it relied upon representations of counsel and administrators indicating that service qualified under overtime exemption for certain persons within a "pool of drivers," and that dispatchers could be considered within a pool of drivers even if they did not drive ambulances. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[4] Labor and Employment 2387(9)
231Hk2387(9) Most Cited Cases
(Formerly 232Ak1522 Labor Relations)

Evidence, including affidavit from ambulance service's president, was sufficient to support finding that ambulance drivers made trips to airport, for purposes of determining applicability of motor carrier exemption from FLSA. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[5] Federal Civil Procedure 165
170Ak165 Most Cited Cases

Class action rule does not require that questions of law or fact common to class predominate; all that can be gleaned from rule itself is that more than one common question of law or fact need exist. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

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[6] Federal Civil Procedure 164
170Ak164 Most Cited Cases

Typicality requirement for class certification, along with adequacy of representation factor, focuses on characteristics of class representatives. Fed.Rules Civ.Proc.Rule 23(a)(3, 4), 28 U.S.C.A.

[7] Federal Civil Procedure 164
170Ak164 Most Cited Cases

Typicality exists, for purposes of rule governing class certification, where injury and conduct are sufficiently similar. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[8] Federal Civil Procedure 164
170Ak164 Most Cited Cases

Differing fact situations of class members do not defeat typicality under class certification rule so long as claims of class representative and class members are based upon same legal or remedial theory. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[9] Federal Civil Procedure 164
170Ak164 Most Cited Cases

Disparities in damages claimed by representative parties and other members of class do not warrant decertification of class. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[10] Labor and Employment 2375
231Hk2375 Most Cited Cases
(Formerly 232Ak1493 Labor Relations)

Ambulance service employees could not proceed collectively with overtime claims under *Lusardi v. Xerox Corp*. test for determining whether employees may proceed collectively in FLSA action, i.e., whether employees are " similarly situated" under plain meaning of that term and in light of purposes of collective action; although avoiding 80 separate trials might serve judicial economy, case was fraught with questions requiring distinct proof as to individual employees. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

***1054** Donna Dell'Olio, Cornish and Dell'Olio, Colorado Springs, CO, for Plaintiffs.

John R. Webb, Holme Roberts & Owen L.L.P., Denver, CO, for Defendant.

MEMORANDUM OPINION & ORDER

BABCOCK, District Judge.

Plaintiffs move for reconsideration of my September 4, 1996, summary judgment order, *Bayles v. American Medical Response*, 937 F.Supp. 1477 (D.Colo.1996). Defendant renews its motion to decertify plaintiffs' class under 29 U.S.C. § 216(b) or, in the alternative, for subclasses and separate liability verdicts. For the following reasons I will grant in part and deny in part each motion.

I.

Reed Ambulance, Inc., predecessor of defendant, American Medical Response of Colorado, Inc. (AMR), operated an ambulance service until it merged with Ambulance Service Company in September of 1993. In October 1993, Ambulance Service Company changed its name to American Medical Response of Colorado, Inc. Reed and AMR will be referred to collectively as AMR. Before August 1, 1993, AMR scheduled its ambulance crews to work approximately ten, twenty-four hour shifts per month. Before August 1, 1992, AMR deducted three hours per shift for meals. After August 1, 1992, it deducted two hours per shift. If an employee was unable to enjoy a meal break during the designated meal period, the employee could submit an extra time slip requesting compensation. Management would then review the call out records to determine whether the employee had sufficient time between calls to enjoy a meal.

AMR also deducted eight hours from each twenty-four hour shift for sleeptime. If ambulance crews were called to duty during this time, they were paid for time worked rounded to the nearest half-hour as long as time worked exceeded fifteen minutes. When calls to duty amounted to more than 3 1/2 hours, employees were paid for all eight hours. Thus, on average plaintiffs were paid for either thirteen or fourteen hours of work per twenty-four hour shift.

Each plaintiff was employed by AMR in at least one of five positions: ambulance driver, ambulance attendant, cabulance driver, cabulance attendant, or dispatcher. Plaintiffs contend that AMR's failure to pay overtime compensation and its deduction of mealtime and sleeptime from hours worked violated the Fair Labor Standards Act, 29 U.S.C. §§ 201-19.

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II. PLAINTIFFS' REQUEST FOR RECONSIDERATION

Plaintiffs request reconsideration of my memorandum opinion and order of September 4, 1996. ***1055***Bayles v. American Medical Response*, 937 F.Supp. 1477 (D.Colo.1996). In particular, plaintiffs contend that I erred in granting summary judgment on (1) plaintiffs' claim for mealtime compensation and (2) the statute of limitations for overtime claims because genuine issues of material fact allegedly remain to be decided. Because I find that genuine issues of fact exist with regard to plaintiffs' mealtime claims, I will vacate my order of summary judgment on those claims. I will deny plaintiffs' motion to reconsider in all other respects.

Reconsideration may be granted upon "an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir.1995). Plaintiffs do not contend there has been a change in the controlling law or that new evidence has been uncovered. Accordingly, I will only reconsider my September 4, 1996, order for clear error.

A. *Mealtime Compensation*

Plaintiffs argue that I clearly erred in granting summary judgment on their claims for mealtime compensation because genuine issues of material fact remain to be decided regarding whether (1) plaintiffs received less than forty-five minutes of uninterrupted mealtime, and (2) plaintiffs' mealtime was spent predominantly for the benefit of the employer. I agree that there remain genuine issues of material fact regarding the plaintiffs' first contention, but not the second, and I will, therefore, vacate my earlier grant of summary judgment on plaintiffs' mealtime compensation claims.

1. The Forty-Five-Minute Meal Break

[1] In my September 4, 1996, order, I found that it was undisputed that plaintiffs were permitted to submit additional pay slips to AMR for mealtimes if the plaintiffs did not have at least a forty-five-minute, uninterrupted period in which they could have eaten. AMR considered forty-five minutes to equal one hour for rounding off purposes. AMR's stated policy was to deduct for mealtimes only if the employee had an uninterrupted forty-five minutes during a particular meal period in which to eat. Reed Policy Manual, p. 19. Plaintiffs request that I reconsider and reverse my grant of summary judgment to AMR because there is a genuine question of fact regarding whether AMR followed its stated policy of allowing forty-five minutes for meals. I agree.

The deposition testimony of Sharon Dole is exemplary. Dole testified in a deposition taken in an earlier action against AMR that employees were not paid for mealtimes if they had even a thirty minute uninterrupted period in which they could have eaten. Dole Dep. pp. 26-27, filed Oct. 2, 1995. This contradicts both AMR's stated policy and Dole's later deposition testimony in which she stated that the minimum mealtime was forty-five minutes. Dole Dep. pp. 20-25, filed Aug. 24, 1995. In addition, several affidavits state that at least for some supervisors, the operative inquiry was whether the employee actually managed to eat, regardless of the time to do so. Baalman Aff. ∂ 7(c); Reynolds Aff. ∂ 8(c), both filed June 7, 1995 ("If we turned in an overtime slip for a missed meal, some supervisors would ask, 'Did you eat?' If you ate, your request was denied.").

Looking at this evidence in a light most favorable to the plaintiffs, I cannot conclude as a matter of law that AMR complied with the FLSA regarding mealtime compensation. AMR deducted up to three hours of mealtime per shift from the plaintiffs' pay. If plaintiffs only received thirty minutes or "enough time to eat" for each meal period, AMR's deductions were excessive and plaintiffs are entitled to compensation. If, however, plaintiffs cannot show that AMR departed from its stated policy of allowing at least forty-five minutes for a meal, I adhere to my earlier order and hold as a matter of law that plaintiffs' claim for mealtime compensation must fail.

2. Predominant Benefit Test

[2] The plaintiffs also challenge my finding that "no reasonable juror could find that plaintiffs' mealtime was spent predominantly for the benefit of AMR." Plaintiffs allege that my finding was unsupported by sworn ***1056** testimony and that I disregarded Brett Bayles' second affidavit. I disagree.

AMR submitted an affidavit by Pat Conroy stating that for each of the three five-hour "time zones" during which an employee could take a meal break, the employees had approximately four hours during which they could take a meal break. Conroy Aff., submitted with AMR's opposition brief, at ∂ 5.

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Conroy did not consider "coverage calls" and, thus, AMR submitted another affidavit by Stephen Duree demonstrating that Conroy's calculations underestimated plaintiffs calls by 25%. Duree Aff., submitted with AMR's reply on October 31, 1995, at ∂ 5. Even with twenty-five percent more calls, however, plaintiffs would have had more than three and one-half hours during each meal time zone during which to enjoy a meal.

Because plaintiffs had ample time to take a meal break between calls the majority of days, the pertinent issue is how they spent their time during their meal breaks. Plaintiffs never identified evidence showing that they had any duties during mealtime beyond being on call and staying close to their ambulances. As my September 4 order explains, such evidence is simply insufficient as a matter of law to prove that plaintiffs' mealtime was spent primarily for the benefit of AMR.

Bayles' second affidavit, which plaintiffs state I "disregarded," is inapposite. In that affidavit, Bayles lists numerous duties that he was required to fulfill between calls. He does not, however, state that he was unable to take a break from such duties to enjoy a meal. The pertinent inquiry is whether plaintiffs' time *during meals* was spent predominantly for the benefit of AMR. Bayles' affidavit indicates only that his time when not responding to calls was spent generally for the benefit of AMR. Such a broad assertion is insufficient to create a genuine issue of material fact regarding whether plaintiffs' mealtimes were spent predominantly for the benefit of AMR.

The nonmoving party has the burden of showing that there are genuine issues of material fact that preclude summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Plaintiffs bear the burden here as nonmovants to present evidence showing a genuine issue of material fact, and they have failed to do so. Accordingly, I will not disturb my holding of September 4, 1996, that no reasonable juror could find that plaintiffs' mealtimes were spent predominantly for the benefit of AMR.

B. *Applicability of the Order to Dispatchers and Cabulance Drivers*

Plaintiffs contend that AMR's summary judgment motion did not seek judgment on dispatchers' claims for mealtime compensation. Defendants concede this point and I need not address it further here.

[3] Plaintiffs also argue that I inadvertently ruled that a two-year statute of limitations will apply to all plaintiffs' claims for overtime. The statute of limitations for overtime claims varies depending upon a finding of willfulness on the part of defendant in violating the FLSA. Generally, ß 207(a)(1) of the FLSA requires that an employee who works more than forty hours per week be compensated at a rate of one and one-half times his regular pay for hours in excess of forty. 29 U.S.C. ß 207(a)(1). Defendant presented evidence that it relied upon representations of counsel and administrators indicating that AMR qualified under an exemption to the FLSA requirement for overtime compensation (MCA exemption). Plaintiffs contend that I "apparently overlooked" the fact that the MCA exemption for overtime only applies to certain persons within a "pool of drivers." Because dispatchers are not within a "pool of drivers" under the MCA exemption, plaintiffs argue that questions of material fact remain regarding AMR's willfulness in not paying overtime to dispatchers. I disagree.

Defendant's motion for summary judgment on the appropriate statute of limitations sought judgment against "all plaintiffs (both ambulance crews and dispatchers) based on events outside of the two-year limitations period." Def. Mot. p. 2. I granted defendant's motion as it relates to overtime compensation. Although my order of September 4 does not specifically discuss the statute of limitations as it relates to dispatchers, my ***1057** ruling on the statute of limitations for overtime claims applied to all plaintiffs. Defendant presented sufficient evidence such that no reasonable juror could conclude that it acted willfully in denying overtime compensation to all plaintiffs, including dispatchers.

AMR presented evidence establishing that dispatchers may be considered within a pool of drivers even if they did not drive ambulances. *See* Powers' Aff., submitted with defendant's opposition brief on August 24, 1995, at ∂ 7 (detailing safety activities of dispatchers); *Tobin v. Hudson Transit Lines*, 95 F.Supp. 530, 534 (D.N.J.1951) (cited in opposition brief at p. 11) (stating that dispatchers affect the safety of vehicle operation); *Levinson v. Spector Motor Service*, 330 U.S. 649, 673, 67 S.Ct. 931, 943-44, 91 L.Ed. 1158 (1947) (cited at p. 10 of opposition brief) (stating that the D.O.T. has regulatory power "over all employees of such carriers whose activities affect safety of operation...."); 29 CFR ß 782.2(a) and (b)(1); *Morris v. McComb*, 332 U.S. 422, 434, 68 S.Ct. 131, 137, 92 L.Ed. 44 (1947) (discussed at pp. 4, 9 and 10 of opposition brief)

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(stating that D.O.T. has regulatory power over mechanics). AMR also submitted letters from counsel specifically advising it that dispatchers fell within the pool of drivers that qualify for the MCA exemption. *See* "Mangan 1983" and "Mangan 1988," exhibits to opposition brief. Accordingly, I did not clearly err in concluding as a matter of law that AMR did not act willfully in failing to pay overtime compensation to dispatchers.

[4] Plaintiffs also state that questions of fact remain with regard to AMR's willfulness in refusing to pay overtime to cabulance drivers because it is disputed whether cabulance drivers made trips to the airport. Allen Powers (Powers), president of Reed from October 1991 to June 1993, indicated that he relied upon the representations of counsel and the Department of Labor (D.O.L.) in refusing to pay overtime to his employees. In my September 4 order, I stated that Reed's (and AMR's) reliance upon such representations precluded a finding of willfulness as a matter of law.

The representations made by the D.O.L. and defendant's counsel indicated that AMR need not pay overtime wages, in part, because its ambulance drivers made trips to the airport that could be considered part of continuing interstate travel. Plaintiffs argue that because it is disputed whether cabulance drivers ever made trips to the airport, a genuine question of fact exists regarding whether AMR willfully violated the FLSA in refusing to pay overtime to cabulance drivers. Plaintiffs' argument fails because plaintiffs have never pointed to any evidence in the record showing that cabulance drivers did not make such trips.

On three separate occasions, plaintiffs alleged in a brief that cabulance drivers never made airport trips. Pltf. Req. for Reconsid. pp. 2- 3; Pltf. Opp. to Def. Mot. for SJ on Stat. of Lim. p. 4; Pltf. Rep. to Def. Opp. of SJ p. 10. In each instance, plaintiffs failed to point to any evidence supporting their contention. Plaintiffs cite only to Powers' deposition for the proposition that Powers did not have any support for his contention that cabulance drivers did make airport trips. Pltf. Opp. to Def. Mot. for SJ on Stat. of Lim. p. 4 (citing Powers Dep. pp. 35-36). To the contrary, AMR submitted an affidavit from Powers stating that cabulance drivers did make trips to the airport.

Again, plaintiffs bear the burden here as nonmovants to present and identify evidence showing a genuine issue of material fact, and they have failed to do so. Plaintiffs' counsel cannot create a dispute of fact simply by alleging that one exists in a brief. Accordingly, I will not disturb my holding of September 4, 1996, regarding the applicable statute of limitations for overtime compensation claims.

III. DEFENDANT'S (RENEWED) MOTION TO DECERTIFY OR, IN THE ALTERNATIVE, FOR SUBCLASSES AND SEPARATE LIABILITY VERDICTS

On February 9, 1995, I conditionally certified this case to proceed as a collective action under 29 U.S.C. ß 216(b) (Supp.1996) for the purpose of allowing plaintiffs to send notice to other potential plaintiffs. On October 31, 1995, AMR moved to decertify the case or, in ***1058** the alternative, for subclasses and separate liability verdicts. I heard oral argument concerning decertification on December 7, 1995. During that argument, I decided that various issues framed by the parties' pending motions for summary judgment needed to be resolved before I could properly address AMR's decertification motion.

On September 4, 1996, I decided all pending summary judgment motions. *Bayles v. American Medical Response*, 937 F.Supp. 1477 (D.Colo.1996). Accordingly, AMR renewed its motion to decertify based upon my September 4, 1996, order. As discussed, I will modify my order of September 4 as it relates to mealtime compensation claims. Although AMR did not address the mealtime issues in its renewed motion for decertification, it did so in its original decertification motion, which AMR incorporated by reference into its most recent motion. Accordingly, AMR's motion is adequately briefed, and I am sufficiently informed to decide it here. In addition, I heard oral argument on AMR's motion for decertification on December 11, 1996. For the following reasons, I will grant, in part, AMR's motion to decertify.

29 U.S.C. 216(b) permits plaintiffs to proceed under the FLSA "for and in behalf of ... themselves and other employees similarly situated." The statute does not define "similarly situated," nor has the Tenth Circuit explained its meaning. Indeed, the standard to be used in determining whether plaintiffs are sufficiently similarly situated to proceed collectively under ß 216(b) has been largely unaddressed by circuit courts. *See Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213 (5th Cir.1995). District court opinions can generally be divided into four categories. *Id.* In most cases, the gravamen of the debate is the extent to which a collective action under ß 216(b) should be treated like a class action under Fed.R.Civ.P. 23.

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My survey of the case law has uncovered the following four approaches to defining "similarly situated" under § 216(b): (1) putative class members are similarly situated if they meet the commonality and typicality requirements of modern Rule 23(a); (2) putative class members are similarly situated if they meet all of the requirements of modern Rule 23 that do not "conflict" with the requirements of § 216(b); (3) putative class members are similarly situated if they meet all of the requirements for a "spurious" class under pre-1966 Rule 23; and (4) putative class members meet the requirements for § 216(b) if they are "similarly situated" under the plain meaning of that term and in light of the purposes of a collective action. In my view, the first approach creates too lenient a standard, and I decline to adopt it. For the purposes of this case, the distinctions among the latter three approaches appear to be more theoretical than practical. Given the considerable inconsistencies among the courts, however, it may be helpful to clarify the law for future cases in which such distinctions may make a difference.

Initially, however, I note that AMR conceded at the December 11, 1996, hearing that all plaintiffs who were dispatchers are similarly situated with respect to their mealtime claims, the only claims asserted by them. Therefore, I will permit dispatchers to proceed collectively, regardless of the definition of "similarly situated." Those representative plaintiff(s) who worked as dispatchers, may continue to represent that class with respect to mealtime claims. For the following reasons, however, I will decertify the remainder of the plaintiffs' conditionally certified class.

A. *Rule 23(a)--Commonality and Typicality*

In *Krueger v. New York Telephone Co.*, 163 F.R.D. 433, 445 (S.D.N.Y.1995), plaintiffs sought to certify both a Rule 23 class action under ERISA and a representative class under the ADEA. The ADEA incorporates § 216(b) of the FLSA by reference. Earlier in the litigation, the court granted authorization to send notice to potential class members. After discovery was completed, the court revisited the question whether the representative plaintiffs were similarly situated to the members of the putative class within the meaning of § 216(b). *Id.* The court first approved the Rule 23 class action. The court then concluded that "[f]or all the reasons that the Court has already found this action should proceed as a class action, and because the representative plaintiffs have satisfied ***1059** the commonality and typicality requirements of Rule 23(a)(2) and (a)(3), it is equally true that the named plaintiffs are similarly situated to other members of the ADEA class." *Id.*

Krueger's discussion, though brief, implies that "similarly situated" may be defined by the commonality and typicality requirements of Rule 23(a)(2) and (a)(3). To the extent *Krueger* implies that standard, I reject it. Although there is some basis for concluding that Rule 23 and § 216(b) can be read in concert, the elements of Rule 23(a) are insufficient to define "similarly situated."

On its face, the *Krueger* standard seems logical. Requiring that plaintiffs have common questions of law or fact at issue and that the representative plaintiff has claims typical of the class appears to reasonably define "similarly situated." Upon further examination, however, Rule 23(a) is not enough. In isolation, the requirements of Rule 23(a) are not all that is needed for a class action to go forward. Rather, to proceed with a class action, representative plaintiffs must also meet one of the alternative requirements of Rule 23(b), which is more stringent. Analogously, the "similarly situated" standard of § 216(b) must require more than compliance with Rule 23(a).

Application of the *Krueger* approach to the facts of this case demonstrates why the minimal requirements of Rule 23(a) are insufficient to show that plaintiffs are similarly situated. AMR, perhaps unwittingly believing that Rule 23(a) presents a higher burden than it does, argues that plaintiffs cannot meet the commonality and typicality requirements of Rule 23(a), and that the class should, therefore, be decertified. I disagree. Common questions of fact are present, and, through the use of subclasses, typical claims could be identified. Therefore, plaintiffs have met the requirements of Rule 23(a), and, if that were the standard, I would not decertify the class. Rule 23(a), however, is not the standard.

Rule 23(a)'s requirements are relatively minimal. Importantly, *Krueger* does not imply that Rule 23(b)(3)'s requirement that common questions of law or fact *predominate* should be engrafted onto § 216(b). That requirement was not part of Rule 23 prior to the 1966 amendments, and the Advisory Committee Notes to those amendments indicate: "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." *See also Heagney v. European American Bank*, 122 F.R.D. 125, 127 n. 2 (E.D.N.Y.1988) ("[T]he

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similarly situated requirement of 29 U.S.C. ß 216(b) is considerably less stringent than the requirement of Fed.R.Civ.Proc. 23(b)(3) that common questions predominate.").

[5] AMR devotes a large portion of its brief detailing questions of fact that are not common to all plaintiffs. At least as to the commonality requirement of Rule 23(a), AMR's argument misses the mark. As I said, Rule 23(a) does not require that common questions of law or fact "predominate." In fact, all that can be gleaned from the rule itself is that more than one common question of law or fact need exist. 7A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure:* Civil 2d ß 1763 at 198 (1986); *Stewart v. Winter*, 669 F.2d 328, 335, n. 16 (1982); *see also Joseph v. General Motors Corp.*, 109 F.R.D. 635, 639 (D.C.Colo.1986) (stating that total commonality is not required). Therefore, although I will discuss the numerous and significant issues that are not common to this putative class in the next section, those differences are irrelevant to a determination of commonality under Rule 23(a)(2). This is a significant defect with a Rule 23(a) definition of "similarly situated."

Common questions do exist here. For example: Is AMR entitled to the good faith defense under ß 259 based on its alleged reliance upon administrative interpretation of the FLSA? What were the conditions at each station during sleeping hours? What were the actual job duties of paramedics, EMTs, dispatchers, and cabulance drivers? Therefore, significant questions exist that are common to the class as a whole and the commonality requirement of Rule 23(a) is satisfied.

[6][7][8][9] The typicality requirement of Rule 23(a) presents a slightly higher hurdle. "This factor, along with adequacy of representation, ***1060** focuses on the characteristics of the class representative(s)." *Wilkerson v. Martin Marietta Corp.*, 875 F.Supp. 1456, 1462 (D.Colo.1995). Here, I focus on the relationship between the alleged harm to the representative plaintiffs and the alleged conduct of AMR affecting the class. "Typicality exists where the injury and the conduct are sufficiently similar." *Id.* (citing *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir.1988)). In addition, "differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based upon the same legal or remedial theory." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir.1988); *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir.1975); 7A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure:* Civil 2d ß 1764 at 243 (1986). Further, disparities in damages claimed by the representative parties and the other members of the class do not warrant decertification. Wright, Miller & Kane, *supra* ß 1764 at 241; *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir.1984), *cert. denied*, 470 U.S. 1004, 105 S.Ct. 1357, 84 L.Ed.2d 379 (1985).

AMR identifies several issues regarding which plaintiffs were in different factual situations from each other and/or are claiming disparate damages. None of plaintiff's examples would defeat certification under Rule 23(a). Rule 23(a) requires only that plaintiffs claims are typical of the class in that they rely on the same legal or remedial theory. Here, all plaintiffs' theories are the same--AMR violated the FLSA by failing to pay adequate mealtime, sleeptime, and/or overtime compensation. Moreover, arguably, subclasses could be established such that the representative plaintiff for each subclass would make the same claims as each plaintiff in that subclass. Plaintiffs in this case were employed in one or more of five positions for AMR: ambulance driver, ambulance attendant, cabulance driver, cabulance attendant, or dispatcher. AMR argues that plaintiffs who were employed in one capacity do not have claims that are typical of those who were employed in another position; however, the representative plaintiffs include one or more persons from each of these categories. Subclasses could, therefore, be crafted to account for these problems with typicality.

AMR also argues that because one of its defenses to the sleeptime claims is that it had an implied agreement with plaintiffs that they would not be paid for interrupted sleep, the class should be decertified. To prove an implied contract existed, AMR must show a meeting of the minds, and AMR argues that it cannot do so without a separate trial for each plaintiff. AMR's argument is, again, misplaced in this context. Rule 23(a)(3) provides only that "the claims or defenses *of the representative parties* are typical of the claims or defense *of the class.*" That *AMR's* defenses to the claims of the plaintiffs vary is irrelevant to this inquiry (which is another significant flaw in this approach). Here, Rule 23(a)'s typicality requirement is satisfied.

Where, as here, more than one common question exists and the claims of the representative plaintiffs are typical of those of the class members, Rule 23(a)'s commonality and typicality requirements are

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satisfied, and, under *Krueger*, plaintiffs could proceed collectively. Without more, however, the *Krueger* test makes little sense. Absent the more stringent safeguards of other subsections of Rule 23, any number of cases would be permitted to proceed collectively under § 216, even where, as here, individual questions of liability dominate and a collective action is unworkable and prejudicial to the defendant.

Perhaps the answer, then, lies in applying all elements of Rule 23 to determine whether plaintiffs are similarly situated under § 216(b). That approach has problems of its own.

B. *Modern Rule 23*

Several courts have held that plaintiffs must meet all of the requirements of a modern Rule 23 class action to proceed collectively under § 216(b). *See, e.g.*, *Shushan v. University of Colorado*, 132 F.R.D. 263 (D.Colo.1990); *St. Leger v. A.C. Nielsen Co.*, 123 F.R.D. 567 (N.D.Ill.1988) (stating that certification was inappropriate because common questions did not predominate). The leading ***1061** case advocating this approach is *Shushan*. There, the court reasoned that there was no apparent reason why "district courts should fail to utilize existing procedures, embodied in Rule 23, which are designed to promote effective management, prevent potential abuse, and protect the rights of all parties." *Id.* at 268.

The court was unpersuaded by the argument, accepted by many courts, that R. 23 and § 216 are wholly unrelated because the former provides for "opt-outs" and the latter for "opt-ins": "[I]t does not seem sensible to reason that, because Congress has effectively directed the courts to alter their usual course and not be guided by rule 23's 'opt-out' feature in ADEA class actions, it has also directed them to discard the compass of rule 23 entirely and navigate the murky waters of such actions by the stars or whatever other instruments they might fashion." *Id.*

The *Shushan* court analogized § 216(b) to a "spurious" class action (pre-1966 amendment to Rule 23), which also contained an opt-in provision. A number of courts prior to 1966 treated collective actions under § 216(b) as spurious class actions. *See* discussion, *infra*. Accordingly, the court concluded that all requirements of Rule 23 class action that do not conflict with the provisions of § 216 must be satisfied. In particular, the court stated that many of Rule 23's requirements have nothing to do with whether plaintiffs must opt-in or opt-out and everything to do with effective case management. For example, the court stated that Rule 23(a)'s four prerequisites and 23(b)(3)'s requirement that common questions of fact predominate should be used to determine whether plaintiffs are similarly situated. *Shushan*, 132 F.R.D. at 267.

Applying *Shushan* to the facts here, I would decertify the class. Were this a Rule 23 class action, plaintiffs would be seeking certification under Rule 23(b)(3). Plaintiffs could not be certified under Rule 23(b)(1) because there is no risk of (1) inconsistent verdicts that would establish incompatible standards of conduct for AMR, or (2) verdicts that would, as a practical matter, be dispositive of the rights of others not parties to this action. In addition, plaintiffs could not bring an action under Rule 23(b)(2) because they seek money damages as opposed to injunctive relief. Therefore, according to Rule 23(b)(3), plaintiffs would need to show that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Common questions do not predominate here.

For example, pursuant to this order, plaintiffs will be permitted to pursue their mealtime claims to a limited extent. With the exception of mealtime claims for dispatchers (which were not the subject of my September 4, 1996, order), I held that defendant's stated policy of deducting one hour of mealtime if an employee had a forty-five minute period in which he could have eaten does not violate the FLSA. My order today does not change that holding. Rather, with the exception of dispatchers, plaintiffs' mealtime claims will be limited to showing that defendant did not follow its stated policy. Plaintiffs vary dramatically in their accounts of whether defendant followed the stated policy, and the evidence appears to reflect that only certain management personnel of defendant may have strayed from that policy. Accordingly, each plaintiff's proof of violation will be individualized because it depends upon how or whether defendant's policy was implemented by individual managers with regard to individual plaintiffs, not what the policy was.

Plaintiffs' sleeptime claims are equally troublesome. 29 C.F.R. § 785.22 provides that when an employee is required to be on duty for twenty-four hours or more, the employer and the employee may agree to exclude bona fide, regularly-scheduled sleeping periods of not more than eight hours from hours

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worked, provided that adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get at least five hours of sleep, the entire time is working time.

***1062** Defendant deducted eight hours from a twenty-four-hour shift as sleeptime, but paid the employees for company business performed during sleeptime. Sleeptime deduction did not apply to cabulance drivers, dispatchers or other employees who did not work twenty-four hour shifts. If the company business exceeded three and one-half hours, the employees were paid for the entire eight hours. Defendant admits that it was incorrect in using a three and one-half hour threshold instead of a three hour threshold as the regulation requires. Def. Mot. to Decert., p. 8, n. 4. Nevertheless, numerous issues that vary on an individual basis must be determined to establish liability as to each plaintiff.

For example, regarding whether an individual plaintiff could have "usually" enjoyed an uninterrupted night's sleep, several factors are unique to each plaintiff:

1. *Call Volume*--The primary interruptions to plaintiffs' sleep resulted from calls to duty. The number of calls to duty, however, varied significantly among stations and plaintiffs. According to AMR, fifty plaintiffs averaged 1.9 calls or less during an average sleep period, while eight plaintiffs averaged 2.9 or more calls. Duree Aff. at ∂ 3. Plaintiffs' own estimates show even greater variations. Ten plaintiffs stated in affidavits that they averaged two calls or less during a typical sleeptime, while fourteen plaintiffs alleged an average of five or more calls during sleeptime. Jacobson Aff. at ∂ 2. Accordingly, the estimates of both AMR and plaintiffs show that sleeptime varied significantly among individual plaintiffs. *See* Def. Mot. to Decert., pp. 8-9.

2. *Sleep Habits*--Plaintiffs claim that AMR should be required to pay them not only for time spent running a call but also for the time it took them to get back to sleep after running a call or being awakened when another crew went out for a call. Plaintiffs' estimates about how long it took them to get back to sleep after an interruption show significant variation. For example, twelve plaintiffs have stated that it took forty-five minutes or more to get back to sleep, whereas nine stated that it took fifteen minutes or less. Jacobsen Aff. at ∂ 8.

3. *Station Variations*--Variations in the conditions present at individual stations also contributed to the disparities in sleeptime among plaintiffs. Some plaintiffs contend that they were kept awake by tones that sounded at the fire stations where they were located. Only four ambulance crews were located at fire stations. Other plaintiffs state that they were kept awake by scanners located at the stations. Some stations did not have scanners, and others turned down the scanners at night. Some plaintiffs contend they were awakened by other crews going out on calls or filling their oxygen tanks. Only four stations housed two different crews, and only four stations refilled oxygen tanks. Def. Mot. to Decert., p. 9-10.

Plaintiffs argue that AMR can defend itself adequately using evidence of averages. Because plaintiffs moved around and worked in various stations, plaintiffs contend that evidence of conditions at each station would need to be presented even at a trial for an individual plaintiff. In addition, plaintiff argues that it would present evidence of AMR's treatment of all plaintiffs, even at an individual trial, as evidence under F.R.E. 404(b) to show AMR's reckless disregard for the law. Therefore, plaintiffs argue that they are similarly situated and can proceed collectively. I disagree.

AMR denies all liability for sleeptime claims because, it asserts, plaintiffs impliedly agreed to its sleeptime policy, thereby precluding recovery. To show an implied agreement, AMR must show a meeting of the minds. AMR cannot, of course, prove a meeting of the minds between AMR and the plaintiffs as a class through some sort of "averaging." That issue will involve questions whether a particular plaintiff complained about the policy, was misled by management regarding the policy, etc. Accordingly, questions of whether there were implied agreements between AMR and plaintiffs regarding AMR's sleeptime policy must be addressed individually.

In addition, plaintiff's argument mischaracterizes the question before me. Even if this case *could* be effectively managed as a collective action, plaintiffs have the burden of ***1063** showing that they are similarly situated. Thus, for the moment, I am assuming that plaintiffs must show that common questions of fact or law predominate, and I am not persuaded that they do. Even assuming that averages were used to generalize the sleeping

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conditions at each station, significant individual issues remain (e.g., individual sleep habits, how much time each plaintiff spent at each station, whether each plaintiff impliedly agreed to AMR's sleeptime policy, etc.) Therefore, treating this under the strict Rule 23 standard advocated by *Shushan*, I would decertify the class.

Shushan has been criticized by a number of courts, however, most of which agree that modern Rule 23 requirements, while instructive, are not prerequisites to maintaining a collective action under § 216(b). *See, e.g., Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 306 (N.D.Cal.1991); *Jackson v. New York Tel. Co.*, 163 F.R.D. 429 (S.D.N.Y.1995). I agree the *Shushan* approach is problematic, but for different reasons. In *Church*, for example, the court stated that because several courts had determined that plaintiffs were precluded from bringing Rule 23 class actions under the FLSA or ADEA, it followed that plaintiffs did not need to meet any of the requirements of Rule 23 to show that they were similarly situated. 137 F.R.D. at 305-06 (citing *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir.1975); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir.1975); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (1977)). The cases relied upon in *Church*, however, are inapposite.

Schmidt and *LaChapelle* held that plaintiffs are not permitted to bring a Rule 23 class action under the FLSA or ADEA because Rule 23's opt-out provision is in direct conflict with the opt-in provision of § 216(b). *Schmidt*, 527 F.2d at 536; *LaChapelle*, 513 F.2d at 289. Those opinions offer no guidance on how to interpret "similarly situated" under § 216(b). Rather, the Fifth and Eighth Circuits simply concluded that § 216(b), however interpreted, is the only means by which plaintiffs can bring collective actions under the FLSA and ADEA. *Id.*

In *Kinney*, the Ninth Circuit extrapolated from *Schmidt* and *LaChapelle* and stated that because Rule 23 and § 216 are "mutually exclusive" and "irreconcilable" (quoting *Schmidt* and *LaChapelle*), "adoption of a portion of the procedures from Rule 23 would be just as contrary to the congressional intent as total adoption of the rule." *Kinney*, 564 F.2d at 862 (quoting *McGinley v. Burroughs Corp.*, 407 F.Supp. 903, 911 (E.D.Pa.1975)). Accordingly, the court held that plaintiffs suing in a representative capacity under § 216(b) were not entitled to circulation of court-approved notice to potential class members, a feature of Rule 23.

The Supreme Court, however, directly obviated the holding of *Kinney* in *Hoffmann (sic)-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989), holding that a district court has the discretion to send notice to potential class members under § 216(b) derived from its "managerial responsibility to oversee the joinder of additional parties." 493 U.S. at 170-71, 110 S.Ct. at 486. Indeed, in reaching its conclusion, the Court in *Sperling* analogized § 216 representative actions to class actions under Rule 23. *Id.*

Thus, none of the case law principally relied upon by *Church* supports its criticism of *Shushan*. *Shushan* recognized that the conflict between the opt-in provision of § 216(b) and the opt-out provision of Rule 23 does not mean that other parts of Rule 23 cannot be used to define "similarly situated" in § 216(b). *Shushan* represents a herculean effort to provide structure to the nebulous "similarly situated" standard by turning to the time-tested notions of Rule 23. Unfortunately, with due respect to my colleague who eloquently authored the opinion, I believe *Shushan* looks to the wrong Rule 23.

Although *Shushan* acknowledges that prior to the 1966 amendments to Rule 23, § 216 collective actions were often treated as "spurious" class actions, it adopts modern Rule 23 standards without explanation. *See also Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1214 (5th Cir.1995) (mischaracterizing *Shushan* as advocating spurious class action treatment of § 216 actions). For example, *Shushan* states that Rule 23(b)(3)'s requirement***1064** that common questions of fact or law "predominate" should be part of a court's decision whether plaintiffs are similarly situated. 132 F.R.D. at 267. As discussed, however, that requirement was not part of Rule 23 prior to 1966, and the Advisory Committee Notes to the 1966 amendments make it clear that the amendments were not intended to affect § 216(b) actions. Therefore, if Rule 23's standards apply to § 216(b) at all, it must be through Rule 23 as it existed prior to 1966.

I turn then to those cases that treat § 216(b) actions as "spurious class actions" under the former Rule 23.

C. *Spurious Class Actions*

Prior to 1966, Rule 23 stated:

> If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on

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> behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

The three variations of a class action came to be referred to as true, hybrid, and spurious, respectively. Prior to 1966, many courts treated collective actions brought under ß 216(b) as "spurious" class actions. *See* Wright, Miller & Kane, supra, ß 1752, at 31-33; *Pentland v. Dravo Corp.*, 152 F.2d 851, 852 (3d Cir.1945). Given that the 1966 amendments to Rule 23 were not intended to affect ß 216(b) actions, there is some support for treating ß 216(b) actions as spurious class actions under the former Rule 23. *See Lusardi v. Xerox Corp.*, 855 F.2d 1062, 1074 n. 15 (3d Cir.1988) (relying on Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and Equal Pay Act through the Fair Labor Standards Act*, 71 Geo.L.J. 119, 139 (1982)). Indeed, the Tenth Circuit, although not addressing the question before me here, has referred to a collective action under ß 216(b) as a "spurious class action." *Equal Employment Opportunity Commiss. v. Sandia Corp.*, 639 F.2d 600, 602 (10th Cir.1980).

The three categories created by the former Rule 23 proved to be highly problematic. According to Professor Zechariah Chaffee: "This tribute to the memory of Wesley Hofeld would be more suitable in a law review article than in an enactment which is to guide the actions of practical men day in and day out." Chaffee, *Some Problems in Equity*, 246 (1950). Courts were constantly baffled as to the correct category under which to proceed. No clear lines divided the true, hybrid, and spurious classes. *See Pentland*, 152 F.2d at 852 ("It may be admitted that the terminology shocks the aesthetic sense and the succession of adjectives before the noun shows the poverty of imagination in choice of terms characteristic of the legal profession.") Another significant problem with the rule was that judges were provided no express discretion to refuse class certification when the tests of the rule were met. Wright, Miller & Kane, *supra*, ß 1752, at 17. Even where the most important issues of a case were so individual to make class treatment highly inefficient, nothing in the rule gave a district court the discretion to refuse class certification. *Id.*

This was especially troublesome in connection with "spurious" class actions. Spurious classes were those tied together only by common questions of fact or law, as opposed to "true" or "hybrid" classes in which the disposition of one class member's rights might affect the rights of others in the class. To certify a spurious class, a party needed only show that one common question of fact or law existed among the class and that they sought a common relief. Courts interpreted the "common relief" provision to require only that the same type of relief be sought from a common source. *See Kainz v. Anheuser-Busch, Inc.* 194 F.2d 737, 743 (7th Cir.), *cert.* ***1065** *denied*, 344 U.S. 820 (1952). Accordingly, a considerable number of cases involving one common question but confounded with overwhelming individual questions would, under a plain reading of the rule, be certified as a class action.

The 1966 amendments to Rule 23 addressed both problems by eliminating the ambiguous class divisions and providing the court with greater discretion to refuse class certification where class treatment would be inefficient or prejudicial. *Id.;* Fed.R.Civ.P. 23(b)(3) (including the requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). The question then is whether discretion exists to refuse certification under ß 216(b) if the test for "similarly situated" is to be equated with a spurious class certification under former Rule 23. I conclude that such discretion exists.

Despite the broad language of former Rule 23, even prior to the 1966 amendments, courts exercised discretion whether to certify a spurious class. Wright, Miller & Kane, *supra*, ß 1752, at 29. "It was said that the 'spurious' class action was allowed as a matter of efficiency to avoid multiplicity of actions and the joinder of parties in these actions was subject to the discretion of the court." *Id.; Knowles v. War Damage Corp.*, 171 F.2d 15 (D.C.Cir.1948), *cert. denied*, 336 U.S. 914, 69 S.Ct. 604, 93 L.Ed. 1077 (1949). In fact, many courts considered a spurious class action simply an alternate device for the permissive joinder of parties without the need for complete diversity of parties. *See, e.g., California Apparel Creators v. Wieder of Calif., Inc.*, 162 F.2d 893, 897 (2d Cir.), *cert. denied*, 332 U.S. 816, 68 S.Ct. 156, 92 L.Ed. 393 (1947).

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The Tenth Circuit rejected the notion that a spurious class action was merely a permissive joinder device, but it did not address whether a court had discretion to deny certification of a spurious class where fairness and efficiency mandated it. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir.1961), *cert. dismissed*, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1962). Rather, the court rejected only the premise that members of a successful plaintiff class could not opt-in after the verdict. *Id.* at 589. I found no Tenth Circuit authority regarding whether a court had discretion under former Rule 23 to deny spurious class certification for equitable reasons. Accordingly, I conclude that the Tenth Circuit would have followed the general rule that regardless of the deafening silence of former Rule 23, district courts had inherent authority to refuse to proceed collectively where it would waste judicial resources or unfairly prejudice the party opposing the proposed class.

Viewing this case in terms of a spurious class action, decertification is appropriate. Although plaintiffs have met the minimal burden for a spurious class action set forth in former Rule 23, in the exercise of my discretion, I conclude that a collective action would be both inefficient and unfairly prejudicial to AMR. As discussed, common questions of fact exist in this case; however, significant issues regarding the liability of AMR to individual plaintiffs are also present. Individual questions of liability on both mealtime and sleeptime claims are simply too numerous and significant to allow this case to proceed efficiently as a collective action.

In addition, there is a significant risk of prejudice to AMR. Even if it were possible to proceed efficiently with this case as a collective action using averaging and F.R.E. 1006 summaries, a jury would be instructed, as a matter of law, that all members of the plaintiff class (or subclass) are similarly situated. AMR would then be forced to argue to the jury that the plaintiffs, in effect, are *not* similarly situated, and some or all plaintiffs deserve no relief. A jury is likely to be confused. Indeed, a collective action is designed to permit the presentation of evidence regarding certain representative plaintiffs that will serve as evidence for the class as a whole. It is oxymoronic to use such a device in a case where proof regarding each individual plaintiff is required to show liability.

Therefore, equating a collective action to a spurious class action under the former Rule 23, I would decertify the class. The question remains, however, why Rule 23, even in its pre-1966 incarnation, should serve as the definition for "similarly situated" in § 216(b). Specifically, I have uncovered no case or ***1066** other authority explaining why collective actions were treated as spurious class actions in the first place. Section 216 does not reference Rule 23, and I have not discovered any reason why the definition of "similarly situated" did not evolve independently. Nevertheless, courts appear to have assumed that § 216 could not stand alone and needed to be pigeon-holed into one of the former Rule 23 categories. *See Pentland*, 152 F.2d at 852 (assuming from the outset that a § 216(b) collective action must be treated as true, hybrid, or spurious).

On June 25, 1938, the date of § 216(b)'s enactment, the Federal Rules of Civil Procedure had been proposed and were pending before Congress, but they had not yet become effective. *Lusardi*, 855 F.2d at 1070. One problem regarding the common law of class actions in 1938 was the binding effect of the class action decree on absent class members. *Id.* To address due process concerns, Congress passed § 216(b), thereby creating an opt-in class. Similarly, the Advisory Committee on the Federal Rules provided for an opt-in class under former Rule 23(a)(3), the spurious class provision. *Id.* Congress permitted Rule 23(a)(3) to become effective by not objecting to it. *See* 28 U.S.C. § 2072.

Therefore, in 1938 Congress had before it both Rule 23 and § 216; yet the language used in each is wholly dissimilar. It could be said that such differences evidence an intent to create distinct standards for an opt-in class. It may be assumed that Congress considered the proposed Rule 23(a) in 1938 in light of the newly passed § 216 and consciously decided to create different standards. It may also be assumed that a rule and a statute, using distinct language and drafted by different entities, were not intended to be interpreted identically. It seems entirely plausible that Rule 23, regardless of vintage, should not even be considered in defining "similarly situated" under § 216(b). Accordingly, I must address a final proposed standard for § 216(b): ad hoc determination.

D. *Ad Hoc Determination of Similarly Situated*

Several courts have interpreted § 216(b) by considering simply the words of the statute itself and the purposes for which it was passed, without reference to Rule 23. This line of cases is typified by *Lusardi v. Xerox Corp.*, 118 F.R.D. 351

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(D.N.J.1987), *vacated in part on other grounds*, 122 F.R.D. 463 (D.N.J.1988). There, the district court conditionally certified a case as a collective action under the ADEA for notice purposes. Generally, at the notice stage, courts following this line of cases "require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan...." *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J.), *judgment aff'd in part, appeal dismissed in part*, 862 F.2d 439 (3d Cir.1988), *judgment aff'd and remanded*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). The court then makes a second determination after discovery has been completed and the case is ready for trial. At this second stage, the standard for "similarly situated" is higher; however, these courts have not articulated a definition for "similarly situated," relying instead upon general principles of judicial economy and fairness. For example, in *Lusardi*, the court addressed several factors in determining that the case should be decertified at the second stage:

> For several reasons, including (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to Xerox which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) the apparent absence of filings required by the ADEA prior to instituting suit, the class will be decertified.

118 F.R.D. at 359. On remand, the *Lusardi* court examined a variety of similar factors and, again, decertified the class. *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 465-66 (D.N.J.1988).

Other district courts have also decided decertification issues without defining "similarly situated." *See, e.g.*, *Plummer v. General Electric Co.*, 93 F.R.D. 311, 312 (E.D.Pa.1981); *Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207, 209 (S.D.W.V.1985); *Burgett v. Cudahy Co.*, 361 F.Supp. 617 (D.Kan.1973); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438 (N.D.Ill.1982). In each case, the court was ***1067** content to decide the question ad hoc, based upon the plain language of the statute and general principles of judicial economy and fairness to the litigants. Although *Lusardi* recognized that Rule 23 class action requirements may be instructive, the court stated that they are "not controlling or even required to be considered." 118 F.R.D. at 359, n. 18.

Lusardi also indicates that courts should consider whether certification would serve the purposes and putative benefits of a collective action under ß 216. The Supreme Court has identified the main benefits of a collective action under ß 216(b): "A collective action allows ... plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged ... activity." *Hoffmann (sic)-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 486, 107 L.Ed.2d 480 (1989).

To date plaintiffs have enjoyed collective benefits in discovery, case management, and trial preparation. The benefits to the plaintiffs in allowing this action to proceed collectively are also significant. The FLSA is a remedial statute, and it seems likely that at least some of the individual plaintiffs would not go forward with this suit if the class is decertified because the costs would be prohibitive. In addition, avoiding the prospect of eighty separate trials upon decertification may serve some measure of judicial economy. However, given the number of individual issues that must be resolved, I am not persuaded that a single trial would save significant time or effort.

[10] In addition, *Lusardi* cautions that I should balance these putative benefits against any prejudice to the defendant and any judicial inefficiencies that may result from allowing plaintiffs to proceed collectively. Further, regardless of the potential benefits, plaintiffs still must meet their burden of showing that they are similarly situated. Because I conclude that plaintiffs have not met that burden, and proceeding collectively would significantly prejudice the defendant, I will decertify the plaintiffs' class.

In *Lusardi*, despite there being some common questions among the class and a collective action would have avoided some repetition of evidence and argument, the court decided that plaintiffs were simply not similarly situated within the meaning of the statute. The same holds true here.

As discussed, this case is fraught with questions requiring distinct proof as to individual plaintiffs. Issues requiring individualized proof, such as call volume, sleep habits, conditions at particular stations, and treatment under AMR's mealtime policy, dominate plaintiffs' claims. In addition, AMR's defense that plaintiffs impliedly agreed to AMR's sleeptime policy cannot be addressed on a class-wide basis. Simply put, under a plain reading of ß 216(b) and bearing in mind the purposes of a collective action, I find and conclude that plaintiffs are not similarly situated.

950 F.Supp. 1053

950 F.Supp. 1053, 3 Wage & Hour Cas.2d (BNA) 1317

(Cite as: 950 F.Supp. 1053)

IV. CONCLUSION

Therefore, under every recognized test, except *Krueger,* which I reject as being too lenient, plaintiffs are not similarly situated under ß 216(b). For the purposes of this case, the other three tests produce the same result. As to future cases, however, the results may vary depending upon the test employed. For example, strict compliance with Rule 23(b)(3)'s requirement that common questions predominate would appear to be a more stringent standard than either the discretionary certification of a spurious class or the ad hoc approach of *Lusardi.* To the extent that is true, I would apply the *Lusardi* approach, which affords flexibility in weighing concerns for judicial economy against unfair prejudice to a defendant tempered by the remedial purposes of the FLSA. Despite the unpredictability of an ad hoc approach, I see no basis to conclude that the paradigm of Rule 23 can be engrafted upon ß 216(b).

Accordingly, I will decertify the plaintiffs' conditionally certified class, with the exception of plaintiffs who worked as dispatchers. Dispatchers will be permitted to proceed collectively. In addition, plaintiffs have consented to the use of separate liability verdicts. ***1068** Therefore, I will grant AMR's motion for separate liability verdicts as to the dispatchers. AMR's motion for separate liability verdicts and subclasses is otherwise mooted by the decertification of the rest of plaintiffs' class.

Accordingly, it is ORDERED that:

1. Plaintiffs' request for reconsideration is GRANTED IN PART, and my ORDER of September 4, 1996, is VACATED IN PART to the extent that I granted summary judgment to defendant on plaintiffs' mealtime compensation claims;
2. Defendant's motion to decertify is GRANTED, except to the extent that those plaintiffs who worked as dispatchers may proceed collectively on their mealtime claims.

950 F.Supp. 1053, 3 Wage & Hour Cas.2d (BNA) 1317

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

CASEY PARKS, et al.,

Plaintiffs,

vs.

EASTWOOD INSURANCE SERVICES, INC., et al.,

Defendants.

Case No. SA CV 02-507-GLT[kc]

DENIAL OF APPLICATION TO PREVENT DEFENSE COMMUNICATIONS

On apparent first impression, the Court holds that, in a representative action for unpaid wages or overtime under the Fair Labor Standards Act, 29 U.S.C. § 216(b), a defendant employer may communicate with prospective plaintiff employees who have not yet "opted in," unless the communication undermines or contradicts the Court's own notice to prospective plaintiffs.

I. BACKGROUND

The named Plaintiffs sued their employer for unpaid overtime wages under the Fair Labor Standards Act. They moved under 29 U.S.C. §216(b) to designate the case as a representative action and to give a Court-authorized notice to prospective plaintiffs. The Court granted the

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motion and ordered an appropriate notice.

Before the Court's notice was sent, Defendant sent to its prospective plaintiff sales agent employees an internal memorandum about the case. In particular, Defendant advised employees they could contact Defendant's general counsel to answer any questions they might have. The memo is attached as an Appendix.

Plaintiffs filed an application to stop Defendant from communicating with prospective plaintiffs, and to make Defendant pay for a corrective notice.

II. DISCUSSION

The restrictions on defendant communication with class action or representative action plaintiffs arise from the existence of an attorney-client relationship. A lawyer is forbidden from communicating with a party the lawyer knows to be represented by counsel, regarding the subject of the representation, without counsel's consent. Rules of Professional Conduct of the California State Bar, Rule 2-100; ABA Model Rules of Professional Conduct, Rule 4.2. This "anti-contact" rule is designed to prevent overreaching of laypersons by attorneys representing adverse parties. Vincent R. Johnson, The Ethics of Communicating with Putative Class Members, 17 REV. LITIG. 497, 511 (1998). Once an attorney-client relationship is established, the attorney serves as a shield protecting the client.

In a class action certified under Rule 23, Federal Rules of Civil Procedure, absent class members are considered represented by class counsel unless they choose to "opt out." See Kleiner v. First National Bank of Atlanta, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985)(citing Van Gemert v. Boeing Co., 590 F.2d 433, 440 n.15 (2nd Cir. 1978), aff'd, 444 U.S. 472 (1980)). Defendants' attorneys are subject to the "anti-

contact" rule, and must "refrain from discussing the litigation with members of the class as of the date of class certification." Id.

The situation is different in a § 216(b) representative action for unpaid wages or overtime. Section 216(b) provides, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party. . ." Until they "opt-in," prospective § 216(b) plaintiffs are not yet parties to the action, they have no attorney, and no attorney-client relation is yet in issue. The Court's authorization to give notice in a § 216(b) case does not create a class of represented plaintiffs as it does in a Rule 23 class action.

For purposes of defense communication with § 216(b) prospective plaintiffs, the situation is analogous to a pre-certification Rule 23 class action, when the prospective plaintiffs are still unrepresented parties. The main difference in such a comparison is that, after the Court authorizes a notice in a § 216(b) case, the Court has an interest that no defense communication undermine or contradict the Court's own notice. However, in other respects, the defense communication allowed in a §216(b) representative action during the period before a prospective plaintiff "opts in" should be the same as in a Rule 23 class action before certification and creation of a represented class.[1/]

[1/]In opposition, Plaintiff cites Resnick v. American Dental Association, 95 F.R.D. 372 (N.D. Ill. 1982), an employment discrimination case under 29 U.S.C. § 216(b). Although not disclosed in the opinion, examination of the complaint shows it was a representative action rather than a Rule 23 class action. Resnick held that, once there is certification, the defendant cannot have ex parte communications with potential class members. Resnick at 376-377. Resnick is of little persuasive value: it simply treats the action as a "class action," making no distinction between an "opt-in" and an "opt-out" situation or when the representation by counsel begins. Resnick does not assist the Court's analysis.

In a Rule 23 class action, pre-certification communication from the defense to prospective plaintiffs is generally permitted. The law is not settled on this issue, but the majority view seems to be against a ban on pre-certification communication between Defendant and potential class members.

The Second Circuit, state and federal district courts in California, and a leading treatise conclude Rule 23 pre-certification communication is permissible because no attorney-client relationship yet exists. Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2nd Cir. 1972)(rejecting argument that "once a plaintiff brought suit on behalf of a class, the court may never permit communications between the defendant and other members"); Babbit v. Albertson's Inc., 1993 WL 128089 (N.D.Cal. 1993) (finding "putative class members in the instant action were not represented by class counsel"); Atari v. Superior Ct. of Santa Clara County, 166 Cal.App.3d 867, 212 Cal. Rptr. 773, 775 (1985)("Absent a showing of actual or threatened abuse, both sides should be permitted to investigate the case fully"); Manual for Complex Litigation (Third) § 30.24 (1995) ("Defendants ordinarily are not precluded from communications with putative class members, including discussions of settlement offers with individual class members before certification").

Although many of the cases involve an advance application to the Court to approve a defendant's communication, there appears to be no basis for restricting communications to those having advance court approval. In fact, the Supreme Court has held parties or their counsel should not be required to obtain prior judicial approval before communicating in a pre-certification class action, except as needed to prevent serious misconduct. See Gulf Oil Co. v. Bernard, 452 U.S. 89,

94-95, 101-102 (1981). An order restricting pre-certification communications must be based on "a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties," or run the risk of imposing an unconstitutional prior restraint on speech. Id. at 101.

Plaintiffs' best authority for prohibiting Rule 23 pre-certification communication is Dondore v. NGK Metals Corp., 152 F.Supp.2d 662, 665 (E.D. Pa. 2001), holding the "mere initiation of a class action" prohibits defense counsel from contacting or interviewing potential class members. The Dondore court reasoned putative members of a class action are passive beneficiaries because they do not have to do anything to benefit from the suit. This logic is not applicable in a representative action where potential plaintiffs must affirmatively opt-in to benefit from the suit. In any event, the weight of authority seems unwilling to adopt the Dondore view.

Other cases restricting Rule 23 pre-certification contact are situations where defendant's communication was misleading or improper. Impervious Paint Industries v. Ashland Oil, 508 F.Supp. 720, 723 (W.D. Ky, 1981) ("In the course of [defendant's] contact of class members, the copy of the class notice was presented along with the oral legal advice which was specifically omitted from the notice prepared by the Court"); Pollar v. Judson Steel Corp., 1984 WL 161273 (N.D. Cal. 1984) (finding defendant's notices could seriously prejudice the rights of absent class members by failing to disclose material facts about the case).

Based on the provisions of § 216(b) and the similar Rule 23 pre-certification situation, the Court concludes there is no prohibition against pre-"opt-in" communication with a § 216(b) potential plaintiff, unless the communication undermines or contradicts the Court's notice.

If an undermining or contradictory communication is sent, the Court can control the proceedings through sanctions, requiring payment for a curative notice, regulation of future ex parte communications, or other appropriate orders.[2/] Any restrictive order should make specific findings of actual or potential abuse or misconduct, and sanctions or limitations on future communications should be narrowly tailored to avoid excessive restraint on speech. Gulf Oil v. Bernard, 452 U.S. at 101.

The Court finds Eastwood's September 26, 2002 Internal Memo to prospective plaintiff sales agents does not undermine or contradict the Court's own notice. It does not state legal advice. Defendant's suggestion to direct questions to its General Counsel is permissible at this pre-"opt in" stage. There is no substantial suggestion of retaliation if an employee opts-in. There does not appear to be serious or undue prejudice or an actual or potential abuse or misconduct as a result of the communication.

III. DISPOSITION

The application for a preventive order is DENIED.

DATED: December 3, 2002.

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

[2/]Of course, if the communication is slanderous, contains a threat of retaliation if a prospective plaintiff opts in, or is otherwise legally inappropriate, the Court can intervene and separate legal remedies may be available.

EASTWOOD INSURANCE SERVICES, INC.
INTERNAL MEMO

Date: September 26, 2002
To: All Sales Agents
From: J[redacted] A. P[redacted], CEO
Re: Class Action Litigation

Eastwood Insurance Services, Inc. has been named as a defendant in a lawsuit entitled *Parks v. Eastwood Insurance Services, Inc.*. The substance of this lawsuit is an allegation that we applied an inappropriate standard in the way that we compensate sales agents. There have been a barrage of similar lawsuits recently filed against many insurance companies and brokers. The company disagrees with the allegation and is aggressively defending the lawsuit.

You will be receiving a Notice of the Class Action in the very near future. We know you were never asked to be a part of this lawsuit and so you may have questions about it. Your branch manager doesn't have any information about this lawsuit beyond what we have shared with you. For this reason, we have instructed them not to discuss the case with you, but rather, to direct you to contact J[redacted] T[redacted], General Counsel for the Company at (714) 6[redacted]. J[redacted] will try to answer any questions you might have.

There may have been numerous rumors made on this topic. This case is in a very early phase so any rumors you may have heard are purely speculative. Please disregard the rumors and trust that the matter will proceed forward in as logical and timely a way as circumstances permit.

We continue to have serious and ambitious business objectives to accomplish, and I encourage you to remain committed to those objectives with me and not allow this matter to become a distraction. Thank you in advance for all of the efforts and dedication which each and everyone of you make to ensure your personal and the company's success.

Thank you,

J[redacted] P[redacted]
CEO

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.
(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).
(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.
(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.
(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:
• the nature of the action,
• the definition of the class certified,
• the class claims, issues, or defenses,

• that a class member may enter an appearance through counsel if the member so desires,
• that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
• the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is

made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.
(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.
(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.
(C) In appointing class counsel, the court
(i) must consider:
• the work counsel has done in identifying or investigating potential claims in the action,
• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
• counsel's knowledge of the applicable law, and
• the resources counsel will commit to representing the class;
(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and
(iv) may make further orders in connection with the appointment.
(2) Appointment Procedure.
(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.
(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.
(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.
(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).
(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release ("the Agreement") is entered into this 1st day of July, 2003 ("the Effective Date"), between Plaintiff Peter Plaintiff, on behalf of himself and all others similarly situated, on the one hand (collectively "Plaintiffs"), and Defendant Defendant Co., its parents, affiliates, successors and assigns on the other.

RECITALS

A. On March 1, 2002, Plaintiff filed a class action suit for unpaid overtime, interest and penalties in the United States District Court for the Northern District of California, entitled Plaintiff v. Defendant Co., which alleged causes of action for unpaid wages, waiting time penalties, violation of Bus. & Prof. Code section 17200 et seq., and fraudulent concealment. Defendant denies each of the allegations in the Lawsuit.

B. Plaintiffs and Defendant desire to settle the Lawsuit in the manner and upon the terms and conditions set forth below.

C. The parties engaged in discovery and exchanged substantial information.

TERMS OF AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, it is hereby stipulated and agreed by and among the undersigned, subject to the Court's written approval of this settlement as fair, just, and reasonable, and having been made in good faith, that all disputes and all claims shall be settled and compromised as follows:

1. IDENTITY OF CLASS. The parties hereby stipulate to conditional class certification for the purposes of settling the Lawsuit. The class is defined as: "All current or former employees of Defendant who, at any time during the period of January 1, 2000 through December 31, 2004 ('the Class Period'), served in the position of Outside Salesperson for Defendant Co. in the State of California."

2. SETTLEMENT CONSIDERATION.

2.1. Establishment of Escrow Fund. Upon Defendant's receipt of notice of the Court's final approval of the settlement, Defendant shall have available a fund ("the Escrow Account") in the total sum of _____. The Escrow Account shall be maintained in Defendant's name, but disbursements from the Escrow Account shall be directed by the Claims Administrator (defined below). The Escrow Account may be subject to reduction only as set forth in Section 8 below.

2.2. Hiring of Accounting Firm. The firm of Ernst & Young shall act as Claims Administrator. Within three (3) business days of receipt of Proof of Claim Forms described in Section 8 of this Agreement, the Claims Administrator shall perform the calculations set forth in Section 2.3. Upon completing its calculations, the Claims Administrator shall prepare a written report setting forth the Payment Due for each class member and shall forward that report to counsel for Plaintiffs and Defendant. Plaintiffs and Defendant shall have the right to question the Claims Administrator concerning the preparation of the report.

2.3. Payment Due. The Claims Administrator shall calculate the Payment Due for each class member as follows:

2.3.1. "Work Months" shall be the number of full months that the class member was employed by Defendant as an Outside Salesperson in California during the Class Period.

2.3.2. "Total Months" shall be the number of months worked collectively by those Outside Salespersons participating in the distribution of the settlement proceeds by having timely provided the Claims Administrator with the appropriate form.

2.3.3. Formula for Calculating Payment Due. The payment due to each class member shall be calculated according to the following formula:

Payment Due = (Work Months divided by Total Months) x (The Escrow Account)

2.4. Expenses of Escrow Account. The reasonable fees and costs of the Claims Administrator shall be paid by Defendant.

2.5. Names, Addresses and Months Worked. Within five (5) business days of signing the Agreement, the parties will provide the Claims Administrator with the names, Work Months and last known addresses of the class members.

3. CLAIMS ADMINISTRATOR. The Claims Administrator shall direct payments from the Escrow Account, carry out the notice procedure, and direct the payment of claims as provided herein.

4. NOTICE TO CLASS MEMBERS. Not later than ten (10) business days after the Court's preliminary approval of the settlement, and unless otherwise ordered by the court, the Claims Administrator shall mail to each class member a "Notice of Settlement of Class Action" and a "Proof of Claim Form and Release," in the forms attached hereto as Exhibits A and B, respectively. The "Notice of Settlement of Class Action" and "Proof of Claim Form and Release" shall be mailed to the class member's last known residential address provided by Defendant to the Claims Administrator. All reasonable costs of notice (including without limitation postage and copying charges) shall be paid by Defendant.

5. PAYMENT OF ATTORNEY'S FEES, COSTS AND EXPENSES. To compensate Plaintiffs' counsel for the attorney's fees and costs necessary to prosecute this case, Defendant shall pay Plaintiffs' counsel the sum of _____ which amount shall be due and payable within ten (10) business days of the Court's final approval of the settlement and its dismissal with prejudice of the lawsuit. Of this amount, _____ represents the reimbursement of expenses. To the extent that expenses are less than _____, the difference between actual expenses and _____ will be distributed to the class members who participate in this settlement. Defendant shall not oppose Plaintiff's application for fees and costs consistent with this Section, and Plaintiff shall not seek fees in excess of this agreed-upon amount.

7. ENHANCED COMPENSATION FOR NAMED PLAINTIFF. To compensate named Plaintiff, Peter Plaintiff, for his time, expense and effort in prosecuting this case, the Defendant shall pay Mr. Plaintiff the additional sum of _____ unless some other amount is ordered by the court. This payment shall be made at the same time the settlement proceeds are distributed to the participating class members.

8. PAYMENT OF CLAIMS. Class members shall submit a signed "Proof of Claim Form and Release" to the Claims Administrator not later than thirty three (33) calendar days from the date the Claims Administrator mailed out the forms to the class members, unless otherwise ordered by the court. The date thirty-three days from the date of mailing by the Claims Administrator is the "Deadline". The date of submission by a class member is the date the document is actually received by the Claims Administrator. The Claims Administrator is authorized to direct payment of only the claims of those class members who have not opted out and who have submitted by the Deadline a signed "Proof of Claim Form and Release," with their names clearly identified.

Not later than ten (10) business days after the Deadline, the Claims Administrator shall deliver a written report to counsel for Plaintiffs and Defendant setting forth: (1) the name of each class member who has timely submitted a "Proof of Claim Form and Release" and the amount that class member is entitled to receive under the terms of the Agreement; (2) the name of each class member who has not responded; and (3) the name of each class member who has opted out of the settlement and whether or not the class member intends to bring an action against Defendant.

Within ten (10) business days following the Court's final approval of the settlement, the Claims Administrator shall make sure that distributions from the Escrow Account are completed in accordance with this Agreement, unless otherwise ordered by the Court. Half (50%) of each such distribution shall have deductions taken for appropriate federal and California taxes, while the remaining half shall be payable in a lump sum representing interest (25%) and penalties (25%). Any amounts remaining in the Escrow Account after 150 days from

the distribution of the settlement proceeds shall revert to Defendant, and any class member who does not opt out of the settlement or file a Proof of Claim Form within the response period agreeing to the settlement shall be deemed to have forfeited his or her share of the settlement.

In the event that class members opt out of the settlement or fail to respond such that the collective number of months of employment during the Class Period of those opting out and not responding total more than 322, the Escrow Account shall be reduced by any additional opt-outs in an amount calculated as follows: (months of employment of opt-outs in excess of 322) divided by (Total Months) times the Escrow Account. Any such reduction shall revert to Defendant.

9. RELEASE OF CLAIMS. Plaintiffs and the class (hereinafter "Releasing Parties"), in consideration of the promises set forth herein, hereby release and discharge any and all claims for:

(1) unpaid overtime wages;

(2) unpaid straight time wages in excess of 7.25 hours per day;

(3) waiting time penalties relating to the alleged failure to pay overtime or straight time wages;

(4) interest on alleged unpaid wages;

(5) costs and attorney's fees associated with the recovery of alleged unpaid wages;

(6) any other damages relating to the alleged failure to pay overtime or straight time wages; and

(7) fraud regarding their exempt or non-exempt status,

that the Releasing Parties may have had arising from their employment with Defendant, its parents, subsidiaries or affiliates, in any Defendant Co. position within the State of California. It is understood and agreed that, as a condition of this release, Plaintiffs and the class knowingly

waive any and all claims, rights, or benefits they may have under Cal. Civil Code section 1542 with respect to the released claims. Section 1542 provides as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

10. STIPULATION FOR COURT APPROVAL. Promptly after execution of this Agreement, Plaintiffs and Defendant shall execute and file the "Stipulation and Order Certifying Class for Settlement Purposes Only," attached hereto as Exhibit C, and the "Stipulation and Order Granting Preliminary Approval of Settlement and Setting Hearing for Final Approval," attached hereto as Exhibit D. The parties and their counsel agree to execute all such further and additional documents as the Court may require to carry out the provisions of this Agreement.

11. NO RETALIATION AGAINST CLASS MEMBERS. Defendant will not threaten, discriminate or retaliate against, either directly or indirectly, any class member because of his or her participation or non-participation in this settlement.

12. DISMISSAL OF LAWSUIT. The Lawsuit shall be dismissed concurrent with the Court's final approval of the settlement. The dismissal shall be with prejudice with respect to the Releasing Parties. The court shall retain jurisdiction to enforce and monitor the settlement.

13. MISCELLANEOUS.

13.1. Entire Agreement. This instrument constitutes the entire agreement and understanding between the parties hereto concerning the subject matter hereof, and supersedes and replaces all prior negotiations and proposed agreements, written and oral, relating thereto. Plaintiffs and Defendant may waive, release or alter any provision of this Agreement, but in no event will such waiver, release or alteration be valid unless it is in writing and signed by duly authorized representatives of Plaintiffs and Defendant and approved in writing by the Court. No waiver of any term, provision or condition of this Agreement, whether

by conduct or otherwise, in any one or more instance shall be deemed to be or construed as a further or continuing waiver of any such term.

13.2. Authority. The undersigned counsel and the parties represent that they are authorized to enter into and execute this Agreement.

13.3. Best Efforts. Each of the undersigned agrees to use his or her best efforts to take, or cause to be taken, all actions as may be reasonably required in order to effectuate this Agreement.

13.4. No Admissions. This Agreement, the settlement and any proceedings or documents in connection therewith shall not be construed as an admission of truth of any allegation or the validity of any claim asserted or of any liability therein; nor shall this Agreement, nor the settlement, nor any papers related to them, nor any of the terms hereof be offered or received in evidence or in any way referred to in any civil, criminal or administrative action or proceeding other than such proceedings as may be necessary to consummate or enforce this Agreement; nor shall they be construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing.

13.5. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and together shall constitute one and the same instrument and when each party has signed at least one such counterpart, this Agreement shall become binding and effective as to all parties as of the day and year first above written.

13.6. Governing Law. This Agreement shall be interpreted and enforced under the laws of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

Plaintiff: _____
Peter Plaintiff

Defendant: Defendant Co.

By: _____

Title: _____

APPROVED AS TO FORM:

The Law Offices Of Plaintiff's Attorney

_____
Plaintiff's Attorney
Attorneys for Plaintiffs

THELEN REID & PRIEST LLP

_____
Attorneys for Defendant Co.

HOT TOPICS IN WAGE & HOUR LAW

TRENDS AND DEVELOPMENTS IN DOL ENFORCEMENT ACTIVITIES

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A. DOL continues to enforce the FLSA vigorously.

1. During its 2003 fiscal year, DOL collected over $212 million in back wages, an increase of about 21% over FY 2002, and a 61% increase from 2001. Significantly, DOL is recovering more money for more employees but closing fewer cases and investing fewer hours.

2. The DOL has continued its special focus on so-called “low-wage” industries. In 2003, the low-wage industries most frequently investigated by the DOL were restaurants (5048 cases), health care (2177 cases), agriculture (1762 cases) and hotels and motels (958 cases). Other industries recently targeted by the DOL (and by plaintiffs' attorneys) are healthcare, temporary help agencies, day care, janitorial services, garment manufacturing, guard services, computer-based call centers and other customer service-related operations.

    a. DOL conducted around 13,000 investigations in its "low-wage" target categories, generating back-wage payments of approximately $40 million.

    b. For 2004, DOL asked for a budget increase specifically aimed in part at its expansion of these efforts. DOL has said that it will be going after other violators in these industries, as well as repeat or "chronic" violators and employers operating under compliance agreements or FLSA injunctions due to past noncompliance.

3. DOL will also be performing audits designed to build a statistical base on the extent of compliance or noncompliance in these industries and others. Employers should not expect to get any "breaks" on violations uncovered in audits undertaken for statistical purposes.

    a. This means that, among other things, enforcement officials will schedule selected employers for a review without regard to whether employees have complained.

b. It is likely that DOL will include what it considers to be a representative number of small businesses, new businesses, and multi-location businesses.

B. The FLSA authorizes representatives of the DOL to investigate and gather data from employers concerning wages, hours and other employment practices.

1. If the DOL decides to investigate, investigators are permitted to enter and inspect premises and records (e.g., records of dollar volume of business transactions, payroll and time records), as well as interview employees to determine whether any person has violated any provision of the FLSA.

2. Sometimes these visits are made with very little notice. Often, an employer is busy with other things and is not able to participate in an investigation right then and there. Investigators from the U.S. Wage and Hour Division are usually willing to put the investigation off for a week or two while the employer prepares to cooperate in the inspection. During this time, the employer should carefully evaluate the status of its compliance with the relevant laws and familiarize itself with management's rights, obligations and alternatives.

3. In-house counsel should carefully monitor the investigation once it starts. Even well intentioned investigators can take mistaken legal positions or make onerous and unrealistic demands upon employers, which may not be justified under the law or the particular circumstances at hand.

4. The DOL will advise of any violations found, and ask the employer to correct them (e.g., requesting payment of any back wages owed). If an agreement is not reached, the Secretary of Labor or an individual employee or group of employees may file a lawsuit to collect past due wages. Under the FLSA, employees may recover lost wages, liquidated damages, interest, attorney fees and costs.

C. Enforcement of the new "White-Collar" exemption rules is a key DOL initiative.

1. DOL rules clarifying the definitions of bona fine exempt employees under the executive, administrative, professional and outside sales and computer employee exemptions (see 29 C.F.R. §541) became effective August 23, 2004.

2. On June 24, 2004, Labor Secretary Chao announced the formation of an enforcement task force to "maximize protection of workers' pay rights" under the new rules. All employers should anticipate scrutiny of exemption classifications during any DOL investigation or audit.

3. The revisions include changes to the so-called "duties" tests used to determine whether an employee is eligible for the executive, professional, administrative, outside sales and/or computer employee exemptions from the FLSA overtime requirements.

4. The new rules increase the wage level below which any employee is entitled to overtime regardless of the nature of the job duties.

5. The new rules include changes to the "salary basis" requirement for exempt executive, administrative and professional employees. The rules now permit partial week suspensions of exempt employees who violate serious work rules (such as sexual harassment) and provide a "safe harbor" to preserve an employee's exempt status in the event impermissible deductions are made (replacing the so-called "window of correction" for improper deductions).

6. DOL has spent considerable money to educate employers about the new rules. Ignorance will not excuse any employer – regardless of size.

    - DOL has created video training seminars, which can be viewed on DOL's web site, downloaded or emailed. Topics include an overview of the new rules by Secretary Chao (3 minutes), "Executive Exemption" (15 minutes), "Administrative Exemption" (15 minutes), "Professional Exemption" (15 minutes) and "Salary Requirements" (20 minutes). The seminars are available on the DOL web site at www.dol.gov under "FairPay Overtime Rules."

    - DOL has also created "Fact Sheets" on the following exemptions, occupations and topics (available at www.dol.gov under the "FairPay Overtime Rules" link):

        - Overview for Executive, Administrative, Professional, Computer, & Outside Sales Employees;
        - Administrative Employees;
        - Professional Employees;
        - Employees in Computer-Related Occupations;
        - Outside Sales Employees;
        - Salary Basis Requirement and the Part-541 Exemptions;
        - Highly-Compensated Workers and the Part-541 Exemptions;
        - Blue-Collar Workers;
        - First Responders;
        - Veterans;
        - Insurance Claims Adjusters;
        - Financial Services Industry Employees;
        - Nurses;
        - Technologists and Technicians.

7. DOL's "Amicus" Program allows interested parties to inform DOL of private cases involving the classification of employees under the new "white collar" exemption rules. The Solicitor's Office will review such cases to determine whether the filing of an *amicus curiae* brief is warranted. The purpose of the Amicus Program is to allow the Solicitor's Office in appropriate cases to share with courts the Department's view of the proper application of the new Part 541 rule. Interested parties should contact the Solicitor's office:

Department of Labor
Office of the Solicitor
Fair Labor Standards
200 Constitution Ave., NW
Room N 2716
Washington, DC 20210
(202) 693-5555

D. During any investigation or audit, an employer should prepare for and anticipate DOL review in areas other exemption classification. Some of the areas in which employers often run into trouble are discussed below:

1. *Minimum Wage and Overtime Violations.* With certain limited exceptions, an employer must pay each nonexempt employee at least the minimum wage (currently $5.15/hour) and, for each hour the employee works over 40 in a particular workweek, overtime at 1.5 times the employee's regular rate.

a. *Deductions.* Employers may run into trouble for deducting certain items from employees' wages that result in wages dropping below the required hourly minimum wage and/or required overtime payment. Charges for employer-required transportation, damaged or unreturned equipment, shortages, uniforms, tools, gloves or other materials necessary for employees to perform their jobs may *not* be deducted from wages if these deductions bring wages for that pay period below the required hourly minimum wage or cut into the required overtime payment.

b. *Regular Rate Calculations.* The regular rate used to calculate overtime must be an hourly rate regardless of how the employee's pay is otherwise computed. It is generally determined by dividing an employee's total compensation (except for certain exclusions) for any workweek by the total number of hours the employee worked in that workweek that the compensation was intended to cover. If an employee is paid solely at one hourly rate of pay, then that is the employee's "regular rate." Employers frequently violate the FLSA by failing to include shift differentials, on-call payments, non-discretionary bonuses, commissions and other forms of incentive earnings in the regular rate and, as a result, in overtime pay.

2. *Hours Worked.* An employer must pay non-exempt employees for all "hours worked." DOL and the courts have construed "hours worked" to include all time that the employer knows or has reason to know an employee is engaged in work.

   a. *Pre-shift and post-shift activities.* In general, employers do not have to pay for activities done before or after an employee's principal work activities ("preliminary" and "postliminary" activities). An employer must pay for such activities, however, if they are "integral and indispensable" to the employee's principal work activities. "Integral and indispensable" activities are those which are (1) necessary for the employee to do his or her job; and (2) performed the benefit of the employer. Examples of such activities include:

      - time spent by employees to fuel and stock their welding rigs each day, including necessary travel time (see *Baker v. Barnard Construction*, 146 F.3d 1214 (10th Cir. 1998));
      - time spent before and after each shift putting on, taking off, and cleaning required sanitary and safety equipment (see *Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998)).

   b. *Travel time.* Travel-time problems are some of the most complex and confusing of all wage-hour issues. Normal commuting to and from work generally is not compensable work time. Travel between job sites, however, is generally counted as hours worked, as is travel between one assignment and another during a workday. Travel between home and the place of assignment on a trip to another city by an employee who normally has a fixed place of work is hours worked. Overnight out-of-town travel by public transportation is hours worked to the extent it occurs during normal working hours, even if the traveling is done on weekends or holidays. Overnight out-of-town travel as a passenger outside normal working hours is not hours worked if the employee is not otherwise working while traveling. If, however, the employee is required to drive a vehicle in connection with this travel, all of the travel time must be considered hours work except for bona fide meal periods.

   c. *Waiting time.* An employee's time spent waiting for something to happen or for something to do can be compensable work time. Courts have found such "wait time" compensable under the FLSA if the time spent waiting is primarily for the benefit of the employer, versus the employee having the time to effectively use for his or her own purposes. One must look at all the facts to decide whether an employee is "engaged to wait" (which is compensable) or "waiting to be engaged" (which is not). For example, unpredictable periods of inactivity while an employee is "on duty," such

as standing by for another assignment during a shift, are usually regarded as being "engaged to wait." On the other hand, casual "pick up" workers who show up on their own at a job site in the hope of being hired for the day are usually "waiting to be engaged" and need not be paid for the waiting time.

d. *On-call time*. Questions sometimes arise as to how to categorize time an employee spends in "on-call" status. Naturally, all work an employee does while on call must be treated as compensable. Whether an employer must record and pay for time an employee is waiting but not working while on call generally depends on the level of restriction placed on the employee's use of the time for his own purposes. An employee who is not required to remain on the premises and who can use the idle on-call time predominantly for his own benefit (even if he is required to carry a beeper) generally need not be compensated for that time.

e. *Meetings and Training*. Attending meetings, training programs and similar activities is compensable unless all of the following conditions are met:

- attendance is outside the employee's regular work hours;
- attendance is voluntary;
- the meeting, training or other such activity is not directly related to the employee's current job; and
- the employee does not perform any productive work during the attendance.

f. *Inadequate records*. Employers who fail to keep adequate records of hours worked will have difficult time establishing that employees have been paid for all such hours. Record-keeping problems frequently arise when: (1) employees do not complete a time card each day but try to remember hours at the end of the pay period; (2) time cards show "scheduled" hours rather than actual hours work; (3) employers automatically deduct for a specific lunch break.

3. *Independent contractors*. Businesses sometimes assume that they need not follow the FLSA with respect to people they call "independent contractors." Whether someone is *really* an "independent contractor" depends on such factors as:

- Whether the business controls the way the work is performed;
- Whether the person has any opportunity for profit or loss in a business sense;
- Whether the person has any significant investment in equipment or materials;
- Whether initiative, judgment or open-market competition is required for the success of the claimed independent enterprise;

- Whether the relationship is for a specific or short time, versus an indefinite or long period; and
- Whether the service rendered is an integral part of the business receiving the service.

4. *Compensatory Time*. Notwithstanding widespread misconceptions to the contrary, private sector employers may not compensate nonexempt employees for working overtime by giving them time off in another week. It is, however, legal to control or rearrange an employee's hours within a workweek to prevent overtime from being worked (subject to compliance with state and local laws).

E. Employers should be alert for a possible increase in the FLSA minimum wage.

1. Senator Ted Kennedy (D. Mass.) is pressing hard for an increase of $1.85, to $7.00 an hour, over two years. He proposes to implement this in three installments: a 70-cent jump 60 days after passage, a hike of 60 cents one year later, and a final spike of 55 cents at 24 months.

2. Even employers who typically pay employees at rates higher than the FLSA minimum wage could be indirectly affected by such an increase through wage compression, heightened employee expectations, or the increased chances that employees will be provoked to ask hard questions about the way they are paid.

3. Other effects could be more direct. For instance, at a minimum wage of $7.00, the lowest overtime-workweek average hourly pay rate for an employee paid under the FLSA Section 7(i) exemption for commissioned employees of a "retail or service establishment" would move from today's $7.73 per hour to more than $10.50 per hour.

F. In recent campaign speeches, President Bush has called on Congress to pass legislation that would extend to private sector workers the options of compensatory time and flexible time arrangements, a choice currently available only to public sector workers.

1. The White House has defined compensatory time as an option that "enables employees to choose paid time off as an alternative to overtime pay." For example, a worker who opts for comp time and works eight hours of overtime would be entitled to 12 hours off, or one and one-half hours off for each hour of overtime.

2. According to the White House, "flex time gives an employee the option of 'flexing' his or her schedule over a pay period, by scheduling more than 40 hours of work in one week, and then scheduling less than 40 hours in the following week. For example, an employee may request to work 48 hours one week in a two-week pay period to offset a paid day off during the following week to chaperone a child's school trip."

3. Although President Bush has not endorsed specific legislation for providing private sector workers flex time or comp time, House Republicans have pointed to the Family Time Flexibility Act (H.R. 1119) as one that would provide for the comp time benefits the White House has described. The bill, introduced March 6, 2003, by Rep. Judy Biggert (R-Ill.), would allow employees to "bank" up to 160 hours of overtime per year for later use as paid time off to give employers more flexibility in setting work schedules. The House Education and the Workforce Committee approved the legislation April 9, 2003 (21 HRR 373, 4/14/03).

4. Employer groups have traditionally supported the changes Bush is proposing. Organized labor, however, issued sharp objections to the proposed changes. In a statement issued Aug. 5 by the AFL-CIO, President John Sweeney said the Bush proposal would take away corporations' "one big disincentive against having their employees work excessive hours--a time-and-one-half cash premium. Many workers will feel pressure from their employers to work more than 40 hours a week without overtime pay, and then take time off in the coming weeks, in order to accommodate the employer's schedule--not their own."

G. States and other jurisdictions are permitted to have wage-hour provisions that are tougher than the FLSA. With increasing frequency, many of them are requiring employers to pay more than the FLSA requires.

1. These laws can require such things as a minimum wage higher than the FLSA requirement; a daily-overtime requirement; minimum pay for reporting to work; or tougher child-labor standards.

2. States and other jurisdictions might also strictly limit or prohibit almost all deductions from wages; set time limits for paying employees who resign or are fired; limit the terms upon which bonus, incentive, or commission payments can be paid, lost, or forfeited; regulate accumulation and payment of vacation or leave; require payment with a particular frequency; or require payment in cash.

3. State or local laws might not recognize all of the exemptions available under the federal FLSA or might recognize them on different or more-limited terms.

4. In recent years, local governments have been enacting so-called "living wage" ordinances requiring employers doing business with or receiving benefits from them to pay rates higher (sometimes substantially so) than the federal and/or state minimum wage. There are numerous "living wage" provisions throughout the nation, providing for rates ranging from $6.25 to $12.00 or more an hour, and there are many ongoing campaigns to enact more requirements of this kind (including efforts to expand coverage to *all* employers in a locality – *not* just government contractors or recipients of benefits).

H. Employers should waste no time evaluating whether they are in compliance with the FLSA and with all applicable state or local laws.

1. Extensive media reports of large recoveries in wage-hour class actions and of efforts to change some of the FLSA exemptions might well have already provoked employees to start wondering whether the way they are paid is in compliance with the FLSA or other applicable laws.

2. The review should not be limited solely to matters involving the final white-collar rules; it should cover all job classifications, whether exempt or not, and all pay practices.

3. As part of this review, employers should address the following areas:

   (1) Assess current salary levels of exempt employees to identify anyone who may lose exempt status under the new $455/week threshold. Management must determine whether to increase the salary of these employees or reclassify the employees as non-exempt.

   (2) Examine and assess the job duties of exempt employees who meet the $455/week salary level in accordance with the new rules.

   (3) Review pay practices for non-exempt employees to ensure they are being paid for all hours worked and that overtime is correctly calculated. Employers frequently violate the FLSA by failing to include shift differentials, on-call payments, non-discretionary bonuses, commissions and other forms of incentive earnings in overtime pay for non-exempt employees.

   (4) Implement a "safe harbor" policy explaining the salary program for exempt employees. The new "white collar" regulations specify that improper deductions from an exempt employee's salary still can result in the loss of an otherwise valid exemption in the absence of a preventive policy. The exemption will not be lost if, among other things, the employer has a clearly communicated policy prohibiting improper deductions, which includes a complaint mechanism. Such a policy should provide that deductions from an exempt employee's salary generally are prohibited and describe the exceptions to the no-docking rule. The complaint procedure should state that improper deductions are a serious violation of company policy and instruct employees to report improper deductions to human resources.

   (5) Implement a clear policy requiring that non-exempt employees record all working time, and that all properly recorded working time must be paid. This is particularly important given the dramatic rise in wage-related collective actions in recent years and the prevalence of employer non-compliance issues.

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WAGE-HOUR COMPLIANCE IN MULTI-UNIT COMPANIES

This summary touches upon some frequently recurring wage-hour issues affecting large employers operating multiple units pursuing different business functions or goals across different states. This summary focuses on the Fair Labor Standards Act, the federal wage-hour law of general application, but one must also follow relevant state and local laws.

A. Be certain that every nonexempt employee is paid the required minimum wage.

< The current FLSA rate is $5.15 an hour. The law might well be amended in the foreseeable future to increase this rate in steps to at least $7.00 or so over the next two years. Be sure you are in compliance with all applicable laws, including as to higher state or local rates, because employee awareness will be heightened by all the minimum-wage media coverage. Keep in mind that, even if yours is a large enterprise generally paying more that the minimum wage, employees might expect raises even though they are paid more than the minimum. Start thinking *now* about how you might balance the need to minimize wage-related cost increases against avoiding the "compression effect".

< Review all payroll deductions or employee payments, repayments, or work-related purchases to ensure that they are not cutting employees' pay to below the required minimum wage. For example, determine how the cost of required uniforms and uniform maintenance is being handled, and find out whether deductions or repayments are being made for shortages, damage to vehicles or equipment, new or replacement tools, and so on in order to evaluate whether these sums are unlawfully reducing employees' wages. Know what is happening *everywhere*.

B. Be certain that every nonexempt employee is paid the required overtime.

< Check to see whether all bonuses, commissions, shift differentials, and other payments for work either are being properly included in computing overtime or may lawfully be excluded from that calculation.

< Evaluate all payroll deductions or employee payments, repayments, or work-related purchases to ensure that employees' time-and-one-half overtime pay is not being unlawfully reduced. For example, see whether the cost of required uniforms or uniform maintenance is cutting into overtime pay, and find out whether any deductions or repayments for tools, shortages, damaged equipment, and so on are having that effect. Again, be sure you know what is happening *everywhere.*

< Ensure that *all* overtime hours are identified as such. For example, have a system for ensuring that work done at different locations or in different jobs is combined for purposes of determining whether overtime pay is due.

< Determine whether any formal or informal "comp time" arrangements exist, including of a "desk drawer" variety. Most such systems do not comply with the FLSA's overtime requirements, but the practice is widespread.

C. Ensure that all "hours worked" are accurately recorded.

< Pay special attention to whether employees are recording pre- and post-shift work; shift-change overlap; opening or closing activities; time spent in banking or going to the post office; compensable training time; meeting time; compensable travel time; compensable "on-call" work; and time spent doing work at home.

< Analyze time records to determine whether they might be inaccurate: for instance, do the records show highly repetitive starting or stopping times; do they appear to mirror only scheduled or "expected" hours; are there recurring corrections, strike-outs, or white-outs; are there unexplained additions to or subtractions from employee worktimes; do the times and totals seem to be reasonable in light of store or employee work patterns or unusual situations?

< It is highly important for a multi-unit enterprise to have in place lawful policies which are designed to produce accurate time records; to see that first-line management understands and enforces those policies; to develop a culture in which employees are at ease about recording their time accurately; to have a system for auditing

time records to see whether problems are cropping up in one location or another; and to have a system in place via which employees can report timekeeping problems or complaints to someone in higher management.

D. Be certain that *every* exemption being relied upon is justified and properly applied as to *each* employee treated as exempt.

< There are detailed criteria which limit to whom exemptions from the FLSA's minimum-wage and/or overtime requirements apply. "Salaried" employees are not necessarily exempt. If there is a challenge, *the employer* bears the burden of proving that each requirement is met.

< These criteria apply on an employee-by-employee basis. Exemption decisions should not be made simply in reliance upon job titles, position descriptions, or vague ideas about what employees do or how they are paid. Considerations of scale and practicality understandably tempt large, multi-unit employers to make exemption decisions on other than an individualized basis, but the risk of being wrong goes up as the level of generality increases.

E. Ensure that employees treated as exempt are paid in the required manner.

< An important criterion for the FLSA's executive, administrative, and professional exemptions is that relating to the "salary basis" of pay. Paying on a "salary basis" generally means that the employee must receive a fixed, predetermined amount of money of a sufficient amount for every workweek in which he or she performs any work, without regard to the number of days or hours worked, and without regard to the quality of his or her work. If the "salary basis" cannot be shown to exist, the employer generally cannot rely upon the FLSA's executive, administrative, or professional exemption (there are limited exceptions).

< Salary deductions may generally be made only for absences of one or more whole days for personal reasons other than sickness, accident, or disability; for absences of one or more whole days caused by the employee's sickness, accident, or disability, *if* this is done in conjunction with a bona fide sick-pay plan (deductions may be made before the employee is qualified for compensation under the plan and after the employee has exhausted the plan's benefits); to reflect the time actually worked in the employee's first or last week of employment; for penalties imposed in good faith for violating safety rules of *major* significance; to offset amounts an employee received for jury or witness fees or as military pay; to provide unpaid leave under the federal Family and Medical Leave Act; or for unpaid disciplinary suspensions of one or more whole days imposed in good

faith for infractions of workplace conduct rules, if the suspension is imposed under a written policy applicable to all employees.

< Salary deductions generally may *not* be made for part-days missed; for absences caused by sickness, accident, or disability where there is no *bona fide* sick-pay plan; for cash or inventory shortages; for disciplinary reasons which either are unrelated to the violation of a safety rule of major significance or do not fall within the disciplinary-suspension exception; or for absences of less than a workweek due to jury duty, attendance as a witness, or temporary military service.

< Large employers should conduct a careful review of their pay systems for exempt employees under the most up-to-date principles to ensure that there are no policies or practices which could jeopardize these employees' exempt status. Management should consider adopting policies and practices designed to take advantage of the so-called "safe harbor" exception added by the U.S. Labor Department's recent revisions of the rules for these exemptions.

F. Evaluate compliance with all child-labor provisions.

< There is an age-16 limit for general occupations. There is an age-18 limit for a number of occupations declared by the U.S. Secretary of Labor to be "hazardous". Persons 14- and 15-year-old may be employed in limited occupations, but only within strict hours- and times-of-day limitations. Some exemptions exist, such as employment by a parent or one standing in the parent's place, but these exemptions are very strictly construed. There are some special provisions for agricultural employment.

< Identify every employee who is 16 or 17, verify his or her age, and find out his or her exact duties. Identify every employee under 16, verify his or her age, and find out his or her exact duties and hours and times of work.

< Large employers can be particularly vulnerable, again due to "local practices"; because of decisions by local management to employ their children or those of their co-workers (such as during the summer months); and in view of the fact that many are unfortunately unaware of the need to have clear, strict, regularly publicized policies in place with respect to employing minors.

G. Comply with posting requirements.

< Some courts have ruled that, because an employer had not displayed the poster required by the U. S. Department of Labor at a particular location, the statute of limitations applying to the FLSA did not begin to run until the employee had actual notice of his FLSA rights. Ensure that all required posters are properly displayed and visible to employees.

H. Check state and local requirements.

< The FLSA does not preempt tougher state or local wage-hour provisions, and many states do in fact have more-stringent requirements. These other laws might well include such things as a higher minimum wage; a daily-overtime requirement; a lower weekly-overtime threshold; minimum pay for reporting to work; or more-rigorous child-labor limitations.

< States and other localities might also strictly limit or prohibit almost all deductions from wages; set time limits for paying employees who resign or are fired; limit the terms upon which bonus, incentive, or commission payments can be paid, lost, or forfeited; regulate accumulation and payment of vacation or leave; or require payment in cash. Moreover, state and local laws might not recognize all of the exemptions available under the FLSA or might recognize them only on different or more-limited terms (particularly in light of the recent FLSA exemption changes).

< It is unfortunately common for large, sophisticated employers to run afoul of one or more of these different and sometimes-inconsistent laws, limitations, or requirements, because practical business considerations favor uniformity across various business units and locations.

I. *Immediately* evaluate the status of your company's compliance.

< Large, multi-unit employers are in some senses more at risk.

< For instance, nowadays plaintiffs' attorneys are more-alert to the possibilities of bringing a wage-hour class action, and they are becoming more confident that they can successfully handle these cases and can make a substantial fee on them. Large, multi-unit enterprises present a prime target for a high-profile, big-money lawsuit. These cases are very difficult and expensive to defend, and it is unusual to be able to find a way to achieve a clear "win".

< Also, the U.S. Labor Department can impose civil money penalties against employers who willfully or repeatedly violate the FLSA's minimum-wage or overtime provisions; these are *in addition to* the other civil and criminal remedies. The U.S. Wage and Hour Division is asserting penalties where violations have been found at one location of a large enterprise on the basis that they are "repeated" in view of a sometimes-small FLSA violation the Division found years ago at another, far-removed location.

< The other risks of noncompliance are at least as great: Back wages, up to an equal amount as "liquidated damages"; interest; injunctions; attorney's fees for private litigants; up to three years of liability; occasionally, liability for individual management members; and even criminal sanctions. Another significant nonmonetary risk for large, high-visibility employers is the possibility of unfavorable publicity.

< Unions have also hit upon compliance shortcomings as being a leverage point in organizing efforts or in collective-bargaining negotiations.

< For these and other important reasons, being sure your company is in compliance with all applicable wage-hour laws is *CRITICAL*.

< In the course of reviewing compliance, make sure that your pay practices are documented as being based on U.S. Labor Department interpretations so as to give you a foundation for asserting a possible legal defense to a later finding that these practices resulted minimum-wage or overtime violations. Particularly in areas of FLSA ambiguity (of which there are many), this could prove to be invaluable to a large, multi-unit enterprise doing business in different court jurisdictions and across different regions of the U.S. Wage and Hour Division.

FISHER & PHILLIPS LLP is a national law firm engaged in the practice of labor and employment law, representing management.

Numerous laws, regulations, interpretations, and other authorities must be evaluated in applying these principles and in determining one's compliance status. This summary of selected issues is intended for general information purposes only and is neither legal advice nor a legal opinion on any specific facts or circumstances, nor is it a complete or all-inclusive explanation either of the issues addressed or of every issue which might be pertinent. You are urged to consult legal counsel concerning both your own, particular situation and any specific legal questions you might have.

