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2016

Fair Labor Standards Act (FLSA) Mediation Training

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Federal Bar Association
Eastern District of New York Chapter

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EDNY ADR DEPARTMENT

EASTERN DISTRICT OF NEW YORK | 100 FEDERAL PLAZA CENTRAL ISLIP, NY

Contents

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FLSA MEDIATION TRAINING

Central Jury Room (1ST Floor)
100 Federal Plaza
Central Islip, New York

Wednesday, September 28, 2016	
8:30am – 9:30am	Registration and Breakfast
9:30am – 9:40am	Introduction Robyn Weinstein
9:40am – 10:00am	FLSA Overview Sima Ali
10:00am – 11:15am	Tipped Employees – Fact Pattern I: Ashley Andrews Sima Ali, Troy L. Kessler, Jeffrey A. Meyer
11:15am – 11:30am	Break
11:30am – 12:45pm	Exempt Employees – Fact Pattern II: Dana Davis
12:45pm – 1:45pm	Lunch
1:45pm – 2:45pm	Calculating Damages Under State and Federal Law Sima Ali, Domenique Camacho Moran, Troy L. Kessler, Jeffrey A. Meyer, Melissa Stewart
2:45pm – 3:00pm	Break
3:00pm – 4:15pm	FLSA Mediation Techniques Robin H. Gise, Patrick M. McKenna, Stephen P. Sonnenberg
4:15pm – 4:25pm	Break
4:25pm – 4:50pm	The Cheeks Checklist Magistrate Judge Steven I. Locke and Magistrate Judge Anne Y. Shields
4:50pm – 5:00pm	Wrap up and Q&A

TRAINER BIOGRAPHIES

SIMA ALI

Ms. Ali is owner and principal attorney at Ali Law Group and primarily represents management, in all areas of labor and employment law. Ms. Ali's practice focuses include wage and hour practices, statutory-based claims such as employment discrimination and retaliation, harassment, leaves-of-absence, disabilities and reasonable accommodations, commercial litigation such as non-competition and trade secrets disputes; and other contact issues related to employment, employment contracts and agreements such as severance arrangements, restrictive covenants, non-competes, labor relations, alternative dispute resolution (arbitration, mediation, negotiation of employment matters), and compliance counseling. Ms. Ali represents clients in a multitude of forums including federal and state court and administrative agencies.

Ms. Ali earned her J.D. degree from the George Washington University Law School and her B.S. degree in Industrial and Labor Relations from Cornell University. Ms. Ali is admitted to practice in New York State; the District Courts for the Southern, and Eastern Districts of New York.

She belongs to a number of legal associations, including the Suffolk County Bar Association (Chair of Labor & Employment Committee and Academy Officer), Huntington Lawyers Club (Member). She also belongs to Professional and Community Associations such as the LI Chapter of the Society for Human Resources Management, Hauppauge Industrial Association, Human Resources Committee Member, and Cornell ILR Alumni Association.

DOMENIQUE CAMACHO MORAN

Domenique Camacho Moran is a partner in the Farrell Fritz Labor & Employment practice group. Ms. Moran has represented employers - from start-ups to large corporations - in connection with all types of employment litigation, including matters arising under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act, and the New York Human Rights Law. Acting as lead counsel, Ms. Moran has represented management in jury trials and hearings in federal and state courts, arbitrations and administrative proceedings.

Ms. Moran earned her J.D. degree from the University of Notre Dame Law School and her B.A. degree from the State University of New York at Stony Brook. She is a member of the New York State Bar Association. Ms. Moran is admitted to practice in New York State; the District Courts for the Southern, Eastern and Northern Districts of New York; and the Circuit Court of Appeals for the Second Circuit.

ROBIN H. GISE

Robin H. Gise, Esq., is a member of the JAMS panel of mediators and arbitrators. She specializes in business/commercial, employment, insurance and real estate/construction disputes. She has extensive experience with employment disputes, including discrimination claims, executive compensation and FLSA/wage and hour claims. Ms. Gise is a member of the FINRA Dispute Resolution Arbitration Roster, the New York County Supreme Court Commercial Division ADR Roster and the Eastern District of New York Mediation Panel. In addition, she serves as a labor arbitrator on several union-management panels.

Ms. Gise is the Secretary of the Alternative Dispute Resolution Committee of the New York City Bar Association. She has served as a trainer/coach for the Southern District of New York's Employment Mediation Program and the New York City Bar Association's Basic Mediation Training and Advanced Commercial Mediation Training. Prior to becoming a neutral, Ms. Gise was an attorney at Cohen, Weiss and Simon LLP and Kaiser, Saurborn & Mair, P.C. She graduated from Oberlin College and obtained her law degree from Fordham University School of Law.

TROY L. KESSLER

Troy L. Kessler is a partner at Shulman Kessler LLP. He has extensive experience in representing employees who have been the victims of discrimination, harassment, wrongful termination, retaliation, overtime and minimum wage violations. Mr. Kessler is licensed to practice law in the State of New York. He is also admitted in the United States District Courts for the Southern and Eastern Districts of New York. He received his law degree from Loyola University School of Law - Chicago. Mr. Kessler received his bachelor's degree in Political Science and History from the University of Wisconsin. He has spoken at CLE events sponsored by the American Bar Association, the Federal Bar Association, the National Employment Lawyers Association – New York and the Suffolk County Bar Association, on topics covering the white-collar exemptions to the FLSA, amendments to the Federal Rules of Civil Procedure, and drafting and negotiating proper settlement agreements. Mr. Kessler is also a contributing author for the American Bar Association's FLSA Midwinter Report, which serves as the annual supplement to the Ellen C. Kearns et al. eds., Fair Labor Standards Act (2d. ed. 2010). Mr. Kessler is a board member for the National Employment Lawyers Association – New York and the co-chair of the Suffolk County Bar Association's Labor & Employment Committee.

MAGISTRATE JUDGE STEVEN I. LOCKE

Steven I. Locke is a United States Magistrate Judge for the Eastern District of New York. Judge Locke received his J.D. from the Hofstra University School of Law and undergraduate and graduate degrees in Economics from Tufts University. Prior to becoming a Magistrate Judge he worked as law clerk to United States District Judge Arthur D. Spatt in the Eastern District of New York from 1995 through 1997 and practiced labor and employment law, initially for Morgan Lewis & Bockius LLP, before starting his own practice in Manhattan.

PATRICK M. MCKENNA

Patrick (Mike) Mckenna, is an attorney in private practice and a member of the New York State and Florida Bars. Mr. McKenna serves on numerous labor and commercial mediation and arbitration panels in New York and Florida.

Since 1999, Mr. McKenna has mediated numerous federal cases in the U.S. District Court for the Eastern and Southern Districts of New York. In addition to private contractual mediations, he has mediated court cases in the U.S. District Court for Colorado, the Southern and Middle Districts of Florida, the New York State Supreme Court, Nassau and Queens Commercial Divisions, the Circuit Courts of Broward and Palm Beach Counties in Florida, and cases under the auspices of the American Arbitration Association. He has served as a Rule 53 Special Master in the Eastern District of New York, and was an inaugural member of the Mediation Advisory Committee for the Southern District of New York.

Prior to becoming a full-time neutral, Mr. McKenna was an active litigator having represented hundreds of employees in FLSA, Title VII, ADEA, ADA, Section 1983, and ERISA actions in federal court. Mr. McKenna has also represented both public and private sector employers and unions in arbitration proceedings involving contract interpretation and disciplinary matters.

For more than 20 years, Mr. McKenna served as corporation counsel to various municipalities, including the Nassau County Bridge Authority, and the Villages of Valley Stream and Malverne, where he was the lead labor negotiator in more than 25 collective bargaining agreements and the principal advocate in grievance, arbitration, and Section 75 proceedings.

Mr. McKenna is a graduate of Buffalo Law School (1976), and holds a M.A. degree in American Government and Politics from George Washington University (1975), and a B.A. degree in Government from the University of Massachusetts at Amherst (1970).

JEFFERY A. MEYER

Jeffery A. Meyer's practice includes the full spectrum of labor and employment law matters. He has substantial litigation experience defending federal and state wage and hour collective and class actions, as well as audits and investigations before the U.S. Department of Labor and New York State Department of Labor. Mr. Meyer advises employers in all matters related to union organizing and the collective bargaining process and frequently appears before the National Labor Relations Board. In addition, Mr. Meyer represents corporate clients in a number of other labor and employment fields, including day-to-day policy advice and the defense of employment discrimination and ERISA lawsuits before federal and state courts and agencies.

Prior to KDV, Mr. Meyer worked at the National Football League Players Association where he was involved with the collective bargaining agreement's injury grievance and non-injury grievance procedure, salary cap issues and player agent regulations. He was also a Summer Clerk for The Honorable Dorothy Eisenberg, Eastern District of New York Bankruptcy Court and a Legal Intern for Turner Construction. Prior to law school, he was a Legal Assistant for Hogan & Hartson LLP (now Hogan Lovells) and worked for the Deloitte & Touche Federal Political Action Committee.

MAGISTRATE JUDGE ANNE Y. SHIELDS

Anne Y. Shields is a United States Magistrate Judge for the Eastern District of New York.

Judge Shields earned her B.A. degree from the State University of New York at Stony Brook, and her J.D. from St. John's University School of Law. At St. John's, Judge Shields was an editor of the St. John's Law Review. After law school, she served as a law clerk to the Honorable George C. Pratt of the Second Circuit Court of Appeals before entering private practice at Skadden, Arps, Slate, Meagher and Flom. Judge Shields later served as a law clerk in the Eastern District of New York for the Honorable Leonard D. Wexler. Prior to becoming a Magistrate Judge, Judge Shields was engaged in private practice focusing on litigation.

Judge Shields is a former President and Member of the Board of Directors of Courtyard Kids, Inc., a child care center built and managed by the United States General Services Administration in Central Islip, New York. She also served as an Officer and Member of the Board of Directors of Brooklyn Defender Services, a New York City public defender organization providing criminal defense and related services to criminal defendants in Brooklyn, New York.

STEPHEN SONNENBERG

Stephen Sonnenberg is a New York based partner in the Employment Law practice of Paul Hastings and Chair of the New York Employment Law Department. He represents management in class and collective actions, wrongful discharge, retaliation, discrimination, and harassment litigation. He counsels clients based in the United States and Asia on a wide variety of U.S. employment matters, including wage and hour, retaliation, and equal employment opportunity issues. Prior to studying law, he practiced psychotherapy as a licensed clinical social worker in a variety of private and public settings, ranging from private practice to a psychiatric hospital. Because of his background as a psychotherapist, Mr. Sonnenberg has had longstanding interest in mediation. He has appeared as panel mediator for the Mediation Program of the Southern District of New York and commencing September 2016 is a member of the Mediation Advisory Committee for the Southern District of New York. Mr. Sonnenberg also has particular experience in the areas of mental disabilities under the Americans With Disabilities Act, emotional distress damages, workplace violence, and the use and misuse of psychiatric and psychological experts.

Mr. Sonnenberg is a Fellow of the College of Labor and Employment Lawyers and was ranked by *Chambers USA* among the top employment defense lawyers in New York. He is a member of the New York University Center for Labor and Employment Law Advisory Board. Mr. Sonnenberg is admitted to the New York, California and District of Columbia Bar.

MELISSA LARDO STEWART

Melissa Lardo Stewart is an associate at Outten & Golden LLP in New York, where she primarily represents employees in class wage and hour and discrimination cases. Ms. Stewart clerked for the Honorable James Orenstein in the Eastern District of New York, and the Honorable Dickinson R. Debevoise in the District of New Jersey. Ms. Stewart received her J.D. magna cum laude in 2009 from Fordham University School of Law, where she earned the Hugh R. Jones Award in Law & Public Policy and served as the President of the Stein Scholars Program for Public Interest Law & Ethics in her third year. Ms. Stewart is an active member of the American Bar Association's Labor & Employment Section, the National Employment Lawyers Association ("NELA"), and NELA's New York affiliate. She is admitted to practice in New York State, the District of Columbia, and the Southern and Eastern Districts of New York.

ROBYN WEINSTEIN

Robyn Weinstein is the ADR Administrator for the U.S. District Court for the Eastern District of New York. Most recently Robyn was a fellow for the Kukin Program for Conflict Resolution and an adjunct clinical professor of mediation at Cardozo Law School. Previously, she was the program director for the Los Angeles office of Arts Arbitration and Mediation Services at California Lawyers for the Arts and served as an adjunct clinical professor of mediation at the Straus Institute for Dispute Resolution at Pepperdine School of Law. Robyn also served on the Board of the Southern California Mediation Association (SCMA), and as SCMA president in 2015-2016.

FACT PATTERNS

FLSA FACT PATTERN I

Ashley Andrews

Ashley Andrews worked as a server in New York City at the Eastern District Diner, a franchised restaurant chain, from June 2013 to August 2013. She was paid a reduced minimum wage plus tips. Before her shift began, Ashley helped the runners and bussers prepare the floor for service, including by folding napkins, filling ketchup bottles, and arranging items on the tables. After her shift, she helped to clean up the dining room, by putting away condiments, taking off tablecloths, and storing bread and crackers. Ashley usually arrived at the restaurant at 9 a.m. and left by 4 p.m. when she had the breakfast/lunch shift, and arrived at 3 p.m. and left by midnight when she had the dinner shift, but sometimes had to stay later under 1 or 2 a.m. Ashley typically did one shift a day, five days a week.

The Eastern District Diner required Ashley to give 2% of her tips to the food bussers, and "recommended" that she give 1% of her tips to the food expediters. The bussers assist the servers with delivering food to the table and cleaning the tables. The expediters garnish plates, confirm that special requests for food orders are complied with, and pull food from the kitchen and organize the plates for Ashley and the other servers. Ashley heard through the grapevine that, several years ago, servers had filed a complaint with the Department of Labor over the Eastern District Diner tip out policy.

FLSA FACT PATTERN II

Dana Davis

Dana Davis worked at another Eastern District Diner location in New York City from December 2014 until she was fired in March 2015. She worked as a floor manager, earning a salary of $455 a week. Davis typically worked 40-45 hours a week, but was not paid overtime. She worked under the general manager who divided her time between the restaurant floor and the back office. Davis spent a lot of time performing customer service, including making sure customers' food arrived on time and that customers were happy with their orders. She also sometimes delivered food and bussed tables when servers and bussers were not available. Davis was in charge of drafting the front-of-the-house schedule for the general manager's review and had recommended that a few employees be disciplined or fired over the years.

After a few servers complained to Davis that they had not been paid for all of the hours they worked, Davis raised their complaints with human resources. Human resources told Davis that if the servers had concerns, they should speak to HR directly. Davis told the servers, who said that they were afraid that if they complained, they would lose their jobs. Davis went back to HR and told HR to investigate the claims whether or not the servers raised them directly.

Shortly after these events, some customers complained to the general manager at Davis' location that they were yelled at by a server for leaving a small tip. They said they told the floor manager on duty, who ignored their complaints. As a result, the general manager fired Davis for poor customer service and management.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FLSA MEDIATION TRAINING
September 28, 2016

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I. WAGE AND HOUR ISSUE SPOTTING - "TIPPED" EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT AND NEW YORK LABOR LAW

29 U.S.C. § 206(a), sets forth the minimum wage (presently $7.25 per hour) that employers must pay to their covered employees. 29 U.S.C. § 203(m) provides that where an employer satisfies the statutory requirements, an employee's wage can also include "tips" in specified, limited circumstances.

An employer may pay any "tipped employee" an hourly rate less than the federal minimum wage by crediting a portion of the actual amount of tips received by the employee toward the required hourly minimum wage. The difference between the full statutory minimum wage and the reduced wage paid to tipped employees is called the "tip credit."

12 NYCRR § 146-1.3 provides that "[a]n employer may take a credit towards the basic minimum hourly rate if a . . . food service worker receives enough tips ***and if the employee has been notified of the tip credit as required in section 146-2.2*** of this Part. Such employees shall be considered "tipped employees." (emphasis added).

The NYLL labor law tip credit for food service workers is as follows:

(1) On and after January 1, 2011, a food service worker shall receive a wage of at least $5.00 per hour, and credit for tips shall not exceed $2.25 per hour, provided that the total of tips received plus the wages equals or exceeds $7.25 per hour.

(2) On and after December 31, 2013, a food service worker shall receive a wage of at least $5.00 per hour, and credit for tips shall not exceed $3.00 per hour, provided that the total of tips received plus the wages equals or exceeds $8.00 per hour.

(3) On and after December 31, 2014, a food service worker shall receive a wage of at least $5.00 per hour, and credit for tips shall not exceed $3.75 per hour, provided that the total of tips received plus the wages equals or exceeds $8.75 per hour.

(4) On and after December 31, 2015, a food service worker shall receive a wage of at least $7.50 per hour, and credit for tips shall not exceed $1.50 per hour, provided that the total of tips received plus the wages equals or exceeds $9.00 per hour.

If an employer is claiming the tip credit, it bears the burden of satisfying several specific prerequisites. *See, e.g., Chung v. New Silver Palace Rest.*, 246 F. Supp. 2d 220, 228–29 (S.D.N.Y.2002) ("[I]n order to [take the tip credit], management also must have satisfied the two stated conditions as to all employees against whom they claimed the tip credit: (1) they must have informed the employee of the provisions of section 203(m), and (2) 'all of the tips received by such employee [must] have been retained by the employee.'" (quoting 29 U.S.C. § 203(m)); *Reich v. Chez Robert, Inc.*, 28 F.3d 401, 403 (3d Cir.1994) ("If the employer cannot show that it has informed employees that tips are being credited against their wages, then no tip credit can be taken....").

Unless the employer can prove that it complied with the NYLL and FLSA, it is required to pay its employees the full statutory minimum wage. *See, e.g., Copantitla v. Fiskardo Estiatnio Inc.*, 788 F. Supp. 2d 253, 291 (S.D.N.Y. 2011) ("Because the notice requirement is unsatisfied, defendants are not entitled to a tip credit."); *Inclan v. New York Hosp. Grp., Inc.*, 95 F. Supp. 3d 490, 502 (S.D.N.Y. 2015) (granting summary judgment to plaintiffs because wage statements listed only "the amount of tips earned" during the pay period and not the amount of tip-credit allowance as required by 12 NYCRR 146-2.2); *New Silver Palace Rest.*, 246 F. Supp. 2d at 229 (sharing of tips with management violates 203(m)(2)); *Fermin v. Las Delicias Peruanas Rest., Inc.*, 93 F. Supp. 3d 19, 40 (E.D.N.Y. 2015) (NYLL prohibits tip sharing "with employees for whom 'personal service to patrons' is not 'a principal and regular part of their duties'" (citing 12 NYCRR §§ 146-2.14, 146-2.15, 146-2.16)).

A. Tip Credited Minimum Wage

1. Only applies to tipped employees

a. "Tipped employee" and "Tips"

A "tipped employee" is "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). The phrase "'customarily and regularly' signifies a frequency which must be greater than occasional, but which may be less than constant." 29 C.F.R. § 531.57.

A tip is a sum presented by a customer as a gift or gratuity in recognition of some service. 29 C.F.R. § 531.52. Whether a tip is to be given, and its amount, are matters determined solely by the customer. *Id.*

Under the NYLL, the term employee is broadly defined as "any individual suffered or permitted to work." 12 NYCRR §146-3.2. For purposes of the hospitality industry, the term employee means an individual "suffered or permitted to work in the hospitality industry," subject to exemptions for bona fide executive, administrative or professional employees. 12 NYCRR § 146-3.2. The NYLL presumes that any charge, including "service" charges, is a gratuity. 12 NYCRR 146-2.18.

b. Types of employees who receive tips

The NYLL provides that the eligibility of employees to receive tips (either from sharing or a tip pool) is based on actual job duties and not job titles. 12 NYCRR § 146-2.14. The emphasis is on actual customer service and contact. *Id.* (providing a list of examples of tip eligible employees including wait staff, bussers, counter personnel, bartenders, barbacks, food runners, and hosts who greet and seat guests).

c. Employees who perform tipped and non-tipped work in the same day

An employee who receives tips may also spend part of his or her time doing work for which no tips are received. In the case of restaurant workers, for servers who perform "general preparation work," if such work exceeds 20% of her time, no tip credit may be taken for the time spent in such duties. *See* 29 C.F.R. § 516.28(a) (employer must maintain records that show and, for those employees, how many hours in each workday are worked in occupations in which the employee receives tips and how many are worked in any occupation in which the employee does not receive tips); *see also, Fast v. Applebee's Int'l, Inc.,* 638 F.3d 872 (8th Cir. 2011), *pet. reh. denied* (July 6, 2011); *Chhab v. Darden Rests., Inc.*, No. 11 Civ. 8345, 2013 WL 5308004, at *3 (S.D.N.Y. Sept. 20, 2013); *Ash v. Sambodromo, LLC*, 676 F. Supp. 2d 1360 (S.D. Fla. 2009).

The NYLL provides that a restaurant worker who performs non-tipped work for two hours or more, or for more than 20% of her time, *whichever is less*, must not be subjected to the tip credit for that day. 12 NYCRR §146-2.9; 12 NYCRR § 146-3.4. The employer has the burden to maintain records regarding tipped and non-tipped work. *See, e.g.*, *Salinas v. Starjem Rest. Corp.*, 12 F. Supp. 2d 442, 471 (S.D.N.Y. 2015).

2. Employers must adhere to specific rules in order to lawfully claim a tip credit

At present, a food service worker in New York must receive a wage of at least $7.50 per hour in wages paid by the employer, and credit for tips shall not exceed $1.50 per hour, provided that the total of tips received plus the wages equals or exceeds $9.00 per hour. 12 NYCRR § 146-1.3.

Under the NYLL in order to take the tip credit, the employer must, prior to the start of employment, provide each employee written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the amount of tip credit, if any, to be taken from the basic minimum hourly rate, and the regular payday. The notice shall also state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate. 12 NYCRR § 146-2.2.

Additionally, an employer cannot properly take the tip credit unless:

- The employee is provided with a pay stub that "list hours worked, rates paid, gross wages, credits claimed (for tips, meals and lodging) if any, deductions and net

wages" (12 NYCRR 146-2.3); and

- The employee retains all tips, which may be subject to lawful tip pooling or sharing. *See, e.g.*, *Fermin*, 93 F. Supp. 3d at 40 (E.D.N.Y. 2015) (NYLL prohibits tip sharing "with employees for whom 'personal service to patrons' is not 'a principal and regular part of their duties'" (citing 12 NYCRR §§ 146-2.14, 146-2.15, 146-2.16)).

a. Tipped employees must be informed

The employer must inform *each* tipped employee before it uses the tip credit of *each* aspect of the tip credit provisions. *See* 12 NYCRR §§ 146-2 (Notice); 12 NYCRR 146-3 (Paystub).

- the amount of the cash wage that is to be paid to the tipped employee by the employer;
- the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of tips actually received by the employee;
- that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
- that the tip credit shall not apply to any employee who has not been informed of these requirements.

See 12 NYCRR §§ 146-2 (Notice); 12 NYCRR 146-3 (Paystub).

The employer has the burden of proving that it has satisfied this notice requirement. *See, e.g.*, *Copantitla*, 788 F. Supp. 2d at 291 ("Because the notice requirement is unsatisfied, defendants are not entitled to a tip credit."); *Inclan*, 95 F. Supp. 3d at 502 (granting summary judgment to plaintiffs because wage statements listed only "the amount of tips earned" during the pay period and not the amount of tip-credit allowance as required by 12 NYCRR 146-2.2)

b. Employees included in tip pool or sharing

12 NYCRR §§ 146.14, 146.15, 146.16 and 146.17 address the requirements of tip pooling or sharing. Most importantly, the NYLL prohibits tip pooling or sharing with either management or with employees whose "principal" or "regular" duties do not include "personal service" to customers and is not "merely occasional or incidental." *See, e.g.*, *New Silver Palace Rest.*, 246 F. Supp. 2d at 229 (sharing of tips with management violates 203(m)(2)); *Fermin*, 93 F. Supp. 3d at 40 (NYLL prohibits tip sharing "with employees for whom 'personal service to patrons' is not 'a principal and regular part of their duties'").

Notably, however, where properly classified "tipped" employees always receive the appropriate minimum wage (inclusive of tips received), some courts have ruled that a violation of NYLL § 196-d will not deprive an employer of the ability to avail themselves of the tip credit. *See, e.g.*, *Murphy v.* Lajaunie, No. 13 Civ. 65083 (RJS), 2016 WL 1192689, at * 4-6 (S.D.N.Y. Mar. 22, 2016). Accordingly, an employer is not required to reimburse those properly classified "tipped" employees for the difference between "tipped" minimum wage and the regular minimum wage.

3. Special recordkeeping requirements for employers claiming the tip credit

29 C.F.R. § 516.28(a) requires employers claiming the tip credit must maintain and preserve the following records (in addition to the records required of all employers in 29 C.F.R. § 516.2(a)):

- A notation identifying each employee whose wage is determined in part by tips;
- The weekly or monthly amount reported by the employee, to the employer, of tips received;
- The amount by which the wages of each tipped employee have been deemed to have been increased by tips as determined by the employer;
- Hours worked each workday in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and
- Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.

12 NYCRR § 146-2.1 provides that:

Every employer shall establish, maintain and preserve for at least six years weekly payroll records which shall show for each employee:

(1) name and address;

(2) social security number or other employee identification number;

(3) occupational classification;

(4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of

hours exceeding 10;

(5) regular and overtime hourly wage rates;

(6) the amount of gross wages;

(7) deductions from gross wages;

(8) the amount of net wages;

(9) tip credits, if any, claimed as part of the minimum wage;

(10) meal and lodging credits, if any, claimed as part of wages;

(11) money paid in cash; and

(12) student classification.

For employers operating a tip pooling or sharing system, the following additional records must be maintained for six years:

(1) a daily log of the tips collected by each employee on each shift, whether in cash or by credit card;

(2) a list of occupations that the employer deems eligible to receive tips through a tip sharing or tip pool system;

(3) the shares of tips that each occupation is scheduled to receive from tip sharing or tip pooling; and

(4) the amount in tips that each employee receives from the tip share or tip pool, by date.

B. Overtime Wages for Tipped Workers

The NYLL provides that "the overtime rate shall be the employee's regular rate of pay before subtracting any tip credit, multiplied by 1 1/2, minus the tip credit. It is a violation of the overtime requirement for an employer to subtract the tip credit first and then multiply the reduced rate by one and one half." 12 NYCRR § 146-1.4.

The regulations provide the following example for tipped workers employed between January 1, 2011 and December 31, 2013:

A food service worker regularly paid $7.25 per hour minus a tip credit of $2.25 per hour, for a wage rate of $5.00 per hour, who works 50 hours in a workweek:

Regular rate: $7.25 per hour
Overtime rate: $7.25 x 1.5 = $10.875 per hour

Wage rate for 40 hours: $7.25 - $2.25 = $5.00 per hour

Wage rate for 10 hours: $10.875 - $2.25 = $8.625 per hour

Wages for the workweek: $5.00 x 40 hours = $200.00
$8.625 x 10 hours = $ 86.25

Total $286.25

C. Liquidated Damages

The FLSA provides for liquidated damages equal to the value of the unpaid overtime. 29 U.S.C. § 216(b). A defendant seeking to escape liquidated damages has a "'difficult' burden" to "a reasonable, good-faith belief of compliance" with the overtime law. *Gayle v. Harry's Nurses Registry, Inc.*, dif, 718 (2d Cir. 2014) (summary order) *cert. denied*, 135 S. Ct. 2059 (2015). Liquidated damages are the norm, not the exception. *Griffin v. Astro Moving and Storage Co. Inc.*, No. 11 Civ. 1844, 2015 WL 1476415, at *2 (E.D.N.Y. Mar. 31, 2015). Since, November 2009, the NYLL has applied a nearly identical standard. *Galeana v. Lemongrass on Broadway Corp.*, No. 10 Civ. 7270, 2014 WL 1364493, at *2, 8 (S.D.N.Y. Apr. 4, 2014).

Because liquidated damages under both the FLSA and NYLL "serve[] fundamentally different purposes," some courts have awarded recovery of liquidated damages under both. *Dominguez v. B S Supermarket, Inc.*, No. 13 Civ. 7247, 2015 WL 1439880, at *12 (E.D.N.Y. Mar. 27, 2015). Although some courts have challenged this rationale for stacked liquidated damages, "the majority view is that prevailing plaintiffs may recover liquidated damages under both the FLSA and the NYLL." *Sanchez v. Viva Nail N.Y. Inc.*, No. 12 Civ. 6322, 2014 WL 869914, at *5 (E.D.N.Y. Mar. 4, 2014); *see, e.g., Galicia v. 63-68 Diner Corp.*, No. 13 Civ. 03689, 2015 WL 1469279, at *6 (E.D.N.Y. Mar. 30, 2015) ("[T]he stacked award of liquidated damages under both the FLSA and NYLL [is] appropriate . . . despite recent amendments to the NYLL[.]").

More recently, however, a number of EDNY courts have adopted an opinion by Magistrate Judge James Orenstein that sides with the view that liquidated damages should not be "stacked." Magistrate Judge Orenstein's opinion stems from his belief that the post-amendment NYLL (after April 9, 2011) has made the remedies "so similar-and now that New York has acted to bring its statute in line with its federal counterpart—it seems more reasonable to conclude that the two statutes adopt the same remedies to achieve the same goals." *Lopez v. Yossi's Heimshe Bakery Inc*., 2015 WL 1469619 at *11 (E.D.N.Y. Mar. 2015) (*citing Gortat v. Capala Bros.*, 949 F. Supp. 2d 374 (E.D.N.Y. June 2013)).

TIPS FOR BEING AN EFFECTIVE MEDIATOR OF EMPLOYMENT DISPUTES

By Ruth D. Raisfeld

Mediation has become an integral process in the life of labor and employment disputes. Each of the federal courts and an increasing number of state courts not only have ADR programs but may require mediation of pending cases right out of the wheel or later during a litigation. More and more attorneys have an opportunity to serve as a mediator, either through court-annexed appointments, volunteer assignments or when retained by parties who believe they can help serve as an honest broker in a private or pending matter.

The bridge from being a litigator to becoming an effective mediator, however, is neither straight nor short! It is essential to be mindful about the transition from the role of advocate to that of a neutral, third party dedicated to resolving the dispute. Here are some tips that may help in making it easier to wear the hat of "mediator."

1. BE NEUTRAL: The mediator's role is to facilitate negotiations leading to a settlement of a pending litigation. It is not to be the lawyer for one side or the other or both. This is true even if you would handle the case differently for one side or the other or believe that the attorneys who have appeared are not as prepared or thoughtful as you would be. Strive to be neutral!

2. RESPECT THE ATTORNEY-CLIENT RELATIONSHIPS: The mediator is there to help, not to commandeer the negotiations. It is important not to criticize or critique the performance of each side's lawyer or to do anything that would undermine the lawyer in front of his/her client. If you believe a lawyer is an obstacle to effective negotiations, in certain circumstances, you might consider talking to the lawyer outside the presence of the client or calling for an "all lawyers" meeting and attempt to put the lawyers on a more productive and constructive path, but it is rarely appropriate to diminish the lawyer in the eyes of his/her client.

3. BE PREPARED: The parties should provide submissions in advance of the mediation. Read them in advance. You can also call each attorney in advance especially if you have an inkling that they haven't prepared. This does not mean you need to do extensive research: ask them to send you cases they think you should read. Further, encourage counsel to get you important documents or testimony before the mediation: it is very hard to get the essence of the argument when reading things for the first time at the mediation.

4. ENCOURAGE PARTIES TO CALCULATE BEST CASE/WORST CASE DAMAGE SCENARIOS: If the parties haven't done this in advance, work with each side separately prior to and during the mediation to do damage estimates depending on the nature of the case, remedies available, whether plaintiff has lost employment or become reemployed, out-of-pocket expenses, medical expenses, emotional distress,

attorneys' fees, etc. This helps to get the parties "reality testing" on their own before the mediation so some of the hard work of getting to a settlement zone is done without you.

5. DO NOT PUT A VALUE ON THE CASE: Sometimes inexperienced counsel and clients will turn to the mediator and say *"What do you think the case is worth?"* This is not your job: whatever you say, one side will think you don't believe them or you are taking sides. While at some point you might offer a mediator's proposal to break impasse, you should be careful to say "This is not what I think the case is worth, but this is what I think both sides can agree to and live with."

6. LISTEN: Be sure to give both sides an opportunity to share their side of the story with you before you start to reality test. Remind the participants that you are not the judge or the jury but simply there to discuss some of the strengths and weaknesses that they may wish to factor into their settlement analysis. Be sensitive to the needs of the parties and remember that there are potential emotional issues on both sides. A plaintiff's emotional state will probably be different in a sexual harassment case then it would be in a wage case. Similarly a large employer will often have different needs and requirements than a small employer. Don't size up the situation without fully listening and letting participants speak.

7. MIX IT UP: Be creative in conducting joint and separate sessions. Sometimes it is helpful to speak with counsel separately from their clients; it is never appropriate to speak with clients without counsel present. Sometimes it may be helpful to reconvene a joint session or to allow clients to speak with each other privately.

8. KEEP TRACK OF TIME: Do not burn through the entire day discussing the facts and the law. At some point, state "well, it sounds like the parties can agree to disagree" and move to a discussion of the future. With a plaintiff ask questions such as: Have you found a job? Are you getting emotional support and/or medical attention? Do you understand how long and complicated lawsuits can be? With a defendant ask questions such as: Has the employee and/or supervisor been replaced? Are potential witnesses available? Do you have access to documents? Does the defendant understand how much time, effort and expense goes into defending an employment decision?

9. **BE PERSISTENT:** Do not give up on settling just because the parties are far apart at 2 p.m. Mediation of employment disputes takes a long time but MOST disputes do settle within one day.

10. **IT AIN'T OVER TIL IT'S OVER:** If the parties come to an agreement, assist in the preparation of a terms sheet or if there is time, an agreement. If the parties do not sign a final agreement in your presence, then set a schedule for drafting the agreement, notifying the court, and filing a stipulation. After the mediation, follow up. Many settlements are derailed by delay and remorse.

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OVERVIEW OF THE FAIR LABOR STANDARDS ACT

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The Fair Labor Standards Act (FLSA) provides workers with minimum wage, overtime pay, and child labor protections. The FLSA covers most, but not all, private and public sector employees. In addition, certain employers and employees are exempt from coverage. The FLSA also created the Wage and Hour Division (WHD) within the Department of Labor (DOL) to administer and enforce the act.

I. MAIN PROVISIONS

- The FLSA covers employees and enterprises engaged in interstate commerce. An enterprise is covered if it has annual sales or business done of at least $500,000. 29 U.S.C. §203(s)(1).
- Although enterprises that have less than $500,000 in annual sales or business done are not covered by the FLSA, employees of these enterprises may be covered if they are individually engaged in interstate commerce. (*See* U.S. Department of Labor, Coverage Under the Fair Labor Standards Act, available at http://www.dol.gov/whd/regs/compliance/whdfs14.pdf).
- Employers must pay a minimum hourly wage – currently $7.25 per hour 29 U.S.C. § 206(a).
- Tipped employees may be paid less than the basic minimum wage, but their cash wage plus tips must equal at least the basic minimum wage. *(Tipped employees will be covered in further detail later in the program).*
- Employers must pay overtime at time and a half for non-exempt employees who work more than 40 hours per week. 29 U.S.C. § 206(a)(1).
- The FLSA, under Section 207(o), allows covered, nonexempt state and local government employees to receive compensatory time off ("comp time") for hours worked over 40 in a workweek. Comp time is time off with pay in lieu of overtime pay. An employer and employees must agree that the employer will provide comp time.
- The limitations period under the FLSA is two years from the time a consent is filed, or three years if the plaintiff can show that the violation was willful. 29 U.S.C. § 255.
- A violation of the FLSA will be deemed willful if the employer either knew, or showed reckless disregard for whether its payroll practices violated the FLSA.
- Liquidated damages can double a back pay award. 29 U.S.C. § 216(b).
- Employers must follow the FLSA with respect to all its employees, except those who qualify as "exempt" under the statute. The three main exemptions are for "executives," "administrators," and "professionals." There are also exemptions

for computer professionals, outside sales employees, and highly compensated employees.

- To be "exempt," an employee generally must be paid on a salary basis and have job duties that satisfy one of the exempt categories.
- Specific Requirements for each exemption:
  - Executive Exemption – see 29 C.F.R. §§ 541.100-541.106
  - Administrative Exemption – see 29 C.F.R. §§ 541.200-541.204
  - Professional Exemption – see 29 C.F.R. §§ 541.300-541.304
  - Computer Employees – see 29 C.F.R. §§ 541.400-541.402
  - Outside Sales – see 29 C.F.R. §§ 541.500-541.504
  - Highly Compensated Employees – see 29 C.F.R. § 541.601
- HCE Case: In this highly compensated employee exemption case *(Bellone v. Kraft Power Corp*., 15-CV-3168 (SJF)(AYS) 2016 WL 2992126 (E.D.N.Y. May 23, 2016)) the court held that the plaintiff was exempt from FLSA and NYLL overtime requirement under the HCE provision where the plaintiff (i) earned in excess of one hundred thousand dollars ($100,000) per year for the duration of his employment with Kraft, (ii) performed one or more of the duties of an executive employee, and (iii) performed some office and/or non-manual work.

  Note: On December 1, 2016 new regulations go into effect increasing the standard salary level from $455 to $913 per week; allowing up to 10% of the salary level to be met with bonuses and commissions; and increasing the HCE total annual compensation from $100,000 to $134,000 per year. The salary level will increase automatically every 3 years, starting in 2020.

- Domestic service workers who provide companionship services in private homes are exempt from both the minimum wage and overtime requirements of the FLSA.
- Home care workers were previously classified under the companionship services categories. However, on August 21, 2015, the Court of Appeals for the District of Columbia Circuit (*Home Care Association of America v. Weil*, No. 15-5018 (D.C. Cir. 2015) issued a unanimous opinion affirming the validity of the Home Care Final Rule which extends minimum wage and overtime protections to home care workers. The associations of home care companies filed a petition for certiorari to the U.S. Supreme Court, asking that Court to review the Court of Appeals decision. On June 27, 2016, the Supreme Court denied that request.

II. NY WAGE & HOUR LAWS

- Limitation period under the New York wage statute is six years. N.Y. Lab. Law §§ 198(3), 663(3).
- Under Section 18 of the FLSA, if states enact minimum wage, overtime, or child labor laws that are more protective of employees than what is provided by the FLSA, the state law applies.

- For example, in circumstances where the calculation of damages would result in a greater payout under one law versus the other (i.e., FLSA vs. NYLL), the plaintiff will be awarded which ever payout amount is higher. In *Zhang v. Red Mountain Noodle House Inc.,* No. 15-CV-628 (SJ) (RER) 2016 WL 4124304 (E.D.N.Y. July 5, 2016) *citing Quiroz v. Luigi's Dolceria, Inc.,* No. 14-CV-871, 2016 WL 2869780 (E.D.N.Y. May 17, 2016), the court determined damages by calculating the plaintiffs' regular rate for the purposes of unpaid overtime compensation using the NYLL Hospitality Industry Wage Order's method of calculation instead of the FLSA's because of the "substantially higher" overtime wage rates that would be available to the employees under the NYLL. This is consistent with the FLSA's policy of not preempting state law where state law provides for a greater recovery.
- The FLSA calculates an employee's regular rate "by dividing the employee's weekly compensation by the total number of hours actually worked by him in that workweek". *Zhang,* 2016 WL 4124304, *quoting* 29 C.F.R. § 778.109 (2011). Under New York's Hospitality Industry Wage Order "the employee's regular hourly rate of pay shall be calculated by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or the actual number of hours worked by that employee during the work week." *Id*., *quoting* N.Y. Comp. codes R. & Regs. title 12 § 146-3.5 (2011).

III. FLSA COLLECTIVE ACTIONS

- Class actions under the FLSA are brought as "collective actions." Courts generally have held that the class action requirements of Federal Rule of Civil Procedure 23 need not be met to establish a collective action under the FLSA.
- FLSA Section 16(b) authorizes collective actions brought on behalf of a class of persons "similarly situated" to the representative plaintiffs. 29 U.S.C. § 216(b).
- Federal Rule 23(a), on the other hand, imposes the following requirements for class actions: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (iv) the representative parties will fairly and adequately protect the interests of the class.
- Potential plaintiffs must opt in to the FLSA collective action rather than opt out, as is the case in Rule 23 actions.
- The opt-in class members and the named plaintiffs must be "similarly situated" to maintain an action under Section 16(b).

IV. CERTIFICATION OF COLLECTIVE ACTIONS

- Plaintiffs' counsel files a motion for conditional collective action certification. If a court conditionally certifies a Section 216(b) collective action, members of the conditionally certified class are usually given notice of the pendency of the case and an opportunity to join the litigation.

- Although the courts only require a "modest factual showing" to certify a collective action, the cases of this jurisdiction represent that while certification is liberally granted, it is not guaranteed in all circumstances. The following is a summary of recently decided Eastern District cases.

Cases where Certification Granted:

- In *Guan v. Long Island Business Institute, Inc*., 15-CV-2215 (CBA) (VMS) 2016 WL 4257549 (E.D.N.Y. August 11, 2016), the court certified a collective action where employees were paid on a biweekly basis without any separation of their weekly hours on their pay stubs. The court observed that these parties "together were victims of a common policy that violated the law," but, only insofar as they were entitled to overtime wages (for example, by working 50 hours one week even if they worked 80 hours or less over two weeks). This factual showing, while modest, was sufficient to "show whether similarly situated plaintiffs do in fact exist."

- In *Dalton v. Gem Financial Services, Inc*., 15 Civ. 5636 (BMC) 2016 WL 3676428 (E.D.N.Y. July 7, 2016), the court granted plaintiff's motion for certification holding that plaintiffs met the similarity requirements for conditional certification as they relate to plaintiffs' proposed non-exempt class members. Plaintiffs provide detailed accounts of numerous conversations with various hourly GEM employees, across all different GEM locations, involving complaints and inquiries relating to their denial of overtime payment by defendants. These accounts included references to multiple conversations whereby the named plaintiffs were explicitly instructed to manipulate time logs in accordance with GEM's alleged policy to restrict compensation to a 40-hour work week, regardless of overtime worked. The fact that some of these potential opt-in plaintiffs worked at different locations and performed different job functions did not, according to the court, "obscure the common scheme".

- In *Vargas v. Black Forest Brew Haus, LLC*, CV 15-4288, (LDW)(ARL) 2016 WL 2889003 (E.D.N.Y. May 17, 2016), the court granted the plaintiff's motion for conditional certification and stated that while the affidavits did not specifically identify the job duties of other employees referenced in their affidavits or state when the discussions concerning the defendants' double book system took place, the court must draw all inferences in favor of the plaintiff at the preliminary certification stage. The court went on to hold that the plaintiffs sufficiently made the "modest factual showing" necessary to demonstrate that dishwashers, kitchen cleaners, preparatory cooks and cooks were victims of a common policy or plan to deprive them of overtime pay.

Cases where Certification Denied:

- In *Cowell v. Utopia Home Care, Inc*., 14-CV-736 (LDW)(SIL) (E.D.N.Y. August 8, 2016), the court denied the plaintiff's motion for conditional certification. According to plaintiff, defendant improperly classified all home healthcare aids and personal care aids as exempt employees under the domestic companionship service employment exemption pursuant to 29 U.S.C. § 213(a)(15). Plaintiff alleged that in her role as an HHA, she was to provide various domestic services (such as meal preparation and service; shopping for groceries and other items; washing clothes; errands outside of the home; shopping for supplies; medical and other appointments; personal hygiene care, dressing, and cleaning; and performing general household cleaning, etc.) thereby making her non-exempt. The court observed that the applicability of the companionship services exemption is an individualized, fact-specific determination of whether the home attendant performed general household work more than 20 percent of the time and that any household work that is related to the fellowship, care or protection of their client wouldn't negate the exemption. Based on the evidence provided, the court concluded that the unique and individualized plans of care that are prepared for Utopia patients, and which Utopia Home Healthcare Aids are required to follow, result in "very fact-specific inquiries" that are not "susceptible to a similarly-situated person analysis that would support the issuance of a collective action notice." Because plaintiff failed to satisfy her burden in demonstrating a factual nexus between herself and other potential opt-in plaintiffs, her motion for conditional certification as a collective action was denied.

- In *Korenblum v. Citigroup, Inc*., 15-CV-3383 (JMF) 2016 WL 3945692 (E.D.N.Y. July 19, 2016), the court denied conditional certification. Plaintiffs were current or former employees of information/technology vendors affiliated with defendant Citigroup, Inc. They alleged that certain types of billing arrangements Citi maintained with its IT vendors—known as "Professional Day" or "Professional Week" plans—denied them overtime wages in violation of federal and New York law. In denying the plaintiff's motion the court held that the evidence was insufficient to warrant conditional certification of a nationwide collective consisting of over 7,500 IT workers with differing job descriptions employed by forty different vendors at over seventy different worksites. The court noted that while there was no dispute that Citi employed a common billing arrangement, without more, Citi's common *billing* arrangement did not, in itself, violate the law.

- In *Ji v. Jling Inc*., 15-CV-4194 (JMA)(SIL), 2016 WL 2939154 (E.D.N.Y. May 19, 2016), the court denied conditional certification. The plaintiff alleged that the defendant had a "common policy" of paying non-managerial employees a flat rate per day, regardless of the number of hours worked and as a result, he never received overtime pay for hours worked in excess of 40 hours per week.

He further alleged that he was unaware of any other employees who received overtime pay. The court observed that plaintiff's sole factual support for his contention that he and all other non-managerial employees were similarly situated is his own affidavit in which he described the number of hours he worked and his rate of pay during the course of his employment at Showa Hibachi, as well as the rates of pay for nine other Showa Hibachi employees. The court concluded that although "conditional certification may be granted on the basis of the complaint and the plaintiff's own affidavit, here, the plaintiff's affidavit was insufficient to demonstrate that he was similarly situated to potential opt-in plaintiffs." Because plaintiff failed to provide any details regarding the observations and conversations that formed the basis of his conclusions, his affidavit contained "precisely the kind of unsupported assertions and conclusory allegations that courts in this District have found to be insufficient to conditionally certify a class under section 216(b)" (citations omitted).

V. OPPOSITION TO MOTION FOR CONDITIONAL CERTIFICATION

- Pros
    - Can try to limit the geographical scope, the number of positions or types of employees at issue, or other factors affecting the size of the conditionally certified class.
- Cons
    - Expensive
    - Conduct a fast-paced, in-depth factual investigation of the employer, its operations, and its employees
    - Risk expose critical tactical points and provide plaintiffs' counsel with a preview of its long-term strategy
    - Given the relatively modest burden on plaintiffs at the conditional certification stage, some employers may find it strategically preferable to reserve their factual and legal arguments until the decertification phase, when plaintiffs will be held to a much higher burden in showing that members of the putative class are similarly situated.
    - Avoid discovery requests from plaintiffs' counsel seeking information that bears on whether members of the proposed class are similarly situated.

VI. NOTICE

- Although Section 216(b) does not specify a procedure for providing notice to potential plaintiffs, either party may request that the court intervene to provide the notice. In *Hoffman-La Roche, Inc. v. Sperling,* 493 U.S. 165 (1989), the Supreme Court held that district courts have discretion to intervene in the notice process. The Court, however, provided little guidance on the extent of that power, and district courts have acted inconsistently on the issue. For this reason, defendants often find it advantageous to work jointly with plaintiffs' counsel to craft a stipulated notice.

- Stipulated notice may arise in one of two situations: 1. A defendant may find it advantageous to stipulate to certification for notice and discovery purposes because disputing a motion for conditional certification would be futile or because that stipulation would be strategically wise; or 2. A defendant who unsuccessfully opposed plaintiff's motion may have nonetheless convinced the court to order a jointly drafted notice.
- Ensure that the notice is fair and neutral and contains a denial of the allegations.
- Keep the response period for opt-in plaintiffs to a reasonable length of time.
- In the absence of unusual circumstances, thirty to sixty days usually suffices.
- Inform potential plaintiffs that opting in will potentially subject them to obligations such as depositions, document production, and testifying at trial. Costs may be imposed upon an opt-in plaintiff should defendants prevail at trial.
- Defendants can resist opposition by arguing that potential plaintiffs are entitled to full notice of all the potential benefits and risks of joining the class.
- Ensure the notice contains an anti-retaliation provision that assures potential plaintiffs that their employment will not be affected in any way should they choose to opt in to the case.
    - There are two strategic reasons for this: 1. should plaintiffs' counsel receive a low opt-in rate, the anti-retaliation provision forestalls the argument that the notice process was tainted by fear of retaliation; and 2. in the event of a companion state law class action, a rigorous anti-retaliation provision may help refute an argument that a Rule 23 opt-out class action is a superior method of adjudicating the plaintiffs' claims.
- When drafting the consent form that will accompany the notice, defendants should make sure to include specific language that opt-in plaintiffs are consenting only to joining the claims asserted in the notice. Through a specific consent, defendants help shield themselves from later-added claims made by the opt-in plaintiffs.
- Defendants should negotiate the method of distribution of the notice to ensure that only one notice is distributed, only once, via United States mail. Plaintiffs' attorneys may seek to distribute notice by electronic mail, through "paycheck stuffers," or by requiring the employer to post a notice in the workplace.
    - Defendants should resist these efforts. E-mails are too easily forwarded to other employees outside the class, with risk being perceived by the class members as "sponsored" by the employer since it is a communication through the employer's e-mail system.
- Once a plaintiff makes clear that a collective action will be sought, a defendant has powerful arguments against unsupervised contact with potential plaintiffs; unsupervised communications may be biased or misleading.
- Plaintiffs' counsel may attempt to communicate with potential opt-in plaintiffs outside issued notice through websites, direct telephone calls, or e-mail

contact thereby avoiding the court's direct supervision. The remedy is to obtain a cease and desist order.

VII. DECERTIFICATION

- After a court has conditionally certified a FLSA collective action, a defendant may file a motion to decertify the class. This motion typically occurs after the parties have completed discovery in a conditionally certified collective action, but the defendant is free to file a motion to decertify at any time.
- If the defendant prevails on a motion to decertify, the court will dismiss the opt-in plaintiffs from the case without prejudice. Those individuals who filed consents to join the action remain free to bring FLSA claims on their own behalf in another proceeding.
- Courts apply a much higher level of scrutiny in examining whether members of the class are similarly situated at the decertification stage, and the statute of limitations is tolled for thirty days to allow opt-in plaintiffs to do so. 28 U.S.C. § 1367(d).
- In *Ruiz v. Citibank, N.A.,* 93 F.Supp.3d 279 (S.D.N.Y.2015), the court decertified the class noting that at the conditional certification stage, the court accepted the testimony of several plaintiffs and declarants regarding the misbehavior of several branch managers. At the close of discovery, the defendant filed a motion to decertify the collective action. The court observed that, at this stage, the "plaintiff's still relied largely on anecdotal allegations of violations, secondhand statements regarding companywide policy to force unpaid overtime attributed to branch managers, and a pair of entirely appropriate workplace policies that interacted—with highly uneven and uncertain effect—across Citibank's many branches. Such evidence may suffice for conditional certification, but it does not provide a persuasive showing that the opt-in plaintiffs are 'similarly situated' and thus does not survive Citibank's motion to decertify the collective action."

VIII. ANSWER

- Include affirmative defenses
    - All wages were received by the employee(s)
    - Statute of limitations
    - Good faith
        - Employer must have acted in good faith conformity with, and in reliance upon, a written regulation, order, ruling, approval, or interpretation of Department of Labor's Wage and Hour Division, or any administrative practice or enforcement of the Division with respect to the class of employers to which it belonged. 29 U.S.C. § 259.
            - Employer must actually have believed that he was acting in conformity with an administrative interpretation, and his belief must be the kind that a reasonably prudent

man would have entertained under the same circumstances. 29 C.F.R. § 790.15.

- Relief from liquidated damages
  - "[E]mployer shows to the satisfaction of the court that the act or omission giving rise to [the employee's claim] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act." 29 U.S.C. § 260.

- Estoppel
  - Employee has deceived or misled the employer to the employer's detriment, as when the employee has falsified his time record without his employer's knowledge.
- Release agreement signed by the employee(s)

IX. DISCOVERY

- The most important discovery that plaintiffs try to obtain at the outset of an FLSA collective action is the names, addresses, and other contact information of the potential opt-in class members.
- If discovery requests seek sensitive information beyond just names and addresses of employees, such as telephone numbers, e-mail addresses, and social security numbers, objections may be well taken.
- Defendants may offer to provide the names and contact information to, and agree to the mailing of notices by, a third-party administrator instead of plaintiffs' counsel.
  - While this does not prevent a collective action notice, it prevents plaintiffs' counsel from being able to contact potential plaintiffs in a manner that invades their privacy.
  - Employers may strengthen this privacy argument against having to disclose names and contact information by regularly asking employees to sign a privacy protection statement that they do not wish their employer to release their contact information to any third party. While a court order probably can override such privacy restrictions, a court is likely to be more cautious in ordering the disclosure of such employee information with privacy protection documents signed by a substantial number of employees.
- Defendants often seek discovery of each opt-in plaintiff's employment history, job duties, hours of work, and pay information because such discovery helps defendants identify and expose differences among the opt-in class plaintiffs and quantify potential damages. If defendants discover sufficient differences among the opt-in class members, they may move for decertification of the class. Defendants should then argue that individuals who affirmatively choose to participate in the litigation are plaintiffs and therefore should be subject to the full range of discovery.

- Some courts have been very generous with defendants and have allowed defendants individualized discovery over all opt-in plaintiffs.
    - In *Krueger v. New York Tel. Co.*, 1 63 F.R.D. 446, 450-51 (S.D.N.Y. 1995), the court permitted the defendants' request to conduct written discovery of all 162 opt-in class members. The court noted that "given the relative compactness of the class," and the fact that the defendants "wish only to serve interrogatories and have not indicated a desire to depose the entire class," discovery of merely a "representative sample" of employees would be inappropriate.
    - If the class of plaintiffs does not exceed roughly 400 or 500 individuals, defense counsel should press plaintiffs' counsel for individualized discovery over the entire opt-in class and assert its right to such discovery. While defense counsel may not wish to depose each and every class member, at the very least, counsel could insist that answers to individualized interrogatories, documents requests, and requests to admit are necessary to mount a viable defense, attempt to decertify the class, and understand the defendant's potential damages exposure. This right to discovery often can be established most effectively in the scheduling order in conjunction with the court's Rule 16 conference.

X. MOOTNESS

- Once a plaintiff receives an offer for the full value of his or her case, a defendant can argue that the court lacks subject matter over the collective action because there is no longer a "case or controversy."
- The primary procedural device to moot collective claims is the offer of judgment provided in Fed. R. Civ. P. 68. If a defendant makes a settlement offer under Rule 68 that the plaintiff does not accept within fourteen days, and if the ultimate judgment obtained by the plaintiff is less than the Rule 68 offer, then the plaintiff must pay the statutory costs incurred by the defendant after the date the offer is made.
- Rule 68 shifts to the plaintiff the cost of litigating a lawsuit that the defendant should not have had to defend.
- The Rule 68 offer of judgment must be high enough to make plaintiff's attorney and his or her client fear that they may not be able to obtain a larger amount at trial, but low enough to be more economical for the defense than continued litigation.
    - In many FLSA cases, it is easy to calculate exactly how much a prevailing plaintiff would win in monetary damages: the back overtime pay (or other wages claimed due) multiplied by two to account for liquidated damages. If the defendant has obtained plaintiff's attorneys' fees in discovery, those fees should be added to the offer of judgment, assuming that they are reasonable.
    - A Rule 68 offer must include costs.
    - Attorneys' fees are not considered costs within the meaning of section 1920. However, where an underlying statute defines costs to also

include attorneys' fees, those fees are also considered to be costs under Rule 68.

- *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).
  The U.S. Supreme Court ruled that an offer of judgment, which the parties agreed was sufficiently generous to satisfy the sole individual plaintiff's wage and hour claim, rendered a plaintiff's entire collective action moot even though the plaintiff did not accept the offer.
- *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016).
  This case resolved an unanswered question that was highlighted by the Supreme Court in *Genesis* regarding mootness and *unaccepted* settlement offers. Here, the Court held that "in accord with Rule 68 of the Federal Rules of Civil Procedure, … an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists."
- *Rivera v. Harvest Bakery Inc.,* 312 F.R.D. 254 (E.D.N.Y. January 25, 2016).
  Because the plaintiffs did not consent to a judgment being entered, and the defendants' offers of judgment lapsed without the court entering judgment on any of the plaintiffs' individual claims, the claims were not rendered moot, in the constitutional sense, by the unaccepted Rule 68 offers. For that reason, the court held that the plaintiffs' mootness argument was without merit.

XI. SETTLEMENT

- On August 7, 2015, the Second Circuit brought clarity to the question of whether parties to a case have the authority to dismiss a pending FLSA lawsuit. In *Cheeks v. Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. Aug. 7, 2015) the court ruled that any dismissal with prejudice requires "the approval of the district court or the DOL to take effect. In doing so the court held that the FLSA is a "uniquely protective statute" and that requiring judicial or DOL approval of settlement agreements is consistent with its underlying purpose "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work". Following *Cheeks*, the parties must consider the supervisory role of the court and the DOL when structuring their settlements.
- (Note: *Cheeks* will be discussed in further detail at the end of the program.)
- Since *Cheeks*, the majority of the cases in the E.D.N.Y. result in settlement agreements being approved; and in circumstances where they are not, the court often gives specific guidance to the parties so that they may submit an amended agreement for approval.
- A recent Eastern District case acknowledged that prior to considering *Cheeks*, the first step in analyzing a settlement agreement, is the consideration of the various factors set forth in *Wolinsky v. Scholastic Inc.* (900 F.Supp.2d 332

(S.D.N.Y. 2012)), including: (1) the plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement is the product of arm's length bargaining between experienced counsel; and (5) the possibility of fraud or collusion. *Gonzales v. Lovin Oven Catering of Suffolk, Inc*., No. 14–CV–2824 (SIL), 2015 WL 6550560 (E.D.N.Y. Oct. 28, 2015. The court went on to state that if the *Wolinsky* standards are met, the court then considers whether the agreement complies with *Cheeks*. In *Gonzales*, the court did not approve the settlement agreement and ruled that it violated the FLSA because the confidentiality provisions barred plaintiffs from discussing the settlement with *anyone* and because the release language was "overly broad".

- In *Sagardia v. AD Delivery & Warehousing, Inc*., 15-CV-677 (CBA)(RLM) 2016 WL 4005777 (E.D.N.Y. July 25, 2016), the court concluded that the settlement agreement was fair and reasonable holding that the Offer of Judgment of $1,500 was more than what the plaintiff would have been entitled to if her claim were to prevail; and that the settlement of attorney costs, in the amount of $5,000 was within the reasonable range for attorneys in FLSA cases in the Eastern District.
- In *Zhang v. Joy's Hair Studio, Inc.,* 13-CV-3220(RRM)(RML) 2016 WL 3582044 (E.D.N.Y. June 27, 2016), the parties first settlement agreement was not approved because while the settlement was found to be "a fair compromise of a bona fide dispute over the Plaintiffs' hours," the agreement contained a troublesome confidentiality provision and failed to include a factual basis supporting plaintiffs' requested attorneys' fees. The parties then submitted a revised settlement agreement removing the confidentiality provision and including a memorandum in support of plaintiffs' requested attorneys' fees. Upon review of the revised agreement, the court found the settlement agreement to be fair and reasonable and approved same.
- In *Romero v. Westbury Jeep Chrysler Dodge, Inc*., 15-cv-4145 (ADS) (SIL) 2016 WL 1369389 (E.D.N.Y. April 6, 2016), the court approved the settlement agreement and observed that unlike the improper settlement agreements described in *Cheeks*, the settlement agreement here did not contain an overly broad release, a non-disparagement clause, or a confidentiality provision. Thus, there was no provision in the settlement agreement preventing the plaintiff from discussing his efforts to enforce his statutory rights to fair pay with other workers, or preventing the public from vindicating its "independent interest in assuring that employees' wages are fair." *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 178 (S.D.N.Y. 2015). Rather, the court observed that terms of the settlement agreement will be available to the public, and the plaintiff is free to discuss the settlement with whomever he pleases. In addition, the release is narrowly tailored to cover only wage and hour claims arising from the period relevant to this litigation. For these reasons, the court approved the settlement as fair and reasonable.

- In *Zeller v. PDC Corporation* 2016 WL 748894 13–CV–5035 (ARR) (JO) (E.D.N.Y. Jan. 28, 2016), the court approved the settlement of the plaintiffs' FLSA collective claims holding that the record makes clear that the proposed settlement is the result of extensive, arms-length negotiations after the parties engaged in significant discovery, and that it reasonably resolves a bona fide dispute.
- In *McCall v. Brosnan Risk Consultants, Ltd.,* 14-CV-2520(JS)(SIL) 2016 WL 4076567 (E.D.N.Y. April 15, 2016), the court denied approval of settlement agreement where the agreement contained a confidentiality provision. The court held that the parties failed to make a compelling showing sufficient to overcome the presumption of public access afforded to FLSA settlement agreements. The court went on to observe that District Courts in this Circuit have declined to approve FLSA agreements containing releases that "are far too sweeping to be fair and reasonable." The court found that the proposed agreement contained an overbroad release of claims not limited to matters addressed in the present action. Accordingly, the court found that this "sweeping" release of claims was wholly unreasonable and denied approval of the settlement agreement.

XII. ARBITRATION AGREEMENTS

- Individual arbitration provisions typically provide that the employer and the employee agree to resolve employment disputes through arbitration, as opposed to conventional litigation. Such provisions may also require that disputes be handled individually, precluding class or collective actions.
- *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).
    - The U.S. Supreme Court held that where parties have agreed in advance to decide disputes only by individual arbitrations, and have waived the right to bring claims by a class action, such agreements are enforceable even though it may not be economical for one party to bring such an individual claim. While it was not itself a wage-and-hour case, American Express should be very helpful to employers.
- *Sutherland v. Ernst & Young LLP,* No. 12-304-cv, 2013 WL 4033844 (2d Cir. Aug. 9, 2013).
    - The plaintiff was employed by E&Y as an audit employee. Her tasks involved pre-professional training and low level clerical work. E&Y classified her as a salary employee who would not receive overtime. The offer letter stated that employment disputes were subject to mandatory mediation/arbitration and included a copy of the firm's ADR program. The plaintiff also signed a confidentiality agreement which listed the terms of the ADR policy. The ADR policy stated that claims based on federal, state, and local ordinances and claims concerning wages/salary were subject to the terms of the Arbitration Agreement. The Arbitration Agreement stated that an employee could not sue in court in connection with a covered dispute and disputes

pertaining to different employees would be heard in separate proceedings.

- The plaintiff alleged that she was wrongfully classified as exempt from overtime requirements of the FLSA and NYLL and sought unpaid overtime hours in a putative class action. E&Y sought to compel arbitration on an individual basis as per the terms of the Arbitration Agreement.
- The plaintiff argued that the Arbitration Agreement she voluntarily signed should not be enforced because she would have to expend $160,000 in attorneys' fees, plus court costs and expert witness costs, in order to litigate her $2,000 overtime claim.
- The Second Circuit held that the Federal Arbitration Act requires courts to enforce a valid agreement to arbitrate even where the relevant substantive law (here the FLSA) permits enforcement by collective or class action. The Second Circuit rejected the argument that the right of a collective action is an integral and fundamentally substantive element of the FLSA that cannot be waived. Instead, the court held that the FLSA did not contain a contrary congressional command that renders class arbitration waivers unenforceable.
- Furthermore, relying on the United States Supreme Court's decision in *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) the Court rejected plaintiff's "effective vindication" argument and held that a "class-action waiver is not rendered invalid by virtue of the fact that [an employee's] claim is not economically worth pursuing individually."

XIII. DEPARTMENT OF LABOR

- Injunctive Relief - 29 U.S.C. § 217
  - The Secretary of Labor may seek to restrain and enjoin continuing violations of minimum wage and overtime requirements, and seek recovery of unpaid compensation on behalf of affected employees.
  - The Secretary may not seek liquidated damages in an action under Section 17.
  - An action under this section may also prohibit the interstate shipment of goods produced in violation of the FLSA, known as the "hot goods" ban found in Section 15(a)(1).
  - Section 17 actions may address violations of the FLSA's recordkeeping requirements.
- Civil Money Penalties - 29 U.S.C. § 216(e)
  - Imposed for repeated or willful violations of the minimum wage and overtime provisions.
  - Any person who violates the provisions of section 212, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty not to exceed $10,000 for each employee who was subject of such a violation.

    - Any person who repeatedly or willfully violates section 206 or 207 shall be subject to a civil penalty not to exceed $1,000 for each such violation.
- Civil Suit
    - Brought on behalf of affected employees to recover unpaid minimum wages and overtime compensation, plus an equal amount in liquidated damages. 29 U.S.C. § 216(c).
    - Employees can then no longer maintain a private cause of action.

XIV. DEPARTMENT OF JUSTICE

- Criminal Prosecution
    - Willful violations of the FLSA are criminal acts. 29 U.S.C. § 216(a).
    - The maximum penalties are a fine of not more than $10,000 or imprisonment for not more than six months, or both. Prison sentences may not be imposed for a first conviction.

XV. PROSPECTIVE LAW

- An update to the regulations defining exemptions for executive, administrative and professional employees shall take effect on December 1, 2016. The Final Rule focuses on updating the salary and compensation levels needed for EAP workers to be exempt.

Representative Evidence in Wage and Hour Class Litigation

By: Stephen P. Sonnenberg and Emily R. Pidot

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One of the greatest litigation risks to employers arises from class-based wage and hour claims. Recent statistics from the Federal Judicial Center show yet another substantial increase in the number of federal wage and hour lawsuits filed in 2013, marking a 45 percent increase over the number filed in 2008, and a 163 percent increase over the number filed in 2003.[1] While the Supreme Court's 2011 decision in *Wal-Mart Stores v. Dukes,* 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), increased the burdens for plaintiffs seeking class certification of discrimination claims, federal courts adjudicating Fair Labor Standards Act (FLSA) collective actions and state wage and hour law class actions have not adopted the Supreme Court's reasoning regarding the commonality requirement under Federal Rule of Civil Procedure 23(a)(2) with the frequency sought by defendant-employers.

At the core of many wage and hour class and collective actions are the questions of whether and how to use representative evidence. Testimony as to liability and/or damages by a portion of the potential class on behalf of all other members, whether in the form of depositions or affidavits, as well as statistical sampling, may be utilized by the parties to support or contest class certification and decertification, or at trial. It may be proffered by putative class members or by experts on their behalf.

Faced with the unwieldy prospect of testimony from each member of a putative or certified class, plaintiffs typically assert that it would be needlessly cumulative for each class member to testify. They often assert that class actions are inherently representative, designed to allow efficient aggregation and resolution of the claims of many in one proceeding. They may assert that certain facts bind all potential class members: typically, a common decision, policy, or plan to which all are subjected.

Defendants typically contest plaintiffs' use of representative evidence by identifying varied circumstances leading to the alleged violation. They may contend that the number of testifying putative class members compared to the total class size is inadequate, and that the testifying class members cannot accurately and reliably speak on behalf of all absent class members. Defendants often contend that selecting a subset of the class to testify as representatives for the entire class violates their fundamental right to due process, because liability is dependent on the individual facts and circumstances of each plaintiff. That said, defendants often utilize representative evidence to contest certification of a class, to defend against plaintiffs' liability theories, and to refute plaintiffs' damages claims.

A court's decision to allow or disallow representative evidence in a wage and hour class action is critical; it may, for example, determine whether the lawsuit will proceed on behalf of a class or individual. During the last year, several decisions nationwide have focused on the use and misuse of such evidence and have provided litigants with guidance regarding some critical questions: Is the representative testimony sufficiently representative given variations in class composition, geography, or size? How should individuals who will provide testimony to be extrapolated to the balance of the class be selected? Does the use of representative evidence deprive the defendant-employer of its right to assert individualized affirmative defenses based on individualized inquiries? Must a court that considers the feasibility of representative evidence as early as the certification stage consider the manner in which such evidence will be utilized at trial?

Post-Dukes Landscape

In *Espenscheid v. DirectSat USA,* 705 F.3d 770 (7th Cir. 2013) (Posner), the U.S. Court of Appeals for the Seventh Circuit affirmed decertification of a hybrid class and collective action arising under the FLSA and Illinois wage and hour law, concluding that evidence from 42 out of 2,341 putative class members was not sufficiently representative due to the lack of uniformity among the class, and was insufficient to calculate each class member's damages. The class members were technicians paid on a piece-rate system; their weekly hours and hourly rate varied depending on their efficiency and personal time-recording practices. Individual testimony showed that some employees recorded their time for tasks they were instructed to omit, while others underreported their time to impress the company.

Affirming decertification of the class, Judge Richard Posner held that the representative evidence of 42 putative class members could not be extrapolated to the entire putative class; to do so "would require that all 2,341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage. No one thinks there was such uniformity." Posner also chastised class counsel for failing to propose a manageable trial plan utilizing the representative evidence and instead insisting on a "shapeless, freewheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned."

This year, in *Duran v. U.S. Bank,* 59 Cal. 4th 1 (2014), a decision read closely by wage and hour practitioners nationwide, the California Supreme Court established new burdens for plaintiffs and affirmed existing due process rights for employers in finding that the lower court had improperly certified a class of employees. The lower court randomly selected only 20 members of a 260-person class, as well as the two named plaintiffs, to provide testimony about their work habits. Relying on this testimony, and rejecting the bank's attempts to introduce evidence from other class members, the trial court held that the bank had misclassified the entire class as exempt from the laws requiring payment of overtime wages. The court then determined damages based on the so-called representative group's testimony.

The Court of Appeals unanimously reversed the trial court, holding that its approach to sampling violated the bank's due process right to present affirmative defenses. The Court of Appeals also held that the trial court abused its discretion by failing to grant the bank's motion to decertify the class. The Supreme Court of California affirmed the Court of Appeals' ruling, and established principles governing representative evidence. First, trial courts must consider the feasibility of trying the case as a class action when deciding whether to certify a class. Second, if a trial plan becomes unworkable, the trial court must order decertification. Third, representative testimony cannot completely undermine a defendant's right to present relevant evidence; if a defense depends upon questions specific to each class member, the statistical model may be inappropriate if it cannot accommodate these individual deviations.

Federal Courts in New York

In New York, there is no seminal decision regarding representative evidence in wage and hour matters. Outcomes vary sharply from one court to another, but each decision offers insight into the appropriate use of representative evidence and its impact on class-based certification and adjudication.

Uniformity and class size are key. Two recent decisions found representative evidence appropriate where the class members were relatively few, worked in the same location performing uniform duties, and were subject to identical policies.

In *Jackson v. Bloomberg,* 13 Civ. 2001(JPO), 2014 U.S. Dist. LEXIS 36282 (S.D.N.Y. March 19, 2014), the court granted plaintiffs' motion to conditionally certify a nationwide FLSA collective action and to certify a Rule 23 class with respect to the New York Labor Law (NYLL) claims, concluding that representative testimony as to both liability and damages was likely to be appropriate. The class members all were classified by Bloomberg as exempt from overtime pay, and had the same title, responsibilities, and work location. Moreover, the court held that plaintiffs demonstrated that Bloomberg had a common policy or plan requiring representatives to work overtime. For a class estimated to be smaller than a few hundred, the court opined that representative testimony was likely appropriate. In response to concerns that representative evidence would be improper for determining damages, the court noted its ability to decertify the class following the liability phase.

In *Johnson v. Wave Comm GR,* 298 F.R.D. 152, 2014 WL 988512 (N.D.N.Y. March 14, 2014), the trial court denied the defendants' motion for decertification of classes under the FLSA and NYLL, finding that common questions of law and fact predominated over questions affecting individual class members. The court distinguished *Espenscheid* because Wave Comm had uniformly applied compensation plans to the class members, all of whom performed the same type of work, in the same location, and under the direction of the same supervisors. The court also stressed that the size of the FLSA and NYLL classes (57 and 200, respectively), rendered representative proof more feasible than in *Espensheid,* where the putative class was larger than 2,300 employees.

Representative testimony showing variation may prove fatal to class certification. Other decisions show the opposite side of the coin: Representative evidence weighs against certification when it demonstrates substantial variance in the performance of job duties, supervision, policy implementation, and timekeeping practices.

In *Tracy v. NVR,* 293 F.R.D. 395 (W.D.N.Y. 2013), for example, the trial court granted the defendant's motion to decertify a FLSA collective action and denied a motion to certify a Rule 23 class, finding that there were wide discrepancies between the representative sample and the remainder of the putative class that rendered impossible a blanket determination concerning the exempt status of the entire putative class. Although class members had the same job description and basic duties, they also had substantial flexibility in the manner in which they performed their duties. Staffing models differed between locations; supervisors' expectations varied; the frequency with which class members performed certain activities varied widely; and employees had broad discretion to decide how to allocate their time. Under these circumstances, the use of representative evidence would not lead to a fair determination of plaintiff's claims.

In *Hinterberger v. Catholic Health Sys.,* 299 F.R.D. 22 (W.D.N.Y. 2014), the trial court denied plaintiffs' motion to certify a Rule 23 class, and granted defendants' motion to decertify a conditionally certified FLSA collective action, finding that representative testimony proffered by plaintiffs weighed against certification. Catholic Health Systems' (CHS) official policy that employees would not be compensated for 30-minute meal breaks, unless they reported working through or being interrupted during the scheduled break, complied with the NYLL and FLSA. Each department manager implemented its own meal-break reporting procedures. Plaintiffs alleged that CHS did not actually follow its official policy, and sought class certification in order to resolve, in an aggregated manner, whether CHS's policy of delegating to supervisors the task of monitoring for missed meal breaks was unlawful.

The court found that the named plaintiffs' testimony evinced "tremendous variation" across titles, job duties, facilities, and departments, with respect to missed meal breaks. Declining to certify the proposed class, the court stressed that the trier of fact would have to determine, on a department-or employee-specific basis, whether CHS had actual or constructive knowledge of unpaid work.

Lessons From Developing Law

Although representative evidence in wage and hour litigation can be an effective tool for both plaintiffs and defendants, trial courts are carefully considering its nature and use. Some trends have emerged. First, where representative evidence based on proper sampling procedures demonstrates the existence of a common policy or plan affecting all class members, courts have been more likely to allow such evidence at the class certification stage and at trial. The analysis, however, is case-specific, and the collection and use of such evidence is often hotly litigated.

Second, where representative evidence shows variation in job duties, reporting practices, and policy implementation, courts are more reluctant to grant class certification. Third, trial courts have closely scrutinized purported representative testimony by a small proportion of a large class. Expert testimony by statisticians and labor economists often plays a critical role in the analysis. Fourth, a growing number of courts are linking the proposed use of representative evidence to a manageable trial plan regardless of the stage of litigation. Attention to these trends is well warranted, as the use and admissibility of representative evidence is likely to remain squarely at issue in litigation of class-based wage and hour claims for the foreseeable future.

i Federal Judicial Caseload Statistics, Table C 2: U.S. District Courts, Civil Cases Commenced, by basis of Jurisdiction and Nature of Suit, 2003-2013, available at http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables_Archive.aspx (during the 12-Months Period Ending Dec. 31) (last visited Oct. 3, 2014).

Part 146

Hospitality Industry Wage Order

Part 146 of Title 12 of the Official Compilation of Codes, Rules, and Regulations

of the State of New York (Cited as NYCRR 146)

Promulgated by the Commissioner of Labor

Effective December 31, 2015

Statutory Authority: Labor Law Article 19, § 653 and § 656; Article 6, §199; and Article 2, § 21(11)

PART 146
HOSPITALITY INDUSTRY

Subpart 146-1 Minimum Wage Rates
Subpart 146-2 Regulations
Subpart 146-3 Definitions

SUBPART 146-1
MINIMUM WAGE RATES

Sec.

§ 146-1.1. Application.

(a) Every employer in the hospitality industry must pay to each employee, as defined in this Part, at least the minimum wage rates provided in this Part.

(b) The rates provided herein shall apply, unless otherwise stated, on and after January 1, 2011.

§ 146-1.2. Basic minimum hourly rate.

(a) The basic minimum hourly rate, except for fast food employees, shall be:

(1) $ 7.25 per hour on and after January 1, 2011;

(2) $ 8.00 per hour on and after December 31, 2013;

(3) $ 8.75 per hour on and after December 31, 2014;

(4) $ 9.00 per hour on and after December 31, 2015.

(b) The basic minimum hourly rate for fast food employees employed in the City of New York shall be:

(1) $10.50 per hour on and after December 31, 2015;

(2) $12.00 per hour on and after December 31, 2016;

(3) $13.50 per hour on and after December 31, 2017;

(4) $15.00 per hour on and after December 31, 2018.

(c) The basic minimum hourly rate for fast food employees employed outside of the City of New York shall be:

(1) $9.75 per hour on and after December 31, 2015;

(2) $10.75 per hour on and after December 31, 2016;

(3) $11.75 per hour on and after December 31, 2017;

(4) $12.75 per hour on and after December 31, 2018;

(5) $13.75 per hour on and after December 31, 2019;

(6) $14.50 per hour on and after December 31, 2020;

(7) $15.00 per hour on and after July 1, 2021.

(d) If a higher wage is established by federal law pursuant to 29 U.S.C. section 206 or any successor provisions, such wage shall apply.

§ 146-1.3. Tip credits.

An employer may take a credit towards the basic minimum hourly rate if a service employee or food service worker receives enough tips and if the employee has been notified of the tip credit as required in section 146-2.2 of this Part. Such employees shall be considered "tipped employees."

(a) *Tip credits for service employees.* (1) On and after January 1, 2011, a service employee shall receive a wage of at least $5.65 per hour, and credit for tips shall not exceed $1.60 per hour, provided that the total of tips received plus wages equals or exceeds $7.25 per hour. FOR RESORT HOTELS ONLY, a service employee shall receive a wage of at least $4.90 per hour, and credit for tips shall not exceed $2.35 per hour, if the weekly average of tips is at least $4.10 per hour.

(2) On and after December 31, 2013, a service employee shall receive a wage of at least $5.65 per hour, and credit for tips shall not exceed $2.35 per hour, provided that the total of tips received plus wages equals or exceeds $8.00 per hour. FOR RESORT HOTELS ONLY, a service employee shall receive a wage of at least $4.90 per hour, and credit for tips shall not exceed $3.10 per hour, if the weekly average of tips is at least $4.50 per hour.

(3) On and after December 31, 2014, a service employee shall receive a wage of at least $5.65 per hour, and credit for tips shall not exceed $3.10 per hour, provided that the total of tips received plus wages equals or exceeds $8.75 per hour. FOR RESORT HOTELS ONLY, a service employee shall receive a wage of at least $4.90 per hour, and credit for tips shall not exceed $3.85 per hour, if the weekly average of tips is at least $4.90 per hour.

(4) On and after December 31, 2015, a service employee shall receive a wage of at least $7.50 per hour, and credit for tips shall not exceed $1.50 per hour, provided that the total of tips received plus wages equals or exceeds $9.00 per hour. FOR RESORT HOTELS ONLY, a service employee shall receive a wage of at least $7.50 per hour, and credit for tips shall not exceed $1.50 per hour, if the tips received equal or exceed at least $5.05 per hour.

(b) *Tip credits for food service workers.* (1) On and after January 1, 2011, a food service worker shall receive a wage of at least $5.00 per hour, and credit for tips shall not exceed $2.25 per hour, provided that the total of tips received plus the wages equals or exceeds $7.25 per hour.

(2) On and after December 31, 2013, a food service worker shall receive a wage of at least $5.00 per hour, and credit for tips shall not exceed $3.00 per hour, provided that the total of tips received plus the wages equals or exceeds $8.00 per hour.

(3) On and after December 31, 2014, a food service worker shall receive a wage of at least $5.00 per hour, and credit for tips shall not exceed $3.75 per hour, provided that the total of tips received plus the wages equals or exceeds $8.75 per hour.

(4) On and after December 31, 2015, a food service worker shall receive a wage of at least $7.50 per hour, and credit for tips shall not exceed $1.50 per hour, provided that the total of tips received plus the wages equals or exceeds $9.00 per hour.

§ 146-1.4. Overtime hourly rates.

An employer shall pay an employee for overtime at a wage rate of 1½ times the employee's regular rate for hours worked in excess of 40 hours in one workweek. When an employer is taking a credit toward the basic minimum hourly rate pursuant to section 146-1.3 of this Subpart, the overtime rate shall be the employee's regular rate of pay before subtracting any tip credit, multiplied by 1½, minus the tip credit. It is a violation of the overtime requirement for an employer to subtract the tip credit first and then multiply the reduced rate by one and one half.

Example 1: Non-tipped employee
An employee regularly paid $10 per hour who works 50 hours in a workweek:

Regular rate:	$10.00 per hour
Overtime rate:	$10.00 x 1.5 = $15.00 per hour
Wage for 40 hours:	$10.00 x 40 = $400.00
Wage for 10 hours:	$15.00 x 10 = $150
	Total $550.00

Example 2: Tipped employee (on and after January 1, 2011, and prior to December 31, 2013)
A food service worker regularly paid $7.25 per hour minus a tip credit of $2.25 per hour, for a wage rate of $5.00 per hour, who works 50 hours in a workweek:

Regular rate:	$7.25 per hour
Overtime rate:	$7.25 x 1.5 = $10.875 per hour
Wage rate for 40 hours:	$7.25 - $2.25 = $5.00 per hour
Wage rate for 10 hours:	$10.875 - $2.25 = $8.625 per hour
Wages for the workweek:	$5.00 x 40 hours = $200.00
	$8.625 x 10 hours = $ 86.25
	Total $286.25

Alternative calculation:

Wages for the work week:	$7.25 x 40 hours = $290.00
	$10.875 x 10 hours = $108.75
	Subtotal $398.75
Minus tip credit	$2.25 x 50 hours = - 112.50
	Total $286.25

§ 146-1.5. Call-in pay.

(a) An employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, shall be paid at the applicable wage rate:

(1) for at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less;

(2) for at least six hours for two shifts totaling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less; and

(3) for at least eight hours for three shifts totaling eight hours or less, or the number of hours in the regularly scheduled shift, whichever is less.

(b) For purposes of this section, *applicable wage rate* shall mean:

(1) Payment for time of actual attendance calculated at the employee's regular or overtime rate of pay, whichever is applicable, minus any customary and usual tip credit;

(2) Payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted. Payment for the balance of the period is not payment for time worked or work performed and need not be included in the regular rate for the purpose of calculating overtime pay.

(c) Call-in pay shall not be offset by any credits for meals or lodging provided to the employee.

(d) A *regularly scheduled shift* is a fixed, repeating shift that an employee normally works on the same day of each week. If an employee's total hours worked or scheduled to work on a given day of the week change from week to week, there is no regularly scheduled shift.

(e) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

§ 146-1.6. Spread of hours greater than 10 in restaurants and all-year hotels.

The *spread of hours* is the length of the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty.

Examples of a spread of hours greater than 10 are: 7 a.m. – 10 a.m., 7 p.m. – 10 p.m. = 6 hours worked but a 15 hour spread; 11:30 a.m. – 3 p.m., 4 p.m. – 10:00 p.m. = 9½ hours worked but a 10½ hour spread.

(a) On each day on which the spread of hours exceeds 10, an employee shall receive one additional hour of pay at the basic minimum hourly rate.

(b) The additional hour of pay shall not be offset by any credits for meals or lodging provided to the employee.

(c) The additional hour of pay is not a payment for time worked or work performed and need not be included in the regular rate for the purpose of calculating overtime pay.

(d) This section shall apply to all employees in restaurants and all-year hotels, regardless of a given employee's regular rate of pay.

§ 146-1.7. Uniform maintenance pay.

Maintaining required uniforms includes washing, ironing, dry cleaning, alterations, repair, or any other maintenance necessary.

(a) Where an employer does not maintain required uniforms for any employee, the employer shall pay the employee, in addition to the employee's agreed rate of pay, uniform maintenance pay of:

(1) on and after January 1, 2011: $9.00 per week for work weeks over 30 hours, $7.10 per week for work weeks of more than 20 but not more than 30 hours, and $4.30 per week for work weeks of 20 hours or less;

(2) on and after December 31, 2013: $9.95 per week for work weeks over 30 hours, $7.85 per week for work weeks of more than 20 but not more than 30 hours, and $4.75 per week for work weeks of 20 hours or less;

(3) on and after December 31, 2014: $10.90 per week for work weeks over 30 hours, $8.60 per week for work weeks of more than 20 but not more than 30 hours, and $5.20 per week for work weeks of 20 hours or less;

(4) on and after December 31, 2015: $11.20 per week for work weeks over 30 hours, $8.85 per week for work weeks of more than 20 but not more than 30 hours, and $5.35 per week for work weeks of 20 hours or less.

(b) *Wash and wear exception to uniform maintenance pay.* An employer will not be required to pay the uniform maintenance pay, where required uniforms

(1) are made of "wash and wear" materials;

(2) may be routinely washed and dried with other personal garments;

(3) do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment; and

(4) are furnished to the employee in sufficient number, or the employee is reimbursed by the employer for the purchase of a sufficient number of uniforms, consistent with the average number of days per week worked by the employee.

(c) *Employee chooses not to use employer-provided laundry service.* The employer will not be required to pay uniform maintenance pay to any employee who chooses not to use the employer's service, where an employer:

(1) launders required uniforms free of charge and with reasonable frequency;

(2) ensures the availability of an adequate supply of clean, properly-fitting uniforms; and

(3) informs employees individually in writing of such service.

(d) Uniform maintenance pay shall not be offset by any credits for meals or lodging provided to the employee.

(e) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

§ 146-1.8 Costs of purchasing required uniforms.

(a) When an employee purchases a required uniform, he or she shall be reimbursed by the employer for the total cost of the uniform no later than the next payday. Employers may not avoid such costs by requiring employees to obtain uniforms before starting the job.

(b) Where the employer furnishes to the employees free of charge, or reimburses the employees for purchasing, enough uniforms for an average workweek, and an employee chooses to purchase additional uniforms in excess of the number needed, the employer will not be required to reimburse the employee for the cost of purchasing the additional uniforms.

(c) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

§ 146-1.9. Credits for meals and lodging.

Meals and/or lodging provided by an employer to an employee may be considered part of the wages paid to the employee but shall be valued at no more than the amounts given below.

(a) *Meal credits in restaurants and all-year hotels.* (1) Meals furnished by an employer to an employee may be considered part of the wages but shall be valued at no more than:

(i) $2.50 per meal for all workers, on and after January 1, 2011;

(ii) $2.75 per meal for non-service employees, on and after December 31, 2013;

(iii) $3.00 per meal for non-service employees, on and after December 31, 2014;

(iv) $3.10 per meal for non-service employees, on and after December 31, 2015.

(2) A credit for more than one meal shall not be permitted for any employee working less than 5 hours on any day.

(3) A credit for more than two meals shall not be permitted for any other employee on any day, except that a credit of one meal per shift may be permitted for an employee working on a split shift.

(b) *Lodging credits in restaurants.* (1) Lodging furnished by an employer to an employee may be considered part of wages but shall be valued at no more than:

(i) $1.50 per day for food service workers and $1.75 per day for all other workers; or $9.60 per week for food service workers and $11.30 per week for all other workers on and after January 1, 2011;

(ii) $1.95 per day or $12.45 per week for non-service employees on and after December 31, 2013;

(iii) $2.15 per day or $13.60 per week non-service employees on and after December 31, 2014;

(iv) $2.20 per day or $14.00 per week for non-service employees on and after December 31, 2015.

(c) *Lodging credits in all-year hotels.* (1) Lodging furnished by an employer to an employee in an all-year hotel may be considered part of wages but shall be valued at no more than:

(i) $0.35 per hour on and after January 1, 2011;

(ii) $0.40 per hour for non-service employees on and after December 31, 2013; (iii) $0.45 per hour for non-service employees on and after December 31, 2014.

(d) *Meal and lodging credits in resort hotels.* Meals and lodging furnished by an employer to an employee in a resort hotel may be considered part of wages but shall be valued at no more than:

(1) Lodging and three meals per day furnished to a residential employee:

(i) $13.75 for each day worked by a food service worker and $16.25 per day for each day worked by all other workers on and after January 1, 2011;

(ii) $17.95 per day for each day worked by non-service employees on and after December 31, 2013;

(iii) $19.65 per day for each day worked by non-service employees on and after December 31, 2014;

(iv) $20.20 per day for each day worked by non-service employees on and after December 31, 2015.

(2) Meals furnished to a non-residential employee:

(i) $2.75 per meal on workdays for a food service worker and $3.25 per meal on workdays for all other workers on and after January 1, 2011;

(ii) $3.60 per meal on workdays for non-service employees on and after December 31, 2013;

(iii) $3.95 per meal on workdays for non-service employees on and after December 31, 2014;

(iv) $4.05 per meal on workdays for non-service employees on and after December 31, 2015.

(3) Lodging furnished without meals:

(i) $0.35 per hour on and after January 1, 2011;

(ii) $0.40 per hour for non-service employees on and after December 31, 2013;

(iii) $0.45 per hour for non-service employees on and after December 31, 2014.

SUBPART 146-2
REGULATIONS

Sec.

§ 146-2.1. Employer records.

(a) Every employer shall establish, maintain and preserve for at least six years weekly payroll records which shall show for each employee:

(1) name and address;

(2) social security number or other employee identification number;

(3) occupational classification;

(4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;

(5) regular and overtime hourly wage rates;

(6) the amount of gross wages;

(7) deductions from gross wages;

(8) the amount of net wages;

(9) tip credits, if any, claimed as part of the minimum wage;

(10) meal and lodging credits, if any, claimed as part of wages;

(11) money paid in cash; and

(12) student classification.

(b) The records should also indicate whether the employee has uniforms maintained by the employer.

(c) In addition, for each individual working in an executive, administrative or professional capacity, or as a staff counselor in a children's camp, an employer's records shall also show:

(1) name and address;

(2) social security number or other employee identification number;

(3) description of occupation; and

(4) for individuals permitted or suffered to work in an executive or administrative capacity, total wages, and the value of meal and lodging credits, if any, for each payroll period.

(d) For each individual for whom student status is claimed, a statement from the school which such individual attends indicating whether or not such individual:

(1) is a student whose course of instruction is one leading to a degree, diploma or certificate; or

(2) is completing residence requirements for a degree; and

(3) is required to obtain supervised and directed vocational experience to fulfill curriculum requirements.

(e) Employers, including those who maintain their records containing the information required by this section, section 146-2.2, section 146-2.17 and section 146-2.18 of this Subpart at a place outside of New York State, shall make such records or sworn certified copies thereof available at the place of employment upon request of the commissioner.

§ 146-2.2. Written notice of pay rates, tip credit and pay day.

(a) Prior to the start of employment, an employer shall give each employee written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the amount of tip credit, if any, to be taken from the basic minimum hourly rate, and the regular payday. The notice shall also state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate. The employer must provide notice in:

(1) English; and

(2) any other language spoken by the new employee as his/her primary language, so long as the Commissioner has made such notice available to employers in such language on the Department's website.

(b) Such notice shall also be required prior to any change in the employee's hourly rates of pay.

(c) An acknowledgment of receipt signed by the employee shall be kept on file for six years.

(d) The employer has the burden of proving compliance with the notification provisions of this section. As an example, the employer will have met this burden by providing the employee with the following notice, filled out and subject to revisions in the minimum rates, subject to the language requirements set forth in subdivision (a) of this section, and the employee signs a statement acknowledging that he or she received the notice.

Notice of Pay Rates and Pay Day

Company name and address _____

Preparer's name and title _____

Employee's name and address _____

Your regular rate of pay will be $_____ per hour for the first 40 hours in a week.

Your overtime rate of pay will be $_____ per hour for hours over 40.

Your designated pay day will be: _____

FOR TIPPED EMPLOYEES ONLY:

The tip credit taken will be $_____ per hour.

If you do not receive enough tips over the course of a week to bring you up to the minimum hourly rates of $7.25 per hour for the first 40 hours and $10.875 per hour for hours over 40, you will be paid additional wages that week to make up the difference.

FOR SERVICE EMPLOYEES IN RESORT HOTELS ONLY (if different from rates given above): If your weekly average of tips received is at least $4.10 per hour, your regular rate of pay will be $ _____ per hour and your overtime rate of pay will be $ _____ per hour. The tip credit taken will be $ _____ per hour.

Preparer's signature and date _____

I have been notified of my pay rate, overtime rate, tip credit if applicable, and designated pay day on the date given below.

Employee's signature and date _____

§ 146-2.3. Statement to employee.

Every employer shall provide to each employee a statement, commonly referred to as a pay stub, with every payment of wages. The pay stub must list hours worked, rates paid, gross wages, credits claimed (for tips, meals and lodging) if any, deductions and net wages.

§ 146-2.4. Posting requirements.

Every employer shall post, in a conspicuous place in his or her establishment, notices issued by the Department of Labor about wage and hour laws, tip appropriations, illegal deduction provisions and any other labor laws that the Commissioner shall deem appropriate.

§ 146-2.5. Hourly rates are required.

Employees as defined in section 146-3.2 of this Title, other than commissioned salespersons, shall be paid hourly rates of pay. Employers may not pay employees on a daily, weekly, salary, piece rate or other non- hourly rate basis.

§ 146-2.6. Weekly basis of minimum wage.

The minimum wage provided by this Part shall be required for each week of work, regardless of the frequency of payment.

§ 146-2.7. Deductions and expenses.

(a) Employers may not make any deductions from wages, except for credits authorized in this Part and deductions authorized or required by law, such as for social security and income taxes. Some examples of prohibited deductions are:

(1) deductions for spoilage or breakage;

(2) deductions because of non-payment by a customer;

(3) deductions for cash shortages or losses; and

(4) fines or penalties for lateness, misconduct, or quitting by an employee without notice.

(b) Employers may not charge employees separately from wages for items prohibited as deductions from wages, except for optional meal purchases allowed by section 146-2.8(d) of this Part.

(c) If an employee must spend money to carry out duties assigned by his or her employer, those expenses must not bring the employee's wage below the required minimum wage.

§ 146-2.8. Meals and lodging.

(a) When an employer takes a meal and/or lodging credit toward the pay of an employee, the employer may not charge the employee any additional money for the meal(s) and/or lodging.

(b) A residential employee in a resort hotel whose compensation is based on the inclusion of meals shall be provided with three meals per day.

(c) An employee who works a shift requiring a meal period under Section 162 of the New York State Labor Law must either:

(1) receive a meal furnished by the employer as part of his or her compensation, at no more than the meal credit allowed in this Part; or

(2) be permitted to bring his or her own food and consume it on premises.

(d) Nothing in this Part shall prevent an employee from purchasing from the employer:

(1) in a restaurant or an all-year hotel, meals at other times or places than those provided as part of his or her compensation;

(2) in a resort hotel, food in addition to meals provided as part of his or her compensation.

Such purchases may not be paid for through deductions from the employee's wages.

§ 146-2.9. Working at tipped and non-tipped occupations on the same day.

On any day that a service employee or food service worker works at a non-tipped occupation

(a) for two hours or more, or

(b) for more than 20 percent of his or her shift, whichever is less, the wages of the employee shall be subject to no tip credit for that day.

Example: An employee has a daily schedule as follows: 8 a.m. to 9:45 a.m., food preparation; 9:45 a.m. to 1:30 p.m., serving food in the restaurant; takes ½ hour meal period; 2:00 p.m. to 4:30 p.m. serving food in the restaurant. That employee has worked 8 hours total, consisting of 6 hours, 15 minutes as a food service worker and 1 hour, 45 minutes in a non-tipped occupation. Twenty percent of an 8 hour shift is 1 hour, 36 minutes. Although the employee worked for less than two hours at the non-tipped occupation, he/she has worked for more than 20 percent of his/her shift at the non-tipped occupation. Therefore, the employee is subject to no tip credit for that day.

§ 146-2.10. Employment covered by more than one wage order.

An employee in the hospitality industry who works for the same employer at an occupation governed by another New York State minimum wage order

(a) for two hours or more during any one day; or

(b) for 12 hours or more in any week shall be paid for all hours of working time for that day or week in accordance with the minimum wage standards contained in the minimum wage order for such other industry or the hospitality industry, whichever is higher.

§ 146-2.11. Learner, trainee, or apprentice rates.

Any employees whom an employer designates learners, trainees, or apprentices must nonetheless be paid at least the minimum rates prescribed in this Part.

§ 146-2.12. Rehabilitation programs.

For an individual employed as part of a rehabilitation program approved by the commissioner, the payment of compensation under such program shall be deemed to meet the requirements of this Part.

§ 146-2.13. Student obtaining vocational experience.

A student is not deemed to be permitted or suffered to work if, in order to fulfill the curriculum requirements of the educational institution which the student attends, the student is required to obtain supervised and directed vocational experience in another establishment.

§ 146-2.14. Tip sharing and tip pooling.

(a) *Tip sharing* is the practice by which a directly tipped employee gives a portion of his or her tips to another service employee or food service worker who participated in providing service to customers and keeps the balance.

(b) *Tip pooling* is the practice by which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees.

(c) *Directly tipped employees* are those who receive tips from patrons or customers without any intermediary between the patron or customer and the employee.

(d) *Indirectly tipped employees* are those employees who, without receiving direct tips, are eligible to receive shared tips or to receive distributions from a tip pool.

(e) Eligibility of employees to receive shared tips, or to receive distributions from a tip pool, shall be based upon duties and not titles. Eligible employees must perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental. Examples of eligible occupations include:

(1) wait staff;

(2) counter personnel who serve food or beverages to customers;

(3) bus persons;

(4) bartenders;

(5) service bartenders;

(6) barbacks;

(7) food runners;

(8) captains who provide direct food service to customers; and

(9) hosts who greet and seat guests.

(f) Employers may not require directly tipped employees to contribute a greater percentage of their tips to indirectly tipped employees through tip sharing or tip pooling than is customary and reasonable.

§ 146-2.15. Tip sharing.

(a) Directly tipped employees may share their tips on a voluntary basis with other service employees or food service workers who participated in providing service to customers.

(b) An employer may require directly tipped food service workers to share their tips with other food service workers who participated in providing service to customers and may set the percentage to be given to each occupation. However, employees must handle the transactions themselves.

(c) Nothing in this section shall be interpreted as requiring an employer to compensate participants in tip sharing for tips wrongfully withheld from the tip sharing by any participant.

§ 146-2.16. Tip pooling.

(a) Directly tipped employees may mutually agree to pool their tips on a voluntary basis and to redistribute the tips among directly tipped employees and indirectly tipped employees who participated in providing the service.

(b) An employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool. Only food service workers may receive distributions from the tip pool.

(c) Nothing in this section shall be interpreted as requiring an employer to compensate participants in tip pooling for tips wrongfully withheld from the tip pool by any participant.

§ 146-2.17. Records of tip sharing or tip pooling.

(a) Employers who operate a tip sharing or tip pooling system must establish, maintain, and preserve for at least six years records which include:

(1) A daily log of the tips collected by each employee on each shift, whether in cash or by credit card;

(2) A list of occupations that the employer deems eligible to receive tips through a tip sharing or tip pool system;

(3) The shares of tips that each occupation is scheduled to receive from tip sharing or tip pooling; and

(4) The amount in tips that each employee receives from the tip share or tip pool, by date.

(b) Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review. Nothing in this section shall be interpreted as granting any employee the right to review the payroll records of any other employee.

§ 146-2.18. Charge purported to be a gratuity or tip.

Section 196-d of the New York State Labor Law prohibits employers from demanding, accepting, or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity.

(a) A charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service workers who provided the service.

(b) There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for "service" or "food service," is a charge purported to be a gratuity.

(c) Employers who make charges purported to be gratuities must establish, maintain and preserve for at least six years records of such charges and their dispositions.

(d) Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review.

§ 146-2.19 Administrative charge not purported to be a gratuity or tip.

(a) A charge for the administration of a banquet, special function, or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.

(b) The employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity.

(c) *Adequate notification* shall include a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests. The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font.

(d) A combination charge, part of which is for the administration of a banquet, special function or package deal and part of which is to be distributed as gratuities to the employees who provided service to the guests, must be broken down into specific percentages or portions, in writing to the customer, in accordance with the standards for adequate notification in subdivision (c) of this section. The portion of the combination charge which will not be distributed as gratuities to the employees who provided service to the guests shall be covered by subdivisions (a), (b) and (c) of this section.

§ 146-2.20. Tips charged on credit cards.

When tips are charged on credit cards, an employer is not required to pay the employee's pro-rated share of the service charge taken by the credit card company for the processing of the tip. The employer must return to the employee the full amount of the tip charged on the credit card, minus the pro-rated portion of the tip taken by the credit card company.

Example: The bill totals $100 exactly. The customer leaves, on their credit card, the $100 payment of the bill, as well as a $20 tip. Both the tip and the bill must be processed through a credit card company which charges a 5 percent fee on all transactions. The total charge levied by the credit card company on the $120 charge is $6. Of that $6, $5 is for the bill (5 percent of $100) and $1 is for the tip (5 percent of $20). The employer must provide the employee $19, which represents the $20 tip minus $1 pro- rated employee's portion of the surcharge).

SUBPART 146-3
DEFINITIONS

Sec.

§ 146-3.1. Hospitality industry.

(a) The term *hospitality industry* includes any restaurant or hotel, as defined herein.

(b) The term *restaurant* includes any eating or drinking place that prepares and offers food or beverage for human consumption either on any of its premises or by such service as catering, banquet, box lunch, curb service or counter service to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto. The term *restaurant* includes but is not limited to restaurant operations of other types of establishments, restaurant concessions in any establishment and concessions in restaurants.

(c) The term *hotel* includes:

(1) any establishment which as a whole or part of its business activities offers lodging accommodations for hire to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto. The industry includes but is not limited to commercial hotels, apartment hotels, resort hotels, lodging houses, boarding houses, all-year hotels, furnished room houses, children's camps, adult camps, tourist camps, tourist homes, auto camps, motels, residence clubs, membership clubs, dude ranches, and spas and baths that provide lodging.

(2) An *all-year hotel* is one that does not qualify as a resort hotel under the definition below. Motor courts, motels, cabins, tourist homes, and other establishments serving similar purposes shall be classified as all-year hotels unless they specifically qualify as resort hotels in accordance with the definition below.

(3) A *resort hotel* is one which offers lodging accommodations of a vacational nature to the public or to members or guests of members, and which:

(i) operates for not more than seven months in any calendar year; or

(ii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of employee workdays during any consecutive four-week period by at least

100 percent over the number of employee workdays in any other consecutive four-week period within the preceding calendar year; or

(iii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of guest days during any consecutive four-week period by at least 100 percent over the number of guest days in any other consecutive four-week period within the preceding calendar year.

(d) The *hospitality industry* excludes:

(1) establishments where the service of food or beverage or the provision of lodging is not available to the public or to members or guests of members, but is incidental to instruction, medical care, religious observance, or the care of persons with disabilities or those who are impoverished or other public charges; and

(2) establishments where the service of food or beverage or the provision of lodging is offered by any corporation, unincorporated association, community chest, fund or foundation organized exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

The exclusions set forth in paragraphs (1) and (2) of this subdivision shall not be deemed to exempt such establishments from coverage under another minimum wage order which covers them.

§ 146-3.2. Employee.

(a) *Employee* means any individual suffered or permitted to work in the hospitality industry by the operator of the establishment or by any other employer, except as provided below.

(b) *Employee* does not include any individual employed by a Federal, State or municipal government or political subdivision thereof.

(c) *Employee* also does not include any individual permitted to work in, or as:

(1) an executive, administrative or professional capacity.

(i) executive. *Work in a bona fide executive capacity* means work by an individual:

(*a*) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;

(*b*) who customarily and regularly directs the work of two or more other employees therein;

(*c*) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

(*d*) who customarily and regularly exercises discretionary powers; and

(*e*) who is paid for his services a salary of at least:

(*1*) $543.75 per week inclusive of board, lodging, or other allowances and facilities on and after January 1, 2011;

(*2*) $600.00 per week inclusive of board, lodging, or other allowances and facilities on and after December 31, 2013;

(*3*) $656.25 per week inclusive of board, lodging, or other allowances and facilities on and after December 31, 2014;

(*4*) $675.00 per week inclusive of board, lodging, or other allowances and facilities on and after December 31, 2015.

(ii) Administrative. Work in a *bona fide administrative capacity* means work by an individual:

(*a*) whose primary duty consists of the performance of office or non-manual field work directly related to management policies or general operations of such individual's employer;

(*b*) who customarily and regularly exercises discretion and independent judgment;

(*c*) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (*e.g.*, employment as an administrative assistant); or who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge; and

(*d*) who is paid for his services a salary of at least:

(*1*) $543.75 per week inclusive of board, lodging, or other allowances and facilities on and after January 1, 2011;

(*2*) $600.00 per week inclusive of board, lodging, or other allowances and facilities on and after December 31, 2013;

(*3*) $656.25 per week inclusive of board, lodging, or other allowances and facilities on and after December 31, 2014;

(*4*) $675.00 per week inclusive of board, lodging, or other allowances and facilities on and after December 31, 2015.

(iii) professional. Work in a *bona fide professional capacity* means work by an individual:

(*a*) whose primary duty consists of the performance of work:

(*1*) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes, or

(*2*) original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and

(*b*) whose work requires the consistent exercise of discretion and judgment in its performance; or

(*c*) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work), and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(2) an outside salesperson. The term *outside salesperson* means an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of:

(i) making sales; or

(ii) selling and delivering articles or goods; or

(iii) obtaining orders or contracts for service or for the use of facilities.

(3) a golf caddy. This exclusion shall not be deemed to exclude caddies from another minimum wage order which covers such employees.

(4) a camper worker. A camper who works no more than four hours a day for a children's camp and at all other times enjoys the same privileges, facilities and accommodations as a regular camper in such camp shall be known as a *camper worker* and shall not be an employee within the meaning of this Part.

(5) spa and bath workers employed by concessionaires in hotels or by spas and baths operated independently of hotels, who shall be covered under another minimum wage order. Spa and bath workers employed by hotels are employees under this Part.

(6) staff counselors in children's camps.

(i) a *staff counselor* is a person whose duties primarily relate to the guidance, instruction, supervision and care of campers in children's camps, whether such work involves direct charge of, or responsibility for, such activities, or merely assistance to persons in charge. The term *staff counselor* includes, but is
not limited to: head counselor, assistant head counselor, specialist counselor or instructor (such as swimming counselor, arts and crafts counselor, etc.), group or division leader, camp mother or father, supervising counselor, senior counselor, counselor, general counselor, bunk counselor, assistant counselor, co-counselor, junior counselor, and counselor aide.

(ii) *children's camp* means any establishment which, as a whole or part of its business activities, is engaged in offering for children, on a resident or nonresident basis, recreational programs of supervised play or organized activity in such fields as sports, nature lore, and arts and crafts, whether known as camps, play groups, play schools, or by any other name. The term *children's camp* does not include an establishment which is open for a period of more than 17 consecutive weeks during the year.

§ 146-3.3. Service employee and non-service employee.

(a) A *service employee* is an employee, other than a food service worker, who customarily receives tips at the rate of $1.60 on and after January 1, 2011; $1.75 on and after December 31, 2013; $1.90 on and after December 31, 2014; and $1.95 on and after December 31, 2015, or more per hour.

(b) A *non-service employee* is any employee other than a service employee or a food service worker.

(c) Classification as a service employee or as a non-service employee shall be on a weekly basis except that an employee may not be classified as a service employee on any day in which she or he has been assigned to work at an occupation in which tips are not customarily received for 2 hours or more or for more than 20 percent of her or his shift, whichever is less.

(d) The employer shall have the burden of proof that an employee receives sufficient tips to be classified as a service employee.

§ 146-3.4. Food service worker.

(a) A *food service worker* is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. The term *food service worker* shall not include delivery workers.

(b) Classification as a food service worker shall be on a weekly basis except that an employee may not be classified as a food service worker on any day in such week in which she or he has been assigned to work in an occupation in which tips are not customarily received for 2 hours or more or for more than 20 percent of her or his shift, whichever is less.

§ 146-3.5. Regular rate of pay.

(a) The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work, before subtracting a tip credit, if any.

(b) If an employer fails to pay an employee an hourly rate of pay, the employee's regular hourly rate of pay shall be calculated by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or the actual number of hours worked by that employee during the work week.

Exclusions from the regular rate are gifts and discretionary bonuses, fringe benefits pay, expense reimbursement, profit-sharing and savings-plan payments, employer contributions to benefit plans, premium pay for hours worked above 8 hours a day or 40 hours a week or above normal daily or weekly standards, premium pay for time and one half (or greater) rates paid for Saturday, Sunday, holiday, day of rest, sixth or seventh day worked, and premium pay for work outside of a contractual daily period not exceeding 8 hours or a contractual weekly period not exceeding 40 hours. The premium pay mentioned above shall be credited towards overtime pay due.

§ 146-3.6. Working time.

Working time means time worked or time of permitted attendance, including waiting time, whether or not work duties are assigned, or time an employee is required to be available for work at a place or within a geographical area prescribed by the employer such that the employee is unable to use the time productively for his or her own purposes, and time spent in traveling as part of the duties of the employee.

§ 146-3.7. Meal.

(a) A *meal* shall provide adequate portions of a variety of wholesome, nutritious foods and shall include at least one of the types of food from all four of the following groups:

(1) fruits or vegetables;

(2) grains or potatoes;

(3) eggs, meat, fish, poultry, dairy, or legumes; and

(4) tea, coffee, milk or juice.

(b) *Meals* shall be deemed to be furnished by an employer to an employee when made available to that employee during reasonable meal periods and customarily eaten by that employee.

§ 146-3.8. Lodging.

Lodging means living accommodations used by the employee which meet generally accepted standards of adequacy and sanitation. All lodging provided by an employer to an employee must comply with all community standards for housing. For purposes of this Part, *community standards* shall mean all applicable state, county and local health or housing codes. The employer shall have the burden of proof that provided lodging complies with community standards.

§ 146-3.9. Split shift.

A *split shift* is a schedule of daily hours in which the working hours required or permitted are not consecutive. Interruption of working hours for a meal period of one hour or less does not constitute a split shift.

§ 146-3.10. Required uniform.

(a) A *required uniform* is that clothing required to be worn while working at the request of an employer, or to comply with any federal, state, city or local law, rule, or regulation, *except* clothing that may be worn as part of an employee's ordinary wardrobe.

(b) *Ordinary wardrobe* shall mean ordinary basic street clothing selected by the employee where the employer permits variations in details of dress.

§ 146-3.11. Week of work.

A *week of work* is a fixed and regularly recurring period of 168 hours–7 consecutive 24 hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under this Part, a single workweek may be established for an establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the

schedule of hours worked by him or her. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of this Part.

§ 146-3.12. Hourly tip rates.

The term *tips received*, as used in section 146-1.3 of this Part, and the term *receives tips*, as used in sections 146-3.3 and 146-3.4 of this Part, shall mean the hourly rate that results when the total amount of tips received by a tipped employee during a week of work are divided by the total working time of such worker during that week of work. The total amount of tips received shall be the net amount of tips received after adjustments for tip pooling, tip sharing, and credit card charges pursuant to sections 146-2.14, 146-2.15, 146-2.16 and 146-2.20.

§ 146-3.13 Fast Food Employee

(a) "Fast Food Employee" shall mean any person employed or permitted to work at or for a Fast Food Establishment by any employer where such person's job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance.

(b) "Fast Food Establishment" shall mean any establishment in the state of New York: (a) which has as its primary purpose serving food or drink items; (b) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out, or delivered to the customer's location; (c) which offers limited service; (d) which is part of a chain; and (e) which is one of thirty (30) or more establishments nationally, including: (i) an integrated enterprise which owns or operates thirty (30) or more such establishments in the aggregate nationally; or (ii) an establishment operated pursuant to a Franchise where the Franchisor and the Franchisee(s) of such Franchisor owns or operates thirty (30) or more such establishments in the aggregate nationally. "Fast Food Establishment" shall include such establishments located within non-Fast Food Establishments.

(c) "Chain" shall mean a set of establishments which share a common brand, or which are characterized by standardized options for décor, marketing, packaging, products, and services.

(d) "Franchisee" shall mean a person or entity to whom a franchise is granted.

(e) "Franchisor" shall mean a person or entity who grants a franchise to another person or entity.

(f) "Franchise" shall have the same definition as set forth in General Business Law Section 681.

(g) "Integrated enterprise" shall mean two or more entities sufficiently integrated so as to be considered a single employer as determined by application of the following factors: (i) degree of interrelation between the operations of multiple entities; (ii) degree to which the entities share common management; (iii) centralized control of labor relations; and (iv) degree of common ownership or financial control.

Successful Mediation of Wage-and-Hour Class Actions

(by Ruth D. Raisfeld, Esq., published in New York Law Journal 4/6/15)

Class actions against employers alleging illegal pay practices under the federal Fair Labor Standards Act ("FLSA") and under state labor laws have been increasing in both federal and state courts throughout the country and particularly in the New York metropolitan area. As a federal district judge recently observed: "Recent years have witnessed an explosion in FLSA litigation. FLSA cases constitute nearly 9% of the civil cases filed in the Southern District of New York [in 2014]. And this district is no outlier. Nationwide, annual FLSA filings are up over 400% from 2001."[i]

Large multi-state companies like Wal-Mart, Starbucks, and JP Morgan, but also smaller local businesses like restaurants, stock brokers, construction companies, mortgage brokers, car washes, and insurance companies have been sued in collective or class actions by present and former employees who alleged that they have not been paid all wages due or that they have been misclassified as employees exempt from overtime. Amendments to the New York Labor Law as well as New York Department of Labor regulations have only contributed more uncertainty to the application of these rules to the workplace, many of which originated during the New Deal and since then have not been amended. The many legal issues raised in these disputes have generated lower court and United States Supreme Court decisions that alter the workplace status quo on almost a daily basis. A panoply of remedies afforded to employees awaits the employer who is found to have engaged in wage-and-hour violations including back pay, liquidated damages, pre-judgment interest, shifting attorneys' fees, and other potential penalties and damages under both federal and state labor law (which in New York carries a six year statute of limitations) making the defense of these claims an expensive and possibly perilous proposition.

The discovery process for these cases also imposes significant burdens on plaintiffs' firms as well as on the employers. Witnesses may be hard to find and are afraid to risk retaliation. In addition, the procedural steps of maintaining class and collective actions are daunting: conditional class certification, distribution of notice to the class, document production, depositions, motions, etc. contribute expenses and delay for both sides. Further, the plaintiffs seeking approval of a class settlement must demonstrate to the trial court that "it is procedurally and substantively fair, reasonable and adequate."[ii]

Given these criteria for court approval of wage-and-hour class settlements, many of these claims are submitted to mediation as a way to facilitate complicated negotiations and help to insure the fairness of the negotiations. Reviewing courts must determine whether the proposed settlement is the result of "vigorous, arm's-length negotiations . . . untainted by collusion. . . . [W]here "the settlement is a by-product of a mediation before

an experienced employment law mediator, there is a presumption of fairness and arm's-length negotiations." [iii]

Thus, many plaintiffs' classes and defendant-employers submit class claims to mediation to manage the uncertainty of litigation, reduce legal fees, provide earlier remedies for employees than would be available after years of litigation, and pave the way to approval of settlements. Leading counsel on both sides of these disputes agree on the utility of mediation to resolve class disputes. According to plaintiffs'-side lawyer Brian Schaffer of Fitapelli & Schaffer, "early settlement discussions benefit both sides and should take place in virtually every wage and hour case. A mediator can be effective in facilitating that process."[iv] Carolyn Richmond of Fox Rothschild, a defense lawyer prominent in the hospitality industry states: "Mediation is truly one of the best ways to resolve these disputes for all sides. Attorneys' fees and other statutory penalties can be so crippling, that it behooves an employer to 'reality test' any factual disputes in mediation before running up substantial fees and expenses that will impede settlement negotiations later on."[v]

Considering the vote of confidence that both sides give mediation for resolution of class disputes, for mediation of class wage-and-hour class actions to be successful, participants should consider the following principles to guide their preparation and strategic calculus.

First, the mediation must be scheduled with sufficient time for the parties to exchange pertinent information in advance: *who are the workers? what were they paid? are there records? what do the records show?* While full-blown discovery is not always necessary, sophisticated counsel in wage-and-hour lawsuits, either with or without court order, provide a sample of payroll records, job descriptions, employee handbooks, time records and other documentary evidence of the way in which employees are paid and their time is recorded or calculated. If the parties stumble in providing such documentation, the mediator is available to help facilitate what will be produced and how much time will be needed to review it prior to the mediation.

Second, once the foregoing exchange has taken place, both sides should prepare damages calculations. Generally, plaintiffs' counsel interviews putative class members, analyzes the available data and calculates damages based on whatever potential statutory and regulatory violations they discover for which they project back pay, liquidated damages, interest, applicable penalties and potential attorneys' fees. Defendants are also well-advised to do their own analysis of best case and worst case scenarios sufficiently in advance of the mediation -- so that both sides (and the mediator) are prepared to make a realistic assessment of the value of the case and the potential settlement zone.

Mediations may fail where the parties had neglected the damages calculation step altogether, or undertook the analysis too close to the mediation, and consequently had significantly conflicting assessments of the potential damages and settlement values. Particularly for the employer, failure to prepare for this "reality testing" may result in "sticker shock," and an inability to determine how to finance the settlement. Inadequate

preparation may doom the mediation and result in unnecessary litigation and expense, only to settle later on.

Third, the right representatives should be at the table: for the employer, the representative attending the mediation must be someone with knowledge of the facts and authority to settle. Along with the principal decision-makers in the business, an accountant or bookkeeper is helpful. Where there are others with a significant financial interest in the business, it is helpful either to have them at the mediation or available by phone. As is the case in mediation generally, when the people with the real settlement authority are not in attendance, it may be difficult to bring them up-to-speed on the ups and downs of the negotiation and thus, the greater the possibility that a mediation will fail.

On the employees' side, whether the class representatives attend the mediation, depends on their availability, their willingness to sit opposite the employer, any language barriers, and their knowledge of the facts and understanding of the issues. However, it is imperative for Plaintiffs' counsel to consider having class representatives or opt-ins attend the mediation so that they understand the settlement process and can help advocate in favor of the fairness of the settlement which will be submitted for court approval.

Fourth, the negotiators of a class settlement must have adequate technical support at the mediation to be able to calculate offers and counter-offers during the give-and-take over factual and legal arguments. A lawyer, legal assistant, book-keeper or accountant with math and excel skills is critical. Attorneys should not attend a class action mediation without bringing a laptop loaded with the payroll data and damage calculations: communicating with someone back at the employer's premises or at the attorneys' offices is cumbersome and inefficient. Projecting damage calculation excel spreadsheets on large screens in the conference room where the mediation is taking place also helps both sides focus on potential damages and settlement possibilities.

Fifth, consider the negotiators' mindset: very often both sides to a wage-and-hour dispute cast their adversaries as ideological villains. The employees may feel that the employer is benefitting from the sweat of their brows; the employers may feel that the employees are ungrateful and that the class action will put the employers out of business and eliminate jobs. Defense counsel may object to plaintiffs' attorneys' fee demands while Plaintiffs' counsel claim that Defense counsel are dragging their feet to generate more fees. Regardless of the real or imagined bones of contention, it is not helpful for the negotiators to demonize the other side or their negotiating partners. It is in everyone's interest to settle and these ideological battles cannot be won.

Finally, the negotiators must be patient, persistent, and determined: even after the difficult task of agreeing to a settlement fund, the negotiators must still hammer out a variety of procedural aspects including the schedule for funding the settlement, the content of the notice to the class, the administration of the settlement, the scope of the release, reversions, tax issues, and attorneys' fees, to cite a few of the moving parts to a class settlement. These technical issues must be worked out for a settlement to be

accepted by the class and approved by a court. Sufficient time must be allotted at the mediation for the negotiators to reduce the agreed upon issues to a terms sheet, followed up in short order by a fully integrated agreement.

Conclusion: Class actions can and should be resolved to avoid uncertain and expensive litigation -- but in order to have a productive and successful mediation, preparation, in advance, is essential.

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[i] Sakiko Fujiwara, et al. v. Sushi Yasuda Ltd., 12 Civ. 8742, NYLJ 1202676425103 (S.D.N.Y. Nov. 12, 2014, Pauley, J.)

[ii] Flores v. One Hanover, LLC, 2014 WL 2567912 (S.D.N.Y. 2014).

[iii] Id. Same, Capsolas v. Pasta Resources Inc., et al, (S.D.N.Y. 2012).

[iv] Brian Schaffer, Esq., e-mail conversation, Feb. 9, 2015.

[v] Carolyn Richmond, Esq., e-mail conversation, Feb. 9, 2015.

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ANATOMY OF AN FLSA MEDIATION

by

Patrick Michael McKenna[1]

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § *201 et seq.* is a potent and effective federal statute designed to remedy the failure of employers to pay the federal minimum wage and overtime pay to non-supervisory level employees. The FLSA imposes on an employer stringent recordkeeping requirements, including daily employee time records and detailed payroll records. It allows employees to initiate "opt-in" collective actions seeking redress under the law. The statutory limitations ("look back") period for damage calculations is two years, but in alleged cases of willful violations, the “look back” period is three years.

In addition to the recovery of any underpayment of wages, where the violation is found to be willful, the FLSA authorizes the court to assess liquidated (compensatory) damages in an amount equal to the underpayment. The FLSA mandates the employer to pay reasonable attorney's fees to plaintiff's counsel. The law also imposes personal liability on owners and officers of corporate entities responsible for failure to comply with the law.

The FLSA, however, pales in comparison to employee protections under Article Six of the New York Labor Law (§ *190 et seq).* While there is substantial overlap with the FLSA, the New York statute is considerably more expansive. It protects the payment of wages and wage supplements (*e.g.,* vacation or holiday pay, sick leave, fringe benefits, *etc*.) for all employees (not just covered "non-exempt" FLSA employees); bars the kick-back of wages, charge backs, misappropriation of tips, and withholding of non-authorized payroll deductions; and provides a guaranteed unpaid meal break, an extra hour at minimum wage for shifts or truncated shifts covering 10 or more hours per day ("spread of hours pay"), and a weekly day of rest for employees in certain industries. Though the law essentially duplicates the FLSA's recordkeeping mandates, New York imposes a longer, six-year period of limitations.

Under the 2011 Wage Theft Prevention Act, New York requires every employer, upon hiring, to give and maintain written notice (which must be signed by the employee) of the amount, rate of pay, and manner of calculating wages, including overtime pay. New York also provides for its own (punitive) liquidated damages equal in amount to any underpayment, the assessment of pre-judgment and post-judgment statutory interest (*to wit*, 9%), and the payment of attorney's fees to plaintiff's counsel.

[1] I wish to thank Robyn Weinstein, Esq., the EDNY Mediation Director, and EDNY mediators Michael A. Levy, Esq., and Michael Starr, Esq. for their helpful substantive and editing suggestions in the preparation of these materials.

Class actions under Rule 23 of the Federal Rules of Civil Procedure are permitted and have a longer six-year "look back" period. As is the case with the FLSA, corporate owners and officers who fail to comply with the law are jointly and severally liable; but again, New York goes much further and imposes potential civil and criminal liability on individuals who violate the New York statute.

The following is a suggested guide on how one might successfully approach an FLSA mediation in federal court:

Step 1: <u>Read the Pleadings Before Initial Conference Call</u>!

Issues to be looking for:

A. <u>From the Complaint</u>:

1. Does the caption name a single or multiple plaintiffs?

2. What is the nature of the action? Is it a Section 16(b) collective ("opt-in") class action, or a hybrid collective/Rule 23 ("opt-out") class action?

3. Who is being sued? A corporate entity, business owner, supervisory officers/employees?

4. Are New York Labor Law claims asserted? If so, which ones?

5. What is the alleged regular rate of compensation? Is it fixed hourly or some other payment method (*e.g.,* fixed weekly with fluctuating hours, dual hourly rate for performing two distinct jobs, task oriented, piecemeal, *etc.*)?

6. Is the claim a failure to pay overtime, failure to pay minimum wage, or both?

7. Does the plaintiff allege misclassification as an exempt employee?

8. Are the wages based on a collective bargaining agreement?

9. Are there any other components that affect the regular rate of pay (*e.g.*, qualified tipped employees, night differential pay, bonus or premium pay, employer credits such as lodging, meals, or company vehicle)?

10. Are any of the plaintiffs still in the employ of the employer?

11. Is retaliation alleged?

B. <u>From the Answer</u>:

1. Possible FLSA affirmative defenses which may be asserted:

a. Workers are exempt under the FLSA and/or FLSA regulations (*e.g.,* bona fide executive administrative, or professional ("white collar") workers, interns, apprentices, outside salespersons, maritime and fishing industry employees, domestic servants, certain agricultural workers, seasonal employees for non-profit or religious amusement and recreational establishments, babysitters, and companionship services, *etc.*).

b. Employer does not meet interstate commerce monetary threshold.

c. Workers are exempt because they fall within purview of the interstate Motor Carrier Act, Railway Labor Act, or other statutory laws which takes the case out of the FLSA.

d. Plaintiffs are independent contractors, not employees.

e. § 301 (Labor Management Disclosure Act) preemption applies because interpretation of the collective bargaining agreement is "inextricably intertwined" with the wage claims.

f. Other 'garden variety' defenses such as statute of limitations, lack of jurisdiction, *etc.*

2. Is this a publicly traded corporation or a "Mom and Pop" business where the ability (as opposed to willingness) to pay full damages may be an issue in the mediation?

3. Did the employer admit any of the material facts alleged in the complaint?

Step 2: <u>The Initial Conference Call</u>

A. Inquire as to whether there are payroll records? Does the employer pay by check or in cash? Does the employer withhold federal, state and local taxes, FICA, Medicare, SDI, etc.? Are W-2s, 1099s or both issued to employees?

B. Ask the employer's counsel if there are time records, sign-in sheets, or some other objective method used to determine number of hours worked (*e.g,.* GPS records on company vehicles), and if so, whether they have been provided to plaintiff's counsel for review. If not, request counsel to provide them to the plaintiff's counsel sufficiently in advance of the mediation so that s/he can run the numbers against plaintiff's allegations in the complaint.

C. Ask plaintiff's counsel if a week by week calculation of underpayment (the "Weekly Damages Sheet") has been (or will be) prepared for each employee before the

mediation. Persuade counsel to commit to providing the Weekly Damages Sheet in an Excel format sufficiently in advance of the mediation session so that opposing counsel can review and critique. [A sample Weekly Damages Sheet is attached.]

D. Suggest to the employer's counsel that s/he work up a separate Weekly Damages Sheet if s/he disagrees with the plaintiff's version. Advise the employer's counsel that creating a Weekly Damages Sheet will not be an admission of liability; rather it will only be a hypothetical calculation based on the employer's proposed understanding of the facts, and defense counsel does not necessarily have to share it with plaintiff's counsel.

E. Strongly remind both parties and their counsel of the strict confidential nature of the mediation. All settlement discussions and any documents prepared exclusively for, and during, mediation negotiations are absolutely privileged under the court's mediation rules and may not be disclosed outside the confines of mediation by either side, not even to a judge who demands to know where each side was at the conclusion of the mediation. Of course, while one side may elect to reveal where it currently stands, it absolutely may not disclose the other side's position learned in the course of the mediation.

F. Inquire as to who will be attending the mediation for each side? Strongly urge all named parties to be present. Make sure they have actual, full decision-making authority to settle at the mediation (not just a predetermined, fixed, monetary ceiling). [NOTE: Wage-hour claims are not covered by EPLI policies, so insurance-carrier representation is not likely to be an issue on the payment of the wage damages, but coverage might exist for defense costs and plaintiff's counsel fees.]

G. Ask if an interpreter is needed? If so, determine who will arrange for it, who will it be, and whether the interpreter is credentialed?

H. Suggest to counsel that they exchange skeletal proposed stipulations of settlement in advance of the mediation, and that they confer so they can come to the mediation with agreed upon language on non-monetary terms so that in the event there is a resolution, the agreement can be memorialized expeditiously.

I. Urge both counsel to bring laptops to the mediation so they can quickly re-compute damage sheets based on revisions of hours, regular rates of pay, liquidated damages, attorney's fees, *etc.*

J. Assure that all counsel are familiar with the Second Circuit's decision in *Cheeks v. Freeport Pancake House, Inc*., 796 F.3d 199 (2d Cir. 2015), cert den. __ U.S. __ (2016). If not, strongly urge that they familiarize themselves with the holding prior to the mediation. An understanding of *Cheeks* will likely alter the negotiating strategy of both sides.

Step 3: The Mediation Session

A. Legal Issues:

1. Are meal breaks included or excluded in the compensable hours?
2. Are holidays, vacations, and sick days accounted for in the Weekly Damage Sheets?
3. What preliminary and post-liminary time is compensable?
4. Spread of hours and split shifts: Is down time compensable or not?

B. Emotional Issues:

1. Psychological/emotional issues: Power and relationship imbalance.
2. A small business owner's sense of betrayal from his workers.
3. Expect to encounter and be required to work through the employer's five stages of grief: 1) denial, 2) anger, 3) bargaining, 4) depression, and 5) acceptance.
4. Intimidation, threats, hostility, and fear of reprisal: usually comes from the employer, but sometimes from empowered employees or their attorney.
5. The employer's unease with the inability to get plaintiff's counsel to compromise on damages if liability is established.
6. Ethnic/cultural conflict and differences

C. Ethical Issues:

1. Undocumented workers without Social Security numbers.
2. Employer and employee violations of immigration laws.
3. Employer violation of payroll tax withholding, UI, Worker's Comp., *etc.*
4. Employee violation of reporting cash wages to IRS.
5. Tax avoidance vs. tax evasion.
6. Mediator's duty of confidentiality conflicting with a lawyer's duty to report criminal conduct.

Step 4: Obstacles to Settlement

A. From Both Sides:

1. Party's distrust and hostility towards the other.
2. Clash of opposing counsel: attorneys remain in adversarial litigation mode, intractably wedded to their narrow legal view of the case and unwilling to engage in meaningful negotiations.
3. One or both attorneys come to the mediation unprepared and either lacks knowledge of the facts or misunderstands the applicable laws.
4. Neither side (but particularly the plaintiff) wants to move off their initial numbers until it is convinced that a settlement is possible because the concessions made in an unsuccessful mediation become the new starting point in subsequent negotiations.

B. From the Employee's Perspective:

1. Employees are not active participants due to language and cultural barriers.
2. Plaintiff's counsel is the sole decision maker.
3. Attorneys for plaintiffs who have 33%-50% contingency fee retainer agreements with their clients may have little incentive to settle the case quickly in light of the *Cheeks* holding that the employees must not bear the burden of fees because the statute authorizes the fee to be shifted to the employer. Attorneys may prolong litigation, particularly in strong cases were liability is virtually assured, so that the fees can be justified in the *Cheeks* fairness hearing. Pre-*Cheeks,* the plaintiff's attorney had every incentive to settle quickly, especially in multi-plaintiff cases, since the attorney was taking a significant portion of the global settlement amount.

C. From the Employer's Perspective:

1. Disruption of the employer's business mode, and in the case of the small business, jeopardizes the financial survival of the business.
2. Concern that any settlement will open the "flood gates" of new claims from other employees.
3. Counsel's failure to understand or appreciate the draconian consequences of going to trial and losing a FLSA/NYLL case.
4. Prospect of having to pay plaintiff's counsel fees.

Step 5: Suggested Techniques to Get Movement Toward Settlement

A. Directed at Both Sides (usually in caucuses):

1. Suggest parties first negotiate plaintiff's number, and then after reaching agreement, attempt to agree on attorney's fee, or allow counsel to make court application for award. Can be an effective tactic if done very early in case and before extensive discovery and motion practice.

2. Identify the disputed issues in the case, and point out that most, if not all, are either questions of fact or mixed questions of law and fact that can only be resolved by a trier of fact. Engage the parties in risk analysis on each item in dispute, and get them to weigh the relative strength of their position vis-a-vis the other side's position. Ask the parties if the continued accrual of fees, litigation costs, and trial risks are worth the effort to pursue the debate to the very end to find out which side's position turned out to be correct.

3. In the early rounds of caucusing, if the parties are hesitant to move off their numbers, assure each side individually that they can stay at their

numbers for bargaining purposes, but ask them confidentially what number or dollar range is needed from the other side as an "offer" that might produce an "accept" (knowing that this is not a final number). This will allow the mediator to begin bracketing towards a settlement, but the discussion is always about what the other side has to put on the table to achieve a settlement.

B. Directed at Plaintiff in Caucus:

1. " A bird in the hand is worth two in the bush": Point out the risk that the employer may not be able to satisfy any resulting judgment.

2. In return for settling with periodic payment terms, the plaintiff gets to negotiate acceptable security terms to guarantee payment of the settlement amount.

3. Emphasize that by certifying the class, the named parties - the attorney's current clients - may walk away with substantially less money, especially where there is the prospect of a bankruptcy filing and some question on the defendant's ability to pay.

4. Emphasize that plaintiff can probably use money now, rather than waiting years, with all the attendant risks, of motions, trial and any appeals which may need to play out.

5. Inquire whether the primary litigation goal is to insure some recovery for the client, or rather, is to punish the employer by insisting on a settlement demand that significantly increases the risk it may drive the employer out of business.

C. Directed at Employer in Caucus:

1. Gently but persuasively move the employer through the first two stages of grief (*to wit,* denial and anger) so that it moves into the bargaining stage.

2. Get the employer to redirect its anger from the employee to the statute that created the employer's current predicament.

3. In cases where there are inadequate time or payroll records, get the employer to own responsibility for not maintaining them, noting out that the employer would not be in this litigation had it kept proper records.

4. If the employer contends that it does not have the cash to satisfy a lump sum settlement, ask how much time would it need and what security it was prepared to offer plaintiff in the event of default (*e.g.*, confession of judgment, mortgage, pledge of personal assets, *etc.*) and in consideration of the payout.

5. If the employer claims that it does not have the ability to pay the amount demanded, ask the employer if it will be voluntarily willing to allow plaintiff's counsel to inspect satisfactory documentation (*e.g.*, corporate and individual tax returns, certified net worth and P/L statements, *etc.*) to prove the point. If agreeable, convene joint caucus with only the attorneys to work out the details of how the information will be exchanged.

6. Point out to the employer that if it cannot quickly prevail on a Rule 12 (b)(6) motion to dismiss or Rule 56 motion for summary judgment, then it will probably never be cheaper in the future to settle than it is today. But stress that it would have been cheaper to settle yesterday, the day before, and the day before that. Explain the calculus of FLSA attorney's fees. In cases where there is some acknowledged liability, every hour in which the settlement is delayed, the employer will be paying both its attorney and the dreaded adversary attorney in the other room. The amount in dispute involving the employee will ultimately be subsumed by the amount owed to the other attorney.

7. Appeal to the employer as a rational businessperson. A competent, sensible businessperson will focus on one goal: to escape from the case as quickly and inexpensively as possible taking into account risk, future litigation costs, potential liability, and fee shifting statutes.

Step 6: Drafting an Agreement for Judicial Review under Cheeks

A. A mediator should not draft nor propose draft language for settlement agreements. Let the attorneys draft and agree on their own language. If asked, the mediator may attempt to mediate any disagreements between counsel.

B. The extent of judicial review of non-class action FLSA settlements vary considerably among members of the bench. Experienced FLSA counsel generally know the assigned judge's customary practice in reviewing FLSA agreements. Counsel have the option, however (even if late in the case), to do limited forum shopping by jointly consenting, under Rule 73 of the Federal Rules of Civil Procedure and Local Rule 73.1, to have the U.S. Magistrate Judge conduct all remaining proceedings.

C. The amount of attorney fees paid to plaintiff's attorney, and the source of the payment (paid by the employer, not by the employees), must be justified usually by the submission of detailed time records.

D. *Cheeks* generally allows the compromise of questions of fact (*e.g.,* number of hours worked) which may have a marked effect on the amount of liquidated damages.

E. Suggest that the parties include recitations of facts in the proposed settlement agreement so that the reviewing judge understands the parties' motivations. For example, let

the court know that there was a good faith dispute over whether the employee was exempt or non-exempt (a mixed question of law and fact) and that neither side wanted to incur the cost and take the risk to litigate the issue before the trier of fact.

F. Another example would be to let the court know that the only way the employer can satisfy the proposed settlement is by paying it out of the revenue stream of the employer's business. Recite that the employer has voluntarily made corporate and personal financial data available to plaintiff's counsel to support its inability to pay the claim; that plaintiff's counsel has done its due diligence and is unable to find assets that can be attached to satisfy a judgment or settlement; that by not settling on the proposed terms, the plaintiff runs the risk of receiving nothing, forcing insolvency, closing of the business, and discharge of the debt in bankruptcy.

Books and Resources

i. Ellen C. Kearns, *et al*, The Fair Labor Standards Act, 3d ed. (BNA 2015) [2 vols./2848 pp./$755]

The FLSA Bible; it has answers and cited cases for virtually every situation imaginable.

ii. Will Aitchison, *et ano*, The FLSA: A User's Manual, 5th ed. (LRIS 2010)[text and cases included on accompanying CD Rom/$39.95]

Good solid introductory book providing an overview of the FLSA.

iii. [No Named Editor], Fair Labor Standards Act: Contemporary Decisions (Landmark 2012) [Kindle eBook $9.99]

Reprint of 140 U.S. Court of Appeals decisions from 2007 through 2011, organized by circuit, that interpret and apply the provisions of the FLSA.

iv. U.S. Code, Title 29, Chapter 8 - Fair Labor Standards (§§ 201 to 219)
U.S. Code, Title 29, Chapter 9 - Portal to Portal Pay (§§ 251 to 262)

Free online access: https://www.law.cornell.edu/uscode/text [Link to smart phone]

v. Code of Fed. Reg. (CFR), Title 29, Subtitle B, Chapter V - Wage and Hour Division (Parts 500 to 871)

Free online access: https://www.law.cornell.edu/cfr/text [link to smart phone]

vi. NY Labor Law, Article 6, (§§ 191 to 199-a)

Free online access: http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:

vii. NY Codes, Rules and Regulations (NYCRR), Title 12, Chapter 11

Free online access: https://govt.westlaw.com/nycrr/ index?transitionType=Default&contextData=(sc.Default)

viii. Interpreter Services: www. languageline.com

Immediate telephonic access to interpreters in 240 languages; reduced hourly rates for accounts opened through participating bar associations.

Representative FLSA Cases

To illustrate the issue complexity of even a seemingly routine FLSA case involving only one or two employees, the following decisions are attached:

Johnson v. D. M. Rothman Company, Inc., 861 F.Supp2d 326 (S.D.N.Y. 2012)[Marrero, D.J.](issues raised include § 301 preemption, calculating regular rate of return and overtime rate with a night differential, unpaid meal periods, use of a credit to offset employer liability).

Cruz v. AAA Carting and Rubbish Removal, Inc., No. 13-CV-8498 (KMK) (S.D.N.Y. July 16, 2015)[Karas, D.J.](issues involve Motor Carrier Act exemption, FLSA subject matter jurisdiction, intrastate workers moving goods in interstate commerce).

Karropoulos v. Soup du Jour, Ltd., No. 13-CV-4545 (ADS)(GRB) (E.D.N.Y. Aug. 31, 2015)[Spatt, D.J.](issues involve payroll and cash payments, fixed weekly salary subject to deductions due to variations in the quality or quantity or work performed; alleged FLSA "white collar" exemption, burden of proof).

DAMAGES ANALYSIS - APPROXIMATE AND SUBJECT TO MODIFICATION.
PREPARED BY COUNSEL AND NOT INTENDED TO BE EVIDENTIARY AT THIS TIME

Damages chart for Plaintiff

Plaintiff's Work Schedule June 2011 -January 8, 2014:

Mon:	4:30 AM -10:00 PM	off	
Tues:	4:30 AM -10:00 PM	17 HRS	***
Wed:	4:30 AM -10:00 PM	17 HRS	
Thur:	4:30 AM -10:00 PM	17 HRS	
Fri:	4:30 AM -10:00 PM	17 HRS	
Sat:	4:30 AM -10:00 PM	17 HRS	
Sun:	4:30 AM -10:00 PM	17 HRS	

Total Hrs: UP TO 102 HOURS PER WEEK

***assume 15 hour work day for purposes of settlement = 90 hour workweek

Week No.	Total Hrs.	Reg. Hrs.	O/T Hrs.	# of Spread Days	Actual Pay Received	Min. Wage Rate	Regular Rate	O/T Rate	Min. Wages Owed	O/T Owed	Federal Liquidated Damages	Required Spread of Hours Pay	NYLL Liquidated Damages	Total Amount Owed
2011														
26	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
27	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
28	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
29	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
30	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
31	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
32	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
33	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
34	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
35	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
36	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
37	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
38	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
39	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
40	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
41	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
42	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
43	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
44	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00

78

Week No.	Total Hrs.	Reg. Hrs.	O/T Hrs.	# of Spread Days	Actual Pay Received	Min. Wage Rate	Regular Rate	O/T Rate	Min. Wages Owed	O/T Owed	Federal Liquidated Damages	Required Spread of Hours Pay	NYLL Liquidated Damages	Total Amount Owed
45	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
46	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
47	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
48	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
49	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
50	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
51	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
52	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
2012														
1	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
2	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
3	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
4	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
5	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
6	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
7	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
8	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
9	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
10	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
11	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
12	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
13	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
14	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
15	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
16	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
17	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
18	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
19	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
20	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
21	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
22	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
23	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
24	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
25	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
26	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
27	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
28	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
29	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
30	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
31	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00

Week No.	Total Hrs.	Reg. Hrs.	O/T Hrs.	# of Spread Days	Actual Pay Received	Min. Wage Rate	Regular Rate	O/T Rate	Min. Wages Owed	O/T Owed	Federal Liquidated Damages	Required Spread of Hours Pay	NYLL Liquidated Damages	Total Amount Owed
32	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
33	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
34	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
35	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
36	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
37	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
38	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
39	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
40	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
41	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
42	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
43	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
44	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
45	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
46	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
47	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
48	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
49	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
50	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
51	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
52	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
2013														
1	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
2	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
3	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
4	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
5	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
6	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
7	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
8	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
9	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
10	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
11	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
12	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
13	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
14	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
15	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
16	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
17	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
18	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00

80

Week No.	Total Hrs.	Reg. Hrs.	O/T Hrs.	# of Spread Days	Actual Pay Received	Min. Wage Rate	Regular Rate	O/T Rate	Min. Wages Owed	O/T Owed	Federal Liquidated Damages	Required Spread of Hours Pay	NYLL Liquidated Damages	Total Amount Owed
19	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
20	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
21	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
22	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
23	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
24	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
25	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
26	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
27	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
28	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
29	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
30	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
31	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
32	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
33	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
34	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
35	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
36	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
37	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
38	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
39	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
40	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
41	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
42	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
43	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
44	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
45	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
46	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
47	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
48	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
49	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
50	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
51	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
52	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
2014														
1	90.00	40.00	50.00	6	$540.00	$7.25	$6.00	$10.88	$50.00	$544.00		$43.50	$637.50	$1,275.00
Period Week Ending	Total Hrs.	Reg. Hrs.	O/T Hrs.	# of Spread Days	Actual Pay Received	Min. Wage Rate	Regular Rate	O/T Prem.	Min. Wages Owed	O/T Premium Owed	Federal Liquidated Damages	Required Spread of Hours Pay	NYLL Liquidated Damages	Total Amount Owed

Week No.	Total Hrs.	Reg. Hrs.	O/T Hrs.	# of Spread Days	Actual Pay Received	Min. Wage Rate	Regular Rate	O/T Rate	Min. Wages Owed	O/T Owed	Federal Liquidated Damages	Required Spread of Hours Pay	NYLL Liquidated Damages	Total Amount Owed
								Totals:	$6,600.00	$71,808.00		$5,742.00	$84,150.00	$168,300.00

861 F.Supp.2d 326, 2012 WL 1788144 (S.D.N.Y.)

(Cite as: 2012 WL 1788144 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,

S.D. New York.
Talbert JOHNSON, et al., Plaintiffs,
v.
D.M. ROTHMAN COMPANY, INC., Defendant.
No. 10 Civ. 8269(VM).

May 14, 2012.

David Christopher Wims, David Wims, Law Offices, Brooklyn, NY, for Plaintiffs.

Patrick Michael McKenna, McKenna & Schneier, Malverne, NY, for Defendant.

DECISION AND ORDER

VICTOR MARRERO, District Judge.

***1** Plaintiffs Talbert Johnson ("Johnson") and Troy Saunders ("Saunders;" and with Johnson, "Plaintiffs"), bring this action against their employer, defendant D.M. Rothman Company, Inc. ("Rothman"), for unpaid overtime wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, New York Labor Law ("NYLL"), Articles 6 and 19, and the Labor–Management Relations Act ("LMRA"), 29 U.S.C. § 185(a).[FN1] Plaintiffs claim that Rothman failed to include certain wage differentials owed to them under the governing Collective Bargaining Agreement ("CBA"). Rothman counterclaims, seeking recoupment for the overpayment of wages.

FN1. The complaint alleges claims under the National Labor Relations Act ("NLRA"). To be consistent with case law, the Court will instead refer to the LMRA, which "amended and encompasses the [NLRA] of 1935." *Pac. Maritime Association v. Local 63, Int'l Longshoremen's and Warehousemen's Union*, 198 F.3d 1078, 1079 n. 2 (9th Cir.1999).

By letter dated June 30, 2011, Rothman sought leave to move for summary judgment dismissing Plaintiffs' claims and granting Rothman's counterclaims for overpayment of wages (Docket No. 11, "June 30 Letter"). Plaintiffs responded by letter dated October 18, 2011 (Docket No. 13) opposing Rothman's request, and Rothman replied in support on November 9, 2011 (Docket No. 17, "November 9 Letter").

In an Order dated January 5, 2012 (Docket No. 18), the Court directed the parties to submit letter briefs and supporting evidence addressing issues raised in the parties' letters, specifically: (1) whether the disposition of Plaintiffs' state law claims depends on the interpretation of the CBA; and (2) whether the alleged offsets for overpayment nullify any overtime wages owed to Plaintiffs. On January 19, 2012, Rothman submitted a six-page letter brief with exhibits (Docket No. 19, "Rothman Ltr. Br." or "January 19 Letter"). Along with Rothman's June 30 and November 9 Letters, the Court now deems Rothman's January 19 Letter a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 ("Rule 56"). Plaintiffs responded to the January 5, 2012 Order with a five-page letter brief, dated January 19, 2012 § Docket No. 20, "Pl. Ltr. Br."). For the reasons discussed below, Rothman's motion for summary judgment is GRANTED in part and DENIED in part.

I. *BACKGROUND* [FN2]

FN2. The Court derives the factual summary from the following pleadings, and any exhibits attached thereto: (1) Rothman's Ltr. Br. dated January 19, 2012 (Docket No. 19); (2) Plaintiffs' Ltr. Br. dated January 19, 2012 (Docket No. 20); (3) Rothman's letter dated June 30, 2011 (Docket No. 11); (4) Plaintiffs' letter dated October 18, 2011 (Docket No. 13); and (5) Rothman's letter dated November 9, 2011 (Docket No. 17). Except where specifically referenced, no further citation to these sources will be made.

Rothman employs Plaintiffs as full-time warehousemen at its Bronx, New York facility. Johnson

has worked for Rothman in that capacity since 1988; Saunders, since 2001. Plaintiffs are members of Local Union No. 202 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union"). At all times relevant to this suit, the terms of the Plaintiffs' employment were governed by the CBA between the Union and the New York Produce Trade Association, Inc., of which Rothman is a member.

A. *TERMS OF THE CBA*

The CBA, which has undergone several minor revisions over the course of Plaintiffs' employment,[FN3] establishes uniform provisions concerning the hours, wages, and working conditions of Union members. Plaintiffs' claims pertain to three "wage differentials" provided in the CBA: a "night differential," "grandfather" pay, and "hi-lo" pay. The differentials refer to premium pay added to the base wage rates for warehousemen. The CBA provides that "[a] night differential of $5.00 per hour will be paid to all employees for hours worked between 8:00 P.M.—4:30 A.M." (Rothman Ltr. Br., ex. B, art. VI(A)(2)(a).) "Grandfathered employees" shall receive "an additional $5.35 per hour for all hours worked between 8 P.M. and 12:00 A.M." (*Id.*, art. VI(A)(2)(b)(3).) The CBA defines "grandfathered employees" as those who "are employed prior to January 16, 1992 and were receiving double time for hours worked between 8 P.M. and 12:00 A.M." (*Id.*, art. VI(2)(b)(1),) Finally, the CBA directs that "Hi–Lo Operators shall receive eighteen and three-quarters cents ($ .1875) per hour over the aforementioned wage rates." (*Id.*, art. VI(B).) The term "Hi–Lo Operators" is not defined.

FN3. Rothman submitted three versions of the CBA and two stipulations with amendments. For the purposes of deciding this motion for summary judgment, the Court relied primarily on the most recent version of the CBA (Rothman Ltr. Br., ex. B), valid as of January 17, 2010, which is identical to the preceding versions in all respects relevant to this suit.

***2** The CBA also establishes a three-step procedure "for the purpose of resolving all grievances and disputes" between the Union and the Association. (Rothman Ltr. Br., ex. B, at 1.) First, an aggrieved employee must timely submit a written grievance to his employer and the Union, which then must meet and try to resolve the grievance within seven working days. Second, if the grievance remains unresolved, a "Labor–Management Grievance Committee" (the "Grievance Committee") must review the grievance and provide a nonbinding recommendation to the Union and employer. Finally, if the recommendation of the Grievance Committee does not resolve the dispute, either the Union or the employer may refer the issue to binding arbitration.

B. *OFFICIAL GRIEVANCES AND THE INSTANT ACTION*

On November 3, 2006, Johnson filed a "Local 202 Grievance Form" complaining about the denial of hi-lo pay. In or around February 2008, Johnson filed another grievance requesting back pay for the night, grandfather, and hi-lo wage differentials.[FN4] On February 20, 2008, the Grievance Committee rejected Johnson's grievance pertaining to grandfather pay. The Grievance Committee did, however, negotiate an agreement offering Johnson $10.50 in back pay for hi-lo work and offered to designate him as a hi-lo operator going forward. Although Rothman paid Johnson the back pay, Johnson did not sign the agreement designating him a hi-lo operator.[FN5]

FN4. Although the record does not contain a February 2008 grievance form from Johnson requesting "hi-lo" pay, Rothman asserts that he grieved his entitlement to "hi-lo" pay at that time, and the record shows that the Grievance Committee did address that issue on February 20, 2008. (*See* Rothman Lt. Br., exs. L, T.)

FN5. The record contains no indication of whether the Grievance Committee considered Johnson's grievance regarding the night differential.

Separately from Johnson, Saunders filed a grievance on September 28, 2007 regarding his entitlement to hi-lo pay. At an October 17, 2007 Grievance Committee meeting, Rothman agreed to pay Saunders $22 .50 back pay, and Saunders was instructed not to use the hi-lo machine in the future. Saunders has admitted that he never grieved his alleged entitlement to grandfather pay, and

there is no indication in the record that Saunders grieved his entitlement to the night differential either.

After several related administrative actions,[FN6] Plaintiffs filed this action claiming that they "were and are not paid time and one-half of their respective regular rates." (Compl. ¶ 20 (Docket No. 1).) In particular, Plaintiffs argue that they were entitled to the three wage differentials described above, and that Rothman failed to include those differentials in the calculation and payment of defendant's time-and-a-half overtime wages for hours worked in excess of forty hours a week.

> FN6. On April 16, 2008, Saunders filed a complaint with the New York State Division of Human Rights ("NYSDHR") against Rothman and the Union, alleging discrimination on account of race in the processing and resolution of his hi-lo grievance. This claim was cross-filed with the United States Equal Opportunity Employment Division ("EEOC"). By Determination and Order dated November 22, 2010, the NYSDHR dismissed the complaint. The EEOC adopted the findings of the NYSDHR and dismissed the federal charge.
>
> On June 30, 2008, Johnson filed a National Labor Relations Board ("NLRB") charge against the Union for breaching the Union's duty of fair representation in the processing of his grievances. Following an investigation, the NLRB dismissed the charge on August 21, 2008; Johnson appealed, and the decision was upheld on November 12, 2008. The NLRB's Director of Appeals denied reconsideration.

II. *LEGAL STANDARD*

A. *SUMMARY JUDGMENT STANDARD*

Pursuant to Rule 56, a court may grant summary judgment if, on the record before it, there exists "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Alabama v. North Carolina*, 130 S.Ct. 2295, 2308 (2010). In determining whether disputed issues of material fact exist, a court must view the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor. *See, e.g., Shapiro v. New York Univ.*, 640 F.Supp.2d 411, 418 (S.D.N.Y.2009) (*citing Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

***3** The role of a court in ruling on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986) (citations omitted). The moving party bears the burden of proving that no genuine issue of material fact exists, or that, because the paucity of evidence presented by the non-movant, no rational jury could find in favor of the non-moving party. *See Gallo v. Prudential Residential Servs., LP*, 22 F.3d 1219, 1223–24 (2d Cir.1994). If the moving party satisfies its burden, the nonmoving party must provide specific facts showing that there is a genuine issue for trial in order to survive the motion for summary judgment. *See Matsushita*, 475 U.S. at 586; *Shannon v. New York City Transit Auth.*, 332 F.3d 95, 98–99 (2d Cir.2003).

B. *STATUTORY PROVISIONS REGARDING WORKERS' RIGHTS*

The FLSA and NYLL, where applicable, require that employers pay overtime for hours worked over forty per week at a rate "not less than one and one-half times the regular rate" of pay. 29 U.S.C. § 207(a)(1); *see* N.Y. Comp.Codes R. & Regs. tit. 12, § 142–2.2 (2012). When an employer calculates overtime pay, "all remuneration for employment," subject to certain exceptions, shall be included in an employee's "regular rate" of pay. 29 U.S.C. § 207(e); *see Isaacs v. Central Parking Sys. of N.Y., Inc.*, No. 10 Civ. 5636, 2012 WL 957494, at *4 (E.D.N.Y. Feb. 27, 2012) ("The parallel NYLL has similar requirements."). An employee's "regular rate" of pay includes shift differentials. *See Conzo v. City of New York*, 667 F.Supp.2d 279, 283 (S.D.N.Y.2009) (holding that shift differentials are part of employees' regular rate of pay); *Scott v. City of New York*, 629 F.Supp.2d 266, 269 (S.D.N.Y.2009) (recognizing that regular rate includes " 'all payments which the parties have agreed shall be received regularly during the work [period]' " (*quoting Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 468 (1948)).

The FLSA confers on employees rights to overtime pay which are independent of contractual rights arising out of a CBA. *See Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (holding that FLSA rights are independent of rights arising out of CBA), In contrast, § 301 of the LMRA [FN7] (" § 301") "governs claims founded directly on rights created by [CBAs], and also claims substantially dependent on analysis of a[CBA]...." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (internal quotation marks omitted). Section 301 requires that an employee exhaust the governing CBA's grievance procedures before bringing a claim for breach of a CBA under the LMRA. *See Dougherty v. American Tel. & Tel. Co.*, 902 F.2d 201, 203–04 (2d Cir.1990) (*citing Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976)).

> FN7. Section 301 of the LMRA states: "Suit for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction over the parties...." 29 U.S.C. § 185(a).

***4** Section 301 preempts state law claims that involve interpretation of an underlying CBA. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988) ("[A]n application of state law is preempted by § 301 of the [LMRA] only if such application requires the interpretation of a[CBA]."). Similarly, § 301 precludes claims brought under the FLSA which involve interpretation of a CBA. *Vadino v. A. Valey Eng'rs.* 903 F.2d 253, 266 (3d Cir.1990) (dismissing FLSA claim dependent on interpretation of CBA because such claims "must be resolved pursuant to the procedures contemplated under the LMRA, specifically grievance, arbitration, and, when permissible, suit in federal court under section 301"); *Hoops v. KeySpan Energy*, 794 F.Supp.2d 371, 379 (E.D.N.Y.2011) (same); *Nakahata v. New York–Presbyterian Healthcare Sys., Inc.*, No. 10 Civ. 2661, 2011 WL 321186, at *4 (S.D.N.Y. Jan. 28, 2011) ("If any of the alleged [FLSA] violations hinges on the [CBA's] definition of the terms of employment, they must be brought under the LMRA and in accordance with the agreement's grievance and arbitration provisions.") (*citing Vadino*, 903 F.2d at 266). Thus, although FLSA and state law overtime claims that "are truly independent of a[CBA] are enforceable," the LMRA will preclude such claims that are "inextricably intertwined" with the terms of a CBA *Dougherty*, 902 F.2d at 203–04. The preemptive effect of § 301 assures that arbitration agreements are enforced and promotes the "uniform interpretation of [CBAs]" under federal law. *Lingle*, 486 U.S. at 404; *see Livadas v. Bradshaw*, 512 U.S. 107, 122 (1994).

"Of course, not every dispute concerning employment, or tangentially involving a provision of a[CBA], is preempted by § 301...." *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). Indeed, "the bare fact that a[CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas*, 512 U.S. at 124. For example, § 301 does not mandate preemption of state law claims requiring "mere referral" to a CBA to determine damages owed. *Vera v. Saks & Co.*, 335 F.3d 109, 115 (2d Cir.2003) ("Nor would a state claim be preempted if its application required mere referral to the CBA for information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled." (internal quotation marks omitted)); *see Wynn v. AC Rochester*, 273 F.3d 153, 158 (2d Cir.2001) § holding that "simple reference to the face of the CBA" does not require preemption of state fraud claim).

III. *DISCUSSION*

Section 301 preempts Plaintiffs' overtime claims arising from their alleged entitlement to grandfather and hi-lo pay. In addition, the evidence in the record shows that, for almost every pay period, Rothman's overpayments offset any FLSA overtime owed to Plaintiffs as a result of the night differential. Finally, the statute of limitations bars a significant portion of Plaintiffs' LMRA claims.

A. *OVERTIME CLAIMS RELATED TO GRANDFATHER AND HI–LO PAY*

***5** Section 301 bars Plaintiffs' NYLL and FLSA claims for overtime pay including the grandfather and hi-lo differentials because resolving those claims would require the Court to interpret the terms of the CBA. Although Plaintiffs are correct that NYLL and the FLSA

provide statutory rights to overtime which are independent of the CBA, the threshold issue here—whether Plaintiffs are entitled to the grandfather and hi-lo differentials at all—is "inextricably intertwined" with the CBA. *Dougherty*, 902 F.2d at 203–204; *see Hoops v. Keyspan Energy*, 822 F.Supp.2d 301, 306–09 (E.D.N.Y.2011) (holding that § 301 precluded employee's FLSA claim for overtime because resolving claim required threshold inquiry into whether employee was entitled to wage differential under CBA).

While "[t]he boundary between claims requiring 'interpretation' of a CBA and ones that merely require such an agreement to be 'consulted' is elusive [,]" determining Plaintiffs' entitlement to the grandfather and hi-lo differentials requires more than "simple reference to the face of the CBA." *Wynn*, 273 F.3d at 158. Rothman disputes that Plaintiffs qualify as "Hi–Lo Operators" or "grandfather employees" as those terms are used in the CBA, and the plain language of the CBA does not indicate a clear answer. For example, the CBA does not provide a definition for the term "Hi–Lo Operator;" nor does it indicate the frequency with which an employee had to work: nighttime hours prior to 1992 to qualify as a "grandfathered employee." To determine whether the Plaintiffs were entitled to grandfather and hi-lo pay, the Court would have to evaluate Plaintiffs' work histories in light of the intended meaning and purpose of the CBA's terms, a task which the Court is ill-equipped to perform, and which the LMRA mandates should be left to the CBA's designated grievance procedures. Thus, unlike the United States Court of Appeals for the Second Circuit's decision in *Wynn*, 273 F.3d at 158, where there was no question regarding the meaning of relevant CBA provisions, here, the Court cannot address Plaintiffs' grandfather and hi-lo claims without digging into forbidden ground. *Cf., Severin v. Project OHR, Inc.*, No. 10 Civ. 9696, 2011 WL 3902994, at *3–*4 (S.D.N.Y. Sept. 2, 2011) at *3–4 (finding no preemption or preclusion where "[n]o provision of the CBA needs to be interpreted" to decide FLSA or NYLL claims); *Polanco v. Brookdale Hosp. Med. Ctr.*, 819 F.Supp.2d 129, 135 (E.D.N.Y.2011) ("Plaintiffs' allegation that they performed work after their scheduled shift but were not paid for [such work] asserts an independent FLSA violation that does not rest upon any interpretation of the CBA."). Therefore, the Court finds that Rothman is entitled to summary judgment as a matter of law on Plaintiffs' state and federal overtime claims arising from their alleged entitlement to the grandfather and hi-lo wage differentials.

B. *OVERTIME CLAIMS RELATED TO NIGHT DIFFERENTIAL*

***6** Section 301 of the LMRA does not preempt or preclude Plaintiffs' overtime claims alleging failure to pay the night differential. For the purposes of its motion for summary judgment, Rothman does not dispute that Plaintiffs were entitled to the night differential and concedes that it erred by failing to add the night differential to the regular rate before calculating overtime. (*See* Rothman Ltr. Br. at 5.) Moreover, the provision of the CBA which guarantees the night differential does not require interpretation by the Court, because the meaning of its plain language is clear. (*See* Rothman Ltr. Br., ex. B, art. VI(A)(2)(a) ("A night differential of $5.00 per hour will be paid to all employees for hours worked between 8:00 P.M.–4:30 P.M.").) It is therefore settled for the purposes of summary judgment that Rothman owes Plaintiffs some back pay as a result of its failure to include the night differential in overtime calculations.[FN8]

FN8. According to Rothman, its failure to add the night differential to the Plaintiffs' regular rate of pay prior to calculating overtime resulted in an underpayment of $2.50 for every hour of overtime worked. (*See* Jan. 19, 2012 letter at 5.)

Rather than disputing Plaintiffs' entitlement to the night differential, Rothman argues that, even taking into account its acknowledged underpayments, Plaintiffs' FLSA overtime claim is offset because Rothman actually made substantial overpayments owing to other calculation errors. Under the FLSA, "[e]xtra compensation paid [for certain activities] shall be creditable toward overtime compensation payable pursuant to this section." 29 U.S.C. § 207(h)(2). "[T]here are three categories of payments which may be credited against overtime compensation mandated by the FLSA," including "extra compensation provided by a premium rate for hours worked in excess of an employee's regular working hours." *Conzo*, 667 F.Supp.2d at 2S9 (*citing* 29 U.S.C. §§ 207(h)(2), 207(e)(5) (internal quotation marks omitted)).

Rothman asserts that it paid Plaintiffs an extra half-hour for each day worked over the last six years because it mistakenly included an unpaid meal break in its accounting,[FN9] and as a result, tabulated overtime beginning at 37.5 hours per week rather than forty hours per week. Rothman argues that these overpayments offset the Plaintiffs' FLSA overtime claim. In support of its offset argument, Rothman has submitted two charts showing a weekly breakdown of hours worked by Johnson and Saunders since 2005, meal hours erroneously paid, and, ultimately, the weekly net credit owed to Rothman as a result of this miscalculation. (*See* Rothman Ltr. Br., exs. Y, Z.) Based on the charts Rothman submitted, the amount that Rothman overpaid Plaintiffs each week—2.5 hours for meal breaks and 1.25 hours resulting from mistaken payment of overtime—is greater than the amount of overtime Rothman admits it owes.[FN10]

FN9. The CBA provides: "Employees shall be permitted one-half (1/2) hour for lunch.... Employees shall not work through their lunch period and the Employer shall not pay any employees for their lunch period." (Rothman Ltr. Br., ex. B, art. VII(C).)

FN10. Under the FLSA's statutory language, Rothman is entitled to credit the 1.25 hours resulting from mistaken payment of overtime against its FLSA. overtime requirement; however, it is not entitled to credit the 2.5 hours of regular wages mistakenly paid, since that is not "premium" compensation paid for work in excess of regular hours. *See* 29 U.S.C. 207(e)(5) (credit allowed for "extra compensation provided by a premium rate for hours worked in excess of an employee's regular working hours"); 29 C.F.R. 778.201(a) ("Certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days are regarded as overtime premiums."); *see also Howard v. City of Springfield, Ill.*, 274 F.3d 1141, 1147 (7th Cir.2002) ("The test [for overtime credit] is set forth in the [FLSA], and is whether the payments are made because the hours are outside the regular workday." (interpreting 29 U.S.C. § 207(e)(7)). Rothman indirectly acknowledged this in its motion for summary judgment:

> Even without the credit of 2.5 hours for erroneously paid meal breaks, the mere payment of the overtime rate beginning at 37.5 hours instead of 40 hours (*i.e.*, 1.25 hours overpayment per week) alone produces an employer credit each week equivalent to the underpayment of $2.50 overtime rate for approximately 9 to 11 hours of overtime. The plaintiffs had so few hours of statutory overtime each week that the employer's overpayments always exceeded the alleged underpayment in each and every week.
>
> (Rothman Ltr. Br. at 6.)

Plaintiffs concede that alleged overpayments may be credited toward FLSA overtime within each pay period, *i.e.*, each week.[FN11] (See Pl. Ltr. Br. at 3.) But Plaintiffs argue that their FLSA claims nevertheless survive because any underpayment of overtime must first be doubled as liquidated damages. (*See id.*) Apart from this argument, Plaintiffs do not challenge the figures in Rothman's charts, object to the charts' admissibility, or cite contrary evidence.

FN11. *See Scott v. City of New York*, 592 F.Supp.2d 475, 484 (S.D.N.Y.2008) (holding that one week is pay period under FLSA).

*7 Assuming Plaintiffs are correct that liquidated damages should be added prior to offset,[FN12] such damages do not alter the net result here. Rothman's charts indicate that Plaintiffs typically worked few hours of overtime each week. (*See* Rothman Ltr. Br., exs. Y, Z.) If Rothman owes Plaintiffs $5.00 per hour over forty hours a week (an equivalent of overtime owed plus liquidated damages),[FN13] the resulting overtime owed to Plaintiffs exceeds the credit to Rothman only on weeks in which Plaintiffs worked more than four hours of overtime. For example, in a week in which Johnson worked 41.75 hours (Feb. 16, 2010), Rothman owes him $8.75 for the 1.75 hours of FLSA

overtime, inclusive of liquidated damages. However, for that same week, Rothman overpaid Johnson $20.56 for the extra 1.25 hours of wages paid. [FN14] Rothman's offset negates Johnson's FLSA claim that week.

> FN12. Under the FLSA, a district court is generally required to award liquidated damages equal to actual damages. *See* 29 U.S.C. § 216(b). "A district court can deny liquidated damages, however, in an exercise of its discretion where the employer demonstrates that it acted in subjective 'good faith' with objectively 'reasonable grounds' for believing that its conduct did not violate the FLSA," *Torres v. Gristede's Operating Corp.*, 628 F.Supp.2d 447, 465 (S.D.N.Y.2008).
>
> FN13. Since Plaintiffs have not challenged Rothman's calculations, the Court adopts Rothman's admission that it underpaid Plaintiffs $2 .50 per hour of overtime worked.
>
> FN14. According to the CBA, the regular rate of pay for warehousemen was between $15.10 and 16.90 per hour between 2005 and 2010. The Court arrived at the $20.56 figure by multiplying the hourly rate effective on Jan. 17, 2010 ($16.45) by 1.25.

In sum, there is no genuine issue of material fact that Rothman's overpayments offset Plaintiffs FLSA overtime, except in weeks when the Plaintiffs worked more than four hours overtime. Johnson worked more than four hours overtime on only two occasions since 2005 (the weeks ending January 10, 2006, and January 30, 2007); Saunders never worked more than four hours overtime in any week since 2005. (*See* Rothman Ltr. Br., exs. Y, Z.) The Court therefore grants Rothman's motion for summary judgment and dismisses: (1) Saunders' FLSA overtime claims arising from the night differential; and (2) Johnson's FLSA overtime claims arising from the night differential for every week except the weeks ending January 10, 2006 and January 30, 2007.

C. *LMRA CLAIM*

In addition to their overtime claims, Plaintiffs also sue Rothman for breach of the CBA pursuant to § 301 of the LMRA. The complaint alleges that the Union breached its duty of fair representation in its handling of Plaintiffs' grievances.[FN15] Johnson's LMRA claim is barred by the applicable six-month statute of limitations. *See DelCostello*, 462 U.S. at 170–71 (holding that statute of limitations for employee's action against employer for breach of CBA is six months). "The cause of action accrues at the time that [Plaintiffs] knew or reasonably should have known of the [U]nion's alleged breach of the duty of fair representation." *Vera v. Saks & Co.*, 424 F.Supp.2d 694, 708 (S.D.N.Y.2006) (internal quotation marks and citation omitted). Johnson filed a charge with the NLRB on June 30, 2008, alleging that the Union had failed to fairly represent his grievances against Rothman. (*See* Rothman Ltr. Br., ex. T.) Thus, as of at least June 30, 2008, Johnson knew of the Union's alleged breach. Since this case was filed more than six months afterward, the limitations period for Johnson's LMRA claim has run.

> FN15. An employee has standing to sue his employer for breach of a CBA under § 301 of the LMRA only if there are allegations that the Union breached its duty of fair representation. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164–65 (1983) ("To prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." (internal quotation marks omitted) (alterations in original)).

As for Saunders, he never grieved the issue of grandfather pay or his entitlement to the night differential; thus, he cannot allege that the Union did not fairly represent him on those charges, and he cannot raise an LMRA claim on that score. *See DelCostello*, 462 U.S. at 163–65 (holding that, in order to bring a claim for breach of a CBA, "an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the [CBA]"). Therefore, Saunders' LMRA claims are potentially viable only with regard to his alleged entitlement to the hi-lo differential. Although it seems unlikely that the Union breached its duty of fair representation—the Grievance Committee actually ruled

in Saunders' favor on that issue, and the NYSDHR determined that the Union did not act in a discriminatory manner (*see* Rothman Ltr. Br., ex. O)—at this point, the Court lacks adequate information regarding the nature of Saunders' allegations to grant Rothman's motion for summary judgment on the LMRA claim with regard to hi-lo pay.

IV. *ORDER*

***8** Accordingly, for the reasons stated above, it is hereby

ORDERED that the motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 of defendant D.M. Rothman is GRANTED in part and DENIED in part in accordance with this Decision and Order.

SO ORDERED.

S.D.N.Y.,2012.

Johnson v. D.M. Rothman Co., Inc.
--- F.Supp.2d ----, 2012 WL 1788144 (S.D.N.Y.)
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EMANUEL KARROPOULOS Plaintiff,
v.
SOUP DU JOUR, LTD., doing business as Bistro 44, and PAUL J. GALLOWITSCH, JR., Defendants.

13-CV-4545 (ADS) (GRB)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

August 31, 2015

MEMORANDUM OF DECISION & ORDER

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SPATT, District Judge.

This case arises from a dispute over whether the Plaintiff Emanuel Karropoulos (the "Plaintiff"), who was employed as an executive chef from 2010 to 2013 by the Defendants Soup du Jour, Ltd., d/b/a Bistro 44, and Paul J. Gallowitsch, Jr., ("Gallowitsch, Jr." and collectively, the "Defendants"), should be paid overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (the "FLSA"), and New York Labor Law § 650, *et seq.* (the "NYLL").

On August 13, 2013, the Plaintiff commenced this action seeking monetary damages, including an award of liquidated damages, pre-judgment and post-judgment interest, restitution, and reasonable attorneys' fees.

Presently before the Court is a motion by the Defendants pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 56 for summary judgment dismissing the complaint in its entirety.

For the reasons set forth below, the Court denies the Defendants' motion.

I. BACKGROUND

Unless otherwise specified, the following facts are drawn from the parties' Rule 56.1 statements.

A. The Parties

The Plaintiff is a resident of East Northport, New York. (Compl. at ¶ 5; Answer at ¶ 5.) From January 2010 to May 2013, the Plaintiff was employed as an executive chef at Bistro 44 by the Defendants. Bistro 44 is a restaurant located at 44 Maine Street in Northport, New York. It specializes in "New American" cuisines, and when the Plaintiff worked there, the menu included items such as, "Glazed Pork Loin, Cioppino, and Braised Beef Short Ribs in a Pinot Noir Reduction." (See Meyer Decl., Ex. N.)

The Defendant Gallowitsch is the Vice President of the Defendant Soup Du Jour, Ltd., a corporation that owned and operated Bistro 44 before selling it on May 15, 2014 to the Jokal Corporation. (Pl.'s Ex. C, at Tr. 9:6-9.)

Paul Gallowitsch, Sr., the Defendant Gallowitsch's father, is the President of Soup Du Jour, Ltd. He is not a party to this action.

Page 3

B. The Plaintiff's Employment Background

In 1996, the Plaintiff received a two-year associate's degree from the American Culinary Institute ("ACI"). (Meyer Decl., Ex. B, at Tr. 19-24.) After graduating from ACI, he worked at Little Palm Island, a restaurant in the Florida Keys, at the "pantry station," and as a line cook at the Hard Rock Café. (Id.)

In 1997, the Plaintiff moved back to New York and worked for a year and a half at the Pine Hollow Country Club ("Pine Hollow"). (Id. at Tr. 30:9-18.) The record does not make clear what his job title or duties were at Pine Hollow.

From 1998 to 1999, the Plaintiff held odd jobs at the Marriott Hotel; Hampton Clambake, a catering company; and performed "scattered" jobs in the construction industry. (Id. at Tr. 30:14-6.)

In 1999, Gallowitsch, Sr. hired the Plaintiff as a line cook for his restaurant Soup Du Jour Bistro, the predecessor to Bistro 44. (Id. at Tr. 24:5-13.) From 2001 to 2002, the Plaintiff worked as a line cook at Skippers, another restaurant owned by Gallowitsch, Sr. (Id. at Tr. 24:14-19.)

In 2002, the Plaintiff moved to San Diego and took a job as an executive chef at Café Athena. During his tenure at Café Athena, it was "rated by Zagat as the Best Greek Restaurant in San Diego." (Joint 56.1 Statement, Dk. No. 30, at ¶ 6.)

In 2004, the Plaintiff moved back to New York and became the executive chef at Via Veneto, a restaurant located in Jericho. (Meyer Decl., Ex. G.) An April 18, 2004 article which appeared in Newsday described the Plaintiff's job at Via Veneto as follows: "Karropoulos, 28, is responsible for menu selection, food preparation, creating daily specials, inventory and overseeing four cooks. He also manages special events." (Id.)

Page 4

In 2009, the Plaintiff left Via Veneto and worked as a sales representative for Sysco Corporation ("Sysco"). (Id. at Tr. 27:11-20.) During this period he was also performing odd jobs in the construction injury. (Id.)

In January 2010, Gallowitsch, Sr. called the Plaintiff to let him know that he was planning to re-open Bistro 44 and invited him to interview for the executive chef position. (Pl.'s Ex. D at Tr. 97:9-16; Meyer Decl., Ex. B, at Tr. 38:5-14.) When asked why he called the Plaintiff, Gallowitsch, Sr. testified, "I chose him right away because I did always enjoy his cooking. He's a great, talented executive chef. His food is really good." (Pl.'s Ex. D, at Tr. 100:2-4.) After the phone call, the Plaintiff had lunch with Gallowitsch, Sr., his wife, and the Defendant Gallowitsch, Jr. Following the lunch, Gallowitsch, Sr. hired the Plaintiff as the executive chef at Bistro 44. (Meyer Decl., Ex. B, at Tr. 38:5-14.)

C. The Plaintiff's Compensation at Bistro 44

The parties agree that the Plaintiff was paid a salary and was not paid overtime. They further agree that each week, the Defendant received a pay check of at least $900 before taxes.

In addition, when he started working at Bistro 44 in January 2010, the Plaintiff received an additional $400 in cash every week. (Meyer Decl., Ex. B, at Tr. 16:3-11.) After two months of working, he received a raise of $100 per week in cash. (Id. at Tr. 11-20.) Therefore, as of March 2010, two months after being hired, the Plaintiff's gross salary prior to taxes was $1,400 per week, which amounted to an annual gross salary of $72,800. (Pl's Ex. C, at Tr. 14:19-25; 15:2-19; Ex. D, at Tr. 88:2-12.)

However, the parties dispute whether the Plaintiff's salary was subject to deductions during his employment. The Defendants assert that the Plaintiff's weekly check was not subject to deductions. (Joint 56.1 Statement, Dkt. No. 30, at ¶ 9.)

Page 5

On the other hand, the Plaintiff asserts that his salary was subject to deductions on several occasions. For example, the Plaintiff testified that in December 2010, he asked the Defendant Gallowitsch, Jr. if he could receive a weekly pay check for his full salary of $1,400 rather than the current arrangement of a $900 pay check and $500 in cash. (Meyer Decl., Ex. B, at Tr. 16:22-17:7.) The Plaintiff testified that he asked for his entire $1,400 salary to be put "on the books" because he was trying to buy a house, and in order to qualify for a loan, his bank requested documentation showing that his salary was $1,400 per week. (Id. at Tr. 11:9-18.)

According to the Plaintiff, the Defendant Gallowitsch, Jr. agreed to the Plaintiff's request but asked the Plaintiff to give him an extra $100 per paycheck to make up for the additional taxes that he would incur as a result of putting the Plaintiff's entire salary "on the books." (Id. at Tr. 12:10-17.)

In May 2011, after he closed on his house, the Plaintiff testified that he endorsed one pay check to Gallowitsch, Jr. as compensation for the additional taxes that the Defendants would likely incur. (Id.) After signing over his check, the Plaintiff allegedly asked the Defendant Gallowitsch, Jr. to restore their previous arrangement and pay him $500 of his $1400 weekly salary in cash. (Id.)

Both the Defendant Gallowitsch, Jr. and Gallowitsch Sr. denied that the Plaintiff asked them to be paid entirely on the books. (Joint 56.1 Statement at ¶ 9; Pl.'s Ex. C, at Tr. 46:20-47:8; Ex. D at Tr. 92:19-21.) The Defendant Gallowitsch, Jr. testified that the Plaintiff occasionally signed paychecks over to him but that the Plaintiff did so for the purpose of cashing his check: "I would cash them for him. So he would sign his paycheck to me and I would give him the cash." (Id. at Tr. 47:22-48:2.)

Page 6

The payroll records submitted by the Defendants indicate that until January 29, 2012, the Plaintiff received pay checks for gross amounts of $900 per week and net amounts after taxes of between $736.32 and $744.48. (Meyer Decl., Ex. I, at pp. 1-99.) From January 29, 2012 to April 29, 2012, the Plaintiff received checks for gross amounts of $1,400 per week and net amounts of $1124.27. (Id. at 99-111.) On April 30, 2012, the Plaintiff received a check for a gross amount of $1,000 and a net amount of $32.67. (Id. at 111.) The record is not clear as to why the net amount of the Plaintiff's April 30, 2012 pay check is so much less than the net amounts of his other pay checks. Finally, from May 7, 2012 until the Plaintiff was terminated on April 30, 2013, he received weekly pay checks for gross amounts of $900 and net amounts of between $759.77 and $744.32. (Id. at 111-16.)

In addition to the alleged deductions for tax purposes, the Plaintiff testified that the Defendants deducted money from his salary when the Plaintiff took time off from work. According to the Plaintiff's testimony, the Defendants did not provide him with any sick days or vacation. (Id. at Tr. 141:16-24.) As a result, whenever the Plaintiff took time off, he alleges that the Defendant took money from the $400 or $500 in cash that he was paid each week. (Id. at Tr. 142:19-21.)

The Defendant Gallowitsch Jr. testified that the Plaintiff did receive paid vacation time when the restaurant closed for ten days in January 2011, 2012, and 2013. (Pl.'s Ex. C, at Tr. 33:9-25.) In addition, he testified that in the Summer of 2012, the Plaintiff was given

an extra pay check of $1400, which represented his vacation pay for that year. (Id. at Tr. 34:16-25.) He further denied that he had ever reduced the Plaintiff's salary because he had taken time off. (Id. at Tr. 37:7-10.)

Page 7

D. The Plaintiff's Duties Prior to the Opening of Bistro 44

After the Plaintiff was hired in January 2010, he assisted with hiring staff and creating the menu for Bistro 44.

In this regard, the Plaintiff prepared a posting on Craig's List seeking job applications for "Sous Chef and line cooks" at Bistro 44. In the posting, his email address was listed as a point of contact.

There is a dispute of fact as to how involved the Plaintiff was in the initial hiring process. The Plaintiff testified that he sat in on the interviews with candidates but described his role in the hiring process as passive:

> [I]t was probably maybe a few days or week before opening, and [the Defendant] and his father were having interviews, I guess, from an ad they posted . . . And I guess they had just asked me if I wanted to sit in on it. And, you know, being that I was just sitting there at the table, you know, doing nothing, . . . But after that day, I was never involved in the hiring of anybody.

(Meyer Decl., Ex. B, at Tr. 66:16-6.)

On the other hand, the Defendant Gallowitsch, Jr. testified that the Plaintiff "was in charge of the hiring and firing of the kitchen, the back of the house. So he had initial interviews with all of the people that were interested in the position." (Meyer Decl., Ex. C, at Tr. 202:17-20.)

The parties also dispute the Plaintiff's role in creating the menu for Bistro 44. The Plaintiff described his role prior to the opening of Bistro 44 as follows:

> I was there . . . cleaning stuff up and throwing old garbage out, and then spending . . . a few hours, also, making . . . a few dishes for . . . [the Defendant Galowitsch's] family to try out and critique and decide if this is something that they're going to put on the menu[.]

(Meyer Decl., Ex. B, at Tr. 86:16-25.)

Page 8

On the other hand, the Defendants contend that the Plaintiff was primarily responsible for creating the menu for Bistro 44. In that regard, Defendant Galowitsch, Jr. testified, "The initial menu was created by Emanuel. He had something that he had . . . written and he brought it to us and that was the first menu that we saw basically from him." (Meyer Decl., Ex. C, at Tr. 195:23-196:2.)

It is also undisputed that the Plaintiff created lists of potential dishes and made edits to draft copies of the menu. (Meyer Decl., Ex. N.) Some of the Plaintiff's proposed dishes — such as "French Onion Soup," "Local Little Neck Clams," "Brown Sugar and Ancho Chile Ribeye" and "Colorado Rack of Lamb" — later appeared on the finalized menu. (Meyer Decl., Exs. N, P.) Some of the Plaintiff's proposed dishes did not make it into the final menu. (See id.)

E. The Plaintiff's Duties Following the Opening of Bistro 44

After Bistro 44 opened in March 2010, the Plaintiff described his duties as entirely related to cooking. He testified that he arrived at Bistro 44 at 10 or 11:00 am and spent an hour prepping food. (Id. at Tr. 147:10-14.) From 11:00 am until the restaurant closed, the Plaintiff claimed that he spent 95% of his time cooking meals. (Id. at Tr. 147:18-25.) He said that during the busier spring and summer months, there were generally two other cooks alongside him in the kitchen, and during the less busy fall and winter months, it was just him and one other cook. (Id. at Tr. 146:2-5; 149:8-17.)

He described the division of labor among the cooks during the busy months as follows:

> Alex Canales, he sort of gravitated toward the pantry side, which was deserts and salads, and proved to be good at that. So he worked that station for lunch and dinner. Miguel proved to be very good at the grill station with temperature. And I did the saute for lunch and dinner, . . . [s]o there was [sic] three position on the weekend: There was saute, which was me; there was grill, which was Miguel; and then there was salads, pantry, which was Alex. And then during the week, it was just two because it wasn't as busy. So it would be me saute/grill, and then Alex or the other pantry guy.

Page 9

(Id. at Tr. 64:17-25.)

Other than his cooking duties, the parties dispute how much authority the Plaintiff had over other matters in the restaurant.

With regard to his own schedule, it is undisputed that the Plaintiff was not required to clock in and clock out, as other kitchen staff employees were required to do. However, he testified that Galowitsch, Jr. had to approve his work schedule and that as noted above, when he took time off, his pay was docked. (Id. at Tr. 35:12-25.) However, relying primarily on the same testimony, the Defendants assert that the Plaintiff had full autonomy over his schedule and deny that his pay was docked when he took time off. (Joint 56.1 Statement, Dkt. No. 30, at ¶ 10.)

With regard to setting the work schedule for other employees, the Plaintiff testified:

> I was told by Paul how many people we needed for each day, how much each person should be working, and then I would try and come up with something, . . . that I thought was . . . what the kitchen needed. And then once I had this, I would bring it to them [Galowitsch, Sr. and the Defendant Galowitsch, Jr.], and then changes from them were made . . . on the [work schedule].

(Meyer Decl., Ex. B, at Tr. 37:19-38:3.)

The Plaintiff further testified that he had no role in hiring or firing kitchen staff employees. (Id. at Tr. 68:14-19.) By contrast, the Defendant Galowitsch, Jr. testified that the Plaintiff had the authority to hire and fire them. (Meyer Decl., Ex. C, at Tr. 203:14-25.)

Both parties point to two incidents to bolster their characterization of the Plaintiff's role with regard to personnel matters. On March 22, 2010, the Plaintiff had a disagreement with Fredy Villalobos ("Villalobos"). The Plaintiff described the incident as follows:

> [Villalobos] was being disrespectful to all of us in the

> kitchen . . . . [H]e left a mess around and did some other stuff . . . . I told him that . . . we all have to clean

Page 10

> up after ourselves. And it ended up into . . . sort of like a little argument and he walked out.

(Meyer Decl., Ex. B, at Tr. 54:3-14.) When asked if he fired Villalobos, the Plaintiff responded, "I had no right to. And it's a no." (Id. at Tr. 54:15-16.) Rather, the Plaintiff contended that after he walked out of the kitchen, Villalobos sent a text message to Alex Canales, another kitchen staff member, in which he stated that he was not coming back to work. (Id. at 56:10-17.) Thus, the Plaintiff contends that Villalobos quit and was not fired by him, as the Defendants contend.

The Defendants dispute the Plaintiff's version of this incident and assert that the Plaintiff fired Villalobos. In support of this assertion, they rely on a Form W-4 purportedly signed by Villalobos on Feburary 26, 2010. (Meyer Decl., Ex. S.) On the form, Gallowitsch, Jr. wrote a note stating, "Hired for opening. Major Disagreement w/ Chef Emanuel. Emanuel fired on spot. Freddy left very unhappy. I walk[ed] him out to [his] car. He have me his extra cooking clothing." (Id.) (emphasis in original). Galowitsch, Jr. also testified that he overheard the argument between the Plaintiff and Villalobos, and "the last thing I heard [the Plaintiff] say is, you're fired; get your things and leave, and then he left . . . So I followed him to his car. He gave me the clothes and I left." (Id. at Tr. 175:13-19.)

With respect to the other personnel incident, on July 3, 2011, the Plaintiff sent a text message to the Defendant Galowitsch, Jr., "Sorry to bother u but need to let go of Daniel [Orlando] . . . [he] walked out last night and I can't blame him[.] [C]an I let him go." (Meyer Dec., Ex. R.) Galowitsch, Jr. responded, "Yup." (Id.)

In regard to this incident, the Plaintiff testified, "What I was probably insinuating, because of the texting, was 'You need to let him go,' because I knew I had no right to fire anyone. I mean, it was told to me time and time again." (Id. at Tr. 52:9-20.) There is no dispute that following the incident, Orlando's employment was terminated.

Page 11

In addition to these two incidents, the Defendants assert that the Plaintiff hired interns from the Culinary Institute of America ("CIA"). (Joint 56.1 Statement, Dkt. No. 30, at ¶ 26.) However, the Plaintiff disputes that he was solely responsible for hiring interns. Both parties rely on the same testimony from the Plaintiff:

> We ended up having . . . three interns. The first one just came in . . . off-the-street asking [for an internship] . . . . So even though it was an unpaid wage, I still went to my supervisor, which was Paul [Gallowitsch, Jr.], and told him . . . . And . . . he gave me the okay to have them come in[.] . . . Then, thereafter, because I guess the schooling found out that we accepted interns, there was an internship coordinator from [the CIA] that called the restaurant once . . . asking to speak with me to . . . see if . . . he could send other people there.

(Meyer Decl., Ex. B, at 129:5-14.)

With regard to training new employees, the Plaintiff testified:

> Well once I got the approval from Paul [Gallowitsch, Sr.] for

> what a dish should look like, . . . I actually took pictures for all of us . . . , and we had it . . . against the wall. But there was [sic] no recipes for everything . . . . We really . . . winged it.

(Id. at Tr. 80:14-81:4.)

The Plaintiff also testified that in February 2013, three months before he was terminated, Gallowitsch Sr. asked him to create recipes for everything on the menus. (Id. at 79:20-80:3.) However, prior to February 2013, the Plaintiff stated that there were no written recipes and instead, the cooks relied on the pictures of the dishes that he placed on the wall of the kitchen. (See id.)

The Plaintiff further testified that although he often created daily specials, Gallowitsch Sr. ultimately controlled the process: "There would be situations where we would make things, serve, and then halfway into service . . . Paul Sr. didn't like it and we took it off." (Id. at Tr. 82:18-21.)

Page 12

On the other hand, Gallowitsch, Jr. testified that the Plaintiff had "full authority in the kitchen to create plates and meals in any way he saw fit[.]" (Meyer Decl., Ex. B, at Tr. 205:14-25.) Gallowitsch, Sr. also denied having any input as to what was put onto the menu each day: "I did not spend any time developing the menu with [the Plaintiff]. I asked him to come up with a menu and that's what he did." (Pl's Ex. D ,at Tr. 75:19-21; Tr. 102:9-103:8.)

It also undisputed that daily staff meetings were held. Gallowitsch, Jr. described the meetings as follows:

> At that staff meeting it would be Emanuel, then it would be all of the wait staff and the bar staff and then some prep cooks or line cooks . . . . [I]n the beginning Emanuel would address the floor staff, what the specials were going to be for the day. He would go over what the ingredients of all of the food items were, how they were going to be prepared, how they were going to be plated and basically put all the wait staff on the right page of how to sell everything . . . . Emanuel would start off speaking. After he finished, then I would go and talk about the rest of the floor situation. So I would talk about how many reservations we had[.]

(The Pl.'s Ex. C, at Tr. 194:7-195:7.)

With regard to purchasing supplies, the Plaintiff testified that he was not responsible for billing or paying vendors. (Meyer Decl., Ex. B, at Tr. 103:13-23.) However, he testified that he was responsible for setting the amount of goods to be ordered from the bakery and sometimes returned products to the extent that they were spoiled. (Id. at 101:5-12.) Other than the bakery, the Plaintiff maintained that he was not permitted to purchase products directly from vendors that cost more than two dollars. (Id. at Tr. 104:7-24.) Instead, he would ask Galowitsch, Jr. to purchase the products for him. (Id.)

The Defendants allege that the Plaintiff had full authority to purchase supplies from vendors. In support of this assertion, they submit what they contend is a hand-written note written by the Plaintiff to Bridget Groeger, a supplier, ordering trays of pasta, chicken, and salmon. (Meyer Decl., Ex. W.)

Page 13

F. The Reviews of Bistro 44

On October 21, 2010, the Foodie Section of the LongIslander Newspaper featured an article with a profile of Bistro 44. It stated:

> Chef Karrapoulos' kitchen boasts sustainable produce, all-natural chicken and no seafood on the endangered species list, and will work to meet dietary needs to make dishes vegetarian and gluten-free. That way, nobody's left out of this great dining spot's second coming.

(Meyer Decl., Ex. X.)

The Defendants also submit an undated article from the Taste of Long Island by Sidney Scott ("Scott"). Scott wrote, "Foodies from miles around are likely flocking to the recently opened Bistro 44 . . . , blending a whole lot of Northport's signature Old World charm with a hint of modern chic, this hip eatery has taken a New American cuisine to a higher level of fine dining." (Id.)

The Defendants also attach an undated review in Newsday of Bistro 44 by Paul Gianotti ("Gianotti"). Gianotti gave the food one star; and rated the price as high, the service as "very good," and the ambience as "good." (Id.)

Finally, Zagat gave Bistro 44 a rating of excellent for the year 2011/12 and stated, "Fans of this 'sophisticated' yet 'unpretentious' Northport New American 'love the food' served in a 'handsome setting.'" (Meyer Decl., Ex. Y.)

G. The Plaintiff's Termination

In the Fall of 2012, the Plaintiff testified that he approached Gallowitsch, Jr. and asked for permission to do "some catering on the side . . . to make a few bucks." (Meyer Decl., Ex. B, at Tr. 116:22-116:8.) According to the Plaintiff, Gallowitsch, Jr. approved his request, and shortly after, the Plaintiff started a catering company called, "Blue Fin Caterers." (Meyer Decl., Ex. B, at Tr. 114:24-116:11.)

Page 14

On April 30, 2013, Gallowitsch, Sr. fired the Plaintiff because "[the Plaintiff] went into his catering business and he did not want to work weekends anymore and he wanted to do his catering things." (Pl.'s Ex. D, at Tr. 139:21-140:6.)

After being fired, the Plaintiff continued to run his catering business. The website for Blue Fin Caterers states:

> Chef Emanuel most recently was the Executive Chef of the Bistro 44 in Northport, New York. A native of Northport, he created exciting New Menu's [sic] at the Bistro when it reopened to Rave Reviews. His Culinary Creations were long remembered and had him return for an encore.

(Meyer Decl., Ex. H.)

II. DISCUSSION

A. Legal Standards

Fed. R. Civ. P. 56(a) provides that a court may grant summary judgment when the "movant shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law."

"Where the moving party demonstrates 'the absence of a genuine issue of material fact,' Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011) (quoting Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

In that regard, a party "must do more than simply show that there is some metaphysical doubt as to the material facts[.]" Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). Further, the opposing party "'may not rely on conclusory allegations or unsubstantiated speculation[.]'" F.D.I.C. v. Great Am. Ins.

Page 15

Co., 607 F.3d 288, 292 (2d Cir. 2010) (quoting Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998)).

"Where it is clear that no rational finder of fact 'could find in favor of the nonmoving party because the evidence to support its case is so slight,' summary judgment should be granted." Id. (quoting Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994)).

The FLSA § 207(a)(1) and 12 NYCRR 142-2.2 require qualifying employers to compensate employees for hours worked in excess of forty hours per work week at a rate not less than one-and-one-half times the regular rate of pay subject to certain exemptions. 29 U.S.C. §§ 206(a)(1), § 207(a)(1); N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2.

Here, the Defendants contend that the Plaintiff is exempt from overtime because he qualifies under the relevant federal and New York regulations as (1) an executive; (2) a creative professional; (3) a learned professional; and (4) an administrative employee.

As these exemptions to the FLSA overtime requirement are considered to be affirmative defenses, the burden of proving that an employee is exempt rests on the employer. Bilyou v. Dutchess Beer Distributors, Inc., 300 F.3d 217, 222 (2d Cir. 2002) ("The burden of invoking these exemptions rests upon the employer.") (citing Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 394 n.1, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960)). In addition, "the exemptions to the FLSA are 'narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.'" Id. (quoting Ben Kanowsky, Inc., 361 U.S. at 392, 80 S.Ct. 453).

Further, "'[t]he exemption question under the FLSA is a mixed question of law and fact. The question of how the employees spent their working time is a question of fact. The question

Page 16

of whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law.'" Pippins v. KPMG, LLP, 759 F.3d 235, 239 (2d Cir. 2014) (quoting Ramos v. Baldor Specialty Foods, Inc., 687 F.3d 554, 558 (2d Cir. 2012)).

Federal courts apply the same standards to interpreting the exemptions under the FLSA as they do to the exemptions under the NYLL. See, e.g., Reiseck v. Universal Commc'ns of Miami, Inc., 591 F.3d 101, 105 (2d Cir. 2010) ("The NYLL, too, mandates overtime pay and applies the same exemptions as the FLSA.") (quoting N.Y. Comp. Codes R. & Regs., tit. 12, § 142-3.2); Scott, 2011 WL 1204406, at *6 ("Because New York's overtime provisions mirror and/or expressly adopt federal wage law . . . federal courts evaluate New York's executive exemption by reference to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq., and its attendant regulations, set forth in the Code of Federal Regulations.").

Thus, the Court's analysis of the exemptions with regard to the Plaintiff's

FLSA claims will also apply to the Plaintiff's NYLL claims. See Ramos v. Baldor Specialty Foods, Inc., 687 F.3d 554, 556 (2d Cir. 2012) ("Like the FLSA, the NYLL 'mandates overtime pay and applies the same exemptions as the FLSA.' Reiseck v. Universal Commc'ns of Miami, Inc., 591 F.3d 101, 105 (2d Cir.2010). We therefore discuss only the FLSA, and do not engage in a separate analysis of [the] plaintiffs' NYLL claims, which fail for the same reasons as their FLSA claims.").

B. As to the Executive Exemption

Here, the Defendants assert that the Plaintiff's overtime claims should be dismissed because they contend that they employed him in a "bona fide executive capacity," and therefore, he was exempt under the FLSA and the NYLL from receiving overtime.

Page 17

The Plaintiffs respond that that there are material disputes of fact as to whether the Defendants employed him in a "bona fide executive capacity," and therefore, summary judgment is inappropriate on that basis.

One category of employees exempt from the overtime requirement under FLSA § 213(a)(1) are employees who are employed in a "bona fide executive capacity."

Under Department of Labor ("DOL") regulations, an employee is employed in a "bona fide executive capacity" if the employee is:

> (1) Compensated on a salary basis at a rate of not less than $455 per week . . .; (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) Who customarily and regularly directs the work of two or more other employees; and (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100; see also Mullins v. City of New York, 653 F.3d 104, 107 (2d Cir. 2011) (same).

The Court will address each of these four factors, in turn.

1. As to the First Factor

As noted above, the first factor that an employer must satisfy to show that an employee is a "bona fide executive" is that he is "[c]ompensated on a salary basis at a rate of not less than $455 per week." 29 C.F.R. § 541.100(a)(1).

Section 541.602(a) of Title 29 of the Code of Federal Regulations ("Section 541.602(a)") defines what it means to be compensated on a "salary basis":

> An employee will be considered to be paid on a 'salary basis' within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Page 18

29 C.F.R. § 541.602.

Here, the Defendants assert that there is no dispute of fact that the Plaintiff earned more than $455 per week. (The Def.'s Mem. of Law at 9-10.) In that regard, both Galowitsch, Jr., and Galowitsch, Sr. testified that the parties entered into an oral agreement when they hired the Plaintiff in January 2010 to compensate him $1,300 per week, which in March 2010, they increased to $1,400 per week for the duration of his employment. (Pl's Ex. C, at Tr. 14:1915:19; Ex. D, at Tr. 87:17-19.) The parties also do not dispute that they agreed that the Plaintiff would be paid $900 of his weekly salary in the form of a check, and the balance in cash. (See id.)

However, the Plaintiff asserts that the cash that he received from the Defendants was "subject to reductions." (The Pl.'s Mem. of Law at 8-9.) The Plaintiff is correct that "an employee will not be exempt if her salary is 'subject to reduction because of variations in the quality or quantity of the work performed.'" 29 C.F.R. § 541.602(a). However, "[s]uch deductions exist only if "there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions." Coleman-Edwards v. Simpson, 330 F. App'x 218, 220 (2d Cir. 2009) (quoting Auer v. Robbins, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)).

Thus, a plaintiff asserting that his salary was "subject to reduction" must allege more than isolated incidents of deductions in order to create a genuine issue of material fact as to whether his employer intended him to be an hourly employee. See, e.g., O'Brien v. Town of Agawam, 350 F.3d 279, 294 (1st Cir. 2003) ("Even taking this evidence in the light most favorable to the officers, four isolated incidents are not sufficient to show an 'actual practice' of reducing supervisory officers' compensation to punish variations in the quality of the work performed. 'The actual instances of pay reduction must amount to an actual practice of making such

Page 19

deductions.'") (quoting Spradling v. City of Tulsa, 198 F.3d 1219, 1224 (10th Cir. 2000)); DiGiore v. Ryan, 172 F.3d 454, 464-65 (7th Cir. 1999) (five isolated incidents insufficient to show actual practice); Martinez v. Hilton Hotels Corp., 930 F. Supp. 2d 508, 522 (S.D.N.Y. 2013) ("[T]hree suspensions among five employees over a period of four years is, in this case, too isolated an occurrence to suggest Defendants had an 'actual practice' of making unlawful deductions from the Plaintiffs' salaries.").

Here, the Plaintiff testified that in April 2011 he gave the Defendants one entire pay check to compensate them for putting his entire salary of $1,400 "on the books" for a period of six months. (Meyer Decl., Ex. B, at Tr. 12:10-17.) In addition, he testified his salary was generally subject to deductions when he left work early for personal reasons but could only point to two particular instances when the Defendants reduced his pay: namely, when he left work to attend the birth of his son; and when he left work after experiencing symptoms of heat exhaustion. (Id. at Tr. 144:9-145:8.)

Other than these three incidents, the Plaintiff points to no evidence suggesting that the Defendants had an "actual practice" of docking employees' pay for partial absences. For example, the Plaintiff does not submit evidence of a formal policy favoring pay deductions or testimony from other employees at Bistro 44 indicating that their weekly salaries were also docked by the Defendants for leaving work early. See Yourman v. Giuliani, 229 F.3d 124, 130 (2d Cir. 2000) ("[D]etermining what constitutes an "actual practice" of pay deductions . . . necessarily involves consideration of additional factors such as the number of times that other forms of discipline are

imposed, the number of employee infractions warranting discipline, the existence of policies favoring or disfavoring pay deductions, the process by which sanctions are determined, and the degree of discretion held by the disciplining authority.").

Page 20

Therefore, even if true, the occurrence of three instances when the Plaintiff's pay was docked is not sufficient to create a genuine issue of material fact that would preclude the Court from finding that the Plaintiff was "[c]ompensated on a salary basis at a rate of not less than $455 per week." See O'Brien, 350 F.3d at 294 ("Even taking this evidence in the light most favorable to the officers, four isolated incidents are not sufficient to show an 'actual practice' of reducing supervisory officers' compensation to punish variations in the quality of the work performed. 'The actual instances of pay reduction must amount to an actual practice of making such deductions.'").

Therefore, the Court finds that the Defendants met their burden with regard to the first factor of the executive exemption test. However, as is made clear below, the Court finds that there are genuine issues of material fact as to the remaining three factors which preclude summary judgment.

2. As to the Second Factor

As noted, in order to show that an employee was employed in a "bona fide executive capacity," the employer must show that his "primary duty is management of the enterprise." 29 C.F.R. § 541.100.

The relevant regulations defines "management" as:

> activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; . . . providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102.

Page 21

The regulations define "primary duty" as "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). To determine whether a plaintiff's performance of management activities constitutes their primary duty, a court must consider "the character of an employee's job as a whole," and in particular, the following factors:

> (i) "the relative importance of the exempt duties as compared with other types of duties"; (ii) "the amount of time spent performing exempt work"; (iii) "the employee's relative freedom from direct supervision"; and (iv) "the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee[.]"

Mullins v. City of New York, 653 F.3d 104, 107 (2d Cir. 2011) (quoting 29 C.F.R. § 541.700(a)).

In the present case, the Defendants acknowledge that there is a factual dispute as to how much time the Plaintiff spent cooking in a given day versus performing management activities. (The Defs.' Mem. of Law at 11.) However, they assert that this dispute of fact is not material because it is undisputed that the Plaintiff performed managerial functions that were more important to the Defendants than his non-managerial functions. (Id.)

In response, the Plaintiff asserts that there are genuine issues of material fact as to whether he performed managerial duties while working at Bistro 44 and there is no evidence suggesting the relative importance of his alleged management duties to the Defendants. (The Pl.'s Opp'n Mem. of Law at 10.) The Court agrees.

In this Circuit, courts have found that a chef's "primary duty" is not management where his duties primarily entail cooking. For example, in Solis v. SCA Rest. Corp., 938 F. Supp. 2d 380, 396 (E.D.N.Y. 2013), after a bench trial, the court concluded that management was not the primary duty of a plaintiff-chef because:

Page 22

> he spent the vast majority of his day cooking food . . . . He did not have keys to the restaurant, interview prospective employees, or determine the salaries or schedules of other employees in the kitchen . . . . Although the amount of time that Mr. Pastor Alfaro spent cooking is not dispositive, defendants have not introduced sufficient evidence that his 'primary duty' was, in fact, management.

Id. at 397; see also Garcia v. Pancho Villa's of Huntington Vill., Inc., No. CV 09-486 (ETB), 2011 WL 1431978, at *3 (E.D.N.Y. Apr. 14, 2011) ("The Court agrees with plaintiffs. It is undisputed that during the course of his employment, Garcia's primary duty was to cook . . . . Nothing before the Court indicates that Garcia had any management duties, let alone that his 'primary duty' was management. Nor is there any evidence that Garcia directed the work of other employees or possessed the authority to hire and fire employees.'").

On the other hand, where it is undisputed that a chef's management duties were more important to his employer than his cooking duties, courts have found that the chef's primary duty is management. For example, the Defendants rely on Scott v. SSP Am., Inc., No. 09-CV-4399 (RRM) (VVP), 2011 WL 1204406, at *9 (E.D.N.Y. Mar. 29, 2011). There, the plaintiff, a unit manager for a group of restaurants and bars in the JFK International Airport, testified that she spent the majority of her time performing non-managerial tasks. Id. at *9. However, she also admitted that even when performing non-managerial tasks, she continued to supervise her subordinates. Id. In addition, the court found that "it is clear from her deposition admissions that the success of [the] [d]efendant's business was more dependent on [the] [p]laintiff's management duties than her other duties, the performance of which did not prevent her from continuing to manage her Units." Id. Based on this testimony, the court found that the plaintiff's primary duty was management. Id. at 10.

Similarly, in Scherer v. Compass Grp. USA, Inc., 340 F. Supp. 2d 942, 943 (W.D. Wis. 2004), also relied on by the Defendants, the plaintiff's testimony indicated that he supervised

Page 23

other employees while he cooked, he exercised discretion on a daily basis, was paid nearly double the wage earned by the hourly employees who worked in the kitchen, and there was testimony from other kitchen staff members indicating that they regarded him as the kitchen manager. Id. at 953-54; see also Chambers v. Sodexo, Inc., 510 F. App'x 336, 339 (5th Cir. 2013) (affirming the district court's decision granting summary judgment to the defendant on the plaintiff's FLSA claim where the plaintiff "admitted in his deposition that even during those periods when he purportedly had no management duties, he gave orders that were obeyed, conducted inventory, held meetings with the cooks, planned for upcoming catering events, and supervised the cooks, at least some of the time, in the kitchen[.]").

In Coberly v. Christus Health, 829 F. Supp. 2d 521, 529 (N.D. Tex. 2011), another case relied on by the Defendants, the defendant submitted evidence that the plaintiff's job description described him as being responsible for:

> planning meals, procuring food supplies and kitchen equipment, production of meals, directing and supervising the operation of the kitchen production staff and work flow of the kitchen personnel, overseeing the food service workers, interviewing and recommending the hiring and firing of food service workers, and participating in the performance management process for the food service workers.

Id. In addition, the defendant submitted a declaration by the plaintiff's supervisor in which he stated that the plaintiff's duties were largely managerial and consistent with his job description. Id. The plaintiff did not respond to the defendant's arguments or present evidence as to the executive exemption. Id. at 530. As such, the court accepted, as unopposed, the "[d]efendant's facts and evidence of the second, third, and forth factors [of the executive exemption test] . . . , and conclud[ed] that [the plaintiff] qualifies as an executive employee." Id.

Here, the Plaintiff testified that he spent 95% of his day cooking. (Meyer Decl., Ex. B at Tr. 64:17-25.) The Defendants do not submit any evidence to contradict the Plaintiff's

Page 24

testimony in this regard, but rather, contend that the Plaintiff can still be found exempt because his management duties were more significant to Bistro 44's business than his cooking duties. (The Defs.' Mem. of Law 11-12.)

The Defendants are correct that under the relevant DOL regulations, "[e]mployees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." 29 C.F.R. § 541.700. However, the record here presents a muddled picture as to those "other factors": "the relative importance of the exempt duties as compared with other types of duties"; "the employee's relative freedom from direct supervision"; and "the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee[.]" See id.

Here, there are no documents, such as a job description, which clearly defined the Plaintiff's job duties or his role at Bistro 44. Coberly, 829 F. Supp. 2d at 530 (noting that a job description for the plaintiff's position as senior chef listed his responsibilities as, among other things, "planning meals, procuring food supplies and kitchen

equipment, production of meals, [and] directing and supervising the operation of the kitchen production staff and work flow of the kitchen personnel[.]"). Nor is there testimony from the Plaintiff's co-workers indicating what their salaries were or how they viewed the Plaintiff's responsibilities in the kitchen, which the DOL and other courts have found to be highly relevant in determining whether the Plaintiff's primary duties are related to management. See 29 C.F.R. § 541.700(a) ("Factors to consider when determining the primary duty of an employee include . . . the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee."); see also Scherer, 340 F. Supp. 2d at 954 ("There is also evidence

Page 25

that both defendant and the staff in both the Commons kitchen and dining area regarded plaintiff as a manager . . . . Kitchen staff considered him to be their immediate supervisor and dining area staff thought of him as the kitchen manager.").

Instead, what the Court is left with is conflicting testimony by the Plaintiff, the Defendant Gallowitsch, Jr., and Gallowitsch Sr. as to what the Plaintiff's managerial responsibilities were and how important they were to the business of Bistro 44.

For example, the Defendant Gallowitsch Jr. testified that the "initial menu [for Bistro 44] was created by Emanuel. He had something that he had type written and he brought it to us and that was the first menu that we saw basically from him." (Meyer Decl., Ex. C, at Tr. 195:23-196:2.) By contrast, the Plaintiff testified that while he helped to create some of the dishes for Bistro 44's menu, "Paul [Gallowitsch] Sr. was the one that was most involved with what the menu should be, what it should taste like, what it should look like." (Meyer Decl., Ex. B, at Tr. 99:19-22.)

With regard to creating daily specials, the Defendant Gallowitsch, Jr. testified that the Plaintiff had "full authority in the kitchen to create plates and meals in any way he saw fit[.]" (Meyer Decl., Ex. B, at Tr. 205:14-25.) On the other hand, the Plaintiff testified that he and the other cooks in the kitchen played an equal role in creating the specials:

> [O]n a weekly basis, . . . we would change the special . . . . [T]here would be a different soup, a different salad, and a different entrée, a different desert. And a lot of times, . . . [the sous chef] would . . . make a dessert special, . . . make a salad special, . . . and it would be something he created.

(Meyer Decl., Ex. B, at Tr. 82:4-11.)

With respect to setting the work schedule for the kitchen staff, Gallowitsch Jr. testified that it was the Plaintiff's responsibility and that he had no role in the process other than when he occasionally asked the Plaintiff to reduce the kitchen staff's hours. (Pl.'s Ex. D, at Tr. 51:23-

Page 26

52:24; 58:23-59:3.) On the other hand, the Plaintiff testified that while he often created the schedules, Gallowitsch, Jr. told him "how many people we needed for each day, how much each person should be working, and then I would try and come up with something, . . . that I thought was . . . what the kitchen needed." (Meyer Decl., Ex. B, at Tr. 37:19-38:3.)

With regard to his ability to set his own work schedule, it is undisputed that the Plaintiff was not required to clock in and clock out, as other kitchen staff employees were required to do. However, he testified that Gallowitsch, Jr. had to approve his work schedule and that as noted above, when he

took time off, his pay was docked. (Id. at Tr. 35:12-25.)

Based on this conflicting testimony and the lack of objective evidence in the record setting forth the Plaintiff's responsibilities, the Court finds that there is a genuine issue of material fact as to the second factor. See Stevens v. HMSHost Corp., No. 10-CV-3571 (ILG) (VVP), 2015 WL 4645734, at *5 (E.D.N.Y. Aug. 5, 2015) ("Since it is far from clear whether plaintiff's managerial obligations were truly important enough to his workplace to classify them as his primary duties, summary judgment must be denied."); Awan v. Durrani, No. 14-CV-4562 (SIL), 2015 WL 4000139, at *12 (E.D.N.Y. July 1, 2015) ("These factual inconsistencies prevent a meaningful examination of whether Awan's job responsibilities rise to the level of executive management within the meaning of the FLSA and NYLL."); Clougher v. Home Depot U.S.A., Inc., 696 F. Supp. 2d 285, 292 (E.D.N.Y. 2010) ("Absent objective evidence, a more complete examination of the facts and circumstances surrounding Clougher's daily responsibilities, and credibility determinations, this Court cannot resolve this question.").

3. As to the Third Factor

The third factor of the executive exemption test requires the employer to prove that the employee "customarily and regularly directs the work of two or more other employees." 29

Page 27

C.F.R. § 541.100(a). As discussed above, there is a material dispute of fact over the extent to which the Plaintiff supervised other employees on the kitchen staff. He testified that he rarely disciplined employees and described the cooking process as collaborative:

> Alex Canales, he sort of gravitated toward the pantry side, which was deserts and salads, and proved to be good at that. So he worked that station for lunch and dinner. Miguel proved to be very good at the grill station with temperature. And I did the saute for lunch and dinner, . . . [s]o there was [sic] three position on the weekend: There was saute, which was me; there was grill, which was Miguel; and then there was salads, pantry, which was Alex. And then during the week, it was just two because it wasn't as busy. So it would be me saute/grill, and then Alex or the other pantry guy.

(Meyer Decl., Ex. B, at Tr. 64:17-25.)

On the other hand, the Defendant Gallowitsch, Jr. described the Plaintiff as having "full authority" over the kitchen staff. (Meyer Decl., Ex. B, at Tr. 205:14-25.)

As with the second factor, without the benefit of objective documentary evidence setting forth the Plaintiff's responsibilities over other employees, this conflicting testimony presents a genuine issue of material fact that precludes the Court from finding as a matter of law that the Plaintiff satisfies the third factor. See Martinez v. Hilton Hotels Corp., 930 F. Supp. 2d 508, 527 (S.D.N.Y. 2013) ("The second criterion of the 'duties' test — that an exempt employee 'customarily and regularly' directs the work of two or more employees — also cannot be resolved on summary judgment because the extent of Plaintiffs' authority over the Room Attendants and Housemen is disputed.").

4. As to the Fourth Factor

The final factor concerns whether the employee "has the authority to hire or fire

other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." 29 C.F.R. § 541.100(a).

Page 28

The DOL regulations state that in determining whether an employee has such authority, a court should consider:

> whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon.

29 C.F.R. § 541.105.

Here again, the Court finds the record to be unclear. With regard to hiring, the Plaintiff does not dispute that in March 2010, he composed an advertisement on Craig's List for sous chefs and line cooks. Nor does he dispute that he was present during the initial interviews for the position. However, he denies making any suggestions during the interviews and stated that he was "never involved in the hiring of anybody." (Meyer Decl., Ex. B, at Tr. 66:16-6.) Again, in opposition, the Defendant Gallowitsch, Jr. testified that the Plaintiff "was in charge of the hiring . . . of the kitchen, the back of the house. So he had initial interviews with all of the people that were interested in the position." (Meyer Decl., Ex. C, at Tr. 202:17-20.)

With regard to firing employees, the Plaintiff also testified that he had no role in firing kitchen staff. (Meyer Decl., Ex. B, at Tr. 68:14-19.) By contrast, the Defendant Gallowitsch, Jr. testified that the Plaintiff had such authority. (Meyer Decl., Ex. C, at Tr. 203:14-25.)

The Defendants also submit a February 26, 2010 Form W-4 for Fred Villalobos, an employee in the kitchen of Bistro 44. (Meyer Decl., Ex. S.) On the form, Gallowitsch, Jr. purportedly wrote a note stating, "Hired for opening. Major Disagreement w/ Chef Emanuel. Emanuel fired on spot. Freddy left very unhappy. I walk[ed] him out to [his] car. He have me his extra cooking clothing." (Id.) They also submit a July 3, 2011 text message from the Plaintiff to Gallowitsch, Jr, "Sorry to bother u but need to let go of Daniel [Orlando] . . . [he] walked out last night and I can't blame him[.] [C]an I let him go." (Meyer Dec., Ex. R.)

Page 29

Gallowitsch, Jr. responded, "Yup," and Orlando's employment was subsequently terminated. (Id.)

The Plaintiff disputes that he fired Villalobos and claims that the July 3, 2011 text message shows that Gallowitsch Jr., not him, had the ultimate authority with regard to firing employees. (Meyer Decl., Ex. B, at Tr. 52:9-20; 175:13-19.)

Even if Gallowitsch, Jr. gave the Plaintiff's recommendations that Villalobos and Orlando be fired "particular weight," that alone would not be sufficient to satisfy the fourth factor. That is because the DOL regulations clearly state "an occasional suggestion with regard to the change in status of a co-worker" is not sufficient to show that an employee's recommendations on hiring or firing were given a particular weight. 29 C.F.R. § 541.105; see also Costello v. Home Depot USA, Inc., 928 F. Supp. 2d 473, 489 (D. Conn. 2013) ("The court notes that the regulations state that the frequency with which an employee's suggestions and

recommendations are sought and relied upon are among the factors courts should consider when evaluating this factor.").

Therefore, in light of the sparse and seemingly contradictory evidence on the record regarding the Plaintiff's authority over personnel decisions at Bistro 44, drawing all inferences in favor of the Plaintiff, the Court finds that the Defendants have not established the absence of a material issue of fact as to the fourth factor.

In sum, the Court finds that there are genuine issues of material fact as to the second, third, and fourth factors of the executive exemption test. As all of the four factors must be satisfied for the Defendants to prevail on their executive exemption defense, the Court finds that summary judgment is inappropriate on that basis. See Stevens v. HMSHost Corp., No. 10-CV-3571 (ILG) (VVP), 2015 WL 4645734, at *6 (E.D.N.Y. Aug. 5, 2015) ("Since all four factors

Page 30

listed in 29 C.F.R. § 541.100(a) must be satisfied for defendants to prevail on their executive exemption defense, however, the lack of a material dispute over this issue does not warrant dismissal of plaintiff's suit.").

C. As to the Creative Professional Exemption

The Defendants next contend that the Plaintiff was employed as a "creative professional" who is exempt from overtime under Section 541.302 of Title 29 of the Code of Federal Regulations ("Section 541.302"). Section 541.302(a) states:

> To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.

29 C.F.R. § 541.302(a).

According to a DOL interpretation accompanying its April 23, 2004 amendments to the regulations governing the overtime exemptions, the "creative professional exemption" can apply to chefs in certain circumstances. In that regard, the DOL concluded:

> to the extent a chef has a primary duty of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items, such chef may be considered an exempt creative professional . . . . However, there is a wide variation in duties of chefs, and the creative professional exemption must be applied on a case-by-case basis with particular focus on the creative duties and abilities of the particular chef at issue. The Department intends that the creative professional exemption extend only to truly 'original' chefs, such as those who work at five-star or gourmet establishments, whose primary duty requires 'invention, imagination, originality, or talent.'"

Defining and Delimiting the Exemptions, 69 Fed. Reg. 22122-01.

"While 'the Department of Labor's interpretations of its own regulations are not binding and do not have the force of law , . . . we will generally defer to an agency's interpretation of its

Page 31

own regulations so long as the interpretation is not plainly erroneous or inconsistent with the law.'" Pippins v. KPMG, LLP, 759 F.3d 235, 242 (2d Cir. 2014) (quoting Ramos v. Baldor Specialty Foods, Inc., 687 F.3d 554, 559 (2d Cir. 2012)).

Here, neither party argues that the DOL's interpretation of the "creative professional exemption" as it relates to chefs is either erroneous or inconsistent with the law. Nor has the Court identified any legal authority disagreeing with the DOL's interpretation of Section 541.302 as it relates to chefs. Thus, the Court defers to the DOL's interpretation and finds that a chef can be a "creative professional" exempt from the FLSA overtime requirements under the particular circumstances identified by the DOL — namely, if the court finds that "the chef has a primary duty of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items[.]" Defining and Delimiting the Exemptions, 69 Fed. Reg. 22122-01.

The Defendants assert that it is undisputed the Plaintiff was a "truly original chef because he "created unique dishes" and Bistro 44 is a "gourmet establishment." (The Defs.' Mem. of Law at 21.) In support of the latter assertion, the Defendants submit a document showing that Zagat rated Bistro 44 as excellent for the period 2011 to 2012, when the Plaintiff was the executive chef. (Id.)

Again, the Court finds that material disputes of fact preclude it from finding that the Plaintiff is a "creative professional" exempt from the FLSA and NYLL overtime requirements. As noted above, the Plaintiff testified that his primary role was cooking "on the line" with other cooks. He further stated that while he did develop some of the dishes, "Paul [Gallowitsch] Sr. was the one that was most involved with what the menu should be, what it should taste like, what it should look like." (Meyer Decl., Ex. B, at Tr. 99:19-22.)

Page 32

The Defendants dispute the Plaintiff's testimony, relying primarily on the testimony of Gallowitsch, Sr. and Gallowitsch, Jr. They also point to the website of Blue Fine Catering, the Plaintiff's catering company, which describes the Plaintiff's job at Bistro 44 as follows: "[The Plaintiff] created exciting New Menu's at the Bistro [44] when it reopened to rave reviews." (Meyer Decl., Ex. H.)

Even if this description is accurate, the Court notes that it does not answer the question of whether the Plaintiff's role in developing the menu at Bistro 44 was his "primary duty." On the contrary, as discussed earlier, the explanation of the Plaintiff's duties is contested by both parties.

Moreover, it is not undisputed that Bistro 44 was a "gourmet" restaurant, as the Defendants contend. While Zagat rated the restaurant as "excellent," Newsday gave it a one star review. Further, although the Plaintiff testified that he did not believe the restaurant to be "gourmet," Gallowitsch, Jr. stated that it served "gourmet" and "really high-end food." (Pl.'s Ex. A, at Tr. 151:23-25; Pl.'s Ex. C, at Tr. 110:24-111:8.)

Without making credibility determinations that are clearly inappropriate at this summary judgment stage of the litigation, the Court cannot conclude that the Plaintiff's "primary duty" was "creating or designing unique dishes," nor can it conclude that Bistro 44 was a "gourmet" restaurant. Thus, the Court also declines to grant

summary judgment in favor of the Defendants on the basis of the "creative professional exemption." See Defining and Delimiting the Exemptions, 69 Fed. Reg. 22122-01 ("The Department intends that the creative professional exemption extend only to truly 'original' chefs, such as those who work at five-star or gourmet establishments, whose primary duty requires 'invention, imagination, originality, or talent.'").

Page 33

D. As to the Learned Professional Exemption

The FLSA also excludes from its overtime provisions "professionals" whose "primary duty [is] . . . the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.301.

The DOL regulations impose a three-pronged test to determine whether a primary duty qualifies for the professional exemption: the work must be (1) "predominantly intellectual in character, and ... requir[e] the consistent exercise of discretion and judgment"; (2) "in a 'field of science or learning,"; and (3) of a type where "specialized academic training is a standard prerequisite for entrance into the profession[.]" 29 C.F.R. § 541.301(a), (d); see also Pippins v. KPMG, LLP, 759 F.3d 235, 238 (2d Cir. 2014) (same).

With regard to chefs, the regulations state:

> Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

29 C.F.R. § 541.301.

Here, the Plaintiff did not earn a four-year degree in a culinary arts program and rather, earned a two-year associates' degree from the ACI. However, the Defendants contend that the Plaintiff still qualifies as a "learned professional" because of his prior experience as an executive chef at Via Veneto in Jericho and at Café Athena in San Diego. (The Defs.' Mem. of Law at 22.)

The Plaintiff disputes that his prior work experience is an appropriate substitute for a four-year culinary degree, emphasizing that much of his prior work was in sales and

Page 34

construction, which are areas that are not related to cooking. (The Pl.'s Opp'n Mem. of Law at 14.) Here again, the Court finds material issues of fact which preclude summary judgment.

The DOL has interpreted its regulations to allow "work experience to substitute for a four-year college degree in the culinary arts." Defining and Delimiting the Exemptions, 69 FR 22122-01. However, regardless of what the Plaintiff's work experience is, the DOL has stated that "ordinary cooks" who "perform predominantly routine mental, manual, mechanical or physical work" do not qualify as "learned professionals." Id.; see also Garcia v. Pancho Villa's of Huntington Vill., Inc., No. CV 09-486 (ETB), 2011 WL 1431978, at *4 (E.D.N.Y. Apr. 14, 2011) ("Moreover, the profession of a cook or a chef does not fall within the field of 'science or learning.' Finally, nothing in the record before the Court indicates that Garcia acquired any knowledge though a 'prolonged course of specialized

intellectual instruction.' Accordingly, Garcia does not meet the requirements necessary to exempt him from the FLSA's coverage as a 'learned professional.'").

Here, as noted above, the parties dispute whether the Plaintiff was the equivalent of a line chef, as he contends, or a gourmet chef that performed work of a "predominantly intellectual in character," as the Defendants contend. Without testimony from other employees in the kitchen or objective documents setting forth the Plaintiff's duties, the Court is not able to resolve this factual dispute without making credibility determinations which are, of course, the sole province of the jury. Accordingly, the Court also denies the Defendant's motion with regard to the "learned professional" exemption.

E. As to the Administrative Professional Exemption

Finally, the Defendants argue that the Plaintiff was an administrative employee exempt from overtime.

Page 35

Under this exemption, the FLSA's overtime requirements are inapplicable to employees (1) who are "[c]ompensated on a salary or fee basis at a rate of not less than $455 per week"; (2) "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers"; and (3) "[w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a).

Here, as discussed with regard to the executive exemption, there is a material dispute of fact as to whether the Plaintiff's primary duty as executive chef "directly related to management or general business operations," as the Defendants contend, or whether the Plaintiff's primary duty related solely to cooking, as the Plaintiff contends. Also, as discussed earlier with respect to the executive exemption, there is a material dispute of fact as to how much discretion and independent judgment the Plaintiff exercised with regard to the menu and the staff in the kitchen of Bistro 44. Therefore, the Court finds genuine issue of material facts as to the second and third factors of the administrative exemption test.

The Defendant is required to prove all three factors in order to demonstrate that the Plaintiff is an administrative employee exempt from overtime. Accordingly, the Court finds, as it did with the executive exemption, that the issue of whether the administrative exemption applies cannot be resolved at this stage of the litigation. See, e.g., Callari v. Blackman Plumbing Supply, Inc., 988 F. Supp. 2d 261, 284 (E.D.N.Y. 2013) (Spatt, J) ("Thus, as with the executive employee exemption, the issue of whether the administrative exemption applies to the [p]laintiff 'cannot be resolved at this stage of the litigation, because there exist disputed issues of material fact over whether [the plaintiff's] 'primary duty [was] the performance of office or non-manual work directly related to the management or general business operations of [the Defendants or the

Page 36

Defendants'] customers.'") (quoting Hendricks v. J.P. Morgan Chase Bank, N.A., 677 F.Supp.2d 544, 559 (D. Conn. 2009)); see also Harper v. Gov't Employees Ins. Co., 754 F. Supp. 2d 461, 465-66 (E.D.N.Y. 2010) ("There is sharp disagreement concerning critical facts regarding the scope of [the] [p]laintiff's duties, and whether those duties allow [the] [p]laintiff to exercise the discretion and judgment required to characterize her position as exempt. The Second Circuit has indicated a very narrow interpretation of the FLSA administrative

exemption, and this court's holding can be determined only upon a clear finding of facts. Because [the] [p]laintiff has raised important questions concerning those facts, summary judgment must be denied.").

In conclusion, the Court finds that the Plaintiff has raised genuine issues of material fact as to whether he is exempt from the overtime requirements of the FLSA and the NYLL. Accordingly, the Court denies the Defendants' motion for summary judgment.

III. CONCLUSION

For the foregoing reasons, the Court denies the Defendants' motion for summary judgment.

SO ORDERED.
Dated: Central Islip, New York
August 31, 2015

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge

JORGE CRUZ, Plaintiff,
v.
AAA CARTING AND RUBBISH REMOVAL, INC.
and PASQUALE CARTALEMI, JR., an individual, Defendants.

Case No. 13-CV-8498 (KMK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

July 16, 2015

OPINION & ORDER

Appearances:

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KENNETH M. KARAS, District Judge:

Jorge Cruz ("Plaintiff") filed suit against AAA Carting and Rubbish Removal, Inc. ("AAA Carting") and Pasquale Cartalemi, Jr. ("Cartalemi") (collectively "Defendants"), alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., for failure to pay time and half for overtime hours and for failure to pay minimum wage, as well as violations of the New York Labor Law ("NYLL"), § 650 et seq., for the same conduct and for failure to pay

Page 2

the appropriate rate for spread of hours and failure to issue accurate hours and wage statements when payroll was issued. Defendants move to dismiss Plaintiff's federal claims under Rule 12 for lack of subject matter jurisdiction over the FLSA claims and for failure to state a claim for a minimum wage violation, and to dismiss the state law claims once the federal claims have been dismissed. Alternatively, Defendants move for summary judgement under Rule 56 on the ground that the FLSA does not apply to Plaintiff. For the following reasons, Defendants' Rule 12 Motion is denied in part and granted in part, and Defendants' Rule 56 Motion is denied.

I. Background

A. Factual Background

The following facts are taken from Plaintiff's Complaint, and are presumed to be true for the purpose of Defendants' Rule 12 Motion. Plaintiff was employed by AAA Carting and its Chief Executive Officer, Cartalemi, from November 27, 2010 to November 27, 2012. (*See* Compl. ¶¶ 8-9, 14-15 (Dkt. No. 1).)[1] AAA Carting "is a corporation providing trash removal services." (*Id.* ¶ 11.) "During his employment with Defendants, Plaintiff's duties included driving a garbage truck locally between Rye Brook and White Plains, New York." (*Id.* ¶ 16.) Plaintiff further asserts that his "duties did not require transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act," and that he "was not otherwise exempt from the overtime requirements of the FLSA and NYLL." (*Id.* ¶¶ 18-19.) Furthermore, Plaintiff alleges that the "qualifying annual volume of business for Defendants exceeds $500,000.00," and

Page 3

that Defendants' "employees are engaged in interstate commerce, as they all handle goods that have been and continue to be moved in interstate commerce." (*Id.* ¶ 10.)

"When Plaintiff was first employed, he was paid $20.00 an hour," and in June 2012 "the rate was increased to $25.51 an hour." (*Id.* ¶ 24.) However, Plaintiff alleges that he "was never paid for hours worked in excess of forty (40) hours." (*Id.* ¶ 25.) Plaintiff alleges, by way of example, that he worked a 60-hour work week from June 3 to 9, 2012, in that he worked "on Monday, June 4, 2012, from 5:30 a.m. to 4:45 p.m.; Tuesday, June 5, 2012, from 5:30 a.m. to 6:00 p.m.; Wednesday, June 6, 2012, from 5:30 a.m. to 5:15 p.m.; Thursday, June 7, 2012, from 5:30 a.m. to 3:45 p.m.; Friday, June 8, 2012, from 5:30 a.m. to 3:45 p.m.; and Saturday, June 9, 2012, from 1:30 a.m. to 9:30 a.m.," but was only paid for 40 hours that week. (*Id.* ¶ 23.) Plaintiff further alleges that he "frequently worked in excess of ten (10) hours in a single work day," but was "never paid for spread-of-hours throughout his employment," and that he "was provided with statements of hours or wages which inaccurately reflected the number of hours worked." (*Id.* ¶¶ 28-29.)

Defendants have submitted materials outside of the pleadings in support of their Motion for Summary Judgment, most of which evidence Plaintiff either disputes or asserts, by his counsel's Rule 56(d) declaration, that he needs discovery in order to dispute. The evidence submitted outside of the pleadings addresses the following points: First, according to Defendants, Plaintiff's route "required that he drive the truck several times a week over the state line into Connecticut." (Decl. of Pasquale P. Cartalemi, Jr. in Supp. of Mot. To Dismiss for Lack of Subject Matter Jurisdiction and/or for Summ. J. ("Cartalemi Decl.") ¶ 22 (Dkt. No. 31); *see also id.* Ex. E (Google Maps screenshots showing Plaintiff's alleged routes).) Plaintiff disputes these assertions, though he acknowledges that he "did drive on King Street, which crosses into

Page 4

Connecticut for forty-five seconds to reach a portion of his route . . . once per month," but maintains that he "did not collect any waste in Connecticut." (Decl. of Jorge Cruz in Opp'n to Defs.' Mot To Dismiss, for Judgment on the Pleadings, and/or for Summ. J. ("Cruz Decl.") ¶ 19 (Dkt. No. 35).) Second, according to Defendants, "[e]mployees whose duties includ[ed] traveling across state lines would sometimes be absent from work due to vacation, sick leave or for personal reasons," and "[d]uring such absences, it would be necessary for an employee from another route to help out by taking over the absent employee's route during his absence." (Cartalemi Decl. ¶ 14.) Plaintiff disputes this, alleging that "to the best of [his] knowledge, Defendants never made a driver abandon his route to cover the route of another driver that was absent," that "[d]uring [his] employment, [he] only drove [his] assigned route," and that "[a]t no time did Defendants ever require [him] to cover the route of another driver in the household waste division." (Cruz Decl. ¶¶ 20-22.) Also, in response generally to Defendants' use of materials outside the pleadings, Plaintiff's counsel asserts that he requires discovery "to demonstrate that Plaintiff's personal contact with interstate commerce was de minim[i]s." (Decl. of Adam A. Biggs, Esq. in Supp. of Discovery pursuant to Fed. R. Civ. P. 56(d) ("Biggs Decl.") ¶ 19 (Dkt. No. 37) (italics omitted).) Discovery is also needed, according to Plaintiff, to show that any interstate travel did not constitute a natural, integral, and inseparable part of his duties. In particular, Plaintiff says he needs discovery to ascertain "how many routes required a driver to have more than de minimis contact with interstate travel; how many drivers, within the entire class of household waste drivers, were required to drive interstate routes; how many intrastate

drivers have ever been called on to drive[] interstate; how many household waste drivers were ever called upon to cover interstate routes for other divisions; whether interstate routes were indiscriminately spread amongst all drivers; how . . . interstate routes [were] assigned; and

Page 5

whether a driver could avoid being called on to drive an interstate route." (*Id.* ¶ 25 (italics omitted).)

Third, Defendants assert that the recycling and garbage often has ended up out of state. In particular, Defendants claim that construction and demolition ("C&D") debris was typically exported out of state, (Cartalemi Decl. ¶ 7), that the recyclables are shipped out of New York both to other states and internationally, (*id.* ¶ 10), that "[t]here are limited landfills in New York so the garbage is shipped out of the state," (*id.* ¶ 11), and that "it has always been [Cartalemi's] understanding and intent that the waste AAA Carting transported to transfer stations would thereafter be shipped out of the state" "[g]iven that AAA Carting's business started out, and operated for its first ten years, exclusively as a 'roll-off' business where much of the C&D waste transported was shipped out of the state," (*id.*).[2] In response, Plaintiff asserts that "Defendants' business had multiple divisions, including construction debris, recycling, and household waste," and that he only collected and transported household waste. (Cruz Decl. ¶¶ 4-9.) Additionally, Plaintiff asserts that he "only deposited waste at the transfer station located in White Plains, New York," except that "[o]n one sole occasion [he] deposited waste at a transfer station located at 325 Yonkers Ave. Yonkers, New York." (*Id.* ¶ 17.) On the list of transfer stations submitted by Defendants, there is not a White Plains location listed, and with regard to the station located at 325 Yonkers Ave., Yonkers, NY, the document states that the destination of waste is "[u]nknown." (Cartalemi Decl. Ex. B (List of Transfer Stations), at unnumbered 2.) Furthermore, Plaintiff's counsel contends that he requires discovery "to demonstrate that the recycling and construction debris divisions are distinct from the household division" and thus

Page 6

evidence related to the other divisions "is irrelevant in regards to household waste." (Biggs Decl. ¶¶ 12-15.) Additionally, Plaintiff "seeks evidence to demonstrate that when Defendants collected the waste they did not have any specific out-of-state recipient in mind beyond the transfer station." (*Id.* ¶ 30.) In particular, Plaintiff seeks to examine Defendants' contracts with municipalities and transfer stations to find "facts that will illustrate that the ultimate locations of the household waste, beyond the transfer station, were immaterial to Defendants." (*Id.*)

Finally, Defendants assert that the Department of Labor ("DOL") conducted a company-wide audit of AAA Carting and "issued a Compliance Action Report finding that the Motor Carrier Exemption applied to AAA Carting's employees because some of the waste or refuse transported by AAA Carting is shipped out-of-state or overseas," (Cartalemi Decl. ¶¶ 15-19), and states that "[d]rivers and helpers routinely pick up recyclables, construction debris, etc[.] that is sent out-of-state or overseas thus entitling the company to the Motor Carriers exemption 13(b)1," (*id.* Ex. C ("DOL Compliance Action Report"), at 2). Plaintiff responds that he requires discovery on whether the DOL Report only addressed the recycling and construction debris portion of the company, and also asserts that this Report is inadmissible hearsay. (Biggs Decl. ¶¶ 34-36.)

B. Procedural Background

Plaintiff filed suit on November 27, 2013, (Dkt. No. 1), and Defendants answered the

Complaint on April 17, 2014, (Dkt. No. 11). On June 6, 2014, the Court held a pre-motion conference, and set a scheduling order for the submission of Defendants' motion. (Dkt. (minute entry for June 6, 2014); Dkt. No. 20.) Thereafter, Defendants filed their Motion and accompanying papers, (Dkt. Nos. 29-33), Plaintiff filed his Opposition, (Dkt. Nos. 34-37), and Defendants filed their Reply, (Dkt. Nos. 38-39). Discovery has been stayed pending resolution

Page 7

of the question of whether the Court has subject matter jurisdiction over this case. (*See* Pl. Jorge Cruz's Mem. of Law in Opp'n to Defs.' Mot To Dismiss, for Judgment on the Pleadings and/or for Summ. J. ("Pl.'s Mem.") 9 (Dkt. No. 36); Biggs Decl. ¶ 3.)

II. Discussion

A. Rule 12 Motion

Defendants move for judgment on the pleadings (1) pursuant to Rule 12(c) and Rule 12(h)(3), claiming that the Court lacks subject matter jurisdiction, and (2) pursuant to Rule 12(c), claiming that Plaintiff has not adequately pleaded a minimum wage violation.[3]

1. Subject Matter Jurisdiction

First, Defendants move for judgment on the pleadings under Rule 12(c) and Rule 12(h)(3), arguing that Plaintiff falls into the FLSA's motor carrier exemption and therefore that the Court does not have subject matter jurisdiction over his claims.

a. Standard of Review

"Where a Rule 12(c) motion asserts that a court lacks subject matter jurisdiction, the motion is governed by the same standard that applies to a Rule 12(b)(1) motion." *Xu v. City of New York*, No. 08-CV-11339, 2010 WL 3060815, at *2 n. 2 (S.D.N.Y. Aug. 3, 2010); *see also*

Page 8

S.E.C. v. Rorech, 673 F. Supp. 2d 217, 220 (S.D.N.Y. 2009) ("The standards to be applied to a motion for judgment on the pleadings pursuant to Rule 12(c) are the same as those applied to a motion to dismiss pursuant to Rule 12(b)."). On a motion to dismiss pursuant to Rule 12(b)(1), a court must dismiss a claim if it "lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (internal quotation marks omitted), *aff'd*, 561 U.S. 247 (2010). Additionally, the difference between a motion made under Rule 12(b)(1) and one made under Rule 12(h)(3) "is largely academic, and the same standards are applicable to both types of motions." *Greystone Bank v. Tavarez*, No. 09-CV-5192, 2010 WL 3325203, at *1 (E.D.N.Y. Aug. 19, 2010). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). In deciding a Rule 12 motion to dismiss, the Court "'must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff,'" *Morrison*, 547 F.3d at 170 (quoting *Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006) (citation and internal quotation marks omitted)), but "'jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it,'" *id.* (quoting *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003)). In deciding the motion, the court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [it] may not rely on conclusory or hearsay statements contained in the affidavits." *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004); *see also Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) ("In

resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court . . . may refer to evidence outside the pleadings.").

Page 9

b. Analysis

Addressing first the issue of subject matter jurisdiction, 28 U.S.C. § 1331 provides that "[t]he district courts . . . have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiff asserts that, because he brings claims under the FLSA, the Court has federal question jurisdiction over his federal claims and has supplemental jurisdiction over his state law claims. (*See* Pl.'s Mem. 5.) Defendants, conversely, argue that the motor carrier exemption to the FLSA exempts Defendants from having to follow the FLSA with respect to Plaintiff, thus depriving the Court of subject matter jurisdiction. (*See* Mem. of Law in Supp. of Defs.' Mot. To Dismiss for Lack of Subject Matter Jurisdiction and/or for Summ. J. ("Defs.' Mem.") 8-18, 20 (Dkt. No. 32).)

The Supreme Court has held that "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue," "[b]ut when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006) (footnote omitted). The jurisdictional grant of the FLSA provides: "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." 29 U.S.C. § 216(b). This provision clearly does not indicate that Congress intended for the statutory limitation at issue here—the motor carrier exemption—to be jurisdictional. *See Jackson v. Maui Sands Resort, Inc.*, No. 08-CV-2972, 2009 WL 7732251, at *2 (N.D. Ohio Sept. 8, 2009) ("[T]he [c]ourt is unable to ascertain . . . how this language [in the statutory grant of

Page 10

jurisdiction] might be construed to show that Congress clearly intended to deprive the courts of jurisdiction where a defendant employer qualifies for an exemption under the FLSA.").

In support of their argument that the motor carrier exemption is jurisdictional, Defendants cite one, pre-*Arbaugh*, case, *Cariani v. D.L.C. Limousine Service, Inc.*, 363 F. Supp. 2d 637 (S.D.N.Y. 2005). In that case, the court ruled that because either the motor carrier exemption to the FLSA or the taxicab exemption to the FLSA applied, the "court lack[ed] subject matter jurisdiction over the plaintiff's federal claim." *Id.* at 649. However, the court in that case decided the issue on a Rule 12(b)(1) motion "without addressing the jurisdiction-merits distinction and after allowing further discovery on the exemption issues." *Casares v. Henry Limousine Ltd.*, No. 09-CV-458, 2009 WL 3398209, at *1 (S.D.N.Y. Oct. 21, 2009) (discussing *Cariani*); *see also Saca v. Dav-El Reservation Sys., Inc.*, 600 F. Supp. 2d 483, 485 (E.D.N.Y. 2009) ("The district court in *Cariani* . . . assumed without any explicit analysis that the FLSA exemption issue went to the court's jurisdiction over the controversy rather than the merits thereof."). Moreover, as Plaintiff notes, this reasoning has not been followed by other courts in the Second Circuit, which have held that whether an employer fits into an FLSA exemption goes to the merits of the claim, not to the Court's jurisdiction. *See Benitez v. F & V Car Wash, Inc.*, No. 11-CV-1857, 2012 WL 1414879, at *1 (E.D.N.Y. Apr. 24, 2012) ("[A]fter review of recent case law

in [the Second] Circuit, the court concurs with [the] [p]laintiffs and concludes that the question of whether a defendant qualifies as an enterprise under the FLSA is not a jurisdictional issue, but an element that a plaintiff must establish in order to prove liability."); *Casares*, 2009 WL 3398209, at *1 (noting that there is "substantial authority that a Rule 12(b)(1) motion for lack of subject matter jurisdiction is not the appropriate procedural device for defendants to assert exemptions to the FLSA" and collecting cases); *Fox v. Commonwealth Worldwide*

Page 11

Chauffeured Transp. of N.Y., LLC, No. 08-CV-1686, 2009 WL 1813230, at *2 (E.D.N.Y. June 25, 2009) (holding that the question of whether the defendant is subject to the FLSA exemptions is a merits question only, and reasoning that this conclusion is "supported by . . . Second Circuit case law and consistent with numerous other district courts in this circuit"); *Saca*, 600 F. Supp. 2d at 485 (disagreeing with *Cariani* and noting that "numerous other courts have considered the issue and concluded that a defendant claiming to be exempt from the FLSA is challenging the merits of the FLSA claim rather than the court's jurisdiction over the subject matter"); *Velez v. Vassallo*, 203 F. Supp. 2d 312, 330 (S.D.N.Y. 2002) ("To prevail on a claim under the FLSA, a plaintiff must, of course, demonstrate that the defendant is covered by the Act, such as by showing that the defendant constitutes an enterprise engaged in commerce. However, this required showing is simply an element of the cause of action. A plaintiff's failure to make this showing constitutes a failure on the merits." (citation omitted)).

Moreover, while "[i]t is true that courts sometimes refer to the plaintiff's obligation to prove a defendant's covered status as 'jurisdictional,'" the term is "overused" and "one that is often used without explicit consideration of whether the court's authority to adjudicate the type of controversy involved in the action" is really at stake." *Velez*, 203 F. Supp. 2d at 330 (some internal quotation marks omitted). Indeed, as recognized by the Second Circuit in *Da Silva v. Kinsho International Corporation*, 229 F.3d 358 (2d Cir. 2000), "[w]hether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question," and "[c]ourt decisions often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Id.* at 361. Therefore, given that the vast majority of the courts in the Second Circuit

Page 12

have held that the issue of whether an employer falls into an FLSA exemption is a merits question and not a jurisdictional threshold, and in light of the Supreme Court's ruling that a limitation on a statute's scope should be considered jurisdictional only when the statute "clearly states" that it should be so considered, *Arbaugh*, 546 U.S. 515, the Court denies Defendants' Motion to dismiss for lack of subject matter jurisdiction.

2. Minimum Wage Violation

Next, Defendants move for judgment on the pleadings under Rule 12(c) with respect to Plaintiff's claim that he was not paid minimum wage under the FLSA for hours he worked in excess of 40 hours a week.

a. Standard of Review

"The standard of review on a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is the same standard of review applied to a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Marte v. Safety Bldg. Cleaning Corp.*, No. 08-CV-1233, 2009 WL

2827976, at *1 (S.D.N.Y. Sept. 2, 2009). With respect to Rule 12(b)(6) motions, the Supreme Court has held that although a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the 'grounds' of his [or her] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (second alteration in original) (citations omitted). Instead, the Supreme Court has emphasized that "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.*, and that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563. A plaintiff must allege "only enough facts to state a claim to relief that is plausible on its

Page 13

face." *Id.* at 570. But if a plaintiff has "not nudged [his or her] claims across the line from conceivable to plausible, the[] complaint must be dismissed." *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2))).

For the purposes of a motion for judgment on the pleadings, as with a motion to dismiss under 12(b)(6), the Court is required to consider as true the factual allegations contained in the Complaint. *See Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) ("We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6), accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor." (italics and internal quotation marks omitted)); *Gonzalez v. Caballero*, 572 F. Supp. 2d 463, 466 (S.D.N.Y. 2008) (same). In deciding a motion for judgment on the pleadings, as with a motion to dismiss, "a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (internal quotation marks omitted) (applying standard to a Rule 12(b)(6) motion); *see also Smith v. City of New York*, No. 13-CV-2395, 2014 WL 4904557, at *3 (E.D.N.Y. Sept. 30, 2014) ("When deciding a motion on the pleadings, the court must confine its consideration to the pleadings and their attachments, to documents . . .

Page 14

incorporated in the complaint by reference, and to matters of which judicial notice may be taken" (alteration in original) (internal quotation marks omitted)).

b. Analysis

Plaintiff claims that because he alleges that he was paid nothing for hours worked in excess of 40 hours a week, he was not paid minimum wage under the FLSA. (Pl.'s Mem. 3-4, 24-25.) However, this argument fails. While Plaintiff may state a claim for a failure to pay *overtime* for the hours worked in excess of 40 hours a week, he does not necessarily state a claim for failure to pay *minimum wage* for those hours, because "[a]n employee cannot state a claim for a minimum wage violation 'unless [his] *average* hourly wage falls below the federal minimum wage.'" *Johnson v. Equinox Holdings, Inc.*, No. 13-CV-6313, 2014 WL 3058438, at *3 (S.D.N.Y. July 2, 2014)

(alteration in original) (emphasis added) (quoting *Lundy v. Catholic Health Sys. of Long Is. Inc.*, 711 F.3d 106, 115 (2d Cir. 2013)). An employee's average hourly wage is calculated "by dividing his total remuneration for employment . . . in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. "For minimum-wage recovery under the FLSA, the pertinent question is whether 'the amount of compensation received by an employee results in a straight-time hourly rate that is less than the applicable federal minimum wage.'" *Chuchuca v. Creative Customs Cabinets Inc.*, No. 13-CV-2506, 2014 WL 6674583, at *9 n.10 (E.D.N.Y. Nov. 25, 2014) (quoting *Gordon v. Kaleida Health*, 847 F. Supp. 2d 479, 490 (W.D.N.Y. 2012)).

Here, Plaintiff alleges that when he was first employed, he was paid $20.00 an hour, and that his pay rate was increased to $25.51 an hour in June 2012. (Compl. ¶ 24.) He also alleges that one week in June 2012 he worked a 60-hour work week, and that he frequently worked in excess of 10 hours per day. (*Id.* ¶¶ 23, 28.) Furthermore, he alleges that he was not paid for the

Page 15

hours he worked in excess of 40 hours a week. (*Id.* ¶ 25.) However, as per Plaintiff's allegations, he was paid for 40 hours a week at a rate of either $20.00 or $25.51 an hour, for a weekly salary of either $800 or $1,020.40 per week. The most Plaintiff alleges that he worked in a week is 60 hours. Thus, assuming Plaintiff's allegations to be true, he was paid a minimum of either $13.33 or $17.01 an hour for actual hours worked, either of which rates is above the federal and state minimum wages. *See Mendoza v. Little Luke, Inc.*, No. 14-CV-3416, 2015 WL 998215, at *5 (E.D.N.Y. Mar. 6, 2015) (noting that federal minimum wage under the FLSA is currently $7.25 an hour and New York minimum wage under the NYLL is $8.75 an hour).[4] Plaintiff offers no support for his theory that he was not paid the minimum wage for the weeks he worked in excess of 40 hours a week because the straight hourly rate was above the minimum wage when accounting for the hours for which he was not paid. Indeed, Plaintiff's reasoning is undercut by *Lundy*, in which the Second Circuit held that employees are not entitled to recovery for unpaid hours worked up to 40 hours a week, so long as the average hourly rate still exceeds the minimum wage. *See Lundy*, 711 F.3d at 116 ("'[T]he agreement to work certain additional hours for nothing was in essence an agreement to accept a reduction in pay. So long as the reduced rate still exceeds [the minimum wage], an agreement to accept reduced pay is valid . . . .' [The] [p]laintiffs here have not alleged that they were paid below minimum wage." (alterations in original) (quoting *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 494 (2d Cir. 1960))). Here, Plaintiff may be entitled to recovery for overtime hours worked in excess of 40 hours a week, but the Court finds that under the reasoning in *Lundy*, Plaintiff's FLSA minimum wage claim should be dismissed.

Page 16

B. Rule 56 Motion

1. Standard of Review

Summary judgment shall be granted where the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 123-24 (2d Cir. 2014) (same). "In determining whether summary judgment is appropriate," a court must "construe the facts in the light most favorable to the non-moving party and . . . resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (internal quotation marks omitted); *see*

also Borough of Upper Saddle River v. Rockland Cnty. Sewer Dist. No. 1, 16 F. Supp. 3d 294, 314 (S.D.N.Y. 2014) (same). Additionally, "[i]t is the movant's burden to show that no genuine factual dispute exists." *Vt. Teddy Bear Co., v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004); *see also Aurora Commercial Corp. v. Approved Funding Corp.*, No. 13-CV-230, 2014 WL 1386633, at *2 (S.D.N.Y. Apr. 9, 2014) (same). "However, when the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim," in which case "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs., L.P. v. PriceWaterhouse Coopers LLP*, 735 F.3d 114, 123 (2d Cir. 2013) (alterations and internal quotation marks omitted). Further, "[t]o survive a [summary judgment] motion . . . , [a nonmovant] need[s] to create more than a 'metaphysical' possibility that his allegations were correct; he need[s] to 'come forward with specific facts showing that there is a genuine issue for trial,'" *Wrobel v. Cnty. of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) (emphasis omitted) (quoting *Matsushita Elec.*

Page 17

Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)), and "cannot rely on the mere allegations or denials contained in the pleadings," *Walker v. City of New York*, No. 11-CV-2941, 2014 WL 1244778, at *5 (S.D.N.Y. Mar. 26, 2014) (internal quotation marks omitted) (citing, inter alia, *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009) ("When a motion for summary judgment is properly supported by documents or other evidentiary materials, the party opposing summary judgment may not merely rest on the allegations or denials of his pleading . . . .")).

"On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law." *Royal Crown Day Care LLC v. Dep't of Health & Mental Hygiene of City of N.Y.*, 746 F.3d 538, 544 (2d Cir. 2014) (internal quotation marks omitted). At summary judgment, "[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Brod*, 653 F.3d at 164 (internal quotation marks omitted); *see also In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, MDL No. 1358, No. M21-88, 2014 WL 840955, at *2 (S.D.N.Y. Mar. 3, 2014) (same). Thus, a court's goal should be "'to isolate and dispose of factually unsupported claims.'" *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 495 (2d Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)); *see also Schatzki v. Weiser Capital Mgmt., LLC*, No. 10-CV-4685, 2013 WL 6189465, at *14 (S.D.N.Y. Nov. 26, 2013) (same).

"If the party opposing a summary judgment motion shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may deny the motion or allow time to take discovery." *Walden v. Sanitation Salvage Corp.*, No. 14-CV-112, 2015 WL 1433353, at *2 (S.D.N.Y. Mar. 30, 2015); *see also* Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts

Page 18

essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."). "The affidavit or declaration must describe: (1) what facts are sought and how they are to be obtained, (2) how such facts are reasonably expected to raise a genuine issue of material fact, (3) what

efforts the affiant has made to obtain them, and (4) why the affiant's efforts were unsuccessful." *Walden*, 2015 WL 1433353, at *2. However, "[t]here is a critical distinction between cases where a litigant opposing a motion for summary judgment requests a stay of that motion to conduct additional discovery and cases where that same litigant opposes a motion for summary judgment on the ground that it is entitled to an opportunity to commence discovery with respect to the non-movant's claims." *Desclafani v. Pave-Mark Corp.*, No. 07-CV-4639, 2008 WL 3914881, at *7 (S.D.N.Y. Aug. 22, 2008) (emphasis, alterations, and internal quotation marks omitted); *see also Walden*, 2015 WL 1433353, at *3 (same). "Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000). But if the nonmovant "give[s] the . . . court no basis to conclude that further discovery would yield" information that would create a genuine dispute as to material facts, then summary judgment may be appropriate, even before discovery has been conducted. *Meloff v. New York Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995).

2. Analysis

The FLSA applies generally to "employees engaged in interstate commerce." *Dauphin v. Chestnut Ridge Transp., Inc.*, 544 F. Supp. 2d 266, 271 (S.D.N.Y. 2008). Among other things, the FLSA requires employers to pay overtime wages to certain employees who work more than 40 hours per week. *See* 29 U.S.C. § 207. However, the FLSA has also exempted classes of

Page 19

employees from its wage protections. "Because the FLSA is a remedial law, [courts] must narrowly construe its exemptions." *Reiseck v. Universal Commc'ns of Miami, Inc.*, 591 F.3d 101, 104 (2d Cir. 2010) (footnote omitted). Moreover, an employer bears the burden of establishing that an exemption applies. *See Young v. Cooper Cameron Corp.*, 586 F.3d 201, 204 (2d Cir. 2009) ("The employer has the burden of proving that the employee clearly falls within the terms of the exemption."); *Clarke v. JPMorgan Chase Bank, N.A.*, No. 08-CV-2400, 2010 WL 1379778, at *15 (S.D.N.Y. Mar. 26, 2010) (same); *Franklin v. Breton Int'l, Inc.*, No. 06-CV-4877, 2006 WL 3591949, at *2 (S.D.N.Y. Dec. 11, 2006) (same).

Defendants argue that they are exempt from paying Plaintiff in accordance with the FLSA because Plaintiff fits into one of the FLSA's exemptions: the motor carrier exemption. This exemption has its roots in a desire for uniformity in regulation. *See Dauphin*, 544 F. Supp. 2d at 271 ("The purpose of [the motor carrier] exemption is to prevent conflict between the FLSA and the Motor Carrier Act."). So as to not subject employers to the possibility of overlapping or inconsistent statutory requirements, the FLSA provides that it does not apply to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49," which is the Motor Carrier Act (the "MCA"). 29 U.S.C. § 213(b)(1); *see also Bilyou v. Dutchess Beer Distrib., Inc.*, 300 F.3d 217, 222-23 (2d Cir. 2002) (same). "Section 31502 grants the Secretary [of Transportation] the authority to prescribe qualifications and maximum hours of service of employees of a motor carrier [or motor private carrier]. This grant of authority applies to transportation by motor carrier [or motor private carrier] of property in interstate or foreign commerce on a public highway." *Walden*, 2015 WL 1433353, at *3 (citing 49 U.S.C. §§ 13501, 13502). Thus, there are two requirements that must be met for an employee

Page 20

to fall under the motor carrier exemption: (1) "the employer must be within the jurisdiction of the Secretary by virtue of operating as a motor carrier [or a motor private carrier], as defined by the statute," and (2) "the individual employee must fall within an exempt classification," which means that the employee (a) "must engage in activities of a character directly affecting the safety" (b) of "operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the [MCA]." *Id.* (internal quotation marks omitted). The Court will address each of these requirements in turn.

First, Defendant AAA Carting must be operating as a motor carrier or as a motor private carrier as defined by the MCA for the motor carrier exemption to apply. Under the MCA, a motor carrier is defined as a person "providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(14).[5] A motor private carrier "means a person, other than a motor carrier, transporting property by motor vehicle when—(A) the transportation is as provided in section 13501 of this title; (B) the person is the owner, lessee, or bailee of the property being transported; and (C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise." *Id.* § 13102(15). Additionally, during the period of Plaintiff's employment, from 2010 to 2012, the MCA has applied only to vehicles over 10,000 pounds. *See Carter v. Tuttnaeur U.S.A. Co.*, — F. Supp. 3d —, 2015 WL 148468, at *4 (E.D.N.Y. Jan. 12, 2015) (explaining the amendments that have been made to the statutory text, and noting that 2005 and 2008 amendments provided that the MCA exemption "does not apply to motor vehicles

Page 21

that weigh 10,000 pounds or less"). Defendants contend, and Plaintiff does not dispute, that AAA Carting is a motor private carrier. (*See* Defs.' Mem. 10; *see generally* Pl.'s Mem.)[6] Moreover, the evidence set forth by Defendants is that "AAA Carting's garbage trucks all weigh well in excess of 10,000 pounds, including the one driven by Plaintiff." (Cartalemi Decl. ¶ 8; *see also id.* Ex. A (AAA Carting Vehicle Schedule) (providing the gross vehicle weights of Defendants' trucks).) Plaintiff does not dispute this fact, nor does Plaintiff's counsel indicate in his declaration that he believes that discovery will create a genuine factual dispute about the weight of the trucks.

Second, the employee must engage in activities directly affecting safety. Here, there is no dispute that Plaintiff was employed as a driver. (*See* Cruz Decl. ¶ 3 ("I drove a garbage truck that collected household waste."); *id.* ¶ 5 ("I only collected and drove household waste"); Cartalemi Decl. ¶ 21 ("Plaintiff was employed by AAA Carting as a garbage truck driver . . . ."); Compl. ¶ 16 ("Plaintiff's duties included driving a garbage truck . . . .").) Nothing in Plaintiff's counsel's declaration suggests that discovery would yield information that Plaintiff was involved

Page 22

in anything other than driving. And it is well established that driving is an activity that directly affects safety. *See Morris v. McComb*, 332 U.S. 422, 430 (1947) ("The drivers are full-time drivers of motor vehicles well within the definition of that class of work by the Commission if the work is done in interstate commerce."); *Walden*, 2015 WL 1433353, at *3, *6 ("The four broad categories of workers whose duties are said to directly affect the safety of vehicle operation are: (1) drivers, (2) mechanics, (3) loaders, and (4) helpers of the first three, . . . [and] [t]he case law regarding the motor carrier exemption's application to drivers is well-established."); *McBeth v. Gabrielli Truck Sales, Ltd.*, 768 F. Supp. 2d 383, 390 (E.D.N.Y. 2010) ("The Department of Labor interprets the motor carrier exemption to apply to drivers, driver's

helpers, loaders, or mechanics whose work directly affects the safety of operation of vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the MCA." (citing 29 C.F.R. § 782.2(b)(2)(i)(ii))); *Dauphin*, 544 F. Supp. 2d at 274 ("The activities of drivers affect safety of operations of motor vehicles . . . .").

The final requirement—and the only one that Plaintiff contests—is the interstate commerce requirement, which requires that Plaintiff must affect the safety of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce. There are two general methods of establishing sufficient involvement in interstate commerce. First, the exemption will apply if interstate travel is a "natural, integral, and inseparable part of the employee['s] duties." *See Williams v. Tri-State Biodiesel, LLC*, No. 13-CV-5041, 2015 WL 305362, at *7 (S.D.N.Y. Jan. 23, 2015) (alterations and internal quotation marks omitted). Second, even if an employee transports the goods wholly intrastate, the exemption may apply if the goods "are involved in a practical continuity of movement in the flow of interstate commerce." *Bilyou*, 300 F.3d at 223 (internal quotation marks omitted). The

Page 23

Court will address whether the undisputed evidence is sufficient to bring Plaintiff within either of these categories such that summary judgment is appropriate, even without discovery.

First, it is undisputed that Plaintiff, at the very least, drove out of state for forty-five seconds once a month as part of his duties. (*See* Cruz Decl. ¶ 19 (admitting that he "did drive on King Street, which crosses into Connecticut for forty-five seconds to reach a portion of his route . . . once per month," but stating that he "did not collect any waste in Connecticut"); *see also* Cartalemi Decl. ¶ 22; *id.* Ex. E (Google Maps screenshots showing Plaintiff's alleged routes).)[7] Defendants argue that even this minimal interstate activity is sufficient to bring Plaintiff within the motor carrier exemption, while Plaintiff argues that such de minimis interstate activities are insufficient. Indeed, courts have applied "[t]he de minimis rule," and thus have held that the motor carrier exemption did not apply, "where the employee's connection with anything affecting interstate motor carrier operations was so indirect and casual as to be trivial." *Crooker v. Sexton Motors, Inc.*, 469 F.2d 206, 210 (1st Cir. 1972) (italics omitted) (citing *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 708 (1947)). However, "[i]n determining whether an employee's activities . . . are de minimis, it is important to focus on 'the character of the activities rather than the proportion of either the employee's time or of his activities.'" *Masson v. Ecolab, Inc.*, No. 04-CV-4488, 2005 WL 2000133, at *7 (S.D.N.Y. Aug. 17, 2005) (quoting *Levinson v. Spector Motor Serv.*, 330 U.S. 649, 674-75 (1947)). Because courts focus on the character of the activities, instead of the proportion of time involved in interstate activity,

Page 24

in determining whether an employee's interstate activities are de minimis, courts are hesitant to apply the de minimis exception to drivers who occasionally drive interstate. *See Williams*, 2015 WL 305362, at *12 (holding that the "activities of one who drives in interstate commerce, however frequently or infrequently, are not trivial," noting that "[o]ther cases have followed this reasoning when it comes to suits brought by drivers," and collecting cases (internal quotation marks omitted)); *see also Roberts v. Cowan Distribution Servs., LLC*, 58 F. Supp. 3d 593, 600 (E.D. Va. 2014) ("An isolated delivery in interstate commerce may be de minimis such that the employee still does not qualify as a driver; however, courts have hesitated to apply the de minimis principles in this

context, because driving in interstate commerce significantly affects the safety of motor vehicle operations." (italics omitted)); *Sinclair v. Beacon Gasoline Co.*, 447 F. Supp. 5, 11 (W.D. La. 1976) ("[T]he de minimis rule should seldom, if ever, be applied to one who drives a motor vehicle carrying property of a private carrier in interstate commerce."), *aff'd*, 571 F.2d 978 (5th Cir. 1978)). "Although the de minimis rule has limited applicability to drivers . . . no court has adopted [the] blanket proposition" that the de minimis rule does not apply to drivers. *Masson*, 2005 WL 2000133, at *8; *see also id.* ("To extend the motor carrier exemption to any driving activity, no matter how infrequent or trivial, would be to encourage employers to send their employees on a minimal number of interstate trips simply to avoid the overtime compensation provisions of FLSA.").

Furthermore, while some courts, including courts within the Second Circuit, have suggested that "an employer's mere showing that an employee engages in more than de minimis interstate activity would be sufficient to invoke the motor carrier exemption," the "'more than de minimis test' has received only sporadic support in case law." *Williams*, 2015 WL 305362, at *13 (italics omitted). "And given that the origin of the de minimis exception—traceable to [the]

Page 25

. . . recognition [in *Pyramid Motor Freight Corporation v. Ispass*, 330 U.S. 695 (1947),] that an employee's duties may so minimally touch on safety that the employee should *not* be included within the exemption," some courts do not "see a warrant for concluding that the applicability of the motor carrier exemption may turn exclusively on an evaluation of whether the plaintiff['s] interstate activities crosses the de minimis threshold." *Id.* (some italics omitted). Rather, the proper test may be whether the interstate activity is a natural, integral, and inseparable part of Plaintiff's duties such that he is likely to be called on to perform interstate travel. *See Masson*, 2005 WL 2000133, at *8 ("Driving in interstate commerce alone does not trigger the motor carrier exemption. Such driving, however frequent, must have been an expected and regular part of an employee's job duties."); *see also Romero v. Flaum Appetizing Corp.*, No. 07-CV-7222, 2011 WL 812157, at *4 (S.D.N.Y. Mar. 1, 2011) ("This determination requires a detailed, fact-specific inquiry into whether the activities of the individual plaintiffs involved interstate travel of a character that was more than de minimis or that interstate travel was a natural, integral and inseparable part of the position [the] plaintiffs held." (alterations and internal quotation marks omitted)); *Dauphin*, 544 F. Supp. 2d at 275 ("[F]or the motor carrier exemption from the FLSA to apply, defendants . . . must establish *either* that the activities of the individual plaintiffs involved interstate travel of a character that was more than de minimis *or* that interstate travel was a natural, integral and inseparable part of the position plaintiffs held." (alterations and internal quotation marks omitted) (emphases added)).

Instead of concluding either that because Plaintiff occasionally drove interstate he falls under the exemption or that because Plaintiff's interstate travel constituted a small percentage of his employment activity he does not, the Court instead is to conduct a "fact-specific analysis" to determine the "character of interstate driving . . . , including an examination of the method by

Page 26

which the employer assigns the interstate activity to the pertinent class of employees, the nature of the employer's business, and perhaps to a lesser degree, the proportion of interstate-to-intrastate employee activity." *Masson*, 2005 WL 2000133, at *9 (internal quotation marks omitted). The origin of this test is found in *Morris v. McComb*, 332 U.S. 422 (1947). In *Morris*, the Supreme Court

considered whether a group of employees who spent about 4% of their time driving in interstate commerce fell within the MCA. *Id.* at 431. Reasoning that "it is the character of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for" regulation under the MCA, the Supreme Court considered how the interstate trips were assigned among employees, ultimately concluding that the brief interstate trips were "a natural, integral[,] and apparently inseparable part" of the employees' employment. *Id.* at 431-33 (internal quotation marks omitted).

Here, according to Defendants, "many of AAA Carting's . . . employees regularly travel into Connecticut." (Cartalemi Decl. ¶ 13; *see also id.* ¶ 12 ("Many employees of AAA Carting regularly travel across state lines as part of their job duties.").) Additionally, Defendants assert that "[e]mployees whose duties includ[ed] traveling across state lines would sometimes be absent from work due to vacation, sick leave or for personal reasons," and "[d]uring such absences, it would be necessary for an employee from another route to help out by taking over the absent employee's route during his absence." (*Id.* ¶ 14.) In response, Plaintiff asserts a need for discovery regarding the number of intrastate and interstate routes driven by construction debris, recycling, and household waste divisions, (Biggs Decl. ¶ 13), the structure of Defendants' business in order to demonstrate that there were different classes of driver employees, (*id.* ¶ 15), how often household waste drivers were asked to drive interstate routes, (*id.* ¶¶ 20, 25), how many household waste drivers were ever called upon to cover interstate routes, (*id.* ¶ 25), how interstate routes were assigned, (*id.*), whether interstate routes were indiscriminately spread

Page 27

among all drivers, (*id.*), and how interstate routes were assigned, (*id.*). Aside from identifying these gaps in discovery, Plaintiff has declared that, for the duration of his employment, he has had one specific route, (Cruz Decl. ¶ 20), that he has never covered a shift for a construction or recycling truck driver, (*id.* ¶ 10), and indeed that he has never covered a route for another household waste driver, (*id.* ¶ 21).[8] Based on the declaration of Plaintiff's counsel and the claim that the only fact not in dispute at this point is that Plaintiff drove out of state for forty-five seconds a month, the Court concludes that it would be premature to hold that interstate travel was a natural, integral, and inseparable part of Plaintiff's duties and grant summary judgment, and that the discovery sought by Plaintiff could indeed create a genuine issue of material fact.

Finally, Defendants argue that the goods transported are involved in a practical continuity of movement in the flow of interstate commerce and thus, even if Plaintiff transports the goods wholly intrastate, the exemption still applies. (*See* Defs.' Mem. 14-15.) *See also Bilyou*, 300 F.3d at 223 (explaining this basis for the exemption). "Whether the transportation is of an interstate nature can be determined by reference to the intended final destination of the transportation when that ultimate destination was envisaged at the time the transportation commenced." *Id.* at 223-24 (internal quotation marks omitted). "If the shipper's fixed and persisting transportation intent at the time of interstate shipment was to deliver an item to a

Page 28

specified customer who had ordered the item, regardless of whether it was stored temporarily intrastate, the motor carrier exemption applies. On the other hand, the exemption does not apply where items are delivered from out of state to an intrastate location, such as a warehouse, for future delivery to customers yet to be identified. In other words, the exemption is inapplicable

where the final destination of any shipment is not decided until after the goods had come to rest in the warehouse." *Masson*, 2005 WL 2000133, at *6 (alteration, citations, and internal quotation marks omitted). Defendants assert generally that the recycling and garbage often has ended up out of state. In particular, Defendants state that C&D debris was typically exported out of state, (Cartalemi Decl. ¶ 7), that the recyclables are shipped out of New York both to other states and internationally, (*id.* ¶ 10), that "[t]here are limited landfills in New York so the garbage is shipped out of the state," (*id.* ¶ 11), and that "it has always been [Cartalemi's] understanding and intent that the waste AAA Carting transported to transfer stations would thereafter be shipped out of the state," (*id.*). As support for this claim, Defendants have provided a list of transfer stations that indicate where the waste is transferred. (*Id.* Ex. B (List of Transfer Stations).) But, according to Plaintiff, apart from one occasion when he deposited waste in Yonkers, he exclusively delivered waste in White Plains, and Defendants have not submitted any evidence regarding where White Plains refuse is shipped and have stated that it is unknown where Yonkers refuse is shipped. (Cruz Decl. ¶ 17; Cartalemi Decl. Ex. B (List of Transfer Stations), at unnumbered 2.) Furthermore, Plaintiff requests discovery "to demonstrate that when Defendants collected the waste they did not have any specific out-of-state recipient in mind beyond the transfer station." (Biggs Decl. ¶ 30.) In particular, Plaintiff seeks to examine Defendants' contracts with municipalities and transfer stations to find "facts that will illustrate that the ultimate locations of the household waste, beyond the transfer station, were immaterial to

Page 29

Defendants." (*Id.*) Because the operative question is whether AAA Carting had a fixed and persisting intent to transport the specific waste out of state at the time the shipment was commenced, even crediting all of the evidence set forth by Defendants, it is not evident that they would be entitled to summary judgment on this point. In any event, the discovery sought by Plaintiff could create a genuine issue of material fact on whether the intended final destination of the refuse transported by Plaintiff was out of state, at the time such transportation commenced. Therefore, it would be inappropriate to grant summary judgment at this time.

III. Conclusion

For the above reasons, Defendants' Motion for Judgment on the Pleadings is granted in part and denied in part. In particular, Defendants' Motion based on Plaintiff's FLSA minimum wage violation claim is granted, but their Motion based on lack of subject matter jurisdiction is denied. Defendants' Motion for Summary Judgment is denied without prejudice to renewal at the close of discovery. The Clerk of the Court is respectfully directed to terminate the pending Motion. (*See* Dkt. No. 29.)

SO ORDERED.

Dated: July 16, 2015
White Plains, New York

/s/
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

Footnotes:

1. Defendants, in their brief, set out a different employment history. (*See* Mem. of Law in Supp. of Defs.' Mot. To Dismiss for Lack of Subject Matter Jurisdiction and/or for Summ. J. ("Defs.' Mem.") 6 (Dkt. No. 32) ("Plaintiff was employed from approximately April 2011 to November 2012 as a driver of one of AAA Carting's garbage trucks.").)

2. Exhibit B to Cartalemi's Declaration contains a list of transfer stations that indicate where the waste is transferred. (Cartalemi Decl. Ex. B (List of Transfer Stations).)

3. Defendants move under Rule 12(b)(1), in addition to Rules 12(c) and 12(h)(3). The 12(b)(1) Motion To Dismiss for lack of subject-matter jurisdiction is untimely because such a motion must be made "before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). The proper bases for this Motion are Rule 12(c) and Rule 12(h)(3). *See Goodwin v. Solil Mgmt. LLC*, No. 10-CV-5546, 2012 WL 1883473, at *1 (S.D.N.Y. May 22, 2012) (converting a motion to dismiss under Rules 12(b)(1) and 12(b)(6) to a motion for judgment on the pleadings under Rule 12(c) because the moving defendants answered the complaint); *Houston v. Goord*, No. 03-CV-1412, 2006 WL 2827163, at *3 (N.D.N.Y. Sept. 29, 2006) (construing a motion under Rules 12(b)(1) and 12(b)(6) as a motion under 12(c) when the moving defendants "submitted an answer which included within it, as defenses, the grounds now raised in their motion").

4. Defendants did not move to dismiss Plaintiff's state minimum wage claim on this ground, although it appears it would be subject to dismissal for the same reasons as the federal minimum wage claim.

5. Person is defined in the statute in reference to 1 U.S.C. § 1, which provides that the word person includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1; *see also* 49 U.S.C. § 13102(18) ("The term 'person', in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person.").

6. Although Defendants assert that "[t]here can be no genuine dispute that AAA Carting is a motor private carrier," (Mem. of Law in Supp. of Defs.' Mot. To Dismiss for Lack of Subject Matter Jurisdiction and/or for Summary Judgment ("Defs.'s Mem.") 10 (Dkt. No. 32) (internal quotation marks omitted)), the issue is not so clear cut. In particular, there is some dispute about whether garbage is property under the MCA, *see, e.g., Charlton v. Republic Servs. of Fla., L.P.*, No. 09-CV-22506, 2010 WL 2232677, at *4-5 (S.D. Fla. June 2, 2010) ("[T]rash and garbage, which have no value, are not property within the meaning of the Motor Carrier Act."); *Alice v. GCS, Inc.*, No. 05-CV-50132, 2006 WL 2644958, at *3 (N.D. Ill. Sept. 14, 2006) ("Therefore, the non-hazardous, non-recyclable waste that [is transported] . . . likely does not qualify as property under the [MCA]."), and based on the limited facts before the Court, it is unclear whether Defendants can be considered owners, lessee, or bailees of the material being transported. Moreover, the definition of motor private carrier requires that the carrier *not* be a motor carrier. It is also not clear to the Court that AAA Carting is not a motor carrier, which would preclude it from being a motor private carrier. In any event, the Court need not drill further on this issue, because it denies Defendants' Motion for Summary Judgment on another ground.

7. Defendants suggest that Plaintiff actually conducted more interstate activity, (*see* Cartalemi Decl. ¶ 22 (asserting that Plaintiff's route "required that he drive the truck several times a week over the state line into Connecticut"; *see also id.* Ex. E (Google Maps screenshots showing Plaintiff's alleged routes)), but the issue at this stage is whether the undisputed facts are sufficient to warrant summary judgment. Because this is a disputed fact, the Court will not grant summary judgment based on Defendants' version of the facts.

8. Defendants also submitted a DOL Report prepared about AAA Carting, which found no wage and hour violations and stated, "Drivers and helpers routinely pick up recyclables, construction debris, etc[.] that is

sent out-of-state or overseas thus entitling the company to the Motor Carriers exemption 13(b)1." (DOL Compliance Action Report 2.) Plaintiff's counsel asserts that he seeks discovery to establish that the DOL Report does not concern Defendants' household waste division. (Biggs Decl. ¶ 35.) In their Reply, Defendants assert that "the purported 'divisions' are a fiction invented by Plaintiff as AAA Carting does not have divisions." (Reply Mem. of Law in Supp. of Defs.' Mot. To Dismiss for Lack of Subject Matter Jurisdiction and/or for Summ. J. ("Defs.' Reply") 5 (Dkt. No. 39).) While this dispute may have to be resolved someday, prudence dictates that the Parties first exchange discovery.

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Double Trouble: Courts Shy Away From **Treble Damages** in Wage, Hour Suits

BY GLENN S. GRINDLINGER AND ALEXANDER W. LEONARD

When a wage and hour suit is filed against an employer, one of the first questions asked by the defendant-employer is: What's my exposure?

Generally, in New York state, in wage and hours suits, plaintiffs allege violations of the federal Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). Both statutes permit prevailing plaintiffs to recover compensatory damages (usually back wages), their reasonable attorney fees and costs and liquidated damages. Whether a successful plaintiff can recover liquidated damages simultaneously under the FLSA and NYLL is an open issue in New York.

In 2010, the legislature passed and the governor signed into law, the New York Wage Theft Prevention Act (WTPA). Effective April 9, 2011, the WTPA increased liquidated damages that may be awarded in wage and hour cases for violations of the NYLL from 25 percent of the underlying back wages owed to 100 percent of the back wages owed and made liquidated damages virtually automatic unless the defendant could prove that it acted in good faith compliance with the law.[1] In other words, after the enactment of the WTPA, for every dollar in back pay owed to a successful plaintiff for violations of the NYLL, the defendant would also likely have to pay the plaintiff an additional dollar in liquidated damages under New York law.

Under the FLSA, successful plaintiffs can also recover liquidated damages equal to 100 percent of the back pay owed and like the NYLL, the burden is on the defendant to prove that it acted in good faith compliance with the FLSA to avoid liquidated damages. Thus, after the enactment of the WTPA, for the first time, the liquidated damage provision under the NYLL appeared to mirror the liquidated damage provision under the FLSA. As most wage and hour practitioners in New York are acutely aware, the plaintiffs' bar has naturally championed applying both sets of liquidated damages to violations covered by both statutes.[2] This permits successful plaintiffs to potentially recover treble damages (i.e., up to 200 percent liquidated damages in addition to any underlying wage liability) in wage and hour litigations, thereby multiplying the recovery available for even relatively minor, technical violations of the NYLL and FLSA.

After the enactment of the Wage Theft Prevention Act, for the first time, the **liquidated damage provision** under the New York Labor Law **appeared to mirror** the liquidated damage provision under the Fair Labor Standards Act.

At the time the WTPA was enacted, practitioners and commentators forecasted these arguments, warning potential "double recovery" theories would be advocated by the plaintiffs' bar,[3] in addition to the robust remedies already available, such as attorney fees that may be awarded to a prevailing plaintiff.

There was certainly a reasonable argument for such cumulative liquidated damages, as federal and state court decisions prior to the enactment of the WTPA (when liquidated damages were only 25 percent under the NYLL) often permitted the recovery of liquidated damages under both statutes (i.e., 125 percent liquidated damages).[4] The theory used by such courts was that liquidated damages under the FLSA were "compensatory" in nature (i.e., meant to compensate the employee for the time he or she was without his or her wages) whereas liquidated damages under the NYLL were "punitive" (i.e., meant to punish and deter employers from engaging in future wage violations).[5] After the enactment of the WTPA, it was assumed that these theories concerning the nature of liquidated damages under both statutes would continue and treble damages might be awarded, thus providing a windfall for successful plaintiffs and further promoting the increase in wage and hour litigation that has occurred over the past decade.

Yet, since the enactment of the WTPA, a split of authority has developed in New York federal and state courts concerning the award of liquidated damages under the FLSA and NYLL. Initially, many courts appeared to allow the simultaneous application of *both* FLSA and NYLL liquidated damages, thus resulting in the application of 200 percent liquidated damages.[6] These courts reasoned that, under existing case law, both statutes still served

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130

differing purposes, and noted that nothing had fundamentally changed regarding either statute other than simply increasing the liquidated damages recovery available under the NYLL.

However, even in 2011, seeds of dissent were already sprouting given the obvious windfall this handed to plaintiffs. Some courts aptly noted that since liquidated damages under the NYLL now mirrored the FLSA, both sets of liquidated damages effectively "serve the same purpose and have the *same practical effect* of deterring wage violations and compensating underpaid workers."[7] This "practical effect" argument lingered as some judges, then in the minority,[8] refused to allow double liquidated damages. These judges found that the purported distinction between liquidated damages under the NYLL and FLSA was illusory since both remedies were identical.

Despite this split of authority, no appellate court has yet to weigh in and settle whether both forms of liquidated damages may be recovered simultaneously.[9] Thus, over the past several years, the courts have reversed course from the initial bevy of federal and state court decisions applying 200 percent liquidated damages. Countless applications seeking 200 percent liquidated damages have since been denied by numerous judges who find such recoveries to be duplicative and unnecessary.[10] These courts continue to reason that "[b]oth forms of damages seek to deter wage-and-hour violations in a manner calculated to compensate the [plaintiff]."[11] Even judges that still apply *both* NYLL and FLSA liquidated damages together have noted the recent trend away from granting 200 percent liquidated damages.[12]

In fact, in some instances judges have begun abrogating their own precedent, and now embrace the view that double liquidated damages under both the NYLL and FLSA are inappropriate given the similarities between both statutes.[13] Today, the prevailing view appears to be that applying liquidated damages remedies under both the NYLL and FLSA results in "a windfall that neither the state nor the federal legislature appears explicitly to have intended."[14] Some courts have gone even further and held that applying prejudgment interest pursuant to N.Y. C.P.L.R. §5004 is inappropriate as well since such interest serves an identical purpose to the FLSA. Therefore, prejudgment interest cannot be awarded where FLSA liquidated damages are also available.[15]

It is certainly difficult to speculate as to the impetus for this sudden reversal by the courts. Perhaps the Second Circuit's recent increased scrutiny of wage and hour cases in the seminal *Cheeks v. Freeport Pancake House* in 2015 sparked this trend.[16] Alternatively, perhaps this trend is a backlash to the record-breaking filings of wage and hour cases in recent years that have clogged federal dockets. Regardless of the reason, there are strong trends within the judiciary to oppose 200 percent liquidated damages for prevailing plaintiffs in FLSA and NYLL litigations.

While much remains to be seen as to how the split among the lower court judges will be resolved over the next few years, and/or if an appellate court will weigh in on the subject, as of now it is clear that a multitude of judges reject treble damages for wage and hour violations in New York. Indeed some plaintiffs' attorneys have begun forgoing such cumulative claims altogether given this recent trend.[17] Now that the initial proliferation of duplicative damages under the NYLL and FLSA has been counterbalanced, practitioners can also expect the defense bar to increasingly reject redundant liquidated damages claims. This is especially true now that some judges who have previously approved both forms of liquidated damages are more recently rejecting such windfall recoveries.

Now that the initial proliferation of duplicative damages under the NYLL and FLSA has been counterbalanced, practitioners can also expect the defense bar to **increasingly reject redundant liquidated damages claims.**

1. Wage Theft Prevention Act of 2010, ch. 564, 2010 N.Y. Laws 1446; N.Y. LAB. LAW §§198(1-a), 663(1).

2. The NYLL provides for a six year statute of limitations, while the FLSA provides for up to a two or three year statute of limitations period depending on whether the violations were "willful." See 29 U.S.C. §255(a); N.Y. LAB. LAW §198(3). Therefore, the double liquidated damages discussed in this article are only applicable for the two or the three year period where both statutes of limitations overlap.

3. See, e.g., "New York Enacts Law Increasing Penalties for Wage and Hour Violations," Carolyn D. Richmond & Glenn S. Grindlinger, December 2010 ("These changes to the NYLL are likely to embolden plaintiffs' attorneys. In the event an employer fails to properly pay its employees, employees will be able to obtain double damages."), available at http://www.foxrothschild.com/publications/new-york-enacts-law-increasing-penalties-for-wage-and-hour-violations; see also "New York's New 'Wage Theft' Law: What It Means, and What To Do Now," Allan S. Bloom & Rebecca E. Raiser, March 2011 ("[T]he WTPA allows a plaintiff to recover "double damages" for wage violations."), available at http://www.paulhastings.com/Resources/Upload/Publications/1845.pdf.

4. See, e.g., *Cao v. Wu Liang Ye Lexington Rest.*, No. 08 CIV. 3725, 2010 WL 4159391, at *5 (S.D.N.Y. Sept. 30, 2010); *Ke v. Saigon Grill*, 595 F. Supp. 2d 240, 261-62 (S.D.N.Y. 2008).

5. *Cao*, 2010 WL 4159391, at *5 ("Under the FLSA, liquidated damages are compensatory, rather than punitive … . In contrast, liquidated damages under the Labor Law are punitive 'to deter an employer's willful withholding of wages due.' … . Because liquidated damages under the FLSA and the Labor Law serve fundamentally different purposes, a plaintiff may recover liquidated damages under both the FLSA and the Labor Law.") (citations omitted).

6. See, e.g., *Gurung v. Malhotra*, 851 F. Supp. 2d 583, 593-94 (S.D.N.Y. 2012); *Santillan v. Henao*, 822 F. Supp. 2d 284, 297 (E.D.N.Y. 2011); see also *Ho v. Sim Enterprises*, No. 11 Civ. 2855, 2014 WL 1998237, at *19 (S.D.N.Y. May 14, 2014); *Hernandez v. P.K.L. Corp.*, No. 12-CV-2276, 2013 WL 5129815, at *1, *5-6 (E.D.N.Y. Sept. 12, 2013); *Hernandez v. Punto y Coma*, No. 10-CV-3149, 2013 WL 4875074, at *1, *8 (E.D.N.Y. Sept. 11, 2013); *Castellanos v. Deli Casagrande*, No. CV 11-245, 2013 WL 1207058, at *6 (E.D.N.Y. March 7, 2013), report & rec. adopted, 2013 WL 1209311 (E.D.N.Y. March 25, 2013).

7. *Fu v. Pop Art Int'l*, No. 10 Civ. 8562, 2011 WL 4552436, at *3-5 (S.D.N.Y. Sept. 19, 2011) (emphasis added) (holding that plaintiff was not entitled to liquidated damages under both federal and state law simultaneously), report & rec. adopted as modified on other grounds, 2011 WL 6092309 (S.D.N.Y. Dec. 7, 2011); *Pineda-Herrera v. Da-Ar-Da*, No. 09-CV-5140, 2011 WL 2133825, at *4-5 (E.D.N.Y. May 26, 2011).

8. *Gurung*, 851 F. Supp. 2d at 593 n.6 (stating that the theory that double damages should not be awarded in light of the amendment of the NYLL to mirror the FLSA is the "minority view").

9. *Inclan v. New York Hosp. Grp.*, 95 F. Supp. 3d 490, 505 (S.D.N.Y. 2015) ("There is no appellate authority as to whether a plaintiff may recover cumulative (sometimes called 'simultaneous' or 'stacked') liquidated damages under the FLSA and NYLL … ."); see also *Garcia v. JonJon Deli Grocery*, No. 13 CIV. 8835, 2015 WL 4940107, at *6 (S.D.N.Y. Aug. 11, 2015) ("The Second Circuit has provided no guidance on whether a Plaintiff may obtain cumulative recovery of liquidated damages under the FLSA and the NYLL.").

10. E.g., *Inclan*, 95 F. Supp. 3d at 506 ("[W]e decline to rule that plaintiffs are entitled to cumulative liquidated damages under the FLSA and NYLL"); see also *Kim v. 511 E. 5TH St.*, No. 12CV8096, 2015 WL 5732079, at *11 (S.D.N.Y. Sept. 30, 2015); *Chowdhury v. Hamza Exp. Food*, No. 14-CV-150, 2015 WL 5541767, at *8 (E.D.N.Y. Aug. 21, 2015) report & rec. adopted, No. 14-CV-150, 2015 WL 5559873 (E.D.N.Y. Sept. 18, 2015); *Garcia*, 2015 WL 4940107, at *6; *McGlone v. Contract Callers*, No. 11-CV-3004, 2015 WL 4425895, at *2 (S.D.N.Y. July 20, 2015); *Olvera v. Los Taquitos Del Tio*, No. 15 CIV. 1262, 2015 WL 3650238, at *2 n.2 (E.D.N.Y. June 11, 2015); *Lopez v. Yossi's Heimishe Bakery*, No. 13 CV 5050, 2015 WL 1469619, at *11 (E.D.N.Y. March 30, 2015); *Jimenez v. Computer Express Int'l Ltd.*, No. 14-CV-5657, 2015 WL 1034478, at *2 (E.D.N.Y. March 10, 2015); *Chuchuca v. Creative Customs Cabinets*, No. 13 Civ. 2506, 2014 WL 6674583, at *16 (E.D.N.Y. Nov. 25, 2014); *Shiu v. New Peking Taste*, No. 11 Civ. 1175, 2014 WL 652355, at *13 (E.D.N.Y. Feb. 19, 2014).

11. *Chuchuca*, 2014 WL 6674583, at *16.

12. *Spain v. Kinder Stuff 2010*, No. 14-CV-2058, 2015 WL 5772190, at *6 (E.D.N.Y. Sept. 29, 2015) ("There is an emerging trend towards denying a cumulative recovery of liquidated damages."); *Herrera v. Tri–State Kitchen & Bath*, No. 14 Civ. 1695, 2015 WL 1529653, at *12 (E.D.N.Y. March 31, 2015) ("[T]here is an emerging trend towards denying a cumulative recovery of liquidated damages, as the NYLL liquidated damages provision now closely parallels the FLSA provisions because of the 2011 amendments, which increased liquidated damages from 25 percent to 100 percent and changed the standard of proof.").

13. Compare *Shiu*, No. 11-CV-1175, 2014 WL 652355, at *13 & n.19 (denying double liquidated damages) (Garaufis, J.), and *Kim*, 2015 WL 5732079, at *11 (S.D.N.Y. Sept. 30, 2015) (denying double liquidated damages) (Maas, Mag. J.), with *Hernandez*, 2013 WL 4875074, at *1, *8 (E.D.N.Y. Sept. 11, 2013) (allowing double liquidated damages) (Garaufis, J.), and *Gurung*, 851 F. Supp. 2d at 593-94 (S.D.N.Y. 2012) (allowing double liquidated damages) (Maas, Mag. J.); see also *Lopez*, 2015 WL 1469619, at *11 & n.13 (E.D.N.Y. March 30, 2015) (denying double liquidated damages and discussing at length that the presiding judge had previously allowed double liquidated damages).

14. *Lopez*, 2015 WL 1469619, at *11.

15. E.g., *Chen v. New Fresco Tortillas Taco*, No. 15 Civ. 2158, 2015 WL 5710320, at *9 (S.D.N.Y. Sept. 25, 2015) ("The same logic which prevents this Court from allowing cumulative liquidated damages under both the NYLL and FLSA … likewise prevents prejudgment interest on overlapping claims for which FLSA liquidated damages have been awarded.") (citation omitted).

16. *Cheeks v. Freeport Pancake House*, 796 F.3d 199 (2d Cir. 2015).

17. *Baltierra v. Advantage Pest Control Co.*, No. 14 CIV. 5917, 2015 WL 5474093, at *9 (S.D.N.Y. Sept. 18, 2015) ("Plaintiffs do not seek cumulative liquidated damages under both the NYLL and FLSA … . In any event, the Court would not award them."); *Pinovi v. FDD Enterprises*, No. 13 CIV. 2800, 2015 WL 4126872, at *6-7 (S.D.N.Y. July 8, 2015) ("A number of courts have challenged whether this 'different purposes' rationale is persuasive after the April 9, 2011 amendment to the NYLL, which renders the liquidated damages provisions of the FLSA and the NYLL nearly identical … . Here, this Court need not choose a side in this debate because Plaintiff's proposed damages calculations only request liquidated damages consistent with the FLSA.") (citation omitted).

Labor & Employment
ALERT
Fox Rothschild LLP
ATTORNEYS AT LAW
May 2016

It Could Have Been Worse: U.S. Department of Labor Increases the Salary Level Necessary for Employers To Classify Employees as Exempt From Overtime

By Carolyn D. Richmond and Glenn S. Grindlinger

On May 18, 2016, the United States Department of Labor (DOL) released amendments to the overtime regulations of the Fair Labor Standards Act (FLSA), which will go into effect on December 1, 2016. While the amendments significantly increase the salary that employers will have to pay employees in order to classify employees as exempt from overtime under the FLSA's white collar exemptions, the amendments are not as severe as the employer community initially feared. Further, in a coup for the employer community, the amendments do not impact the duties that must be performed by employees to satisfy the white collar exemptions (i.e., the executive, administrative, professional and computer professional exemptions).

Under the FLSA, in order to qualify as exempt from overtime under the white collar exemptions, three factors must be satisfied:

- The employee must be paid on a salary basis that is not subject to reduction based on the quality or quantity of the work performed. In other words the employee must receive a guaranteed payment each pay period.
- The salary must be at least $455.00 per week, although some state and municipal laws may require that higher salary be paid.
- The employee must satisfy the professional, executive, administrative or computer duties tests.

The amendments only impact the first two factors and they do not revise any of the duties tests.

The amendments essentially make four significant changes to the FLSA's overtime exemptions. First, they double the weekly salary threshold that must be paid in order to classify an employee as exempt from overtime under the white collar exemptions from $455.00 per week ($23,660.00 per year) to $913.00 per week ($47,476.00 per year). Again, some states and municipalities may have a salary threshold that is even higher than $913.00 per week, in which case the employer must satisfy the higher salary level in order for the employee to be classified as exempt from overtime under the white collar exemptions.

Second, for the first time, the amendments allow an employer to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level provided that such nondiscretionary bonuses and incentive payments are paid at least quarterly. In other words, an employer can satisfy the salary threshold by paying the employee $821.17 per week

and paying a quarterly guaranteed bonus of at least $1,186.90.

Third, the amendments provide for an automatic increase to the salary threshold. The increase will occur every three years commencing on January 1, 2020, and will be set at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently, the South). The DOL will publish the new salary level at least 150 days before it becomes effective.

Fourth, the amendments modify the Highly Compensated Employee (HCE) exemption. Under this exemption, employees are exempt from overtime under the FLSA if they receive at least $100,000 in compensation and they regularly and customarily satisfy one or more of the exempt duties referenced in the duties tests for the professional, executive, administrative or exemptions. The amendments modify the HCE by:

- Increasing the compensation threshold from $100,000 per year to $134,004 per year;
- Requiring that employees be paid at least $913 per week on a salary basis; and
- Automatically increasing the annual compensation threshold every three years starting on January 1, 2020, to the level equal to the 90th percentile of annual earnings of full-time salaried workers nationally.

Employers must remember that some states and municipalities do not recognize the HCE exemption in which case employers cannot utilize this exemption.

The below chart summaries these key amendments to the FLSA regulations:

	Current Rule	**Amended Rule Effective December 1, 2016**
Salary Level	$455 weekly	$913 weekly
HCE Total Annual Compensation Level	$100,000 annually	$134,004 annually
Automatic Adjusting	None	Every 3 years starting on January 1, 2020, maintaining the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census Region and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally.
Bonuses/Incentive Compensation	No provision to count nondiscretionary bonuses and commissions toward the standard salary level.	Up to 10 percent of standard salary level can come from nondiscretionary bonuses, incentive payments and commissions, paid at least quarterly.

While the doubling of the salary threshold to satisfy the white collar exemptions is not good news for the employer community, it could have been much worse. In its proposed regulations, the DOL suggested increasing the salary threshold to more than $50,000, having yearly automatic increases and changing the duties tests to make it more difficult to for employers to classify employees as exempt from overtime even if they are paid well over $50,000. In response to these proposals, the employer community warned the DOL that there would be a drastic negative impact on the economy if these proposals went forward. It seems that the DOL, at least in part, listened to the issues raised by employers in response to their initial proposals.

As a result of these amendments, employers must reassess the status of their lower-level exempt staff. If exempt employees currently earn less than $913.00 per week and the employer wants to maintain the employee as exempt, assuming the duties tests are satisfied, the employer must raise the employee's salary to at least $913.00 per week or raise the employee's salary to $821.17 per week and pay a nondiscretionary bonus or incentive compensation at least quarterly in an amount that averages out to $91.30 per week. The other option is for employees to reclassify such employees as nonexempt and entitled to overtime. Whatever option the employer selects, it is important for the employer to work closely with counsel to ensure that the ramifications of their decision is well understood and properly implemented.

For more information about this alert, please contact Carolyn D. Richmond at crichmond@foxrothschild.com or 212.878.7983, Glenn S. Grindlinger at ggrindlinger@foxrothschild.com or 212.905.2305 or any member of the firm's Labor & Employment Department.

796 F.3d 199
United States Court of Appeals,
Second Circuit.

Dorian CHEEKS, Plaintiff–Appellant,
v.
FREEPORT PANCAKE HOUSE, INC., W.P.S. Industries, Inc., Defendants–Appellees.

Docket No. 14–299–cv.
|
Argued: Nov. 14, 2014.
|
Decided: Aug. 7, 2015.

Synopsis

Background: Former employee brought action against former employer under Fair Labor Standards Act (FLSA) and New York Labor Law. The United States District Court for the Eastern District of New York, Joanna Seybert, J., refused to enter parties' stipulation of settlement dismissing, with prejudice, former employee's FLSA claims. Former employee filed interlocutory appeal, seeking certification of question of whether FLSA actions are exception to general rule that parties may stipulate to dismissal of an action without involvement of court.

[Holding:] The Court of Appeals, Pooler, Circuit Judge, held that, as a matter of first impression the FLSA is an "applicable federal statute," for purposes of the rule governing voluntary dismissal of an action by a plaintiff, and therefore stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the Department of Labor (DOL) to take effect.

Affirmed; remanded.

Attorneys and Law Firms

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Laura Moskowitz, Senior Attorney, U.S. Department of Labor, Office of the Solicitor, (M. Patricia Smith, Solicitor of Labor, Jennifer S. Brand, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, on the brief), Washington, D.C., for Amicus Curiae U.S. Department of Labor.

Before: POOLER, PARKER and WESLEY, Circuit Judges.

Opinion

POOLER, Circuit Judge:

Dorian Cheeks appeals, pursuant to 28 U.S.C. § 1292(b), from the refusal of the United States District Court for the Eastern District of New York (Joanna Seybert, *J.*) to enter the parties' stipulation of settlement dismissing, with prejudice, Cheeks'

claims under the Fair Labor Standards Act ("FLSA") and New York Labor Law. The district court held that parties cannot enter into private settlements of FLSA claims without either the approval of the district court or the Department of Labor ("DOL"). We agree that absent such approval, parties cannot settle their FLSA claims through a private stipulated dismissal with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). We thus affirm, and remand for further proceedings consistent with this opinion.

BACKGROUND

Cheeks worked at both Freeport Pancake House, Inc. and W.P.S. Industries, Inc. (together, "Freeport Pancake House") as a restaurant server and manager over the course of several years. In August 2012, Cheeks sued Freeport Pancake House seeking to recover overtime wages, liquidated damages and attorneys' fees under both the FLSA and New York Labor Law. Cheeks also alleged he was demoted, and ultimately fired, for complaining about Freeport Pancake House's failure to pay him and other employees the required overtime wage. Cheeks sought back pay, front pay in lieu of reinstatement, and damages for the unlawful retaliation. Freeport Pancake House denied Cheeks' allegations.

After appearing at an initial conference with the district court, and engaging in a period of discovery, the parties agreed on a private settlement of Cheeks' action. The parties then filed a joint stipulation and order of dismissal with prejudice pursuant to Rule 41(a)(1)(A)(ii). *Cheeks v. Freeport Pancake House, Inc.*, No. 2:12–cv–04199 (E.D.N.Y. Dec. 27, 2013) ECF No. 15. The district court declined to accept the stipulation as submitted, concluding that Cheeks could not agree to a private settlement of his FLSA claims without either the approval of the district court or the supervision of the DOL. The district court directed the parties to "file a copy of the settlement agreement on the public docket," and to "show cause why the proposed settlement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching." App'x at 35 (internal quotation marks omitted). The district court further ordered ***201** the parties to "show cause by providing the Court with additional information in the form of affidavits or other documentary evidence explaining why the proposed settlement is fair and reasonable." App'x at 35.

Rather than disclose the terms of their settlement, the parties instead asked the district court to stay further proceedings and to certify, pursuant to 28 U.S.C. § 1292(b), the question of whether FLSA actions are an exception to Rule 41(a)(1)(A)(ii)'s general rule that parties may stipulate to the dismissal of an action without the involvement of the court. On February 20, 2014, the district court entered an order staying the case and certifying the question for interlocutory appeal. Our Court granted the motion. *Cheeks v. Freeport Pancake House, Inc.*, 14–299–cv (2d Cir. May 7, 2014), ECF No. 44. Our Court heard oral argument on November 14, 2014. As both parties advocated in favor of reversal, following oral argument we solicited the views of the DOL on the issues raised in this matter. The DOL submitted a letter brief on March 27, 2015, taking the position that the FLSA falls within the "applicable federal statute" exception to Rule 41(a)(1)(A), such that the parties may not stipulate to the dismissal of FLSA claims with prejudice without the involvement of a court or the DOL." Cheeks submitted supplemental briefing in response to the DOL's submission on April 20, 2015, and we find no need for additional oral argument.

DISCUSSION

The current appeal raises the issue of determining whether parties may settle FLSA claims with prejudice, without court approval or DOL supervision [1], under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The question of whether judicial approval of, and public access to, FLSA settlements is required is an open one in our Circuit. [2] We review this question of law de novo. *See Cmty. Health Care Ass'n of N.Y. v. Shah*, 770 F.3d 129, 150 (2d Cir.2014).

Rule 41(a)(1)(A) provides in relevant part that:

> Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
>
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
>
> (ii) a stipulation of dismissal signed by all parties who have appeared.

Fed.R.Civ.P. 41(a)(1)(A).

The FLSA is silent as to Rule 41. We must determine, then, if the FLSA is an "applicable federal statute" within the meaning of the rule. If it is not, then Cheeks' case was dismissed by operation of Rule 41(a)(1)(A)(ii), and the parties did not need approval from the district court for the dismissal to be effective. *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir.1998) ("The judge's signature on the stipulation did not change the nature of the dismissal. Because the dismissal ***202** was effectuated by stipulation of the parties, the court lacked the authority to condition [the] dismissal...."") (collecting cases).

We start with a relatively blank slate, as neither the Supreme Court nor our sister Circuits have addressed the precise issue before us. District courts in our Circuit, however, have grappled with the issue to differing results. Those requiring court approval of private FLSA settlements regularly base their analysis on a pair of Supreme Court cases: *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945) and *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114 (1946).

Brooklyn Savings involved a night watchman who worked at Brooklyn Savings Bank for two years. 324 U.S. at 699, 65 S.Ct. 895. The watchman was entitled to overtime pay for his work, but was not compensated for his overtime while he worked for the bank. *Id.* at 700, 65 S.Ct. 895. The watchman left the bank's employ, and two years later the bank computed the statutory overtime it owed him and offered the watchman a check for $423.16 in exchange for a release of all his FLSA rights. *Id.* The watchman signed the release, took the check, and then sued the bank for liquidated damages pursuant to the FLSA, which were admittedly not included in the settlement. *Id.*

The Supreme Court held that in the absence of a genuine dispute as to whether employees are entitled to damages, employees could not waive their rights to such damages in a private FLSA settlement. *Id.* at 704, 65 S.Ct. 895. Because the only issue before the court was the issue of liquidated damages, which were a matter of statutory calculation, the Court concluded that there was no bona fide dispute between the parties as to the amount in dispute. *Id.* at 703, 65 S.Ct. 895. The Court noted that the FLSA's legislative history "shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Id.* at 706, 65 S.Ct. 895. In addition, the FLSA "was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Id.* at 706–07, 65 S.Ct. 895. Concluding that the FLSA's statutory language indicated that "Congress did not intend that an employee should be allowed to waive his right to liquidated damages," the Court refused to enforce the release and allowed the watchman to proceed on his claim for liquidated damages. *Id.* at 706, 65 S.Ct. 895. However, the Court left unaddressed the issue of whether parties could privately settle FLSA claims if such settlements resolved "a bona fide dispute between the parties." *Id.* at 703, 65 S.Ct. 895.

A year later, in *D.A. Schulte*, the Supreme Court answered that question in part, barring enforcement of private settlements of bona fide disputes where the dispute centered on whether or not the employer is covered by the FLSA. 328 U.S. at 114, 66 S.Ct. 925. Again, the Supreme Court looked to the purpose of the FLSA, which "was to secure for the lowest paid segment of the nation's workers a subsistence wage," and determined "that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage." *Id.* at 116, 66 S.Ct. 925. However, the Supreme Court again specifically declined to opine as to "the possibility of compromises in other situations which may ***203** arise, such as a dispute over the number of hours worked or the regular rate of employment." *Id.* at 114–15, 66 S.Ct. 925.

[1] **[2]** *Brooklyn Savings* and *Gangi* establish that (1) employees may not waive the right to recover liquidated damages due under the FLSA; and (2) that employees may not privately settle the issue of whether an employer is covered under the FLSA. These cases leave open the question of whether employees can enforce private settlements of FLSA claims where there is a bona fide dispute as to liability, i.e., the number of hours worked or the amount of compensation due. In considering that question, the Eleventh Circuit answered "yes," but only if the DOL or a district court first determines that the proposed settlement "is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Lynn's Food Stores, Inc. v. United States Dep't of Labor*, 679 F.2d 1350, 1355 (11th Cir.1982). [3]

In *Lynn's Food*, an employer sought a declaratory judgment that the private settlements it had entered into with its employees absolved it of any future liability under the FLSA. *Id.* at 1351–52. The private settlements were entered into after the DOL found the employer "was liable to its employees for back wages and liquidated damages," *id.* at 1352, but were not made with DOL approval. The putative settlements paid the employees far less than the DOL had calculated the employees were owed.

In rejecting the settlements, the Eleventh Circuit noted that "FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Id.* (internal quotation marks omitted). The court reasoned that requiring DOL or district court involvement maintains fairness in the settlement process given the great disparity in bargaining power between employers and employees. *Id.* The Eleventh Circuit noted that the employer's actions were "a virtual catalog of the sort of practices which the FLSA was intended to prohibit." *Id.* at 1354. For example, the employees had not brought suit under the FLSA and were seemingly "unaware that the Department of Labor had determined that Lynn's owed them back wages under the FLSA, or that they had any rights at all under the statute." *Id.* Despite that, the employer "insinuated that the employees were not really entitled to any back wages," and suggested "that only malcontents would accept back wages owed them under the FLSA." *Id.* The employees were not represented by counsel, and in some cases did not speak English. *Id.* The Eleventh Circuit noted that these practices were "illustrative of the many harms which may occur when employers are allowed to 'bargain' with their employees over minimum wages and overtime compensation, and convinces us of the necessity of a rule to prohibit such invidious practices." *Id.* at 1354–55. [4]

***204** The Fifth Circuit, however, concluded that a private settlement agreement containing a release of FLSA claims entered into between a union and an employer waived employees' FLSA claims, even without district court approval or DOL supervision. *Martin v. Spring Break #83 Prods., L.L.C.*, 688 F.3d 247, 253–57 (5th Cir.2012). In *Martin*, the plaintiffs were members of a union, and the union had entered into a collective bargaining agreement with the employer. *Id.* at 249. The plaintiffs filed a grievance with the union regarding the employer's alleged failure to pay wages for work performed by the plaintiffs. *Id.* Following an investigation, the union entered into an agreement with the employer settling the disputed compensation for hours worked. *Id.* However, before the settlement agreement was executed, the plaintiffs sued, seeking to recover unpaid wages pursuant to the FLSA. *Id.* at 249–50.

The Fifth Circuit concluded that the agreement between the union and employer was binding on the plaintiffs and barred the plaintiffs from filing a FLSA claim against the employer. *Id.* at 253–54. The Fifth Circuit carved out an exception from the general rule barring employees' waiver of FLSA claims and adopted the rationale set forth in *Martinez v. Bohls Bearing Equipment Co.*, 361 F.Supp.2d 608, 633 (W.D.Tex.2005) ("[A] private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability."). The Fifth Circuit reasoned that "[t]he Settlement Agreement was a way to resolve a bona fide dispute as to the number of hours worked—not the rate at which Appellants would be paid for those hours—and though Appellants contend they are yet not satisfied, they received agreed-upon compensation for the disputed number of hours worked." *Martin*, 688 F.3d at 256. The Fifth Circuit noted that the concerns identified in *Lynn's Food*—unrepresented workers unaware of their FLSA rights—"[were] not implicated." *Id.* at 256 n. 10. *Martin*, however, cannot be read as a wholesale rejection of *Lynn's Food*: it relies heavily on evidence that a bona fide dispute between the parties existed, and that the employees who accepted the earlier settlement were represented by counsel. *Id.* at 255, 256 n. 10; *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 165 (5th Cir.2015) (emphasizing that the private settlements approved in *Martin* did not "undermine

the purpose of the FLSA because the plaintiffs did not waive their claims through some sort of bargain but instead received compensation for the disputed hours").

While offering useful guidance, the cases discussed above all arise in the context of whether a private FLSA settlement is enforceable. The question before us, however, asks whether the parties can enter into a private stipulated dismissal of FLSA claims with prejudice, without the involvement of the district court or DOL, that may later be enforceable. The parties do not cite, and our research did not reveal, any cases that speak directly to the issue before us: whether the FLSA is an "applicable federal statute" within the meaning of Rule 41(a)(1)(A). Nor are we aided by the Advisory Committee's notes, which simply state that the language "any applicable federal statute" serves to "preserve" provisions in "such statutes as" 8 U.S.C. § 1329 (immigration violations) and 31 U.S.C. § 3730 (qui tam actions), both of which explicitly require court approval before dismissal. Fed.R.Civ.P. 41 advisory committee's note to 1937 Adoption. As noted above, the FLSA itself is silent on the issue. One district court in our Circuit found that this silence supports the conclusion that the FLSA is not an "applicable federal statute" within the meaning of Rule 41. *Picerni v. Bilingual Seit & Preschool Inc.*, 925 F.Supp.2d 368, 375 (E.D.N.Y.2013) ("[W]hile the FLSA expressly ***205** authorizes an individual or collective action for wage violations, it does not condition their dismissal upon court approval. The absence of such a requirement is a strong indication that Congress did not intend it, as it has expressly conditioned dismissals under other statutes upon court approval."). The *Picerni* court concluded that:

> Nothing in *Brooklyn Savings*, *Gangi*, or any of their reasoned progeny expressly holds that the FLSA is one of those Rule 41—exempted statutes. For it is one thing to say that a release given to an employer in a private settlement will not, under certain circumstances, be enforced in subsequent litigation—that is the holding of *Brooklyn Savings* and *Gangi*—it is quite another to say that even if the parties want to take their chances that their settlement will not be effective, the Court will not permit them to do so.

Id. at 373.

The *Picerni* court also noted that "the vast majority of FLSA cases ... are simply too small, and the employer's finances too marginal, to have the parties take further action if the Court is not satisfied with the settlement." *Id.* at 377. Thus, the *Picerni* court concluded, "the FLSA is not one of the qualifying statutes that fall within the exemption from Rule 41." *Id.* at 375; *see also Lima v. Hatsuhana of USA, Inc.*, No. 13 Civ. 3389(JMF), 2014 WL 177412, at *1–2 (S.D.N.Y. Jan. 16, 2014) (indicating a willingness to follow *Picerni* but declining to do so given the inadequacy of the parties' briefing on the issue).

Seemingly unpersuaded by *Picerni*, the majority of district courts in our Circuit continue to require judicial approval of private FLSA settlements. *See, e.g.*, *Lopez v. Nights of Cabiria, LLC*, —— F.Supp.3d ——, No. 14–cv–1274 (LAK), 2015 WL 1455689, at *3 (S.D.N.Y. March 30, 2015) ("Some disagreement has arisen among district courts in this circuit as to whether such settlements do in fact require court approval, or may be consummated as a matter of right under Rule 41. The trend among district courts is nonetheless to continue subjecting FLSA settlements to judicial scrutiny.") (citation omitted); *Armenta v. Dirty Bird Grp., LLC*, No. 13cv4603, 2014 WL 3344287, at *4 (S.D.N.Y. June 27, 2014) (same) (collecting cases), *Archer v. TNT USA Inc.*, 12 F.Supp.3d 373, 384 n. 2 (E.D.N.Y.2014) (same); *Files*, 2013 WL 1874602, at *1–3 (same).

In *Socias v. Vornado Realty L.P.*, the district court explained its disagreement with *Picerni:*

> Low wage employees, even when represented in the context of a pending lawsuit, often face extenuating economic and social circumstances and lack equal bargaining power; therefore, they are more susceptible to coercion or more likely to accept unreasonable, discounted settlement offers quickly. In recognition of this problem, the FLSA is distinct from all other employment statutes.

297 F.R.D. 38, 40 (E.D.N.Y.2014). The *Socias* court further noted that "although employees, through counsel, often voluntarily consent to dismissal of FLSA claims and, in some instances, are resistant to judicial review of settlement, the purposes of FLSA require that it be applied even to those who would decline its protections." *Id.* at 41 (internal quotation marks, alteration, and emphasis omitted). Finally, the *Socias* court observed that judicial approval furthers the purposes of the FLSA, because

"[w]ithout judicial oversight, ... employers may be more inclined to offer, and employees, even when represented by counsel, may be more inclined to accept, private settlements that ultimately are ***206** cheaper to the employer than compliance with the Act." *Id.; see also Armenta,* 2014 WL 3344287, at *4 ("Taken to its logical conclusion, *Picerni* would permit defendants to circumvent the FLSA's 'deterrent effect' and eviscerate FLSA protections.").

[3] **[4]** **[5]** We conclude that the cases discussed above, read in light of the unique policy considerations underlying the FLSA, place the FLSA within Rule 41's "applicable federal statute" exception. Thus, Rule 41(a)(1)(A)(ii) stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the DOL to take effect. Requiring judicial or DOL approval of such settlements is consistent with what both the Supreme Court and our Court have long recognized as the FLSA's underlying purpose: "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *A.H. Phillips, Inc. v. Walling,* 324 U.S. 490, 493, 65 S.Ct. 807, 89 L.Ed. 1095 (1945) (internal quotation marks omitted). "[T]hese provisions were designed to remedy the evil of overwork by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime." *Chao v. Gotham Registry, Inc.,* 514 F.3d 280, 285 (2d Cir.2008) (internal quotation marks omitted). Thus, "[i]n service of the statute's remedial and humanitarian goals, the Supreme Court consistently has interpreted the Act liberally and afforded its protections exceptionally broad coverage." *Id.* at 285.

Examining the basis on which district courts recently rejected several proposed FLSA settlements highlights the potential for abuse in such settlements, and underscores why judicial approval in the FLSA setting is necessary. In *Nights of Cabiria,* the proposed settlement agreement included (1) "a battery of highly restrictive confidentiality provisions ... in strong tension with the remedial purposes of the FLSA;" (2) an overbroad release that would "waive practically any possible claim against the defendants, including unknown claims and claims that have no relationship whatsoever to wage-and-hour issues;" and (3) a provision that would set the fee for plaintiff's attorney at "between 40 and 43.6 percent of the total settlement payment" without adequate documentation to support such a fee award. 2015 WL 1455689, at *1–7. In *Guareno v. Vincent Perito, Inc.,* the district court rejected a proposed FLSA settlement in part because it contained a pledge by plaintiff's attorney not to "represent any person bringing similar claims against Defendants." No. 14cv1635, 2014 WL 4953746, at *2 (S.D.N.Y. Sept.26, 2014). "Such a provision raises the specter of defendants settling FLSA claims with plaintiffs, perhaps at a premium, in order to avoid a collective action or individual lawsuits from other employees whose rights have been similarly violated." *Id.; see also, e.g., Nall v. Mal–Motels, Inc.,* 723 F.3d 1304, 1306 (11th Cir.2013) (employee testified she felt pressured to accept employer's out-of-court settlement offer because "she trusted [the employer] and she was homeless at the time and needed money") (internal quotation marks omitted); *Walker v. Vital Recovery Servs., Inc.,* 300 F.R.D. 599, 600 n. 4 (N.D.Ga.2014) ("According to Plaintiff's counsel, twenty-two plaintiffs accepted the offers of judgment—many for $100—because 'they are unemployed and desperate for any money they can find.' ").

[6] We are mindful of the concerns articulated in *Picerni,* particularly the court's observation that the "vast majority of FLSA cases" before it "are simply too small, and the employer's finances too marginal," for proceeding with litigation to make financial sense if the district court rejects the proposed settlement. ***207** 925 F.Supp.2d at 377 (noting that FLSA cases tend to "settle for less than $20,000 in combined recovery and attorneys' fees, and usually for far less than that; often the employee will settle for between $500 and $2000 dollars in unpaid wages."). However, the FLSA is a uniquely protective statute. The burdens described in *Picerni* must be balanced against the FLSA's primary remedial purpose: to prevent abuses by unscrupulous employers, and remedy the disparate bargaining power between employers and employees. *See Brooklyn Sav. Bank,* 324 U.S. at 706–07, 65 S.Ct. 895. As the cases described above illustrate, the need for such employee protections, even where the employees are represented by counsel, remains.

CONCLUSION

For the reasons given above, we affirm and remand for further proceedings consistent with this opinion.

All Citations

796 F.3d 199, 165 Lab.Cas. P 36,366, 92 Fed.R.Serv.3d 494, 25 Wage & Hour Cas.2d (BNA) 138

Footnotes

1 Pursuant to Section 216(c) of the FLSA, the Secretary of Labor has the authority to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under" the FLSA. 29 U.S.C. § 216(c). "[T]he 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 ... to such unpaid minimum wages or unpaid overtime compensation and" liquidated damages due under the FLSA. *Id.*

2 As it is not before us, we leave for another day the question of whether parties may settle such cases without court approval or DOL supervision by entering into a Rule 41(a)(1)(A) stipulation without prejudice.

3 Because this appeal was certified before the parties presented the district court with evidence to support their proposed settlement, we express no opinion as to whether a bona fide dispute exists here, or what the district court must consider in deciding whether to approve the putative settlement of Cheeks' claims.

4 Other Circuits agree with the Eleventh Circuit's conclusion that waiver of a FLSA claim in a private settlement is not valid. *Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir.2008) ("FLSA rights are statutory and cannot be waived"); *see also Whiting v. Johns Hopkins Hospital*, 680 F.Supp.2d 750, 753 (D.Md.2010) *aff'd Whiting v. The Johns Hopkins Hosp.*, 416 Fed.Appx. 312 (4th Cir.2011) (same); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir.1986) (same).

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Expert Analysis

Second Circuit Requires Court Approval of all FLSA Settlements

By
Glenn S. Grindlinger

Settlement of wage and hour actions just got harder in New York, Connecticut, and Vermont. On Aug. 7, 2015, in *Cheeks v. Freeport Pancake House*, the U.S. Court of Appeals for the Second Circuit, which covers New York, Connecticut, and Vermont, issued a decision that prevents parties from stipulating to the dismissal of a case in which there are claims alleging violations of the Fair Labor Standards Act (FLSA).

Generally, when parties settle a federal court action, they simply file a stipulation pursuant to Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure that dismisses the case with prejudice. By filing such a stipulation, the parties do not have to provide the court with a copy of their settlement agreement and the terms of any such agreement can remain private and confidential. In *Cheeks*, the Second Circuit held that parties cannot use Rule 41(a)(1)(A) to dismiss FLSA cases with prejudice and instead the parties must submit their settlement agreement to the District Court for review so that the District Court can determine whether the settlement is fair and equitable.

Case Background

In *Cheeks*, the plaintiff, Dorian Cheeks, had worked for the defendant, Freeport Pancake House, Inc., as a restaurant server and manager. In August 2012, she filed a complaint in the U.S. District Court for the Eastern District of New York alleging that Freeport Pancake House did not properly pay her overtime in violation of the FLSA and New York Labor Law. Plaintiff sought to recover overtime wages, liquidated damages, attorney fees, and costs. The complaint was filed as a single-plaintiff action; it was not filed as a class or collective action.

During discovery, the parties privately settled the matter. As part of their settlement, they submitted to the District Court a stipulation of dismissal with prejudice pursuant to Rule 41(a)(1)(A). The District Court rejected the stipulation holding that the parties could not agree to a private settlement of an FLSA claim absent court or U.S. Department of Labor approval. As such, the District Court directed the parties to file a copy of the settlement agreement on the public docket and explain to the court why the settlement was fair and reasonable.

> A Second Circuit decision prevents parties from stipulating to the dismissal of a case in which there are claims alleging violations of the Fair Labor Standards Act.

The parties refused and requested that the District Court stay the proceedings and certify the action for interlocutory appeal to address whether FLSA claims could be dismissed by stipulation under Rule 41(a) (1(A). The District Court did so, and the appeal followed.

Decision Rationale

The Second Circuit in *Cheeks* had to address whether Rule 41(a)(1)(A) permits parties to dismiss an FLSA suit by stipulation. Rule 41(a)(1)(A) states in relevant part that:

> Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without court order by filing:
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
> (ii) a stipulation of dismissal signed by all parties who have appeared.

Thus, the issue before the Second Circuit was whether the FLSA is an "applicable federal statute" preventing parties from dismissing actions by stipulation under Rule 41(a)(1)(A).

The Second Circuit acknowledged that the FLSA itself was silent on the issue of whether it is an "applicable federal statute" under Rule 41 as were the Advisory Committee notes to the rule itself. The Second Circuit also conceded that neither the Supreme Court nor any circuit court had ever addressed the issue. However, the Second Circuit noted that district courts that have confronted the issue start by reviewing three key cases.

The first case is *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). In *Brooklyn Savings Bank*, a night watchman claimed that he was not paid overtime. The parties agreed that the night watchman was owed $423.16, which the employer paid, and the night watchman signed a release. The night watchman then sued Brooklyn Savings Bank for liquidated damages. The Supreme Court held that employees could not waive their right to recover liquidated damages under the FLSA if there was no bona fide dispute and since there was no dispute that the night watchman was owed overtime the case could proceed. See id. at 704.

In reaching its decision, the Supreme Court noted that the FLSA's legislative history "shows an intent on the part of Congress to protect certain groups of the population from substandard

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wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." Id. at 706. Further, the FLSA "was a recognition of the fact that due to unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." Id. at 706-07.

The second case, *D.A. Schulte v. Gangi*, 328 U.S. 108 (1946), was issued by the Supreme Court a year after Brooklyn Savings Bank. In *D.A. Schulte*, the Supreme Court held that parties could not privately settle the issue of whether an employer is covered under the FLSA. See id. at 114. Again, in reaching its decision, the Supreme Court highlighted the fact that the FLSA was implemented to protect employees who are the most susceptible to reaching unfair agreements with their employers because of their unequal bargaining power and limited resources. See id. at 116.

The third case was a 1982 decision from the U.S. Court of Appeals for the Eleventh Circuit, *Lynn's Food Stores v. U.S. Dept.. of Labor*, 679 F.2d 1350 (11th Cir. 1982). In *Lynn's Foods*, an employer sought a declaratory judgment that a private settlement reached when there was a bona fide dispute was enforceable and absolved the employer of FLSA liability. See id. at 1351-52.

The Eleventh Circuit rejected the settlements and held that parties could only settle FLSA claims if there was a bona fide dispute and the settlement was overseen by a court or the Department of Labor. As in *Brooklyn Savings Bank* and *D.A. Schulte*, in reaching its decision, the Eleventh Circuit noted that the great disparity in bargaining power between employees and employers requires oversight of FLSA settlement agreements by the judicial branch or the Department of Labor.

Based on these cases, the Second Circuit concluded that the FLSA has unique policy considerations and goals, namely to protect low-wage employees with unequal bargaining power who are more susceptible to coercion and more apt to accept unreasonable, discounted settlements. Thus, the Second Circuit held that the FLSA is different from all other employment statutes. In fact, the Second Circuit noted that many district courts had rejected FLSA settlements because of such alleged coercion and abuse.

Examples that the Second Circuit cited include "a battery of highly restrictive confidentiality provisions," overly broad release provisions that would waive all possible claims against the defendants including claims that have no relationship to wage and hour issues, and attorney fees provisions that allow plaintiffs' attorneys to recover a substantial percentage of the recovery. Accordingly, the Second Circuit held that the FLSA is an "applicable federal statute" under Rule 41 and therefore parties cannot dismiss FLSA cases with prejudice pursuant to stipulation. Instead, they must submit their settlement agreements to the district court for review.

However, the Second Circuit left open the question for another day of whether parties could dismiss FLSA actions without prejudice by stipulation. In addition, the Second Circuit did not address whether, if the parties have privately settled an FLSA action, the district court has constitutional jurisdiction to continue to oversee the matter as it would seem that upon settlement no case or controversy exists. See *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (When the issues in dispute between the parties "are no longer 'live,'" a case becomes moot and the federal court lacks jurisdiction); *Lillbask ex rel. Mauclaire v. Conn. Dept. of Educ.*, 397 F.3d 77, 84 (2d Cir. 2005) ("[A]t all times, the dispute before the court must be real and live, not feigned, academic, or conjectural. When the issues in dispute between the parties are no longer live, a case becomes moot, and the court—whether trial, appellate, or Supreme—loses jurisdiction over the suit, which therefore must be dismissed.") (internal citations and quotation marks omitted)

While it was dicta, the Second Circuit clearly disapproved of general releases contained in FLSA settlements. Thus, defendants now risk courts rejecting settlement agreements because they contain general releases.

Implications of 'Cheeks'

After *Cheeks*, FLSA cases within the Second Circuit will be more difficult to resolve for a number of reasons. First, no matter how frivolous the allegations, parties will no longer be able to quickly resolve their differences if the plaintiff alleges a violation of the FLSA. Instead they will have to submit their settlement to a court for its approval. This would be required even if the defendant has not appeared in the action because the settlement was reached before the defendant responded to the complaint.

Second, it will be very difficult to make any FLSA settlement confidential. One of the main provisions that most defendants seek in resolving any lawsuit, including an FLSA lawsuit, is that the settlement will be confidential. Currently, many district courts permit parties to settle FLSA cases without submitting the settlement agreement to the court for review. When district courts have reviewed settlement agreements prior to dismissing the action, the courts have rejected the parties' attempts to have the settlements placed under seal, and thus, the settlement agreements become part of the public record. This problem will now be exacerbated because, if parties are now going to be required to submit all FLSA settlements to a court for approval, the settlement agreement will be on the public docket where anyone can review its terms. This will nullify any confidentiality provisions contained in FLSA settlements.

Third, in holding that FLSA cases cannot be dismissed by stipulation, the Second Circuit noted that there have been "abuses" in FLSA settlement agreements. Among the "abuses" noted by the Second Circuit are overly broad releases that go beyond wage and hour matters. This is a significant problem for defendants. While it was dicta, the Second Circuit clearly disapproved of general releases contained in FLSA settlements. Thus, defendants now risk courts rejecting settlement agreements because they contain general releases, and if a settlement agreement contains a release limited to wage and hour matters only, defendants risk paying a settlement and having the plaintiff file a claim for non-wage and hour violations. Thus, defendants will not have security that once the settlement is finalized all issues between the parties will be resolved.

Cheeks is a problematic decision for employers as it will make it harder to resolve FLSA claims. Because courts will scrutinize FLSA settlement agreements before they will dismiss an FLSA case, defendant-employers will find it difficult to include confidentiality and other provisions in an agreement that are normally contained in settlement agreements. Further, defendant-employers run the risk of settling an FLSA case and exposing themselves to other lawsuits. As such, employers must be vigilant in ensuring their continued compliance with the FLSA.

Effective Mediation in Wage and Hour Litigation

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I. Introduction

With the growth of mediation as a means to resolve wage and hour litigation, developing effective mediation strategies has become an essential tool for practitioners. Mediation offers parties the ability to make hands-on decisions concerning the outcome of their dispute at virtually any stage in the process. As one mediator aptly stated, "Mediation holds that the parties, who must live with the outcome, who know the landscape best, and who care most about the outcome, should be the decision-makers."[2]

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[2] Michael J. Leech, *How Did You Do That? Trade Secrets of a Mediator,* CBA RECORD (June/July 2004).

Indeed, many courts now routinely require some form of alternative dispute resolution proceeding, including mediation, early in the litigation or at some point before trial.

With mediation, however, one size does not fit all. Mediation of large collective or class actions in the wage and hour context raises a distinct set of options and opportunities, many of which are not implicated in other types of employment litigation. This paper discusses mediation strategy from the authors' perspective, which is that of management attorneys, and includes an in-depth look at what makes an effective advocate in the particular context of wage and hour mediations. This paper begins with a discussion of the factors that should be considered in deciding when and with whom to mediate. Then, this paper discusses the pre-mediation steps that can be taken to maximize the productivity of the mediation and steps that can be taken during the mediation to increase the likelihood of reaching a resolution. Finally, this paper outlines a few key considerations in documenting settlement.

II. Mediation Strategy

To take full advantage of the benefits of mediation, the effective advocate must develop a mediation strategy. Among the myriad of elements to consider, a mediation strategy should consider the timing of the mediation, mediator selection, the content of written submissions to the mediator, the negotiating approach to be utilized, and the presence of clients or other interested persons.

A. Timing

As an initial consideration, the advocate must consider when is the best time to mediate a case. Many lawyers believe that the best time to mediate is after the close of

discovery.[3] At that point in the dispute, both sides have had the opportunity to become informed as to the strengths and weaknesses of their case, and as a result, may be more likely to reach an agreement. Additionally, following discovery, the parties tend to be personally and financially invested in the dispute, perhaps even to the point of figurative exhaustion, and therefore more interested in finding a way to end the litigation.

Others assert that mediating a case as early as possible is ideal, as it limits the expense and time drain of discovery.[4] At this point, the defendant has likely conducted an investigation in response to the complaint, and has the best opportunity to present the strengths of its case while minimizing the risk that negative information will be discovered. Even so, the defense should expect a request for pre-mediation discovery from the plaintiffs' counsel. Often a ***sampling*** of time records, job duties and payroll records from the relevant statute of limitations period can be an effective way to educate both sides without the burden and expense of full fact discovery. This enables both sides to have an informed basis from which to make decisions at mediation.

By mediating early in the litigation, the parties usually have fewer costs sunk into the dispute, and with the prospect of significant costs yet to come, the parties may be more willing to settle. Another reason to mediate early is the likelihood that the judge or decision-maker has yet to make any definitive rulings especially with regard to FLSA conditional certification or a Rule 23 class certification. Often, an important procedural

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[3] Lawrence M. Watson Jr., *Effective Advocacy in Mediation: A Planning Guide to Prepare for a Civil Trial Mediation*, www.summitsolutions.us/resources/Watson_Effective_Adv.pdf (last visited June 29, 2011).

[4] Michelle Clardy, *Top 10 Tips and Tactics for an Effective Mediation*, http://apps.americanbar.org/litigation/litigationnews/practice_areas/commercial-tips-for-effective-mediation.html (last visited June 29, 2011).

or substantive ruling can greatly increase or decrease the bargaining power of one side. On the contrary, when both sides face uncertainty with regard to the potential outcome of an important ruling, the bargaining power tends to be more evenly distributed.

The above viewpoints represent, perhaps, the extreme positions of when to mediate a wage hour lawsuit – very early in the case or after discovery is complete. The authors' experience in mediation suggests that the best time to mediate a case is following *some* preliminary discovery. Unless and until the parties have conducted some discovery, mediation is often frustrating and ultimately ineffective because the parties approach the mediation with widely divergent views of the facts in dispute. Parties are not likely to reach an agreement before attaining a realistic sense of the strengths and weaknesses of their opponent. The effective advocate will develop a litigation plan that enables both clients and their legal counsel to attain this information sooner rather than later.

The use of sampling as described above can be an efficient tool. In addition, it may be necessary in some cases to conduct depositions of the named plaintiffs and perhaps representative management witnesses to focus the dispute and narrow the gap between understanding between the claims in the litigation and the practices in the workplace. Another type of limited pre-mediation discovery may include giving the plaintiffs' lawyers access to the workplace. Especially when the lawsuit involves allegations that employees performed off-the-clock work, a limited tour of the worksite for plaintiffs' counsel can have a significant impact.[5] Of course, the parties must agree

[5] The adage that "a picture is worth a thousand words" rings true in wage and hour mediation if the plaintiffs' lawyers actually observe in the workplace activity such as donning and doffing that corroborates the defense lawyers' description. In the right case,

on a protocol that protects the interest of both sides in the event mediation is not successful. With some or all of these steps taken, the parties can engage in an informed settlement dialogue at a relatively early stage in the process.

B. Mediator Selection

Selecting the right mediator depends on a number of factors, including, location, availability, cost, mediator style, mediator experience, and mediator reputation. As an initial matter, the mediator should have a proven track record as a neutral and be willing to provide references from attorneys who engaged the mediator even if their particular case or cases did not settle.

Mediators fall into two broad categories – evaluative and facilitative. Evaluative mediators are known for offering their opinion on how the parties should settle the case.[6] On the other hand, facilitative mediators are known for allowing the parties to come to their own conclusion as to how to settle the case.[7] In wage and hour cases, the parties are generally best served by selecting a mediator with evaluative tendencies, which means that the mediator has substantive knowledge and experience with wage and hour law litigation. With substantive knowledge of the federal and state wage and hour laws at the center of the dispute, the mediator will be able to better understand the issues and communicate with counsel and the parties in a common language unique to wage and

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a tour of the workplace can effectively convey a message that the defendant is in compliance with the law or that litigating the case as a class or collective action will be very difficult.

[6] Michael Roberts, *Choosing the Right Mediator: A Guide to Effective Mediation Styles*, http://www.mediate.com/articles/roberts3.cfm (last visited June 29, 2011).

[7] *Id.*

hour disputes. This knowledge, in turn, will be valuable help to the parties in exploring a settlement.

Selecting a mediator with extensive experience in wage and hour matters also will increase the likelihood that both sides will respect and value the mediator's evaluation of the respective positions of the parties. A mediator with knowledge of wage and hour laws can act as a "reality check" for the parties by providing each with a credible assessment of the weaknesses of their respective cases -- a task that is often difficult to accomplish by the client's attorney because of pressure to focus on the positive aspects of the client's case. Although it is rare to find a mediator with a background of both employee representation and company representation, substantive experience gained from litigating FLSA cases and knowledge of the law adds value regardless of which side their the prior advocacy supported. The key is that both sides to the mediation respect the substantive expertise of the mediator even if they do not ultimately agree with his or her evaluation of the likely outcome of the particular dispute.

C. Pre-Mediation Communication and Written Submissions

Once the mediator is selected, initial progress can be made through telephone calls between the mediator and the parties' lawyers as well as by exchanging pre-mediation written submissions. Nearly all mediators require a statement from each side summarizing the pertinent facts, the issues, and the positions of the parties. Mediators differ in whether they require the parties to exchange the pre-mediation memorandum but we have found it almost universally advisable to share the pre-mediation memoranda with both the client and opposing counsel. Exchanging the written submission in

advance of the in-person mediation should be viewed as a further step in educating the other side about the company's view of the facts and the law.

D. Preliminary Issues to Address Before the Scheduled Mediation

The following can and should be addressed before the parties to a wage and hour case begin the mediation: (1) the description and size of the class from each party's perspective; (2) the specific factual and legal issues on the merits and the corresponding dollar calculations; (3) categorization of claimants into distinct groups for purposes of settlement; (4) class certification issues, including whether the class is F.R.C.P. 23 or FLSA class; (5) class notice and claims administration process; (6) expected participation rates; (7) disposition of unclaimed funds; (8) treatment of class representatives and any premium payments contemplated; (9) scope of release; (10) settlement proposals to date and the reasoning behind such proposals; (11) defendant's ability to pay; (12) anticipated judicial stance on the case; and (13) attorneys' fees.

Some of these issues are more critical to resolve early on than others. First, the parties should be on the same page about who is in and who is not in the class. Contrary to the initial reaction of some defendants, it is not unusual for both sides to desire class certification in the context of a negotiated settlement. The reason is that an expansion of the class definition may benefit the defendant as the defendant can negotiate for a release of liability from more potential claimants.

In wage and hour cases, it is particularly important to include a discussion of the framework for potential damages in the written submission. Each party should include a damages model in their written submission. Preferably, both models will use the same elements to calculate the damages—i.e., such as number of putative class members,

average rate of pay, number of days or hours worked, scope of potential penalties, etc.—so that the source of any discrepancy is easy to pin-point. Since agreeing to the calculation of damages is crucial to settling a wage and hour case, catching these discrepancies early on by breaking down damages into component parts and using the same spreadsheet format helps the parties facilitate a workable agreement in a timely fashion.

The parties also should seek to resolve differences over attorneys' fees before the mediation. Often, plaintiffs' attorneys assume that fees are a given and not worth discussing until the conclusion of the mediation. This belief is mistaken, as plaintiffs' attorneys' fees are often contested and require detailed work on the part of the mediator to review plaintiffs' time records and test how efficient counsel has been. Thus, it is best to address attorneys' fees before the mediation. Plaintiffs' attorneys should consider providing their time records to the mediator before the mediation if there is any issue with the total amount of fees demanded.

In addition to a general memorandum outlining each party's take on the dispute, the mediator may request a confidential document from each side. This document should identify all motivators for and impediments to settlement. The effective advocate uses the document to candidly communicate with the mediator so that the mediator can better assist the parties in reaching a settlement.

Apart from written submissions, pre-mediation telephone calls can facilitate the exchange of information without the need for travel or coordinating the schedules of all attorneys and clients. A joint conference call should be used to set the ground rules for the mediation, identify the necessary attendees, and discuss the information that has been

or will be exchanged between the parties prior to the in-person mediation. Unlike civil litigation, private mediation rules do not bar *ex parte* communications between the mediator and either of the parties and their lawyers. Candid pre-mediation discussions with the mediator are an effective way to communicate information to the mediator without risk of alienating the other side or prematurely revealing vulnerable information to the other side. The confidentiality inherent with out-of-court mediation presents lawyers with an opportunity to educate and attempt to persuade the mediator in confidence and in advance of the parties' in-person mediation.

E. Presence of Clients at the Mediation

Should clients attend the mediation? From the defense standpoint, the answer is a resounding "yes" at least in terms of having a company representative on hand to participate and listen to the presentation by the plaintiffs and their attorneys. The company's initial positions in the dispute often change as the mediation progresses and it hears the plaintiffs' perspective on the mediation unvarnished. The need to re-evaluate is common, and counsel cannot do so effectively if the decision-maker is not present and keenly aware of the dynamics at play in the mediation.[8] In addition, it can be beneficial to have a company representative who is intimately familiar with the plaintiffs' work activities. Such an individual may be able to assist counsel in readily responding to the plaintiffs' attorneys' contentions and "keep the opposition honest."

It is less common that named or representative plaintiffs attend mediation sessions in a class or collective wage and hour action. In our experience, the presence of plaintiffs

[8] Michael J. Leech, *Mediation Tips PowerPoint Presentation* (April 15, 2011).

at the actual mediation is less important than the plaintiffs' attorneys being able to speak on behalf of their clients and the putative class.

F. The Mediation Day

At the in-person mediation session, parties should have with them copies of the relevant documents from the litigation as well as the information exchanged in anticipation of mediation. If the case is mediated early in the litigation, having copies of relevant case law, administrative opinions or key statistics is valuable to the extent such information is needed to support or justify a parties' litigation or settlement position. Where discrete legal issues could impact the scope of the litigation, or perhaps resolve the case altogether, defense counsel must be prepared to argue the supporting case law and plant the seed of doubt in the mind of the plaintiffs' counsel.

Although opening statements have historically been used to open an in-person mediation session, not every case benefits from an opening presentation where the attorneys merely re-state the viewpoint expressed in their written submission or where it is clear that factual disputes are well-known and all parties acknowledge that factual disagreements will not be resolved at mediation. In such a case, the mediation may progress faster once the parties are separated into different rooms and the mediator engages in shuttle diplomacy while the parties focus on the financial implications of a deal.

If the parties agree that opening statements will be made, it is important for defense counsel in a wage and hour case to disavow the plaintiffs' counsel of any notions that litigating the case on a class-wide basis will be straightforward or will follow the pattern of any prior cases in which the plaintiffs' may have been involved. Careful

thought should be given to the structure of an opening offer so that it honors the company's stated position of compliance with the law and yet acknowledges that settlement will involve a reasonable payment in exchange for a release of claims. In advance of the mediation, defense counsel should create electronic spreadsheets containing the monetary components of an opening offer and which can be modified as necessary throughout the mediation.

After the in-person mediation ends, keeping the mediator engaged beyond the scheduled mediation session can be valuable in resolving an impasse. Experienced wage and hour mediators often schedule a second mediation session, to occur some days or weeks after the first, to allow the parties time to process and evaluate the information learned. Mediators also frequently offer to continue *ex parte* or joint conference calls if the dispute appears to be hung up on a particular contested fact or legal issue, or appears to be headed in the direction of resolution. Regardless of the forum, though, counsel should take advantage of the additional communication to communicate a steadfast desire to settle only on reasonable terms. Continued discussions offer yet another opportunity for counsel to present targeted factual or legal arguments in response to questions or obstacles raised at the mediation.

III. Utilizing a Settlement Memorandum at the Mediation

Counsel should come to the mediation with a checklist of important settlement terms and the range of options that may be available as a compromise. If a deal is struck, counsel should normally memorialize the terms of the settlement before leaving the mediation even if all parties agree that the memorandum will be replaced with a formal settlement agreement to be completed by counsel and presented to the court.

Normally, the Memorandum of Understanding (MOU) should be signed by a representative for all parties and should set forth the essential terms of the parties' settlement. Simultaneous execution provides certainty as to the terms of the agreement. In particular, the MOU should define the putative class to which the settlement applies, the claims that will be resolved by means of the settlement and the scope of the release by which settlement participants will be bound. The MOU should, of course, state the Settlement Amount, its component parts and the method by which each settlement participant's individual share will be calculated. The MOU should describe the tax characterization of any settlement payment. The MOU should also address attorneys' fees and costs and the costs of administering the settlement and whether there will be a claims administrator. The MOU should also describe what steps the parties will take to receive court approval of the settlement and obtain a dismissal of the litigation. Finally, the MOU should recite that the parties will prepare and execute a formal Settlement Agreement and Release of all claims.

IV. Conclusion

The potential benefits of a successful mediation are great for both parties to a wage and hour litigation. To take full advantage of these benefits, counsel should enter mediations with a clear strategy and be well prepared to maximize the benefits of mediation at all stages of the process. The best mediators address the threshold procedural and substantive issues early and often – before, during, and after the end of an in-person mediation session. By raising and considering with your clients the issues and strategies discussed above, counsel will be better able to serve their clients and will increase the chance of a favorable settlement.

WAGE AND HOUR OUTLINE

A. ***Perez v. Mortg. Bankers Ass'n***, 135 S. Ct. 1199 (Mar. 9, 2015) (overruling D.C. Circuit's interpretation of notice-and-comment requirement for rule-making under Administrative Procedure Act (APA)).

FACTS

- The Department of Labor's ("DOL") Wage and Hour Division issued opinion letters in 1999 and 2001 stating that mortgage loan officers do not qualify for the FLSA administrative exemption.

- The DOL promulgated revised FLSA regulations in 2004 and the Mortgage Bankers Association (MBA) requested a new opinion interpreting the revised regulations.

- The DOL issued an opinion letter in 2006 finding that mortgage loan officers fell within the administrative exemption under the 2004 regulations.

- The DOL again altered its interpretation of the FLSA's administrative exemption as it applied to mortgage loan officers in 2010.

- These DOL interpretations were all issued without notice and comment.

- The MBA filed a complaint in federal district court challenging the 2010 interpretation, arguing that it was procedurally invalid in light of the D.C. Circuit's precedent under the so-called *Paralyzed Veterans* doctrine, which held that if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish . . . without notice and comment."

KEY TAKEAWAYS

- The Court held that the *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA.

- Executive agencies are *not* required to use notice-and-comment procedures when changing their interpretation of their own regulations.

- However, where an agency issues an informal, interpretive rule that is arbitrary

or capricious, courts will not give it effect.

B. ***Integrity Staffing Solutions, Inc. v. Busk***, 135 S. Ct. 513 (Dec. 9, 2014) (holding that time spent by employees waiting for and undergoing security screenings before leaving workplace is not compensable under FLSA).

FACTS

- Integrity Staffing Solutions, Inc. required its hourly warehouse workers, who retrieved products from warehouse shelves and packaged them for delivery to Amazon.com customers, to undergo a security screening before leaving the warehouse each day.

- Former employees brought putative class action under the FLSA, alleging that they were entitled to compensation for the roughly 25 minutes each day that they spent waiting for and undergoing those screenings.

- They also alleged that the company could have reduced that time to a *de minimis* amount by adding screeners or staggering shift terminations and that the screenings were conducted to prevent employee theft and, thus, for the sole benefit of the employers and their customers.

- The district court dismissed the complaint for failure to state a claim, holding that the screenings were not integral and indispensable to the employees' principal activities but were instead postliminary and non-compensable.

- The Ninth Circuit reversed, ruling that post-shift activities that would ordinarily be classified as non-compensable postliminary activities are compensable as integral and indispensable to an employee's principal activities if the post-shift activities are necessary to the principal work and are performed for the employer's benefit.

KEY TAKEAWAYS

- The Supreme Court reversed, holding that this time is not compensable under the FLSA.

- The Court rejected the employees' argument that time spent on screenings was compensable because the employer required it for the employer's benefit, holding that this theory was inconsistent with Congress' amendment of the FLSA in the Portal-to-Portal Act to limit the scope of compensable work.

- Instead, the Court ruled that for an activity to be integral and indispensable to a

principal activity, and thus compensable, it must be "an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

- The Court concluded that the security screenings were not a "principal activity" of the employees because they were employed to package products, not to go through security screenings.

- The security screenings were also not "integral or indispensable" to the employees' principal activities since the employer "could have eliminated the screenings altogether without impairing the employees' ability to complete their work."

- The Court also rejected as irrelevant whether the employer could have shortened the time required for the screenings, holding that such arguments "are properly presented to the employer at the bargaining table . . . not to a court in an FLSA claim."

C. ***Tyson Foods, Inc. v. Bouaphakeo,*** No. 14-1146 (U.S. Mar. 22, 2016) (holding that whether "representative evidence," such as statistical evidence may be used in a class action depends on the purpose of which it is being used and the elements of the underlying claim).

FACTS

● Plaintiffs in this donning and doffing case were employees at Tyson Foods' pork processing plant's kill, cut and retrim departments in an Iowa facility where hogs were slaughtered and prepared for shipment. The work was dangerous and required use of certain protective gear, the composition which depended on the work performed on any given day.

● Tyson did not pay for specific time spent donning and doffing the gear. Instead, as the result of prior litigation, it used different systems at different times to estimate an amount of pay it gave to some workers and not others. Tyson did not keep proper records of employee time spent donning and doffing.

● Plaintiffs' claim was that they were denied pay for the donning and doffing, which when properly calculated entitled them to overtime pay under both the FLSA and Iowa state wage and hour law.

● The district court certified the case as a Rule 23 class action with respect the state law claims and a collective action with respect to the FLSA cause of action, acknowledging that while the workers did not all wear the same gear the similarities among the employees under Tyson's pay system predominated over these differences such that class status was appropriate.

● Because there were no time records covering the work at issue, Plaintiffs retained experts to use "representative evidence" to create and apply a class-wide formula to estimate the average time used by each employee for donning and doffing the safety gear. This average amount of time could then be added to each employee's hours worked in a given week, and thereby used to determine whether overtime pay was owed.

● The issue on appeal was whether class certification was appropriate or whether the individual inquiries into the time each worker spent donning and doffing predominated over any other issues such that certification was improper. Embedded in this question was whether the formula applied by Plaintiffs could be used such that common issues predominated over individual questions.

KEY TAKEAWAYS

● The Supreme Court concluded that application of this type of formula in this context was appropriate to establish class-wide liability.

● In reaching this conclusion the Court acknowledged that sometimes representative evidence may be the only way to establish liability, and the fact that such evidence is used in a class-wide context rather than in a single plaintiff case does not render it inappropriate.

● In this case the evidence was proper because the employer had failed to maintain the required time-records. It wouldn't make sense to allow Tyson to take advantage of this failure to defeat liability, particularly in the FLSA context given the remedial nature of the statute and the public policy which animates it, militating against making the burden of proving hours worked an impossible hurdle.

● Especially significant was that even if the case was brought as multiple single-plaintiff cases rather than a class action, the mathematical calculations, in this case the average time spent donning and doffing, could have been used by each Plaintiff--in other words the same evidence would have been a permissible means of demonstrating hours worked in each individual case.

● *Wal-Mart Stores, Inc. v. Dukes*, a sex discrimination putative class action, was distinguishable because those employees were not similarly situated. Here, the plaintiff-employees were subject to single pay policy at a single plant and did similar work. In *Dukes*, the various allegedly offending managers at different stores had been given discretion by the employer over employment matters, and no common mode of exercising that discretion was established.

● In reaching its conclusion the Court declined to create a broad categorical rule concerning use of representative or statistical evidence in the class context. Rather the

use of such evidence depends on the purpose for which it is introduced and the underlying cause of action. The key is "the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action."

D. ***Chen v. Major League Baseball Props., Inc.***, 798 F.3d 72 (2d Cir. Aug. 14, 2015) (holding that an "establishment" for purposes of the FLSA's amusement and recreational establishment exemption requirements means a distinct, physical place of business as opposed to an integrated multi-unit business or enterprise).

FACTS

- FanFest was a five-day interactive baseball theme park organized in conjunction with Major League Baseball's 2013 All-Star Week which was held at the Javits Center in New York City.

- Plaintiff volunteered to work at FanFest. After attending a three-hour training, he then worked 14 hours over three shifts. Plaintiff was not paid minimum wage for his work, but instead was given a t-shirt, cap, drawstring backpack, water bottle, and a baseball.

- He then sued, arguing that he should have been paid minimum wage for the time he worked at FanFest.

- MLB moved to dismiss, arguing that FanFest volunteers are exempt from the FLSA's minimum wage requirements under the seasonal amusement or recreational establishment exemption.

- The district court granted the motion and dismissed the case.

KEY TAKEAWAYS

- The Second Circuit affirmed. The appeal turned on the meaning of the word "establishment." Chen argued that, although FanFest took place at the Javits Center, he was actually an employee of Major League Baseball and the Office of the Commissioner of Baseball, so the relevant "establishment" should include all operations of those entities. If that were the case, the exemption would not have applied since Major League Baseball and the Commissioner of Baseball do not operate seasonally, as defined by clauses (A) or (B) of § 213(a)(3).

- The court rejected this argument, holding that FanFest at the Javits Center is the relevant "establishment," and because FanFest was only a 5-day long event, it clearly meets the "seasonal" requirement of clause (A).

- In so holding, the court relied on case law, legislative history, and DOL regulations that define "establishment" as a "distinct physical place of business," as opposed to "an entire business or enterprise" which may include several places of business.

E. ***Cheeks v. Freeport Pancake House, Inc.***, 796 F.3d 199 (2d Cir. Aug. 7, 2015) (holding that stipulated dismissals settling FLSA claims with prejudice require court or DOL approval).

FACTS

- Standard FLSA case was quickly settled after the Initial Conference.

- The parties then filed a joint Stipulation of Dismissal with Prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

- The district judge refused to honor the stipulation and ordered the parties to "file a copy of the settlement agreement on the public docket" and "show cause why the proposed settlement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching."

- The parties instead asked the judge to certify the case for immediate review by the Second Circuit on the issue of whether FLSA actions are an exception to Rule 41(a)(1)(A)(ii)'s general rule that parties may stipulate to a dismissal with prejudice without the involvement of the court.

KEY TAKEAWAYS

- Because the parties agreed that court approval should not be required, the Second Circuit solicited the views of the DOL.

- The DOL submitted a letter brief taking the position that the "FLSA falls within the 'applicable federal statute' exception to Rule 41(a)(1)(A), such that the parties may not stipulate to the dismissal of FLSA claims with prejudice without involvement of a court or the DOL."

- The court agreed with the DOL. It started its analysis by noting that this issue is a "blank slate" as "neither the Supreme Court nor our sister Circuits have addressed the precise issue before us."

- Although the court was "mindful of the concerns" articulated by district courts which held that court approval is not required, it ultimately held that the FLSA is a "uniquely protective statute," and as such, requiring judicial or DOL approval is consistent with its underlying purpose and helps eliminate potential abuse, such as exceedingly disproportionate attorney awards.

F. ***Gortat v. Capala Bros.***, 795 F.3d 292 (2d Cir. July 29, 2015) (holding that expert fees are not recoverable under the FLSA).

FACTS

- Plaintiffs alleged that they were denied wages, including overtime compensation, throughout their employment.

- After six years of litigation, the case went to trial and the plaintiffs prevailed, winning unpaid wages as well as $514,284.00 in attorney's fees and $68,294.50 in costs.

- In support of their claims, the plaintiffs retained an economic expert to aid in establishing their alleged damages.

- In their appeal to the Second Circuit of the fee award, the defendants argued that the expert fees (which constituted $10,425 of the attorney's fee award) are not recoverable under the FLSA.

KEY TAKEAWAYS

- The Second Circuit held that expert fees are not recoverable under the FLSA.

- The Court relied on the text of the FLSA, which states that where a defendant has violated the Act, "the court . . . shall, in addition to any judgment awarded to the . . . plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

- Based on this language, the Court said that the plaintiffs were not entitled to be reimbursed for the expert fees, as the FLSA does not explicitly provide for such reimbursement.

G. ***Lola v. Skadden, Arps, Slate, Meagher & Flom LLP***, --- F. App'x ---, 2015 WL 4476828 (2d Cir. July 23, 2015) (holding that document review work not necessarily amount to practicing law).

FACTS

- Plaintiff alleged that he should have been eligible for overtime pay for his work as a contract attorney performing document review for a law firm in connection with a multi-district litigation.

- He claimed that this work was not exempt from the overtime laws as it did not constitute the "practice of law" because he used criteria developed by others to simply sort documents into different categories, but exercised no legal judgment whatsoever.

- The district court granted the defendants' motion to dismiss, holding that contract attorneys were exempt from the FLSA as licensed attorneys engaged in the practice of law.

- Although the plaintiff was paid on an hourly basis, the district court noted that the FLSA's regulatory scheme carves doctors and lawyers out of the salary and duty analysis employed to discern if other types of employees fall within the professional exemption.

KEY TAKEAWAYS

- The Second Circuit reversed, holding that document review work does not necessarily amount to the practice of law.

- Although the court agreed with the lower court's conclusion to look to North Carolina law in determining whether plaintiff was practicing law under the meaning of the FLSA, it said in remanding the case that the trial court erred in concluding that "engaging in document review per se constitutes practicing law."

- The court noted that a "fair reading" of plaintiff's complaint showed that he "provided services that a machine could have provided" and pointed to the parties' agreement at oral argument "that an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law."

H. ***Glatt v. Fox Searchlight Pictures, Inc.***, 791 F.3d 376 (2d Cir. July 2, 2015) (establishing primary beneficiary test to determine whether an unpaid intern is an employee under the FLSA and NYLL).

FACTS

- Unpaid interns brought putative class action against movie distribution company and its parent company, claiming compensation as employees under the FLSA and NYLL.

- In 2010, the DOL published a formal intern fact sheet to provide guidance on what circumstances qualify workers as employees in the context of unpaid interns working in for-profit companies. The fact sheet enumerated six factors, each of which must be satisfied before an employer may establish that an intern is not an employee pursuant to the FLSA. The factors, mirroring prior DOL guidelines on trainees, were based on the reasoning articulated by the Supreme Court in a 1947 decision holding that unpaid railroad brakemen trainees should not be treated as employees under the relevant statutes.

- Prior to the court's opinion in *Glatt*, district courts in the Second Circuit generally applied a totality of the circumstances approach that incorporated, with varying degrees of deference, the DOL's six criteria in determining an intern's employment status.

KEY TAKEAWAYS

- The court rejected the DOL's six-factor test and concluded that the proper inquiry for determining when an intern qualifies as an employee under the FLSA turns on whether the intern or the employer is the primary beneficiary of the relationship.

- The court also found that the question of whether each plaintiff satisfied the primary beneficiary standard called for a highly individualized analysis that required particularized proof.

- The court noted that the primary beneficiary test, adopted by some sister circuits, has two salient features: (1) "what the intern receives in exchange for his work"; and (2) unlike the DOL's rigid criteria, the flexibility "to examine the economic reality as it exists between the intern and the employer."

- The court then articulated specific considerations to help guide district courts in applying the revised standard. These considerations include:

    1) whether the intern and the employer clearly understand that there is no expectation of compensation;

    2) whether the internship provides training similar to that provided in an educational environment;

    3) whether the internship is tied to the intern's formal education program by

integrated coursework or the receipt of academic credit;

4) whether the internship corresponds to the academic calendar;

5) whether the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;

6) whether the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and

7) whether the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

- The court instructed that its considerations are not exhaustive, that no single factor is dispositive, and that "every factor need not point in the same direction for [a] court to conclude that [an] intern is not an employee entitled to the minimum wage."

- The court next addressed whether plaintiffs could be certified as a New York class under Rule 23 and concluded that the primary beneficiary standard requires a "highly individualized inquiry" into the activities and circumstances of each plaintiff and therefore reversed the district court's certification order.

- Finally, the court held that the plaintiffs in the proposed collective action were not similarly situated even under the minimal pre-discovery standard under the FLSA. If anything, the court explained, the prospective FLSA collective, being nationwide in scope, "present[ed] an even wider range of [individual] experience" than the New York class.

I. ***Greathouse v. JHS Sec., Inc.***, 784 F.3d 105 (2d Cir. Apr. 20, 2015) (overruling prior precedent that making informal oral complaint is not "filing a complaint" and thus not protected under the FLSA).

FACTS

- Plaintiff claimed he was retaliated against in violation of the FLSA when his employment was terminated after he complained internally about the alleged nonpayment of his wages.

KEY TAKEAWAYS

- Internal complaints to an employer are now protected from retaliation under the FLSA.

- Specifically, a complaint is "filed" for the purposes of the FLSA "when a reasonable objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act."

- The employee need not invoke the FLSA by name in order to claim its protection and the complaint could be oral or written.

- This decision overrules the Second Circuit's long-standing precedent that an employee's complaint must be made to a governmental agency in order to qualify for protection under the FLSA's anti-retaliation provision.

J. ***Roach v. T.L. Cannon Corp.***, 778 F.3d 401 (2d Cir. Feb. 10, 2015) (holding that class certification under Rule 23(b)(3) does not require a finding that damages are capable of measurement on a class-wide basis).

FACTS

- Plaintiffs alleged that Cannon had a policy of not paying "spread of hours" pay—which is a premium payment that the New York Labor Law requires employers to make to certain non-exempt employees any time they work more than 10 hours in a workday.

- The district court applied the U.S. Supreme Court's *Comcast* ruling, and found that certification was inappropriate, because even though Cannon failed to factor in the spread of hours pay into its non-exempt employees' weekly wage calculation, each potential class member would have to rely on individualized proof of hours worked to prove the amount of their damages, and thus, the plaintiffs could not satisfy the Rule 23(b)(3) predominance requirement. Put differently, class treatment was inappropriate because plaintiffs could not offer a damages model that would appropriately calculate damages across the entire class.

KEY TAKEAWAYS

- The Second Circuit reversed, holding that *Comcast* does not prevent class certification solely because plaintiffs cannot measure damages on a class-wide basis.

- Instead, the Second Circuit said that the district court may consider as but one factor in its predominance analysis that damages "may have to be ascertained on

an individual basis" when deciding "whether issues susceptible to generalized proof outweigh individual issues."

K. ***Ruiz v. Citibank, N.A.***, 93 F. Supp. 3d 279 (S.D.N.Y. Mar. 19, 2015) (decertifying class of 400 personal bankers under *Dukes* where discovery had not turned up more than anecdotal evidence of illegal pay practices).

FACTS

- Personal bankers from California, New York, Washington D.C. and other states alleged that Citibank withheld overtime pay under a nationwide scheme encouraging off-the-clock work.

- The court denied the plaintiffs' bid for class certification of state law claims and decertified a collective action under the FLSA.

KEY TAKEAWAYS

- The court compared the case to the U.S. Supreme Court *Dukes* ruling and denied class certification almost entirely on the "commonality" requirement of Rule 23.

- Although finding "systematic violations at the branch level," the court held that the plaintiffs failed to produce sufficient evidence to connect those violations to a uniform, overarching company practice.

- In decertifying the FLSA collective action, the court analogized the "commonality" requirement of Rule 23 to the "similarly situated" test for collective action ultimate certification.

L. ***Mark v. Gawker Media LLC***, No. 13-cv-4347 (AJN), 2015 WL 2330274 (S.D.N.Y. Apr. 10, 2015) (approving notice to potential FLSA opt-ins by social media).

FACTS

- Former interns alleged that Gawker, an online media company and blog network, failed to properly pay interns the minimum wage and failed to maintain proper records.
- The court permitted the plaintiffs to propose forms of notice that would be provided to potential opt-ins via social media.

- The plaintiffs' first proposal, which involved the use of Twitter, LinkedIn, Reddit, Facebook, and Tumblr, was rejected after the judge found the proposals

"substantially overbroad for purposes of providing notice to potential opt-in Plaintiffs, and much of Plaintiffs' plan appears calculated to punish Defendants rather than provide notice of opt-in rights."

- The plaintiffs then submitted a revised proposal, in which they asked to "follow" known former interns on Twitter in order to send a direct private message, to "friend" former interns on Facebook so that a direct message would not go to the user's spam folder and to send an "InMail" message to former interns on LinkedIn.

KEY TAKEAWAYS

- The court approved the revised proposal on two conditions: (i) that the plaintiffs "unfollow" the former intern on Twitter if the intern does not opt-in by the opt-in deadline; and (ii) that they not "friend" individuals on Facebook, "as it could create a misleading impression of the individual's relationship with plaintiffs' counsel."

- This case illustrates a recent trend in which courts have recognized the potential utility and communication value of social media.

M. ***Doyle v. City of New York***, 91 F. Supp. 3d 480 (S.D.N.Y. Mar. 4, 2015) (holding that individuals who perform community service in exchange for dismissal of criminal charges are not employees entitled to federal minimum wage).

FACTS

- Plaintiffs performed community service for New York City in exchange for eventual dismissal of minor criminal charges as part of a diversionary program known as an adjournment in contemplation of dismissal (ACD).

- Plaintiffs were not paid for their service and brought an action against the city, alleging that they qualified as employees under the FLSA and thus were entitled to receive federal minimum wage.

- The city moved to dismiss for failure to state a claim.

KEY TAKEAWAYS

- The court dismissed the complaint, holding that plaintiffs were not "employees" within the meaning of the FLSA as a matter of law.

- The court gave deference to the DOL's interpretation that individuals who are

required by a court to perform community service for no compensation are notconsidered employees under the FLSA, and found that, as a matter of economic reality, plaintiffs were not covered employees.

- Applying the economic reality test at "a higher level of generality" and relying on "our common linguistic intuitions," the court found that plaintiffs did not perform community service to earn a living or to receive financial compensation, but to avoid further criminal prosecution.

- The court observed that extending the FLSA to cover the plaintiffs would do little to advance the law's purpose and would possibly undermine the efficacy of New York's ACD program.

N. ***Flores v. Mamma Lombardi's of Holbrook, Inc.***, --- F. Supp. 3d ---, 2015 WL 2374515 (E.D.N.Y. May 18, 2015) (reducing attorneys' fees described as a "princely sum" in FLSA case).

FACTS

- Parties in wage and hour collective and class action involving class of over 4,000 employees asked Magistrate Judge to approve a $1.375 million settlement.

- The settlement agreement called for an award of one-third of the settlement amount, or approximately $445,500, to go to class counsel for attorneys' fees.

- Although the judge approved the overall settlement amount, he rejected the attorney fee application, instead finding the appropriate amount given the nature of the case and work performed to be $92,974.90—a reduction of more than 80%.

KEY TAKEAWAYS

- In rejecting the "princely sum" sought by plaintiffs' counsel, the court noted that in assessing the reasonableness of fee applications in class actions, courts must "act as a fiduciary who must serve as a guardian of the rights of absent class members."

- The court noted that the fee request "appears to be driven by plaintiffs' counsel seeking high payouts at the expense of silent class members" and suggested that other courts which had approved similar fee awards had failed to scrutinize the reasonableness of the fee applications.

- The court noted that awarding fees on a percentage basis would "result in a windfall" and instead applied the lodestar method.

O. ***Scott v. Chipotle Mexican Grill, Inc.***, 94 F. Supp. 3d 585 (S.D.N.Y. Mar. 27, 2015) (holding that a report prepared by a human resources consultant is not protected by the attorney-client privilege).

FACTS

- Plaintiffs alleged that Chipotle misclassified its Apprentices and Assistant Managers as exempt from federal and state overtime laws.

- Plaintiffs moved to compel the production of a report prepared by a human resources consultant retained by a law firm Chipotle had hired to assess whether its Apprentices and Assistant Managers should be paid overtime.

- This report analyzed the job functions of a group of Apprentices to, "get a really good understanding of what Apprentices do in their day-to-day jobs" and provide the law firm "information on the ground so that they could give us an opinion on what we were asking."

- Chipotle maintained that the report was attorney-client privileged.

KEY TAKEAWAYS

- The court held that the report was not protected by the attorney-client privilege because the consultant was not an agent of Chipotle's attorneys.

- In reaching this conclusion, the court noted that the law firm that received the report had already offered its opinion on whether the positions were exempt from overtime laws and that by the time the report came out, Chipotle had already hired another firm for a second opinion, which it had also received.

- The court further noted that the report did not tell the attorneys anything critical to their legal analysis that they could not learn on their own. The consultant was not, for instance, interpreting complicated scientific concepts beyond the lawyers' expertise so that the lawyers could then provide legal advice, but was just explaining job duties to the attorneys, which they could have learned from the client directly.

P. ***Koumoulis v. Indep. Fin. Mktg. Grp., Inc.***, 295 F.R.D. 28 (E.D.N.Y. Nov. 1, 2013)

(holding that communications between outside counsel and HR personnel during employer's internal investigation into discrimination allegations were not protected by attorney–client privilege).

FACTS

- Plaintiffs alleged that defendants discriminated against them because of their religion, national origin, and race; subjected them to a hostile work environment; and retaliated against them for complaining.

- Plaintiffs moved to compel the production of documents that defendants withheld on the basis of the attorney–client privilege concerning one plaintiff's internal complaints and the subsequent investigation by the company's human resources managers into those complaints.

KEY TAKEAWAYS

- The court held that communications between outside counsel and human resources personnel were not protected by the attorney–client privilege because "their predominant purpose was to provide human resources and thus business advice, not legal advice."

- The court described outside counsel's role as "help[ing] supervise and direct the internal investigations primarily as an adjunct member of Defendants' human resources team."
- The court acknowledged the difficulty of its decision in light of the overlapping nature of legal and human resources advice, but still found the advice business-related because "like other business activities with a regulatory flavor, [human resources work] is part of the day-to-day operation of a business." The court explained that, "just as an employment lawyer's legal advice may well account for business concerns, a human resources employee's business advice may well include a consideration of the law."

- In articulating its decision, the court noted that counsel's advice rarely involved interpreting and applying legal principles.

- Upon review, the district judge reaffirmed the magistrate judge's opinion, describing outside counsel's advice as "plainly . . . not legal advice, but rather human resources advice on personnel management and customer relations."

FLSA: Life After *Cheeks*

I. FLSA: Introductory Matters

Filing Trends in the EDNY: 2005 -2014

- While the number of Employment Discrimination lawsuits in the EDNY have remain fairly constant, the number of FLSA cases continues to rise:
    - Employment Discrimination: yearly filings between 313-394
    - FLSA: steady rise: **2005-2104: 97 cases to 763 cases**
- Individual/collective/class actions may be filed.
- Most cases are styled as collectives, even before any additional plaintiffs "opt-in."
- Anecdotally, most cases in EDNY appear to be those brought against small businesses who have either been paying wages in cash, paying straight wages that often exceed minimum wage, without the payment of overtime wages, poor record keeping documenting hours worked and wages earned as well as failure to comply with New York State wage notice laws.
- Vast majority of these cases are settled; early settlement is desired by both parties and routine.

II. How are parties to approach settlement after *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015)?

- *Cheeks* resolved the question of whether parties may enter into a non-approved Rule 41 stipulation of dismissal with prejudice without court approval.
    - They may not.
- *Cheeks* makes clear that court approval is required prior to filing of a Rule 41(a)(1)(A)(ii) stipulation of dismissal with prejudice.

- *Cheeks* has been narrowly interpreted by courts in the EDNY and SDNY. Most courts do not require a full hearing for settlement approval.
- Instead, Judges have taken a variety of approaches, including informal argument on the record, reliance on settlement proceedings conducted by the court, and/or the requirement that parties submit letter motions demonstrating why approval should be granted, without the necessity of a personal appearance by counsel.
- Courts focus first on general fairness of the settlement and, then on three main areas of concern raised by *Cheeks*.

Fairness of the Settlement

- Courts first consider the general fairness of the settlement. The issue is whether the settlement "reflects a fair and "reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching." *Mosquera v. Masada Auto Sales, Ltd.,* 09–CV–4925 (NGG), 2011 WL 282327, at *1 (E.D.N.Y. Jan. 25, 2011). The particular *Cheeks* concerns are then addressed. *See e.g.*, *Gonzalez v. Lovin Oven*, 2015 WL 6550560 (E.D.N.Y. October 28, 2015) (SIL). *Accord, Matheis v. NYPS, LLC*, 2016 WL 519089 (S.D.N.Y. February 4, 2016).
- *Lovin Oven* recognizes this two-step approach to evaluating FLSA settlements. The first evaluation is fairness under the five factors set forth in *Wolinsky v. Scholastic, Inc.,* 900 F. Supp. 2d 332, 335-36 (S.D.N.Y. 2012). Those factors are:

  (1) the plaintiff's range of possible recovery;

  (2) the extent to which "the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses";

  (3) the seriousness of the litigation risks faced by the parties;

(4) whether "the settlement agreement is the product of arm's-length bargaining between experienced counsel"; and

(5) the possibility of fraud or collusion.

Wolinsky, 900 F. Supp. 2d at 335. *See also Gaspar v. Personal Touch Moving, Inc.*, 2015 WL 7871036, at *1 (S.D.N.Y. December 3, 2015) (court considering the *bona fides* of the dispute being settled considers "the nature of plaintiffs' claims, ... the litigation and negotiation process, the employers' potential exposure both to plaintiffs and to any putative class, the bases of estimates of plaintiffs' maximum possible recovery, the probability of plaintiffs' success on the merits, and evidence supporting any requested fee award").

- When advocating for general fairness:
    - Counsel should be able to support the dollar amount and distribution of settlement proceeds as well as defendant's actual exposure in the case.
    - If there is disagreement as to wages earned, counsel "must provide each party's estimate of the number of hours worked and the applicable wage." *Gasper*, 2015 WL 7871036, at *1 (citations omitted).
- Disputes as to whether employees are properly classified as exempt
    - Properly raised as presenting *bona fide* dispute in the settlement of an FLSA case. *See, e.g. Samaroo v. Deluxe Delivery Systems, Inc.*, 2016 WL 1070346, at * 3 (S.D.N.Y. March 17, 2016) (noting the "general uncertainty of litigation" and that the parties "hotly dispute plaintiff's status as employees" as relevant in determining whether the settlement is a fair and reasonable compromise of claims).

- Pleading standard has relevance to the question of whether there is, in fact, a bona fide dispute as to liability.

- Defendant's failure to maintain records
  - Although this is often thought of as fatal to a defense, it should be remembered that the burden is, at all times on the employee to prove hours worked.
  - In the absence of records, employee may testify as to hours worked to the best of his recollection. *Avelar v. Ed Quiros, Inc.*, 2015 WL 1247102 (E.D.N.Y. 2015). The employees' recollection and estimates are presumed correct. (*Rodriguez v. Almighty Cleaning, Inc.,* 784 F. Supp. 2d 114, 126 (E.D.N.Y. 2011)).
  - Even with "recollection" being sufficient, plausibility is required. Plaintiff must plead facts sufficient to support a "reasonable inference" as to hours worked. References to "approximate" or "usual" hours worked may not be enough. *(Lundy v. Catholic Health Sys. of Long Island Inc.,* 711 F.3d 106, 114 (2d Cir. 2013); *Nakahata v. New York–Presbyterian Healthcare Sys., Inc.,* 723 F.3d 192, 200 (2d Cir. 2013); *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 88 (2d Cir. 2013), cert. denied, 134 S. Ct. 918 (2014)).
- *Question as to whether realistic likelihood of collecting full judgment is a valid reason for settlement.

Three areas of Settlements Arising in Post-*Cheeks* Settlement Proceedings

- *Cheeks* raises three major areas of concern. While *Cheeks* does not hold explicitly that confidentiality and general releases are always prohibited, it calls these provisions, as well as the reasonableness of attorneys' fees provisions into question. *E.g., Lovin Oven,* 2015 WL 6550560, at 3-4 (declining to approve settlement but giving parties option of

submitting new agreement deleting confidentiality provision); *Thallapaka v. Sheridan Hotel Assoc. LLC*, 2015 WL 5148867, at *1 (S.D.N.Y. Aug. 17, 2015) (rejecting confidentiality and general release provisions as well as proposed attorneys' fee award as insufficiently supported by the record); *Run Guo Zhang v. Lin Kumo Japanese Rest. Inc.*, 2015 WL 5122530 (S.D.N.Y. Aug. 31, 2015) (approving of settlement after additional submissions on attorneys' fees and deletion of confidentiality provision and an explanation of the bona fides of the dispute).

1. **<u>Confidentiality</u>**

- This appears to be the major factor for rejection of FLSA settlement agreements. Most courts regard such provisions as contrary to public policy. *E.g., Scherzer v. LVEB, LLC*, 2015 WL 7281651, at *1 (E.D.N.Y. November 16, 2015).
  - Indeed, it is difficult to articulate a need for such a provision in the context of an FLSA case. *See e.g., Lovin Oven*, 2015 WL 6550560, at *2-3*; Souza v. 65th St. Marks Bistro*, 2015 WL 7271747 (S.D.N.Y. November 16, 2015). A provision restricting statements to the media was approved in *Lola v. Skadden, Arps, Slate, Meagher & Flom*, 2016 WL 922223, at *2 (S.D.N.Y. February 3, 2016) (upholding term that plaintiff "will not contact the media or utilize any social media regarding this Settlement or its terms," and that, if contacted about the Settlement, Plaintiffs and their counsel shall respond " 'no comment' or be limited solely to words to the following effect: 'The matter has been resolved' ").
- * Question as to whether a mutual non-disparagement clause suffers from the same defect as a general confidentiality provision.

- Courts are unwilling to hold that "not all non-disparagement clauses are per se objectionable." *Panganiban v. Medex Diagnostic and Treatment Center, LLC*, 2016 WL 927183, at *2 (E.D.N.Y. March 7, 2016) (AMD) (quoting, *Martinez v. Gulluoglu LLC*, 2016 WL 206474, at *1 (S.D.N.Y. Jan. 15, 2016) (quotation marks and citations omitted) In Panganiban, the court noted:
    - "a settlement agreement may incorporate a non-disparagement agree as long as it includes "a carve-out for truthful statements about plaintiffs' experience litigating their case,"
    - and approving a clause stating that the "plaintiff agrees not to take any action that disparages [defendants]" and provides, "in relevant part: "[t]his Paragraph shall not be interpreted to prevent Plaintiff from making truthful statements concerning the Fair Labor Standards Act claims and defenses asserted in this action." *Id.* at *2.
- In *Gaspar v. Personal Touch Moving, Inc.*, 2015 WL 7871036, at *1 (S.D.N.Y. December 3, 2015), a broad non-disparagement provision was rejected by the court.
    - There, the court suggested that counsel consider a different provision narrowly tailored "to allow Plaintiffs to discuss" litigation of the particular case. *Id*. at 3. *See also Martinez v. Gulluoglu LLC*, 2016 WL 206474, at *1 (S.D.N.Y. January 15, 2016) (rejecting non-disparagement provision lacking appropriate "carve out"); *Tillman v. Travel*, 2015 WL 7313867, at *2 (E.D.N.Y. November 20, 2015) (rejecting broad non-disparagement provision).

2. **General Releases**

- Overly broad general releases have been rejected under *Cheeks*. *See e.g. Martinez v. Gulluoglu LLC,* 2016 WL 206474, at *2 (S.D.N.Y. January 15, 2016) (rejecting "grossly overbroad "Full General Release"); *Alvarez v. Michael Anthony George Construction Corp.*, 2015 WL 10353124, at *1 (E.D.N.Y. August 27, 2015) (court "cannot approve a settlement that includes the release of claims unrelated to wage and hour issues").
- Such provisions come under scrutiny because courts will not allow an employer to "leverage" a wage claim against other possible other claims. *Souza*, However, these provisions are not uniformly rejected. *E.g., Souza,* 2015 WL 7271747, at *5 (S.D.N.Y. November 16, 2015) (noting that "[u]nlike the courts that have rejected similar general release language in FLSA settlements," court was "inclined to allow for a general release" with modifications).
- Unlike confidentiality provisions, which are difficult to justify, courts have recognized the value of allowing parties to an FLSA lawsuit, like other employment related lawsuits, to move on from their relationship. *See Lola v. Skadden, Arps, Slate, Meagher & Flom*, 2016 WL 922223, at *2 (S.D.N.Y. February 3, 2016) (noting that "there is nothing inherently unfair about a release of claims in an FLSA settlement," and concluding that "mutual releases of claims . . . are fair and reasonable, and do not run afoul of the FLSA's purpose of preventing abuse by employers").
- Parties may argue that the employer is paying a "premium" over the wage claim in return for a general release.

- The particular amount attributable to the release of a non-FLSA claim has been held not subject to scrutiny under Cheeks, even if it is part of the overall settlement. *Panganiban v. Medex Diagnostic and Treatment Center, LLC*, 2016 WL 927183, at *1 (E.D.N.Y. March 7, 2016) (settlement amount of assault and battery claim raised in same action as FLSA claim not subject to *Cheeks* analysis); *see also Gaspar v. Personal Touch Moving, Inc.*, 2015 WL 7871036, at *2 (S.D.N.Y. December 3, 2015).

Ethical consideration of counseling for such releases:

- Approval of such clauses would generally require mutuality as well as court inquiry confirming the plaintiff's understanding of the nature of the claims being released.
- Issue arises as to the use of such releases in collective/class actions. While individual plaintiffs might be allowed to enter into such releases, particular circumstances may differ and there generally cannot be such a waiver of all class members.

3. **Attorney Fees**

- The attorney fee analysis is undertaken to determine whether the amount of fees is reasonable under the circumstances.
    - Thus a court will look to "the lodestar-the product of a reasonable hourly rate and the reasonable number of hours required by the case-which creates a presumptively reasonable fee." *Gaspar v. Personal Touch Moving, Inc.*, 2015 WL 7871036, at *1 (S.D.N.Y. December 3, 2015) (quoting *Stanczyk v. City of New York*, 752 F.3d 273, 284 (2d Cir. 2014)).

- In the context of an FLSA settlement a court may nonetheless hold that a reasonable lodestar calculated fee is excessive if it represents an "extraordinarily large percentage of the total recovery." *Id*. at 2 (approving one third of total recovery as an appropriate FLSA fee); *but see Samaroo,* 2016 WL 1070346 n.4 (court holding that it is not required, under *Cheeks* to "address the fee arrangement between plaintiffs and their counsel." The S*amaroo* also noted that:
  - "the purpose of the FLSA is to regulate the relationship between an employee and his employer and to protect the employee from over-reaching by the employer"
  - and not "to regulate the relationship between the employee as plaintiff and his counsel or to alter the freedom of contract between a client and his attorney."
- Generally, it appears that courts will not disturb fees in the 30-35% range but "have often rejected" those in the 40% range. A percentage fee that would have resulted in what was characterized as an excessive "princely sum," was rejected by the Court in *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 2015 WL 2374515 (E.D.N.Y. May 18, 2015) (discussed in related materials).
  - There, the Court rejected an attorneys' fee award of one-third of the $1.375 million settlement amount, or approximately $445,500. Although the court approved the overall settlement amount, it rejected the attorney fee application, instead finding the appropriate amount given the nature of the case and work performed to be $92,974.90—a reduction of more than 80% (noting that when assessing the reasonableness of fee applications in class

actions, courts must "act as a fiduciary who must serve as a guardian of the rights of absent class members"). *Id.,* at *306.

- The court noted that awarding fees on a percentage basis would "result in a windfall" and instead applied the lodestar method. Generally, courts will closely scrutinize awards in excess of 30%. *See Flores v. Food Express Rego Park, Inc.*, 2016 WL 386042, at *3 (E.D.N.Y. February 1, 2016); *Martinez v. Gulluoglu LLC*, 2016 WL 206474, at *2 (S.D.N.Y. January 15, 2016) ("[b]arring unusual circumstances" courts decline to award fees constituting more than one-third of the total settlement amount in an FLSA action).
- *Flores* also notes that the "prevailing" hourly rate for FLSA cases in the Eastern District ranges between $300 and $400 for partners, and $100 to $150 for junior associates. *Flores*, 2016 WL 386042, at *3 (E.D.N.Y. February 1, 2016).

III. Alternate Approaches to FLSA Disposition

- **Rule 68 Offers of Judgment**:
  - Supreme Court has recently made clear that the making of a Rule 68 Offer of Judgment that gives Plaintiff all relief sought under particular consumer protection legislation does not moot the Plaintiff's case. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). *Campbell-Ewald* involved claims brought pursuant to the Telephone Consumer Protection Act (the "TCPA").
  - Prior to Campbell there was an open question as to whether such an offer requires that the court simply enter judgment and close the case.

- In *Campbell* the Supreme Court held that "an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists." 136 S. Ct. at 664.
- The Court further noted that a "would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id*. at 672.
- This case is important because Plaintiffs are no longer in the position of arguing that early offers of judgment should not allow Defendants to "pick off" plaintiffs prior to collective or class certification motions. It is clear now that plaintiff who seeks to proceed to collective or class certification will not be prohibited from pursuing such claims by an unaccepted Rule 68 offer of judgment.

- **Agreed-upon Rule 68 Offers**
  - If Plaintiff decides to accept a Rule 68 Offer of Judgment, does *Cheeks* require court approval?
    - In *Barnhill v. Fred Stark Estate*, 2015 WL 5680145 (E.D.N.Y. September 24, 2015), District Judge Cogan held that no such approval is required.
    - *Barnhill* construes Cheeks narrowly, holding that the decision does not speak to Rule 68. Distinguishes between Rule 41, which was construed in *Cheeks*, and Rule 68, which was not. Noting also that Rule 68 offers are public filings. Therefore *Cheeks* confidentiality concerns do not apply.
- **Arbitration of FLSA Claims**

- Questions have arisen as to whether FLSA claims are arbitrable. If so, does *Cheeks* impact the conduct of the arbitration and/or the terms under which an arbitrated FLSA award may be approved by the court?
- *Moton v. Maplebear*, 2016 WL 616343, at *6 (S.D.N.Y. February 9, 2016) holds that nothing in *Cheeks* prohibits arbitration of FLSA claims. *Accord, Bynum v. Maplebear*, 2016 WL 552058, at *12 (E.D.N.Y. February 12, 2016) (JBW).
- The *Moton* Court rejected the notion that the confidentiality of arbitration proceedings (in this case under JAMS rules) does not prohibit arbitration. *Moton* holds However, *Cheeks* does apply if court approval of the award is sought.

- **<u>Dismissals Without Prejudice</u>**
  - A court may give the parties the option of obtaining approval for a Cheeks-compliant settlement agreement or, in the alternative, agreeing to dismissal of the case without prejudice "as such settlements do not require Court approval." *Reynoso v. Norman's Cay Group LLC*, 2015 WL 10098595, at *2 (S.D.N.Y. November 23, 2015); *see also Souza v. 65th St. Marks Bistro*, 2015 WL 7271747, at *2 (November 6, 2015) (noting that *Cheeks* "explicitly left open whether parties may settle FLSA cases without court approval or DOL supervision by entering into a Rule 41(a) stipulation without prejudice) (citing *Cheeks*, at 201, n.2.) (notes that Cheeks does not speak to dismissals without prejudice).

IV. <u>Ethical Concerns: Settlement of Collective/Class Action Certification</u>

- FLSA provides that cases may be brought on behalf of similarly situated employees (differs from Rule 23 Class Action because employees must "opt-in" whereas Rule 23 Class members must opt-out if making choice not to be bound)

- **Note**: Conditional Certification is not the same as Class Action Certification. FLSA collective certification is merely a mechanism to provide for the sending of notice to those who may ultimately be held to be within a class. *Myers v. Hertz*, 624 F.3d 537, 555 n. 10 (2d Cir. 2010).
- Standard for conditional certification is lenient:
    - Allegations based only upon the statement of a single plaintiff may be sufficient. *Velasquez v. Digital Page, Inc.*, 2014 WL 2048425 (E.D.N.Y. 2014). Standards for Rule 23 – Supreme Court recognizes that if Rule 23 standards are met, so too are collective certification standards (*Tyson*)
- Wage case settlements may provide for both conditional certification under the FLSA and for class certification of state law claims. *See e.g. Zeller v. PDC Corporation*, 2016 WL 748894 (E.D.N.Y. January 28, 2016).
- Settlement of collective/class claims can involve creation of a common fund providing to be allocated among class members proportional to the hours worked. Common fund cases raises the issue of the amount of compromise for each class member's wage.
    - Approval was recommended in *Zeller* despite the court's recognition that the amount was only a fraction of the amount of actual and liquidated damages due to the complex and costly nature of litigation of the wage claims at issue across the 24 states where class members are located.

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Fair Labor Standards Act Update

September 28, 2016
United States District Court
Eastern District of New York
Central Islip, New York

I. Pre-Litigation Settlements

A. Background

1. In *Cheeks v. Freeport International Pancake House*, 796 F.3d 199 (2d Cir. 2015), the Second Circuit held that stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the Department of Labor (DOL) to take effect.

2. Thus, absent approval, a release of FLSA claims contained in a negotiated settlement agreement is not binding.

3. Pursuant to *Cheeks*, an employee can now execute an out of court unapproved settlement agreement, which contains a release of claims under all employment related statutes including the FLSA, and then commence an action for unpaid wages in violation of the FLSA.

    a) In this instance, the settlement amount paid to Plaintiff will be a set-off against the damages owed.

    b) Employee will also be able to recover liquidated damages as same are non-waivable absent approval. *See Cheeks*, 796 F.3d at 203.

4. In settling matters pre-suit, parties generally desire to resolve claims quickly and without the cost of litigation.

    a) Pre-suit settlements benefit employees because:
        (1) Employee's claims are resolved quickly.
        (2) Employee is not required to participate in discovery.
        (3) Funds that could have been spent on employer's legal fees are used to compensate employee.

b) Pre-suit settlements benefit Employers because:
(1) Relatively low legal costs compared to litigation.
(2) Speed of resolution.
(3) No publicity/public record.
(4) Avoid potential of larger class/collective action.

B. Approval vs. Non-Approval of Pre-Litigation Settlements

1. Each option presents its own advantages and disadvantages.

a) Non-Approval Advantages
(1) Settlements consummated privately without court involvement.
(2) Speed
(3) Less cost
(4) Quiet settlement – No publicity/public record
(5) Scope of release is up to parties
(a) Can be a general release which includes non-FLSA related claims
(b) Mutual release can be included by employer if desired.
(6) Confidentiality can be included
(7) Non-Disparagement provisions can be included
(a) Either one-sided or mutual depending on negotiation
(b) Employers should only seek to bind specific individuals on its behalf.
(i) Employing entity cannot practically be bound to a non-disparagement clause because statements by all employees cannot be controlled by employer.
(8) Flexible settlement terms
(a) Flexible allocation of settlement proceeds between W2 and 1099
(b) Plaintiff's counsel's fees only subject to retainer agreement between Plaintiff and attorney – no justification to Court required.
(9) Liquidated damage provision can be included.

b) Non-Approval disadvantages
(1) No FLSA binding release. *See Cheeks*.
(a) Plaintiff can bring a second action under FLSA.

c) Approval advantages

(1) Full, complete, and binding release of FLSA claims for the time period referenced in the complaint.

d) Approval issues

(1) With judicial approval comes heightened scrutiny of FLSA settlements

(a) In *Cheeks*, the Second Circuit noted several areas of concern regarding FLSA settlements by referencing cases in which settlement agreements were rejected because they:

(i) Contained a battery of highly restrictive confidentiality provisions. *See* L*opez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170 (S.D.N.Y. 2015).

(ii) Contained an overbroad release that would "waive practically any possible claim against the defendants, including unknown claims and claims that have no relationship whatsoever to wage-and-hour issues." *See id.*

(iii) Contained a provision that would set the attorney's fee "between 40 and 43.6 percent of the total settlement payment" without adequate documentation to support such a fee award. *See id.*

(iv) Contained a provision barring Plaintiff's attorney from "representing any person bringing similar claims against Defendants." *See Guareno v. Vincent Perito, Inc.*, No. 14 Civ. 1635, 2014 WL 4953746, at *2 (S.D.N.Y. Sept.26, 2014).

(a) Lawyers are prohibited from insisting upon such a provision, or agreeing to same, by the plain language of Rule 5.6 of the New York Rules of Professional Conduct. The rule prohibits lawyers from participating in the making or offering "an

agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy."

(2) In light of the foregoing, in the wake of *Cheeks*, Courts are reviewing settlement agreements with heightened scrutiny. Some of the areas of focus include:

(a) Release Language

(i) Courts may disfavor releases which extend to claims beyond those at issue in the litigation. *See Lazaro-Garcia v. Sengupta Food Services*, No. 15 Civ. 4259, 2015 WL 9162701 (S.D.N.Y. Dec. 12, 2015) (general release rejected as Court insisted on a release limited to claims at issue in the action); *Batres v. Valente Landscaping Inc*., No. 14 Civ. 1434, 2016 WL 4991595 (E.D.N.Y. Sept. 15, 2016) (settlement agreement rejected where release language included all "employment-related claims . . . under theories of liability not alleged in the instant action ").

(ii) Solution – general mutual release. *See Souza v. 65 St. Mark's Bistro*, No. 15 Civ. 327, 2015 WL 7271747 (S.D.N.Y. Nov. 6, 2015) (general release approved where employer offered its own general release noting that mutual releases "ensure that both the employees and the employer are walking away from their relationship up to that point in time without the potential for any further disputes").

(b) Non-disparagement provisions

(i) General non-disparagement provisions which prohibit Plaintiff from "criticizing" defendant in any manner may be scrutinized. *See Lazaro-Garcia v. Sengupta Food Services*, No. 15 Civ. 4259, 2015 WL 9162701 (S.D.N.Y. Dec. 12, 2015) (broad non-disparagement provision rejected because "Barring the plaintiff from speaking about the settlement [and criticizing employer in the process] would ... thwart

Congress's intent to ensure widespread compliance with the statute ... by silencing the employee who has vindicated a disputed FLSA right.")

(ii) Solution – draft non-Disparagement provision which contains a carve-out for truthful statements about employee's experience litigating their case. L*opez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 177-78 (S.D.N.Y. 2015).

(c) Confidentiality – *see infra*.

(d) Settlement submission to the Court highlights "bona fides" of dispute. *See Run Guo Zhang v. Lin Kumo Japanese Restaurant Inc*., No. 13 Civ. 667, 2015 WL 5122530 (S.D.N.Y. Aug 31. 2015) (Parties directed to re-file joint settlement submission that explained the *bona fides* of the dispute and plaintiffs' counsel's contemporaneous time records).

(e) Attorney's fees - Compare

(i) *Flores v. Food Express Rego Park, Inc.*, No. 15 Civ. 1410, 2016 WL 386042 (E.D.N.Y. Feb. 1, 2016) (Court reviewed and reduced attorney's fees)

(ii) *Samaroo v. Deluxe Delivery Systems*, No. 11 Civ. 3391, 2016 WL 1070346, at *3, n. 4 (S.D.N.Y. Mar. 17, 2016) (Court declined to review attorney's fees indicating that "[the Court does] do not understand the FLSA to regulate the relationship between the employee as plaintiff and his counsel or to alter the freedom of contract between a client and his attorney.")

(f) Public filing of settlement agreement

(i) While some judges may permit settlement agreements to be submitted *ex parte*, other Courts may insist on public filing of the

settlement agreement - the federal courts have recognized a strong presumption of public access to court records. *Standard Chartered Bank, Int'l (Ams.) v. Calvo*, 757 F.Supp.2d 258, 259–60 (S.D.N.Y.2010) (internal quotations omitted). This presumption of public access extends to judicially-approved FLSA settlements. *See Armenta v. Dirty Bird Group, LLC*, 13 Civ. 4603, 2014 WL 3344287, at *1 (S.D.N.Y. June 27, 2014).

(g) Prohibitions on future employment

(i) At least one post *Cheeks* court has questioned the inclusion of language in a settlement agreement which prohibits future employment, as same frustrates the remedial purpose of the FLSA. *See Flores v. Food Express Rego Park, Inc.*, No. 15 Civ. 1410, 2016 WL 386042 (E.D.N.Y. Feb. 1, 2016). However, the *Flores* Court ultimately approved the provision because "plaintiff has represented that defendants only have one remaining restaurant, the waiver's impact on plaintiff's future career opportunities is not substantial." *Id.*

e) Methods of achieving approval in the pre-suit context.

(1) Federal Court

(a) Employee files action post-settlement. Complaint can allege settlement and request approval of same in prayer for relief.

(b) Defendant accepts service.

(c) Plaintiff formally reports to the Court that the matter settled pre-suit.

(d) Parties file joint settlement submissions in accordance with the Court's particular procedure.

(2) New York State Court

(a) New York State Court has the authority to adjudicate an FLSA claim.

(i) 29 U.S.C. § 216 (b) provides that an action for unpaid minimum wages, unpaid

overtime, and liquidated damages 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." (emphasis added).

(b) *Cheeks* holds that judicial approval is required, but its holding does not state that approval of a settlement can only be carried out by a Federal Court.

f) Federal Court vs. State Court

(1) Federal Court advantages
- (a) Faster
- (b) The bench is more familiar with wage and hour topics.

(2) Federal Court disadvantages
- (a) Heightened scrutiny of settlement terms. See *supra*.
- (b) Multiple submissions may be required.
- (c) Lack of uniform procedure following *Cheeks.*
- (d) Heightened scrutiny of attorney's fees.

(3) State Court advantages
- (a) Less scrutiny due to volume of cases in State Court.
  - (i) Parties may be able to obtain approval with respect to settlement terms that could not be obtained in Federal Court.
- (b) Possibly less scrutiny of attorney fee applications.
- (c) Electronically Papers are not easily accessible to members of the public

(4) State Court disadvantages
- (a) State Court may be slower.
- (b) Multiple appearances may be required. Increases costs for clients.

C. Other Issues in Pre-Litigation Settlements

1. Use of Affidavits

a) In consummating an unapproved pre-suit settlement, employers have a legitimate interest to protect against future FLSA claim by employee.

b) To protect against future claims, employers should insist on obtaining an affidavit from the employee in which the employee:
   (1) Acknowledges the settlement amount is offered in consideration for a full and complete release and resolution of all claims.
   (2) Acknowledges that he/she entered into settlement freely, voluntarily, and without duress.
   (3) Acknowledges that by settling, employer does not concede/admit liability.
   (4) Acknowledges that he/she has been paid in full for all time worked and is owed no other forms of compensation, including, but not limited to, any wages, tips, overtime pay, minimum wage, spread of hours pay, call-in pay, sick pay, vacation pay, accrued benefit, bonus or commission.
   (5) Acknowledges that because he/she has been paid in full, he/she has no valid claim for remuneration and any future claim would be without merit.

c) Other useful provisions to include in affidavit:
   (1) Acknowledgement of confidentiality/non-disparagement provisions contained in agreement.
   (2) Acknowledgement that consideration offered in settlement is valid and reasonable.
   (3) Waiver of rights to future employment.
   (4) Affirmation that employee currently knows of no other employee interested in bringing a claim against the employer and has not assisted any individual in this regard.

d) Although *Cheeks* technically permits an employee to commence a future FLSA lawsuit, affidavits are useful because:
   (1) Admissible as direct or impeachment evidence
   (2) Can be used on an eventual motion for summary judgement by employer;
   (3) Can be used at trial as direct evidence or on cross examination.

(4) Prior sworn statements of the employee can be of immense use to employer when attacking employee's credibility in a future lawsuit.

(5) Provides negotiating leverage to employer to assist in convincing the employee to withdraw future claim or settle future claim for a nominal amount (seeking judicial approval).

(6) Useful in a similar manner should the employee opt into future collective action by another individual.

(7) May be used by employer to exclude the employee from a subsequent Rule 23 class action.

2. Confidentiality provisions in non-approved settlements.

a) As many courts have observed, both before and after *Cheeks* was decided, "[c]onfidentiality provisions in FLSA settlements are contrary to public policy." *Guerra–Alonso v. West 54 Deli. Corp.*, No. 14 Civ. 7247, 2015 WL 3777403, at *1 (S.D.N.Y. May 22, 2015) (citation omitted); *Thallapaka v. Sheridan Hotel Assoc.*, No. 15 Civ. 1321, 2015 WL 5148867, at *1 (S.D.N.Y. Aug. 17, 2015) ("overwhelming majority of courts reject the proposition that FLSA settlements can be confidential").

(1) Courts conclude that such provisions, and similar ones that impose an obligation on a settling plaintiff to refrain from discussing any aspect of the case or the settlement "come into conflict with Congress' intent ... both to advance employees' awareness of their FLSA rights and to ensure pervasive implementation of the FLSA in the workplace," which consequently requires a court to consider "both the rights of the settling employee and the public at large" in approving any settlement. *Camacho v. Ess–A–Bagel, Inc.*, No. 14 Civ., 2015 WL 129723, at *2–3 (S.D.N.Y. Jan. 9, 2015).

(2) Accordingly, post *Cheeks*, judicial approval of confidentiality provisions is exceedingly unlikely. *See Souza v. 65 St. Mark's Bistro*, No. 15 Civ. 327, 2015 WL 7271747 (S.D.N.Y. Nov. 6, 2015) (rejecting confidentiality provision because there was nothing to justify the inclusion of such a provision).

b) However, *Cheeks* does not prohibit the inclusion of confidentiality provisions in settlement agreements.

(1) Although confidentiality provisions are generally enforceable as a matter of contract law, the enforceability of such a provision in the post *Cheeks* universe remains an undecided issue.

II. Current Litigation Trends

A. Joint Employment

1. The FLSA is a remedial statute that broadly defines employment.

2. Economic realities (a/k/a functional control) of the relationship is the key.

See Grenawalt v. AT&T Mobility LLC, No. 15 Civ. 949, __ F. App'x __, 2016 WL 945048 (2d Cir. Mar. 14, 2016). The Second Circuit reversed an award of summary judgment in Defendant's favor, and remanded the case to the district court, finding that there were genuine issues of material fact regarding the six factor analysis set forth in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003). The factors that must be considered in the totality of the circumstances, when considering whether there is joint employment are:

a) Whether the alleged employer's premises and equipment was used for the worker's work;
b) Whether the contractor had a business that could or did shift from on employer to another;
c) The extent to which the worker performed a discrete line-job that was integral to the alleged employer's business;
d) Could responsibility under the contracts could pass from one subcontractor to another without any material changes;
e) The degree to which the alleged employer supervised the worker's work;
f) Whether the worker worked exclusively or predominantly for the alleged employer.

See also Copper v. Calvary Staffing, LLC, No. 14 Civ. 3676, 2015 WL 5658739 (E.D.N.Y. Sept. 2015) (motion to dismiss denied, where plaintiffs adequately pled that Enterprise Rental Car acted as their employer, despite the fact that they were also employees of Calvary Staffing).

3. United States Department of Labor Administrator's Interpretation 2016-1:

> In an effort to ensure that workers receive the protections to which they are entitled and that employers understand their legal obligations, the possibility of joint employment

> should be regularly considered in FLSA and MSPA cases, particularly where (1) the employee works for two employers who are associated or related in some way with respect to the employee; or (2) the employee's employer is an intermediary or otherwise provides labor to another employer.

Administrator David Weil, U.S. Dept. of Labor, Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act, Admin. Interpret. No. 2014-2 (Jan. 20, 2016), available at www.dol.gov/whd/flsa/Joint_Employment_AI.htm

B. Independent Contractors

1. The FLSA is a remedial statute that broadly defines employment.

2. Under the FLSA, the economic realities of the relationship is the key. As set forth in *Brock v. Superior Care*, 840 F.2d 1054, 1058 (2d Cir. 1988), the factors that must be considered in the totality of the circumstances are, when evaluating whether a worker is an independent contractor are:

   a) The degree of control exercised by the employer over the worker;
   b) The worker's opportunity for profit of loss and their investment in the business;
   c) The degree of skill and independent initiative required to perform the work;
   d) The permanence or duration of the working relationship; and
   e) The extent to which the work.

   See also Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901 (S.D.N.Y. 2013) (workers deemed to be employees under both the FLSA and NYLL).

3. United States Department of Labor Administrator's Interpretation 2015-1

> The very broad definition of employment under the FLSA as 'to suffer or permit to work' and the Act's intended expansive coverage for workers must be considered when applying the economic realities factors to d:etermine whether a worker is an employee or an independent contractor. The factors should not be analyzed mechanically or in a vacuum, and no single factor, including control, should be over-emphasized. Instead, each factor should be considered in light of the ultimate determination of whether the worker is really in business

for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee).

Administrator David Weil, U.S. Dept. of Labor, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors, Admin. Inter. No. 2015-1 (July 15, 2015), available at www.dol.gov/whd/workers/misclassification/ai-2015_1.htm.

4. The New York Independent contractor standard

a) *Bynog v Cipriani Group, Inc.*, 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692 (2003)

(1) The Bynog factors "relevant to assessing control include whether the worker":

(a) worked at his own convenience
(b) was free to engage in other employment
(c) received fringe benefits
(d) was on the employer's payroll; and
(e) was on a fixed schedule."

b) Under the NYLL, the degree of control is critical to the independent contractor analysis as courts have recognized that "[i]ncidental control over the results produced—without further evidence of control over the means employed to achieve the results—will not constitute substantial evidence of an employer-employee relationship." *In re Hertz Corp.*, 2 N.Y.3d 733, 735, 778 N.Y.S.2d 743 (2004).