Florida Constitutional Minimum Wage Guarantee
& FLSA Update on Enterprise Coverage,
Fluctuating Work Week Calculations and Attorneys' Fees

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I. Florida Constitutional Minimum Wage Update

Since May 2, 2005, at Article X, Section 24, Fla. Const. (hereinafter, "Guarantee"), Florida's Constitution has required employers to "pay Employees Wages no less than the Minimum Wage for all hours worked in Florida." Article X, Section 24, Fla. Const. The minimum rate is currently $7.21 per hour. *See, Id*. at (c) (directing that the rate be recalculated on September 30th of each year succeeding the Guarantee's enactment).

Florida's minimum wage act claims are governed by a general four (4) year statute of limitations with a five (5) year limitation period for willful violations. Florida's amendment specifically provides that individuals experiencing violations of this amendment may bring a class action pursuant to Rule 1.220, *Fla.R.Civ.P*.

The minimum wage guarantee provides that "case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall

guide the construction of this amendment and its implementing statutes or regulations." *Id.* at § 24 (f). *See*, e.g., *Lee v. Askin Trucking, Inc.*, 2006 U.S. Dist. LEXIS 97552 **7-8 (S.D. Fla. February 7, 2006) (rejecting application of waiver, estoppel or unclean hands defenses to Florida minimum wage claims on the premise that the Guarantee should be interpreted similarly to FLSA).[1] However, the guarantee provides some remedies over and above the FLSA. For instance, the Portal to Portal Act, 29 U.S.C. § 259 *et seq.*, which amends the FLSA, identifies certain employee activities which are not compensable under the FLSA, such as**:** (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. 29 U.S.C. § 254(a). The Employee Commuting Flexibility Act contained in the Portal to Portal Act, states that employees may not be entitled to compensation for time spent commuting back and forth to work in an employer's vehicle.[2] The Portal to Portal Act does not apply to the Florida minimum wage guarantee, so, on its face the Guarantee provides for recovery of

[1] In *Curry v. High Springs Family Practice Clinic and Diagnosis Center, Inc.*,, 2008 U.S. Dist. LEXIS 99462 * 10 (N.D. Fla. December 9, 2008), Judge Paul dismissed the affirmative defense of unclean hands in a FLSA case for lack of factual allegations but stated that it may be a sufficient affirmative defense to a FLSA claim in some cases. It refused to dismiss the affirmative defense of waiver and estoppel by silence. *Id.* at *12.

[2] The ECFA states that "the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee." 29 U.S.C. § 254(a).

minimum wage for time spent commuting as well as for time spent performing preliminary and postliminary activities.

Florida's minimum wage guarantee also requires employers to "pay Employees Wages no less than the Minimum Wage for all hours worked in Florida." [as opposed to "in any workweek" as under the FLSA.] Art. X, Section 24, Fla. Const., § (c). *See*, *Curry v. High Springs Family Practice Clinic and Diagnosis Center*, 2008 U.S. Dist. LEXIS 99462 * 24 (N.D. Fla. December 9, 2008) (pointing out that Florida's act regulates minimum wage "for all hours worked in Florida.") Therefore, Florida's minimum wage law should be interpreted to require the minimum wage to be paid for each hour worked, rather than a sum which exceeds minimum wage based upon a total of the number of hours worked per week. This interpretation to require at least minimum wage for *each* hour worked would bring within the ambit of the guarantee the claims of many individuals otherwise ineligible under federal law from bringing a minimum wage claim based upon the total income they are paid in a workweek.

A. Implementing Legislation

On December 12, 2005, the Florida legislature enacted Florida Statute Section 448.110, which provides that no individual not entitled to minimum wage under the FLSA will be entitled to minimum wage under the Guarantee and incorporates 29 U.S.C. sections 213 and 214. *See*, *Roldan v. Pure Air Solutions, Inc.*, 2009 U.S. Dist. LEXIS 8485 *9 (S.D. Fla. January 27, 2009) (awarding minimum wage under Florida law for plaintiffs' first and last weeks of employment).[3] It prohibits retaliation and imposes additional requirements on plaintiffs bringing suits under the Florida minimum wage act,

[3] By their terms, the provisions in 29 U.S.C. §§ 213(b-c) and (h-j) are inapplicable to the Florida Minimum Wage Act.

including that the plaintiff notify the employer in writing of their intention to sue prior to filing the action.[4] The implementing legislation also provides that representative plaintiffs in a class action are required to prove the individual identity and damages of each class member.

The required notice of Florida minimum wage claims must include the minimum wage amount to which person claims to be entitled, the actual or estimated work dates and hours for which payment is sought, and the total amount of unpaid wages. *See*, §448.110(6)(a). The statute of limitations is then tolled for a fifteen-day period in which employer may respond. *Id*. at (b). If the employer fails to resolve the claim the grievant can file a claim for unpaid wages consistent with the notice. *Id*.

There is currently a conflict court conflict as to the enforceability of the notice requirement. On June 30, 2006, Judge Moody in the Middle District of Florida, in *Throw v. Republic Enterprise Systems, Inc.*, 2006 U.S. Dist. Lexis 46215 (M.D. Fla. June 30, 2005), held that plaintiffs who bring a suit under the Florida minimum wage act are not required to satisfy the notice requirement of Section 448.110(6)(a) because Section 24(e) of the Act "creates a constitutional right directly enforceable in a court of law by an aggrieved party with no requirement that notice be given." *Id*. at **1-6. However, in January 2008, Judge Marra in the Southern District of Florida issued an opinion upholding the notice requirement on the basis that the notice requirement is permitted by and not contrary to the Florida Constitution. *Resnick v. Oppenheimer & Co., Inc.*, 2008 U.S. Dist. LEXIS 1163 (S. D. Fla., January 8, 2008). *Accord, Dominguez v. Design by Nature Corp*., 2008 U.S. Dist. LEXIS 83467 (S.D. Fla. September 25, 2008), *Curry v. High Springs*, 2008 U.S. Dist. LEXIS 99462 * 27-29 (holding that notice requirement is

[4] Fla. Stat. § 448.110(6)(a)(2005).

substantive, burden is on plaintiff to prove and that it applies in state and federal court) and *Ramirez v. Martinez,* 2009 U.S. Dist. LEXIS 4573 (S.D. Fla. January 23, 2009).

To date, there are no published orders directing the manner by which to comply with the notice requirement in the context of a Rule 23 case. Our firm practice is to put the employer on notice of the claims of the named plaintiffs, on notice of the putative class claims and their basis, and to request the data to make a calculation of potential damages. If the employer does not provide the data then they are not in a position to argue that the plaintiffs failed to comply with the notice provision.

B. Tip Credit

Similarly to the FLSA, Florida's guarantee provides for a tip credit, by which employers may take a credit toward the minimum wage owed tipped employees. Employers may credit towards satisfaction of the minimum wage tips up to the amount of the allowable FLSA tip credit in 2003 for eligible employees.

C. Class Actions

The minimum wage guarantee specifically provides that enforcement may be in the form of class actions. Fla. Const. Art. X, § 24(e). In *Castillo v. N&R Services of Central Florida*, 2008 U.S. Dist. LEXIS 36882 (M.D. Fla. May 1, 2008), Judge Lazarra of the Middle District certified class-wide Florida minimum wage claims under Fed.R.Civ.P. 23 for citrus workers who alleged they were paid under a piece rate which did not comply with minimum wage. The class members brought claims under the FLSA, the minimum wage guarantee and claims for breach of contract. Questions of fact common to the class included whether N&R complied with the minimum wage rate, kept

accurate records, and provided lawful documentation reflecting the compensation for H-2A workers.

Judge Whittemore rejected the recommendation of his Magistrate Judge and declined to assert supplemental jurisdiction over Florida minimum wage claims and breach of contract claims asserted by piece workers in *Santiago v. Wm. G. Roe & Sons*, 2008 U. D. Dist. LEXIS 60719 (M.D. Fla. July 29, 2008). The parties had alleged claims under FLSA but did not seek class certification. The court concluded that the state law claims substantially predominated over the FLSA claims (which became a mere "appendage," because they would involve a greater number of issues and a more comprehensive remedy. *Id*. at *4.

In *Johnson v. Express Service Messenger & Trucking, Inc.*, 2008 U.S. Dist. LEXIS 60243 (S.D. Fla. July 25, 2008), Judge Simonton concluded plaintiff failed to demonstrate individual coverage or enterprise coverage over Defendant and dismissed Plaintiff's FLSA claims. Plaintiff was a courier, delivering locally in Miami-Date County. The court characterized the state law claims as "mirror image" claims to the FLSA claims and declined to exercise supplemental jurisdiction because it had dismissed all claims over which it had original jurisdiction and plaintiffs would suffer no substantive prejudice by filing in state court. *Id*. at **23-24.

II. **Enterprise Coverage under the Fair Labor Standards Act**

Currently there are several district court decisions consolidated for appeal before the Eleventh Circuit which deal with employer coverage under the Fair Labor Standards Act.[5] The decisions on appeal were issued from the Southern District of Florida and have

[5] Currently consolidated for appeal are: *Polycarpe v. E & S Landscaping Services, Inc*. Case no.: 08-15154-EE; *Bien-Aime v. Nanak's Landscaping, Inc.*, Case no: 08-15290-JJ; *Lamonica v. Safe Hurricane*

erroneously construed the definition of enterprise coverage in Section 203(s) of the FLSA as amended in 1974 so as to allow employers grossing $500,000 or more annually, which employ more than two workers "handling … goods or materials that have been moved in or produced for commerce," to circumvent the requirements of the Act and avoid paying minimum wage and overtime premiums by claiming they only transact business within the state. Oral argument is set for October 22, 2009. The DOL has filed an *amicus* supporting the position of the plaintiffs/appellants in these cases.

A. Historical Background of Section 203(s)

As *originally* enacted in 1938, Congress did not provide for "enterprise coverage" in the FLSA. The coverage of the Act was limited to individual employees who directly "engaged in commerce or the production of goods for commerce." *Id*. In 1943, the Supreme Court described the applicability of the FLSA, as highly dependent upon the "character of the employees' work," such that an employee would only be covered by the Act only if a substantial part of the employee's activities involved the shipment or distribution of goods across state lines. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-72 (1943).

In May 1961, Congress amended the FLSA and "shifted the basis of coverage from employees to employers" to establish "enterprise coverage." *Id*. As a result of its amendment of the FLSA to incorporate enterprise coverage, all employees of an

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Shutters, Inc., Case No.: 08-15963-C; *Milbourne v. Aarmada Protection Systems 2000, Inc.*, Case no. 08-17055-FF; *Flores v. Nuvoc, Inc.*, Case no.: 08-17109-F; and *Vallecillo v Wall to Wall Residence Repairs, Inc.*, Case no.: 09-10938-FF.

employer are covered by the FLSA if "two or more of its employees" are "engaged in commerce or the production of goods for commerce." *Id*. The legislative history of the FLSA and case law demonstrate that the enterprise analysis was included in the FLSA expressly for the purpose of expanding the scope of coverage of the statute. *See Patel v. Wargo*, 803 F.2d 632, 635 (11th Cir. 1986).

The 1961 amendments broadened the reach of the FLSA's coverage provisions under the Commerce Clause by including within the definition of an "enterprise engaged in commerce" any business which had employees "handling, selling, or otherwise working on goods that have been moved in or produced for commerce" so that Section 203(s) of the FLSA read:

> 'enterprise engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person . . . .

See FLSA Amendments of 1961, P.L. 87-30, § 2, 75 Stat. 65, 66.

In September 1966, the FLSA was further amended "to extend its protections to additional employees" when Congress modified the definition of an "enterprise engaged in commerce" within §203(s) to focus on the activity of the enterprise:

> 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person . . . .

See FLSA Amendments of 1966, P.L. 89-601, 80 Stat. 830, 831.

In 1974, Congress definitively amended § 203(s) of the FLSA with respect to enterprise coverage to make it clear that enterprise coverage may be established by

showing that the employer has employees handling goods or materials that have moved in or been produced for interstate commerce by substituting "or employees" for "including employees," and inserting "or materials" following the word "goods," in Section 203(s)(1)(A)(i):

> 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, ***or employees*** handling, selling, or otherwise working on goods ***or materials*** that have been moved in or produced for commerce by any person . . .

See Fair Labor Standards Amendments of 1974, P.L. 93-259, 88 Stat. 55, 59 (emphasis added).

This is the current definition of "enterprise engaged in commerce," which the district courts below should have applied. This definition clearly encompasses "materials" which *have moved* in commerce *or* been "produced for commerce."[6] This construction is confirmed by comments in the Senate Report of the Amendments:

> The bill also adds the words 'or materials' after the word 'goods' to make clear the Congressional intent to include within this additional basis of coverage the handling of goods consumed in the employer's business, as, e.g. the soap used by a laundry. The 'handling' language was added based on a retrospective view of the effect of substandard wage conditions.
>
> While the original Act recognized the effect of such conditions on subsequent interstate outflow of products, it was not until the 1961 amendments that Congress specifically recognized their effect on the prior interstate inflow, based on the 'obvious economic fact that demand for a product causes its interstate movement quite as surely as does production' . . . and the addition of the words 'and materials' will clarify this point.

[6] "Materials" are "produced for" commerce when the producer "intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or some altered form or as part of an ingredient of other goods) in such interstate commerce." 29 C.F.R. § 776.21(a); *United States v. Darby*, 312 U.S. 100 (1941).

> Although a few district courts have erroneously construed the 'handling' clause as being inapplicable to employees who handle goods used in their employer's own commercial operations, the only court of appeals to decide this question and the majority of the district courts have held otherwise and the addition of the words 'and materials' will clarify this point.

Sen. Rep. No. 93-690, 93rd Cong., 2d Sess., 17 (1974) (citations omitted). The 1974 Senate Report confirms that Congress' legislative intent in the 1974 amendments was to extend the minimum wage, overtime and record keeping provisions of the FLSA applicable to all employers who meet the requisite sales volume standard and whose employees—*after* May 1, 1974—handle, sell, or otherwise work on materials which moved in commerce at some point in time.

B. Interpretation

The holding in *Dunlop v. Industrial America Corp.*, 516 F.2d 498, 500 (5th Cir. 1975), is illustrative of the broad effect of the 1974 amendment. In *Dunlop,* the former Fifth Circuit reviewed the history of the enactment of enterprise coverage, concluding that the 1966 amendment left the definition of "goods" in Section 203(i) intact.[7] *Id*. The Court rejected the proposition that the 1966 amendment reached so far as to encompass local enterprises whose only connection with commerce was the usage of oil and gasoline in the operation of a garbage removal service. *Id*. at 501. The Court stated that "***prior to*** its amendment in 1974[,] the Fair Labor Standards Act *did not* reach enterprises which provided only services to its customers and did not pass on any goods obtained from interstate commerce." *Id.* at 502 (emphasis added). However, the Court described the 1974 amendments as circumventing the definition of "goods" at Section 203(i) by a

[7] *But see, Brennan v. Greene's Propane Gas Service, Inc.*, 479 F.2d 1027, 1030 (5th Cir. Ga. 1973) (interpreting language in 1966 amendment and stating that plain language of § 203(s) contains no requirement of continuity in the present and citing its opinion in *Shultz v. Kip's Big Boy, Inc.*, 431 F.2d 530, 533 (5th Cir. 1970) as dispositive in holding that "the legislation was designed to regulate enterprises dealing in articles acquired intrastate after travel in interstate commerce").

broader definition of "enterprise engaged in commerce," to include enterprises with "employees handling, selling or otherwise working on goods or materials that have moved in commerce" with the "practical effect" of expanding coverage of the FLSA to every business in the nation exceeding the gross volume threshold. *Id*. at 502 and n. 8.

In the thirty plus years following the amendment of the definition of "enterprise coverage," the term "materials" has been deemed to include not only gasoline and oil, but also to include, among other things, "trucks, truck bodies, tires, batteries, and accessories, sixty-gallon containers, shovels, brooms,…," *Marshall v. Bruner,* 668 F.2d 748, 751-52 (3rd Cir. 1982); vehicles, *Velez v. Vassallo,* 203 F. Supp. 2d 312, 329 (S.D. N.Y. 2002); radios, books and flashlights, *Archie v. Grand Cent. P'ship,* 997 F. Supp. 504, 530 (S.D.N.Y. 1998); pipes, faucets, nails, windows, door locks, detergents, grass seed, brooms, garbage bags and salt, *Radulescu v. Moldowan*, 845 F. Supp. 1260, 1264 (N.D. Ill. 1994); *Marshall v. West County Disposal, Ltd.*, 1980 U.S. Dist. LEXIS 16812 (E.D. Miss. Nov. 28, 1980); light bulbs, toilet paper, maintenance and custodial supplies, paint, soap, detergents, caulking, plumbing supplies, plumbing equipment, heating equipment and air conditioning equipment, *Marshall v. Davis*, 526 F. Supp. 325, 328 (M.D. Tenn. 1981); and soap, appliances and food items, *Marshall v. Sunshine & Leisure*, 496 F. Supp. 354, 357-59 (M.D. Fla. 1980). The Department of Labor[8] has interpreted "materials" to include coffee and cleaning supplies, 1997 DOL WH LEXIS 6, *2, as well as fixtures, tools, furnaces, air conditioners, piping, solder, joint compound, valves, and pumps, 1982 DOLWH LEXIS 3, *1.

[8] As the Agency charged with the administration of the Fair Labor Standards Act, the Department of Labor's interpretations are "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Enterprise coverage under the "handling clause" does not require a showing of direct participation in commerce. The Eleventh Circuit has held that an employee may establish enterprise coverage if he shows the requisite volume of sales and establishes that his employer has employees: (1) "engaged in commerce," (2) engaged "in the production of goods for commerce," *or* (3) "handling selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person." *Scott v. K.W. Max Investments, Inc.*, 256 Fed. Appx. 244 (11th Cir. October 2, 2007)(unpublished)[9] *quoting* 29 U.S.C. § 203(s)(1)(A)(emphasis added). In so doing, the Court explained that:

> [t]o qualify as 'engaged in commerce' an employee must 'directly participat[e] in the actual movement of persons or things in interstate commerce by (i) working for an instrumentality of interstate commerce . . . or (ii) by regularly using the instrumentalities of interstate commerce in his work.

Id. at 248 *quoting Thorne v. All Restoration Servs.*, 448 F.3d 1264, 1266 (11th Cir. 2006). The Court added that:

> An employee may also qualify as 'engaged in . . . the production of goods for commerce' if his 'work is closely related and directly essential to the production of goods for commerce.'

Id. quoting Thorne, 448 F.3d at 1268.

In the context of enterprise coverage, it is immaterial whether goods or materials were purchased within the state in which the business is located from some intermediary poised between the manufacturer and the business using the materials. *See, e.g.*, *Donovan*, 717 F.2d at 1322-23; *Radulescu*, 845 F. Supp. at 1265 (determining that although purchased locally, supplies had previously moved in interstate commerce and

[9] Eleventh Circuit Rule 36-2 states that "[u]npublished opinions are not considered binding precedent, but they may be cited as persuasive authority."

supplies were handled and used by defendant's employees). The "critical issue is whether the goods or materials handled by [the employer] and his employees had moved in interstate commerce." *Pierre*, 2006 U.S. Dist. LEXIS 85182, at *13.

The statutory language defining enterprise coverage "imposes no requirement that the goods have a present involvement in interstate commerce when they are handled or sold." *Donovan v. Scoles*, 652 F.2d at 18-19; *see also*, *Davis*, 526 F.Supp. at 328 (the term "materials" is neither burdened nor restricted with the "ultimate consumer" exemption found in definition of "goods"). In fact, the 1974 amendment encompasses materials that have "been produced for commerce," which includes items the producer "intends, hopes, expects, or has reason to believe … will move in … interstate commerce." *See* 29 C.F.R. § 776.21(a); *United States v. Darby*, 312 U.S. 100 (1941).

The "coming to rest" doctrine is inapplicable to the analysis of enterprise coverage under the "handling clause." *See*, *Diaz v. Jaguar*, 2009 WL 1758709 *3 (S.D. Fla. June 22, 2009). Throughout the history of the FLSA, "goods" have been defined as: "products, commodities, merchandise, or articles or subjects of commerce of any character, … but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof…." 29 U.S.C. § 203(i). The former Fifth Circuit observed in *Dunlop*, 516 F.2d at 502 (emphasis added), that "prior to its amendment in 1974 the Fair Labor Standards Act did not reach enterprises which provided only services to its customers and did not pass on any *goods* obtained from interstate commerce." However, this requirement does not apply to goods or materials after the 1974 amendment to Section 203(s), as the Court in *Dunlop* stated:

> [t]his latest amendment leaves the definition of goods intact but ***circumvents it*** by a broader definition of 'enterprise engaged in

> commerce.' The new definition includes enterprises with 'employees handling, selling, or otherwise working on goods or *materials* that have been moved in … commerce …'

See, *Id*. at 502, n.8. (bold emphasis added).

The Department of Labor concurs that the "coming to rest" doctrine is inapplicable to a determination of enterprise coverage. It has stated that for the purpose of Section 3(s), "goods will be considered to 'have been moved *** in commerce' when they have moved across State lines before they are handled, sold, or otherwise worked on…. It is immaterial in such a case that the goods may have 'come to rest' within the meaning of the term 'in commerce' as interpreted in other respects, before they are handled." 29 C.F.R. § 779.242; *see also, e.g.*, 1997 DOL WH LEXIS 6, *2 (under enterprise provisions of the FLSA employer does not have to have employees directly 'engaged in commerce' provided it has employees handling … products, supplies or equipment produced or shipped from outside the state even though purchased within the state) and 1982 DOLWH LEXIS 3 (employer was an "enterprise engaged in commerce" because it had two or more employees who handled goods that have been moved in or produced for commerce although purchased locally).

C. Demonstrating Enterprise Coverage

Recognizing that hindsight is 20:20, the practice tip which evolves from these cases is to engage in early and exhaustive discovery on the issue of employer coverage unless it is admitted and even buttressed by a stipulation between the parties. The definition of an "enterprise engaged in commerce" in Section 203(s) of the FLSA as amended in 1974 extends the Act's reach to nearly every business which employs more than two workers who handle goods or materials that have been moved in interstate

commerce or were produced for interstate commerce providing it exceeds the $500,000 threshold of gross volume of sales made or business done. Discovery of such "materials" should include a videotaped inspection of the equipment on the premises and requests for admission as to the origin of various items, tools and supplies in the workplace. The burden is on the plaintiff to demonstrate enterprise coverage.

III. Fluctuating Work Week Calculation

Generally speaking, when an employee succeeds in demonstrating in an unpaid overtime claim, damages are calculated at one and one-half times the employee's regular rate. However, under the fluctuating work week (FWW) method, prospectively applied when a non-exempt employee's hours fluctuate from week to week, the employee is paid on a salary basis, and the salary is intended to compensate the employee "as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many." 29 C.F.R. § 778.114(a) (emphasis added).

The regulation governing the FWW method was promulgated after the Supreme Court's ruling in *Overnight Transport. Co. v. Missel*, 316 U.S. 572. *Missel* held that when a non-exempt employee is paid a fixed salary for all hours worked but no overtime premium, the remedy is additional half-time premium based on all hours worked.

The FWW compensation method rests on the principle that the employee's salary is straight time compensation for all hours worked in a week, no matter how few or how many. Under this theory, an employee who is owed overtime is deemed to have been already been paid for the straight time portion of those overtime hours. Therefore, the money owed to the employee is only one-half of the regular rate for each overtime hour. Since the regular rate is computed by dividing the salary by actual hours worked, the

regular rate will fluctuate along with the hours from week to week. *Dingwall v. Friedman Fisher Associates*, P.C., 3 F. Supp. 2d 215, 221 (N.D.N.Y. 1998).

Under the FWW an employer may pay a fixed amount each week for whatever hours an employee works. The unfortunate result for employees is that the more hours an employee works, the lower the hourly rate of pay becomes. For example, the regular hourly rate of an employee paid a fixed salary of $500 per week under the FWW is $12.50 if the employee works 40 hours ($500/40 hours). If the employee works 60 hours, the regular hourly rate is $8.33 ($500/60 hours). If the employee works 80 hours, the regular hourly rate is $6.25 ($500/80 hours). By working 40 hours of overtime in a week, the employee's overtime premium drops in half, from $12.50 to $6.25. Thus, the more overtime required, the lower the overtime premium.

The regulation governing the FWW requires that the (1) the salary be sufficiently large to ensure that no workweek will be worked in which the employee's earnings from the salary fall below the FLSA's minimum wage rate, no matter how many hours are actually worked in the week; and (2) that the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which only a small number of hours is worked. 29 C.F.R. § 778.114(c).

Litigation may arise when non-exempt employees allege that the requirements of the FWW has been violated such that the employer may not take advantage of the FWW method. In determining if the calculation has properly been applied, courts typically examine five factors: (1) whether there is clear and mutual understanding between parties; (2) whether the employee's hours fluctuate from week to week; (3) whether the

employer pays the same fixed salary regardless of number of hours worked during particular week; (4) whether the salary provides average hourly compensation of exceeding minimum wage; and (5) whether the employee received extra compensation, in addition to such salary, for all overtime hours worked. *Griffin v. Wake County*, 142 F.3d 712, 715 (4th Cir. 1998); *Condo v. Sysco Corp.*, 1 F.3d 599, 601-02 (7th Cir. 1993); *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F.Supp.2d 82, 101 (D.D.C. 1998); *Garcia v. Allsup's Convenience Stores, Inc.*, 167 F. Supp. 2d 1308, 1311-12 (D. N.M. 2001).

For instance, a non-exempt employee might prevail on the basis that his or her hours did not in fact fluctuate. In that event, the overtime rate can be calculated in accordance with Section 778.113, which provides for a fixed salary for a set number of hours. *See, e.g.*, *Dooley v. Liberty Mutual Insurance Co.*, 369 F.Supp.2d 81 (D. Mass. 2005) (FWW case in which plaintiffs contended premium payments precluded application of § 778.114 because they did not receive a "fixed salary," the court calculated damages under § 778.113, dividing weekly salary by 40 and calculating overtime as 1.5 times the regular rate). *See also, Singer v. City of Waco*, 324 F.3d 813, 824 (5th Cir. 2003) (dividing a biweekly salary by the total number of hours worked in each two-week period and calculating overtime hours at 1.5 times the regular hourly rate).

The FWW methodology of calculating damages may also be applied where non-exempt employees paid by a fixed salary worked "off the clock." In that event, the additional overtime premium is owed for the additional hours. For example, in *Saxton v. Young*, 479 F.Supp.2d 1243, 1255 (N.D. Ala. May 13, 2007), the court concluded Section

778.114 is properly applied where plaintiffs acknowledged they were paid a fixed rate intended to compensate for all hours worked. *See also, Perez v. Radioshack Corp.*, 2005 U.S. Dist. LEXIS 33420 (N.D. Ill. December 14, 2005) (applying Section 778.114 despite the fact that overtime was not paid contemporaneously and employees did not have a clear mutual understanding of compensation method).

a. Additional Compensation

Because the FWW requires a fixed salary, commissions, bonuses or other premium payments paid to employees on an irregular or discretionary basis may disqualify an employer from applying the FWW calculation. The requirement is that fixed straight time pay does not vary *up or down* based on the hours worked. Nor is the fixed pay a minimum payment – it must be fixed and unvarying. "Non-overtime premium" pay, even bonuses or incentive pay, violate that fixed pay requirement because payment of these premiums directly changes the amount of straight time pay and the regular rate.

For example, in *O'Brien v. Town of Agawam,* 350 F.3d 279 (1st Cir. 2003), the Town of Agawam paid police officers night-time shift differentials in addition to a fixed amount of straight time pay regardless of whether the night hours were overtime hours. The First Circuit found that non-overtime premium payments violate the plain language of §778.114. It explained "it is not enough that the officers receive a fixed *minimum* sum each week; rather, to comply with the regulation, the Town must pay each officer a "fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, *whether few or many*." 350 F.3d at 288.

In *Dooley*, 369 F. Supp. at 85-86, an insurance company paid its auto damage appraisers premiums in addition to their straight-time pay for working non-overtime hours on Saturdays. The district court reasoned that because Section 778.114 requires a fixed straight time pay for all the hours an employee works, whether few or many, additions to straight time pay are not allowed. It found that the Saturday premium pay violated the fixed straight time pay requirement and found an application of the FWW improper.

In *Ayers v. SGS Control Service, Inc.*, 2007 U.S. Dist. LEXIS 76539 (S.D.N.Y. October 9, 2007), the employer paid its inspectors premium "sea payments" for working off shore and for working on scheduled days off in addition to their straight-time pay. The court found that the premium payments violated the requirement of Section 778.114, that the fixed amount of straight time pay not vary, even though the payments were in addition to a fixed salary. Accordingly, the court rejected defendant's proposed calculation of unpaid overtime in accordance with the FWW.

In *Teblum v Eckerds*, 2006 U.S. Dist. LEXIS 24530 (M.D. Fla. April 28, 2006), a federal district court in Florida denied summary judgment for the employer on the basis that there was a material issue of fact as to whether defendant paid plaintiffs a 50% overtime bonus in addition to the fixed weekly salary because non-productive time was added into the equation which determined employee overtime.

b. No Mutual Understanding

Proper prospective application of the FWW method requires evidence of a "clear mutual understanding" between employer and employer as to the pay plan. In *Reasoner v. All Seasons Pool Serv., Inc.*, 2007 U.S. Dist. LEXIS 90308 (M.D. Fla. December 7,

2007), the court denied summary judgment to the defendant on its claim that plaintiffs were properly compensated for their overtime work under the fluctuating work week method. The court reasoned, first, that plaintiffs' wage and hour records reflected that plaintiffs were overpaid under the FWW compensation method and, second, that plaintiffs denied ever being told they would be paid a straight weekly salary regardless of whether they worked more or less than forty hours in a given work week. Both of these factors raised a genuine issue of material fact as to whether there was a "clear mutual understanding" that plaintiffs would be compensated under the fluctuating work week method.

In *Hunter v. Sprint Corp.*, 453 F. Supp.2d 44 (D. D.C. 2006), the district court rejected application of the FWW method for lack of evidence of a clear understanding of the payment method, as well as failure to demonstrate that the employees' hours fluctuated.

In *Robinson v. Evergreen Presbyterian Ministries, Inc.*, 2008 U.S. Dist. LEXIS 13624 (W. D. Okla. February 22, 2008), a home health care provider was sued by current and former "home managers" for unpaid overtime. Defendant contended that the plaintiffs had been paid in accordance with 29 C.F.R. Section 778.114. The court denied defendant's motion for summary judgment, finding plaintiffs presented sufficient evidence to show there was not a clear mutual understanding that defendant would pay plaintiffs a fixed salary for all the hours they worked, but rather plaintiffs understood the salary to compensate them for working 40 hours each week with overtime paid at a specific set rate.

c. Other Violations of Salary Test

Deductions from salary for an absence of a full day are not permitted under the FWW method of compensation. *See*, Wage & Hour Div., U.S. Dep't of Labor, Op. Ltr., May 28, 1999. *See*, *Hunter*, 453 F.Supp.2d at 60. *Stokes v. Norwich Taxi*, 289 Conn. 465 (Conn. 2008) But to defeat the FWW, there must be a record that the deductions were made "frequently or constantly." *See*, *Conne v. Speedy Cash of Mississippi, Inc.*, 246 Fed.Appx. 849 851-52 (5th Cir. 2007) (reversing district court's holding that one violation of the FWW by employer in form of single failure to pay for one sick day disallowed future application of the payment method, and remanding for calculation of damages pursuant to FWW method).

The FWW defense will not apply where the employees' regular rate falls below minimum wage due to the excessive number of hours worked. *See, e.g., Condo v. Sysco*, 1 F.3d 599 (7th Cir. 1993).

d. Application to Misclassification Cases

Defendants frequently attempt to retroactively impose the FWW method of calculating unpaid overtime damages for non-exempt employees in misclassification cases. This theory provides that where the record shows the salary was intended to compensate for all hours worked, the calculation established in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577 (1942) should be applied, in which the employee will only be owed a varying overtime premium for hours over forty after determining the regular rate on a week to week on the basis of the actual hours worked.

Application of the *Missel* calculation is differentiated from application of Section 778.114, on the premise that the regulation provides guidance as to how to comply with the FLSA, but *Missel* reflects the basis for the regulation and the methodology of

remedying failure to pay an overtime premium.[10] Arguably, in most situations, a misclassified non-exempt employee has in fact worked with the understanding that the salary he or she received was intended to compensate for all hours worked. *See, e.g., Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988); *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 39-40 (1st Cir. 1999) (retroactively applying FWW method to calculate unpaid overtime compensation for misclassified employee where the court found there was a clear understanding the salary was intended to an unlimited number of hours per week); *Perez v. RadioShak Corp.*, 2005 U.S. Dist. LEXIS 33420 (N.D. Ill. December 14, 2005). *But see Villegas v. Dependable Construction Serv., Inc.*, 2008 U.S. Dist. LEXIS 98801 (S.D. Tex December 8, 2008) (approving in misclassification case reasoning in *EZPawn* but following binding Fifth Circuit authority requiring application of FWW).

i. Caselaw Providing the FWW Method is Inappropriate for Retroactive Calculation of Damages – the *Rainey* Line of Cases

There is a line of cases, however, typified in *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F.Supp.2d 82, 101 (D.D.C. 1998), which provide that half-time damages are only appropriate where all the requirements of § 778.114 are met. These case hold that retroactive calculation of damages in misclassification cases cannot meet the requirements of § 778.114.

Convincing arguments can be made in support of this theory.[11] First, a threshold requirement of Section 778.114 is that the employee contemporaneously "receives extra

[10] *See, e.g., "Calculating Overtime in Misclassification Cases,"* Paul DeCamp and Jacqueline C. Tully, 278 Fair Labor Standards Handbook 3.
[11] *See* "The Value of Overtime: Rethinking the Use of the Fluctuating Workweek Methodology to Calculate Damages in Fair Labor Standards Act Misclassification Cases," John T. Mullan, February 2009 California Labor & Employment Bulletin 57.

compensation," in addition to salary, for all overtime hours. *See*, e.g., *Rainey*, 26 F.Supp. 2d at 100) and *Cowan v. Treetop Enters., Inc.*, 163 F.Supp.2d 930, 941 (M.D. Tenn. 2001). Second, in the case of an exempt employee, there can be no "clear understanding" as to the payment of overtime when the employer did not contemplate entitlement to overtime. Third, there can be no *legally cognizable* agreement with a non-exempt employee to a fixed salary for every hour worked no matter how great unless the terms of the Section 778.114 are met.

Proponents of this theory point out that *Missel* was not a misclassification case. And from the premise that there is no legally cognizable agreement for a fixed salary, the logic flows that the *Missel* damages calculation should not be made. Instead, the employee should be entitled to overtime premium of one and one-half times the regular rate for all hours over forty per week, computed from week to week on the basis of actual hours worked. *See*, e.g., *Rainey*, 26 F.Supp.2d at 101; *In Re: Texas EZ Pawn Fair Labor Standards Act Litigation*, 2008 U.S. Dist. LEXIS 53636 (W. D. Tex. June 18, 2008) (rejecting retroactive calculation of damages in misclassification case under FWW method and calculating overtime damages at 1.5 times the salary divided by 40); *Scott v. OTS, Inc.*, 1:02-CV-1950, 2006 U.S Dist. LEXIS (N.D. Ga. 2006); *Hopkins v. Tex. Mast Climbers, LLC*, 2006 U.S. Dist. LEXIS 38721 (S.D. Tex. 2005); *Cowan*, 163 F.Supp.2d 930; *Dingwall v. Friedman Fisher Assocs.*, P.C., 3 F.Supp. 2d 215 (N.D. N.Y. 1998); *Burgess v. Catawba County*, 805 F.Supp. 341 (W.D. N.C. 1992); *Spires v. Ben Hill County*, 745 F.Supp. 690 (M.D. Ga. 1990). *See also, Brown v. Nipper Auto Parts*, 2009 WL 1437836 (4th Cir. May 2009) (in which court declined to apply § 778.114 to damages of misclassified auto parts store "manager" because employer could not demonstrate

clear understanding as to FWW pay arrangement or contemporaneous payment of overtime.)

Current Developments:

In July, 2008, the DOL proposed "clean up amendments" to the FWW regulation. Its proposal was to eliminate language cautioning that the FWW method may be invalidated where bonuses or premium payments are made in addition to salary. Instead the regulation would provide that *bona fide* bonus or premium payments would not invalidate the FWW method provided they are included in the regular rate (unless otherwise excludable, *see* FLSA sections 7(e)(1)-(8)). It also eliminated the parenthetical in "[w]here there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the total hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period,…" Among others, NELA vigorously opposed the amendment and to date, it has not passed.

In 2009, the DOL published an opinion letter which approved an employer's proposed calculation of damages under the FWW for retroactive payment of overtime wages to misclassified employees. *See*, FLSA 2009-3. The employer purportedly discovered its misclassification of employees after a reorganization effort. The opinion is only binding upon party to whom addressed. It is also favorable that the DOL applied § 778.114 rather than reverting to *Missel*. However, it did not acknowledge that the employer had failed to meet the regulations requirements because it had not paid the overtime contemporaneously and did not have had "clear understanding" with employees

as to this method of compensation. NELA has joined other employee rights groups in requesting that this letter be withdrawn.

A ruling on the application of FWW in a misclassification case is pending in 7th Circuit case of Negro v. American Family Properties. NELA has filed an *amicus curiae* brief but the Court rejected it.

IV. **FLSA Attorney Fee Entitlement – Eleventh Circuit**

Generally speaking, the court's duty to determine the reasonableness of the proposed attorneys' fees as part of a fairness determination has been applied within the context of collective, not individual, actions. See, *Tam Su v. Elec. Arts, Inc.*, No. 6:05-cv-131-Orl-28JGG, 2007 U.S. Dist. LEXIS 72961, at **10-11 (M.D. Fla. August 29, 2007). However, in a single plaintiff case, *Silva v. Grant Miller, et al*, 2009 U.S. App. LEXIS 561, ** 5-6 (11th Cir. January 13, 2009), the Eleventh Circuit issued an opinion affirming that district courts have the right to include review of the reasonableness of attorneys fees claimed under a private contingency agreement between plaintiff and plaintiff's counsel, within the context of the court's review of the reasonableness of a FLSA settlement. According to *Silva*, this is so even if the plaintiff's claim is compromised only as a result of the contingency fee recovery. *See also*, *Zegers v. Countrywide Mortgage Ventures, Inc.*, 569 F.Supp. 2d 1259, 1261 (M.D. Fla. 2008) (refusing to apply *Venegas v.* Mitchell, 495 U.S. 82 (1990) to permit supplementation of attorneys fees obtained from a common fund on basis of contingency fee contract reasoning that fee-shifting provision of the FLSA was to ensure that plaintiffs receive damages as well as attorneys fees from defendant – as opposed to fees out of the reward – and rejecting plaintiffs' contention that court is without jurisdiction to review attorneys' fee in FLSA settlement).

Following *Silva, t*he Middle District Orlando Division has issued a ruling providing that contingency fee agreements between plaintiffs' attorneys and the plaintiffs are included in the review a court gives a FLSA settlement in order to give it final and binding effect, whenever the employees' receives less than a full recovery. The court will decide the reasonableness of the attorneys' fees using the lodestar method. *See, Jackson v. Pete's Painting of Central Florida, Inc.*, 2009 U.S. Dist. LEXIS 63379 (M.D. Fla. July 21, 2009).