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This paper is an update summarizing decisions, regulations, and interpretations effecting claims brought under the Fair Labor Standards Act and Florida Constitution, Article X, Section 24. Specifically, this paper focuses on legal developments related to (1) tipped employees and (2) employees regularly misclassified as independent contractors. It also provides an update on the DOL's new regulations effective December 1, 2016 changing who will be exempt under the overtime exemptions.

I. TIPPED EMPLOYEES

Under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(m):

> In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to –
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> (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such employee on the date of the enactment of this paragraph; and
> (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.
>
> The additional amount on account of tips may not exceed the amount of tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Under Article X, Section 24 of the Florida Constitution, for "tipped Employees meeting eligibility requirements for the tip credit under the FLSA, Employers may credit towards satisfaction of the Minimum Wage tips up to the amount of the allowable FLSA tip credit in 2003." The amount of the allowable tip credit under the FLSA in 2003 was $3.02. Under Article X, Section 24 of the Florida Constitution the maximum allowable tip credit is calculated by the Florida Minimum Wage (which may be adjusted on Jan. 1 each year) minus $3.02.

Effective May 5, 2011, the Department of Labor promulgated new regulations updating its existing regulations for tipped employees, 29 C.F.R. § 531 *et seq.* *See* 76 Fed. Reg. 18832, 18856 (April 5, 2011).

According to the DOL, for an employer to be eligible for a tip credit (up to maximum credit of $5.12 per hour under the FLSA) towards its minimum wage obligation under the Act, the following requirements must be met:

> (1) the employer must pay the tipped employee a direct cash wage of at least $2.13 per hour for all hours worked in a work week;
> (2) the employer must not seek to take a credit in excess of the amount of tips actually received by the employee in a work week;
> (3) the employer must inform the tipped employee of the provisions of Section 3(m); and
> (4) the tipped employee must get to keep all tips he or she receives, unless he or she is part of a valid tip pool comprised of employees who customarily and regularly receive tips.

29 C.F.R. § 531.50-.59; 76 Fed. Reg. 18832, 18856 (April 5, 2011).

Notice - What Is Sufficient?

Pursuant to section 3(m), an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit of the provisions of section 3(m) of the Act, *i.e.*:

> 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 the 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 in this section.
>
> 29 C.F.R. § 531.59.

Courts are looking to the 2011 DOL clarification for guidance on what is required by notice:

- Howard v. Second Chance Jai Alai LLC, 5:15-cv-200, 2016 WL 3349022, *4 (M.D. Fla. June 16, 2016) (following the DOL's 2011 clarification of the notice requirements and the employers duty to meet those requirements).
- Perez v. Sophia's Kalamazoo, LLC, No. 1:14-CV-772, 2015 WL 7272234, at *7 (W.D. Mich. Nov. 17, 2015) (citing 29 C.F.R. § 516.28(a)(3) which provides "[t]he amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.").

- Driver v. AppleIllinois, Inc., 917 F. Supp. 2d 793, 803 (N.D. Ill. 2013) (holding the tip-sharing agreement that the employer had tipped employees sign was insufficient to meet the notice requirements of 29 U.S.C. § 203(m) in part because "[i]t does not inform the employee of his wage rate or the fact his wage rate will actually be lower than the minimum wage; it does not state how much of the employee's tips will be used to make up the minimum wage. . .").
- Perrin v. Papa John's Intern., Inc., 114 F. Supp. 3d 707, 729 (E.D. Mo. July 8, 2015) (explaining the importance of the notice requirement, including, that "the tip credit notice [required under the regulation] informs employees of their regular rate of pay and of the higher rate to which they are entitled for overtime.").
- Dorsey v. TGT Consulting, LLC, 888 F. Supp. 2d 670, 681 (D. Md. 2012) (recognizing that DOL's regulation "includes a more detailed notice requirement than courts had previously mandated.")
- Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253, 287-88 (S.D.N.Y. 2011) (finding "providing employees with a copy of § 203(m) and informing them that their tips will be used as a credit against the minimum wage as permitted by law" is sufficient notice).

- But see Garcia v. Koning Rests. Int'l, 2013 WL 8150984 (S.D. Fla. 2013) (finding plaintiff's signing of a Position Description and Agreement Form, stating, "I understand and agree to my position duties, requirements, compensation and benefits. I also acknowledge and agree that, as of November 24, 2009, I will be paid as a Tipped Employee and earn a tip rate of $5.00 an hour while employed by [Defendant]. It's also important that I report all my daily tips to my employer per our company Policy Bulletin # 501" coupled with testimony that he only would signed something he understood, was sufficient notice).

Tip Pooling

Under the FLSA, employees may only share in wait staff employees' tips if they are "employees who customarily and regularly receive tips." 29 U.S.C. § 203(m).

Who can share in a mandatory tip pool?

- Montano v. Montrose Restaurant Assocs., Inc., 800 F.3d 186, 193 (5th Cir. 2015) ("The central difference between employees who are traditionally tipped and those who are not is that the former work primarily in the front of the house where they are seen by and interact with customers, while the latter work primarily or exclusively in the back of the house.") Occasional, or *de minimis*, food service does not transform a non-tipped employee into employees eligible to receive tips. Id.
- Rubio v. Fuji Sushi & Teppani, Inc., 2013 WL 230216, at *3 (M.D. Fla. Jan. 22, 2013) (granting plaintiffs summary judgment finding "[i]t was not the kitchen chefs' job to engage with customers, but to prepare food in the kitchen," and "whatever rare and unusual interaction the kitchen chefs had with customers was incidental" and "[did] not

compare to those of servers … who [] interact[ed] with customers on a much more frequent basis").

- Pedigo v. Austin Rumba, Inc., 722 F. Supp. 2d 714 (W.D. Tex. 2010) (granting plaintiff summary judgment after analyzing dishwashers' and preparation cooks' primary job duties and finding they were impermissibly included in the tip pool where their infrequent duties bussing tables, delivering food to tables, and performing as barbacks were ancillary duties, and dishwashers and cooks are non-tipped occupations).

Who can share in a "voluntary" tip pool?

According to the DOL's Field Operations Handbook tipped employees may "decid[e], free from any coercion whatever and outside of any formalized arrangement or as a condition of employment, what to do with their tips, including sharing them with whichever co-workers they please." FOH, § 30d04(c). Thus, for a tip-sharing arrangement to be lawful under the FLSA four requirements must be met. First, the tipped employees themselves must "decid[e]" to share the tips. Id. Second, that decision must be "free from any coercion whatever." Id. Third, the tip-sharing must be "outside of any formalized arrangement." Id. Fourth, the tip-sharing must not be "as a condition of employment." Id.

- However, in Kubiak v. S.W. Cowboy, Inc., No. 3:12-CV-1306-J-34JRK, 2016 WL 659305, at *9 (M.D. Fla. Feb. 18, 2016), the court found the tip sharing agreement with kitchen staff "voluntary" even through there appeared to be a formalized agreement for sharing tips with the kitchen.
- The Kubiak court did confirm that employers can never share in tips, even voluntarily, recognizing that "[w]ithout question, even if the Kitchen Tip Pool was voluntary, if Defendants themselves received any portion of the proceeds, the Kitchen Tip Pool would violate the retention requirement of the FLSA. This is so because the FLSA prohibits any agreement whereby the employees' tips become property of the employer. See DOL Field Operations Handbook § 30d01(a); Fact Sheet No. 15." Id. at *13.

Retaining Tips

Must The Tipped Employee Get To Keep All Tips He Or She Receives If The Employer Does Not Take A Tip Credit And Pays Them The Full Minimum Wage?

In 2011, the DOL revised 29 C.F.R. § 531.52 as follows:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section [20]3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section [20]3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

The DOL explained:

> Under the 1974 amendments to section 3(m), an employer's ability to utilize an employee's tips is limited to taking a credit against the employee's tips as permitted by

section 3(m). Section 3(m) provides the only method by which an employer may use tips received by an employee. An employer's only options under section 3(m) are to take a credit against the employee's tips up to the statutory differential, or to pay the entire minimum wage directly. See Wage and Hour Opinion Letter WH-536, 1989 WL 610348 (October 26, 1989) (defining when an employer does not claim a tip credit as when the employer does not retain any tips and pays the employee the minimum wage).

76 FR 18832-01.

The DOL further explained that it promulgated this new rule to make it clear that tips are the property of the employee following the statutory silence *Cumbie* exposed. *Id.* at 18,841–42.

- Oregon Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080, 1085 (9th Cir. 2016) (finding "the FLSA is silent regarding the tip pooling practices of employers who do not take a tip credit" and accordingly Chervon deference to the DOL's new regulations).

  In Oregon Rest., the Ninth Circuit looked to congressional history and the purpose of the FLSA in finding the DOL's regulations reasonable:
  - The Committee reported that the 1974 amendment "modifies section [20]3(m) of the Fair Labor Standards Act by requiring ... that all tips received be paid out to tipped employees." S.Rep. No. 93–690, at 42.
  - In 1977, the Committee again reported that "[t]ips are not wages, and under the 1974 amendments tips must be retained by the employees ... and cannot be paid to the employer *or* otherwise used by the employer to offset his wage obligation, except to the extent permitted by section [20]3(m)." S.Rep. No. 95–440 at 368 (1977) (emphasis added). The use of the word "or" supports the DOL's interpretation of the FLSA because it implies that the only acceptable use by an employer of employee tips is a tip credit.
  - Additionally, we find that the purpose of the FLSA does not support the view that Congress clearly intended to permanently allow employers that do not take a tip credit to do whatever they wish with their employees' tips.
  - The court held "[c]onsidering the statements in the relevant legislative history and the purpose and structure of the FLSA, we find that the DOL's interpretation is more closely aligned with Congressional intent, and at the very least, that the DOL's interpretation is reasonable." *Id*. at 1090.

However, federal district courts are declining to follow Oregon Rest. & Lodging Ass'n v. Perez:

- Aguila v. Corp. Caterers II, Inc., No. 1:15-CV-24350-KMM, 2016 WL 4196656, at *3 (S.D. Fla. Aug. 9, 2016) (rejecting *Perez* and finding the DOL lacked authority to find that Section 203(m) requires employees to retain their all their tips even when they are paid the full minimum wage).
- Malivuk v. Ameripark, LLC, No. 1:15-CV-2570-WSD, 2016 WL 3999878, at *3 (N.D. Ga. July 26, 2016) (finding"[t]he weight of authority holds that 'Section 203(m)...does

not require an employer to return tip money to an employee where the employer does not claim to have used those tips to satisfy the employees' minimum wage'").

- Brueningsen v. Resort Express Inc., No. 2:12-CV-843-DN, 2016 WL 1181683, at *1 (D. Utah Mar. 25, 2016) (rejecting Oregon Rest. and Lodging Ass'n v. Perez as nonbinding precedent and unpersuasive).

Other potential (state law) avenues of relief:

- Carol Carter, et al., Plaintiffs, v. PJS of Parma, Inc., et al., Defendants., No. 1:15 CV 1545, 2016 WL 1618132, at *2 (N.D. Ohio Apr. 22, 2016) (allowing plaintiffs to continue with common law unjust enrichment claim for tips because the claims are not dependent upon the application of the FLSA and declining to address the DOL's regulation in 29 C.F.R. § 531.52 that "[t]ips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA"). Also, distinguishing *Holland v. Levy Premium Foodservice Ltd. P'ship*, 469 F. App'x 794 (11th Cir. 2012), where the plaintiffs alleged the defendant's retention of a service charge was unjust, which the court held was a legal conclusion rather than an allegation of fact and therefore insufficient to defeat a motion to dismiss. *Id.* at 797.
- Guerra v. Guadalajara, IV, No. 3:16CV00020, 2016 WL 3766444, at *3 (W.D. Va. July 7, 2016) (holding "based on the Fourth Circuit's decision in Trejo, and in the absence of any authority for the proposition that 29 C.F.R. § 531.52 creates a private cause of action for improper retention of tips, it appears that state law provides the only viable remedy for plaintiffs seeking the return of additional tip money withheld by their employer."). See, e.g., Labriola, 2016 U.S. Dist. LEXIS 37186, at *14, 19,2016 WL 1106862 (holding that the plaintiffs' allegation that defendants improperly confiscated portions of the plaintiffs' tips was not actionable under the FLSA but could support a claim under Illinois common law); Azeez v. Ramaiah, No. 14 Civ. 5623, 2015 U.S. Dist. LEXIS 46574, at *19-22, 2015 WL 1637871 (S.D.N.Y. Apr. 9, 2015) (holding that neither the FLSA nor the regulation issued by the Department of Labor provides a cause of action for unlawful retention of tips, but that such action can be pursued under New York law).

Non-Tip Producing Duties and The 20% Rule:

As explained in Fast v. Applebee's Int'l, Inc., No. 06-4146-CV-C-NKL, 2010 WL 816639, at *2 (W.D. Mo. Mar. 4, 2010), aff'd, 638 F.3d 872 (8th Cir. 2011):

> The Department of Labor has adopted a regulation to deal with employees who work in dual occupations. It provides that:
>
> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least [$30] a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning, and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the

> counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips. 29 C.F.R § 531.56(e).
>
> Thus, according to the regulation, just because an employee is not doing work that directly produces tips does not mean that a tip credit cannot be taken. So long as a tipped employee is doing related work *in his or her tipped occupation,* a tip credit is permitted.
>
> The Department of Labor, however, has also developed guidelines for determining how much non-tipped work can be assigned to the employee before the employee effectively has moved into a non-tipped occupation and becomes a dual employee. Section 30d00(e) of the Department of Labor's Field Operations Handbook states:
>
> (e) Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting table, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

In Pellon v. Business Representation International, 528 F. Supp. 2d 1306, *aff'd*, 291 Fed. Apprx. 310 (2008), the court characterized the DOL's 20% rule, as applied to skycaps, as "infeasible":

> Permitting Plaintiffs to scrutinize every day minute by minute, attempt to differentiate what qualifies as tipped activity and what does not, and adjust their wage accordingly would create an exception that would threaten to swallow every rule governing (and allowing) for tip credit for employers. First of all, ruling in that manner would present a discovery nightmare. Of greater concern is the fact that under the reasoning proffered by Plaintiffs, nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts.

However, overwhelmingly, courts have found that the DOL's 20% rule is entitled to deference and have disagreed that, as applied to wait staff employees, the Rule is infeasible. For "discrete time periods," even the Middle District of Florida agrees, related non-tipped activities are feasible to identify.

- Langlands v. JK & T Wings, Inc., No. 15-13551, 2016 WL 4073548, at *3 (E.D. Mich. Aug. 1, 2016) (distinguishing Pellon because the court found "the [Pellon] plaintiff's dual jobs claim was exceedingly 'intertwined with direct tip-producing tasks throughout the day' such that dividing the intertwined tasks would be 'impractical or impossible.'"); see also McLamb v. High 5 Hosp., No. 16-00039 GMS, 2016 WL 3751946, at *4 (D. Del. July 12, 2016) (same).
- Knox v. Jones Grp., No. 115CV01738SEBTAB, 2016 WL 4371630, at *6–7 (S.D. Ind. Aug. 15, 2016) (extensive analysis and concluding, "consistent with the Eighth Circuit's holding in *Fast v. Applebees Int'l, Inc.*, that the DOL's interpretation of § 531.56(e) is entitled to deference").
- Flood v. Carlson Restaurants Inc., 94 F. Supp. 3d 572, 582–84 (S.D.N.Y. 2015) (collecting cases and recognizing district court across the country have "endorsed the twenty percent rule" and its application).
- Irvine v. Destination Wild Dunes Mgmt., Inc., 106 F. Supp. 3d 729, 734 (D.S.C. 2015) (evaluating the application of 20% rule and finding "it is not a real burden on an employer to require that they be aware of how employees are spending their time before reducing their wages by 71%").
- Crate v. Q's Rest. Grp. LLC, No. 813CV2549T24EAJ, 2014 WL 10556347, at *3–4 (M.D. Fla. May 2, 2014) (recognizing Pellon did not reach the questions as to whether the DOL's 20% rule is entitled to deference and citing to Fast v. Applebee's Intern., Inc., 2010 WL 816639, at *7 (W.D. Mo. Mar. 4, 2010) finding the "the [DOL] Handbook's twenty percent limitation persuasive and practical").
- In Crate, Judge Bucklew held that while she agreed with "the *Pellon* court that '[p]ermitting Plaintiffs to scrutinize every day minute by minute, [in an] attempt to differentiate what qualifies as tipped activity and what does not, and adjust their wage accordingly' would likely be infeasible"—the plaintiffs can still prevail "to the extent that there are discrete time periods—such as before the restaurant opens to customers, after the restaurant is closed to customers, or between the lunch and dinner shifts—during which the Plaintiffs can show that they were engaged in related, non-tipped activities, such could be used as evidence to support their claim that they spent more than 20% of their shifts doing related, non-tipped work for which Defendant is not entitled to the tip credit."

II. INDEPENDENT CONTRACTORS OR EMPLOYEES

What Industries Are Currently in the "Hot Seat":

Adult Entertainment Establishments (Exotic Dancers):

Courts across the country have consistently held that entertainers/dancers are independent contractors.

- ***Degidio v. Crazy Horse Saloon & Rest., Inc*, 4:13-CV-02136-BHH, 2015 WL 5834280, at *7 (D.S.C. 2015)(collecting cases):** The court in this matter identifies over 15 cases in which entertainers have been found to be employees. These cases include: *Mason v. Fantasy, LLC,* 13–CV–02020–RM–KLM, 2015 WL 4512327, at

*13 (D.Colo. July 27, 2015); *Henderson v. 1400 Northside* Drive, Inc., 1:13–CV–3767–TWT, 2015 WL 3823995, at *5 (N.D. Ga. June 19, 2015); *Verma v. 3001 Castor, Inc.,* CIV.A. 13–3034, 2014 WL 2957453, at *5 (E.D. Pa. June 30, 2014): *McFeeley v. Jackson St. Ent., LLC*, 47 F.Supp.3d 260, 279 (D.Md.2014) *Stevenson v. Great Am. Dream, Inc.*, 1:12–CV–3359–TWT, 2013 WL 6880921, at *6 (N.D.Ga. Dec. 31, 2013); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F.Supp.2d 901, 912–13 (S.D.N.Y.2013); *Collins v. Barney's Barn, Inc.*, et al., No. 4:12CV00685 SWW (E.D.Ark. Nov. 14, 2013); *Butler v. PP & G, Inc.*, CIV.A. WMN–13–430, 2013 WL 5964476, at *9 (D.Md. Nov. 7, 2013) reconsideration denied, CIV.A. WMN–13–430, 2014 WL 199001 (D.Md. Jan. 16, 2014); *Thornton v. Crazy Horse, Inc.*, No. 3:06–CV–00251–TMB, 2012 WL 2175753 (D. Alaska June 14, 2012); *Clincy v. Galardi S. Enters., Inc.*, 808 F.Supp.2d 1326, 1343 (N.D.Ga.2011); *Thompson v. Linda and A. Inc.*, 779 F.Supp.2d 139, 151 (D.D.C.2011); *Morse v. Mer Corp.*, 2010 WL 2346334, at *6 (S.D.Ind.2010); *Harrell v. Diamond A Entm't Inc.*, 992 F.Supp. 1343, 1348 (M.D.Fla.1997); *Reich v. Priba Corp.*, 890 F.Supp. 586, 594 (N.D.Tex.1995); *Martin v. Priba Corp.*, 1992 WL 486911, at *5 (N.D.Tex.1992); *see also Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 330 (5th Cir.1993) (affirming district court's determination that exotic dancers were employees under the FLSA). Cf. *Matson v. 7455, Inc.*, No. 98–788, 2000 WL 1132110, at *4 (D.Or.Jan.14, 2000); *Hilborn v. Prime Time Club, Inc.*, No. 11–00197, 2012 WL 9187581, at *1 (E.D.Ark. July 12, 2012).

- ***Clincy v. Galardi S. Enterprises, Inc.*, 808 F. Supp. 2d 1326, 1343 (N.D. Ga. 2011)(collecting cases):** "Before embarking on an examination of the factors set forth above as applicable to the facts of this action, the Court notes that several courts have addressed the question of whether a nude dancer is an employee under the FLSA, and " '[w]ithout exception, these courts have found an employment relationship and required the nightclub to pay its dancers a minimum wage.'" *Harrell v. Diamond A Entm't, Inc.*, 992 F.Supp. 1343, 1347–48 (M.D.Fla.1997) (citing e.g. *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324 (5th Cir.1993) (finding dancers are employees under the FLSA); *Reich v. Priba Corp.*, 890 F.Supp. 586 (N.D.Tex.1995) (same); *Martin v. Priba Corp.*, 1992 WL 486911 (N.D.Tex. Nov.6, 1992) (same)); *see also Morse v. Mer Corp.*, No. 1:08–cv–1389–WLT–JMS, 2010 WL 2346334 (S.D.Ind. June 4, 2010) (same); *Jeffcoat v. Alaska Dep't of Labor*, 732 P.2d 1073 (Alaska 1987) (finding entertainers to be employees under state labor laws based on FLSA); *Doe v. Cin–Lan, Inc.*, No. 08–cv–12719, 2008 WL 4960170 (E.D.Mich. Nov. 20, 2008) (granting entertainer's motion for preliminary injunction, holding that entertainer was substantially likely to succeed on claim that she is an employee under FLSA).

Others are still in litigation:

- ***Espinoza v. Galardi S. Enterprises, Inc.*, 14-21244-CIV, 2016 WL 127586, at *12 (S.D. Fla. 2016)**(certifying Rule 23 class of entertainers)
- ***Tapia, et al. v. Doll House, Inc., et al.*, Case No.: 2015-CA-00322, filed in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida**(motion for class certification is currently pending).

- ***Burrell v. Toppers Int'l, Inc.*, 3:15-CV-125(CDL), 2016 WL 4111375, at *2 (M.D. Ga. 2016):** (conditionally certifying opt-out class of entertainers pursuant to the FLSA)
- ***Woods v. Club Cabaret, Inc.*, 140 F. Supp. 3d 775, 785 (C.D. Ill. 2015)**(conditionally certifying opt-out class of entertainers pursuant to the FLSA)

Cable Companies (Cable Technicians/Installers):

- ***Boyd, et al. v. SFS Communications, LLC, et al.***, Case No.: 8:15-CV-03068, filed October 8, 2015 in the United States District Court for the District of Maryland, Southern Division.
- ***Thornton v. Mainline Communications, LLC*,** 157 F. Supp. 3d 844 (E.D. Mo. 2016)(granting summary judgement for Plaintiffs concluding that installers were employees, not independent contractors).
- ***Matrai v. DirecTV, LLC*, 14-2022-SAC, 2016 WL 845257, at *7 (D. Kan. 2016)**(finding that a genuine issue of material fact existed as to whether installers were misclassified as independent contractors, but granting defendant's motion for summary judgment because defendant "carried its burden of showing the retail or service establishment exemption is met and that [defendant] is exempt from paying overtime compensation pursuant to 29 U.S.C. § 207(i)."
- ***Benion v. Lecom, Inc.*, 15-14367, 2016 WL 2801562, at *12 (E.D. Mich. 2016), *reconsideration denied*, 15-14367, 2016 WL 3254611 (E.D. Mich. 2016)**(granting conditional certification for a class of installers).
- ***Eberline v. Media Net, L.L.C.***, 636 Fed. Appx. 225, 229 (5th Cir. 2016)(affirming a defense verdict stating "[v]iewing the evidence in the light most favorable to the verdict, as we must, we are not convinced that the facts and inferences point so strongly in favor of [plaintiff] that no rational jury could have concluded that he was not Defendants' employee").

Common Defenses to Entertainer/Dancer Cases:

Attacking the Independent Contract Analysis: These attacks as cited above have been summarily rejected in recent cases.

- ***Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343, 1349 (M.D. Fla. 1997):** This case offers a thorough analysis of the factors and has formed the basis for many of the above cited opinions. In analyzing the control factor, the Middle District of Florida explains that the "real question is whether the dancer exerts control over a "meaningful" part of the business" not whether the "dancer's job requires some measure of discretion and flexibility." The fact that the dancers are allowed to work when they want and perform for whomever she wants does not reflect "control over a 'meaningful part' of the business that she stood 'as a separate economic entity.'"
- ***McFeeley v. Jackson St. Entm't, LLC*, 15-1583, 2016 WL 3191896, at *3 (4th Cir. 2016):** Determining entertainers were employees explaining "[m]ost critical on the facts of this case is the first factor of the "economic realities" test: the degree of

control that the putative employer has over the manner in which the work is performed."

- ***Foster v. Gold & Silver Private Club, Inc.*, 7:14CV00698, 2015 WL 8489998, at *5 (W.D. Va. 2015)**: Concluding that entertainers were employees under the FLSA and noting that "[a]lthough the plaintiffs signed agreements labeling them as independent contractors, the label used by the parties is not dispositive under the economic realities test." *citing McFeeley*, 47 F. Supp. 3d at 273, and *McComb*, 331 U.S. at 729.

Asserting that Performance Fees are Service Charges Requiring Set Off:

- ***Hart v. Rick's Cabaret Intern., Inc.*, 967 F. Supp. 2d 901, 928-33 (S.D.N.Y. 2013):** This is the seminal case in analyzing whether the set amount, typically set by the club, that an entertainer receives for performing an individual dance for a customer is a service charge and entitles the club to a set off. The court ultimately rejected this argument because 1) "these fees were not included in Rick's NY's gross receipts;" 2) "the performance fees included direct cash payments by customers to the dancers, which were of varying size and were completely unrecorded by Rick's NY in any form;" 3) "the performance fees . . . were understood by Rick's to be the property of the dancers;" and 4) "the performance fees were paid directly by the customer to the dancer, either in the form of cash or Dance Dollars." The court further explained that [t]he accident that a subset of the performance fees happened to have been paid by credit card and took the form of vouchers, and therefore that these fees temporarily passed from the dancer to Rick's NY before being converted to cash, does not alter their essential character" of being tips and not service charges. That Rick's NY maintained incomplete records of the total performance fees paid, with partial records being generated only by the happenstance that some customers chose to pay by credit card, does not make the recorded payments qualitatively different from the non-recorded ones. Third, the performance fees (both *933 the cash fees and the $18 portion of the credit-card-paid fees retained by the dancers) were understood by Rick's to be the property of the dancers. *See* Marshall 2/23/12 Dep. 46 (testimony of Rick's CFO that "the $18 belongs to the independent contractor, the entertainer as does the cash she gets"); Pl. 56.1 ¶ 378; Def. Resp. 56.1 ¶ 378. There is no record evidence that customers perceived the money they paid the dancers (whether in cash or Dance Dollars) otherwise, and the circumstances would not support such an inference. Fourth, the performance fees were paid directly by the customer to the dancer, either in the form of cash or Dance Dollars; only the process of converting these vouchers into liquid currency brought Rick's NY, fleetingly, into the transaction.
- ***Gardner v. Country Club, Inc.*, 4:13-CV-03399-BHH, 2015 WL 7783556, at *1 (D.S.C. 2015)**: Refusing to apply a set off for performance fees, stating "[t]he defendant has not provided evidence, beyond conclusory allegations, that the payments alleged to be service charges are taken into the defendants gross receipts in their full amount."
- ***Geter v. Galardi S. Enterprises, Inc.*, 14-21896-CIV, 2015 WL 2384068, at *5 (S.D. Fla. 2015)(internal citation omitted):** Refusing to decertify the class in part because "if Plaintiffs are found to be entitled to back wages, Defendants seeking a set-off

"bear the burden of proving the amount of the mandatory minimum dance fees retained by" Plaintiffs. . . [and i]f Defendants are unable to identify evidence sufficient to meet their burden, they would be unable to claim set-offs."

Arguing that Entertainers are Skilled Professionals:

- ***Harrell*, 992 F. Supp. at 1357**: Rejecting defendant's argument that plaintiff was exempt as a skilled professional within the meaning of § 541.3 as defendants "failed to meet its burden of showing that Plaintiff's work required 'invention, imagination, or talent,' because there was no evidence "to suspect that Plaintiff was doing anything more than "moving."
- ***Henderson v. 1400 Northside Drive, Inc.*, 110 F. Supp. 3d 1318, 1321 (N.D. Ga. 2015):** "[B]ased on the undisputed facts, the Plaintiffs' primary duties did not require sufficient creativity, and so the Plaintiffs are entitled to judgment as a matter of law on the Defendant's CPE defense." The *Henderson* court also rejected defendant's arguments that fees should be offset as service charges for the reasons set forth in *Hart v. Rick's Cabaret Intern., Inc.*

The Use of the 7(i) Exemption in Cable Installer Cases:

To qualify for the 7(i) exemption the following conditions must be met: 1) an employee must be employed by a retail or service establishment, 2) the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and 3) more than half the employee's total earnings in a representative period must consist of commissions.

Unfortunately courts have recently, and consistently, applied the retail service exemption to cable installers/technicians:

- ***Matrai v. DirecTV, LLC*, 14-2022-SAC, 2016 WL 845257, at *7 (D. Kan. 2016)**
- ***Tucker v. Jones Communications*, 2013 U.S. Dist. LEXIS 163509 (M.D. Ga. 2013).**
- ***Moore v. Advanced Cable Contractors, Inc*., 2013 U.S. Dist. LEXIS 108359 (N.D. Ga. Aug. 1, 2013)**
- ***Owopetu v. Nationwide CATV Auditing Services, Inc.*, 5:10-CV-18, 2011 WL 4433159 (D. Vt. 2011)**
- ***Horn v. Digital Cable & Communications, Inc.*, 1:06 CV 325, 2009 WL 404240 (N.D. Ohio 2009)**

But see:

- ***Goldberg v. Kleban Eng'g Corp.*, 303 F.2d 855, 858 (5th Cir. 1962)**(holding that a company that provided plumbing, heating, and air conditioning services as a subcontractor for a general contractor — providing its services directly to the 'ultimate consumer' or 'owner' while receiving payment under the subcontract with the general contractor — was engaged in sales for resale").
- ***Alvarado v. Corp. Cleaning Services, Inc.*, 782 F.3d 365, 369–70 (7th Cir. 2015)**(rejecting the application of the holding in *Goldberg* explaining that

Goldberg relied upon the definition in Section 213(a)(2) and that "[a]lthough two congressional *370 reports discussing the amendment that added the commission exemption to the Act said that "retail or service establishment" is defined in section 213(a)(2), . . . the reports are not the law and don't explain why a definition meant for the intrastate business exemption should also apply to the commission exemption").

- Defendants must keep accurate time records to be entitled to the exemption.
  - **29 C.F.R. § 516.16**: Employers claiming they are exempt under 7(i) from their obligation to pay overtime under the FLSA (207(a)) shall maintain and preserve payroll and other records containing all the information and data required by § 516.2(a) except paragraphs (a) (6), (8), (9), and (11), and in addition: (a) A symbol, letter or other notation placed on the payroll records identifying each employee who is paid pursuant to section 7(i); (b) A copy of the agreement or understanding under which section 7(i) is utilized or, if such agreement or understanding is not in writing, a memorandum summarizing its terms including the basis of compensation, the applicable representative period and the date the agreement was entered into and how long it remains in effect. Such agreements or understandings, or summaries may be individually or collectively drawn up; and (c) Total compensation paid to each employee each pay period (showing separately the amount of commissions and the amount of noncommission straight-time earnings).
  - ***Johnson v. Wave Comm GR LLC*, 4 F. Supp. 3d 423, 445 (N.D.N.Y. 2014)**: The court refused to apply 7(i) because defendants had no time records stating "the hours reported by the opt-in plaintiffs cannot be used by defendants to satisfy their burden under § 207(i) because the regular rate of pay must be calculated on a weekly basis and the average amount of hours worked cannot be used. The defendant's failure "to track its employees' actual weekly hours" means that it "cannot establish that [plaintiffs] earned more than one and one-half times the minimum wage for any week during that period."

Arbitration Agreements

Class-action and collective-action waivers in arbitration agreements may violate the NLRA:

- ***Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016):** In examining the text, history, and purpose of the Section 7, the *Lewis* court determined that "Section 7's plain language" along with Section 8, "renders unenforceable any contract provision purporting to waive employees' access to such remedies." *Id*. at 1154. The court also explained that because the Federal Arbitration Act requires that arbitration agreements be treated like all other agreements, they can be rendered unenforceable due to illegality, including violating the NLRA. *Id*. at 1157. Ultimately, the court determined that the defendant's arbitration agreement which required employees to individually arbitrate wage and hour claims and to waive their right "to participate in or receive money or any other relief from any class, collective, or representative proceeding" was unenforceable "[b]ecause it precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes" and found the "arbitration provision violates Sections 7 and 8 of the NLRA." *Id.* at 1159-61.

- ***Morris, et al. v. Ernst & Young, et al.*, Case No.: 5:12-cv-0464 (9th Cir. August 22, 2016)(for publication):** In this case the company had a provision that required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in "separate proceedings." "The effect of the two provisions is that employees could not initiate concerted legal claims against the company in any forum—in court, in arbitration proceedings, or elsewhere." In vacating the lower court's decision to compel arbitration that Ninth Circuit determined that sections § 7 and § 8 of the NLRA "make the terms of the concerted action waiver unenforceable." The court explained "[t]he 'separate proceedings' clause prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else.
- ***Sullivan v. PJ United Inc.*, No. 15-13114, 2016 WL 2961738, at *1 (11th Cir. May 23, 2016) (per curiam)**: Affirming the lower court's decision that the arbitrator did not err in allowing the arbitration to proceed as a collective action when "[t]he Arbitrator relied on a decision of the NLRB holding that the waiver of class arbitration in this very Agreement was unenforceable pursuant to the National Labor Relations Act."

III. SUMMARY OF THE NEW FLSA OVERTIME REGULATIONS

What you need to know:

- Effective December 1, 2016. However, there is a non-enforcement policy "for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds." For this limited group, the DOL will not enforce the updated salary requirement until March 17, 2019.
- Does not change any of the existing job duty requirements to qualify for exemption.
- Does not eliminate the "concurrent duties" test currently in place for the FLSA White Collar Exemptions.
- Expected that 4.2 million workers will be directly affected by the rule, and 8.9 million currently overtime eligible workers will get strengthened overtime protections.

What are the primary changes?

Focuses on updating the salary and compensation levels needed for Executive, Administrative, and Professional workers to be exempt:

- Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region ($913 per week; $47,476 annually for a full-year worker)
  - An exempt computer employee may also be paid $27.63 per hour.
  - Academic administrative employees may qualify for exemption either by satisfying the standard salary level test or, alternatively, being paid on a salary

basis at a rate at least equal to the entrance salary for teachers in the educational establishment at which the employee is employed
    - Special salary level test for employees in American Samoa is 84 percent of the standard salary level, $767 per
    - The regulations also establish a special "base rate" threshold for employees in the motion picture industry. The base rate is $1,397 per week, or a prorated amount based on the number of days worked
- Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004)
- Provides for automatic increases in the salary levels every three years (beginning January 1, 2020) – with the minimum salary level indexed to the 40th percentile of salaries for full-time workers in the lowest wage census region (currently the south region), and the HCE level indexed to the 90th percentile of salaries for national full-time salary workers;
- Amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

Anticipated Areas of Litigation?

Fluctuating Work Week

- The DOL "Guidance for Private Employers on Changes to the White Collar Exemptions in the Overtime Final Rule provides employers with the option of "continuing to pay employees a salary and pay overtime for hours in excess of 40 per week."
- It also suggests that "an employer and employee to agree to a fixed salary for a workweek of more than 40 hours, in which the salary includes overtime compensation under certain conditions. If, however, the employee's schedule changes in any way during any week (either by working more or fewer hours), the employer must adjust the salary for that week."
    - Look to make sure there is a mutual understanding;
    - That the employer has calculated the regular rate of pay appropriately, and
    - Ensuring that they have included all hours worked.
    -

Use of Nondiscretionary Commissions and Bonuses

- The DOL's final rule permits employers to use nondiscretionary bonuses and incentive payments (such as commissions) to satisfy up to 10% of the new minimum salary requirements (up to $4,747.60 per year, or $1,186.90 per quarter) if the person is exempt under the Executive, Administrative, or Professional Exemption. The final rule also requires employers to pay exempt employees at least 90% of the minimum salary level per workweek. This equates to $821.70 per workweek or $42,728.40 annualized.

    - ♦ Nondiscretionary bonuses and incentive payments (including commissions) are forms of compensation promised to employees to induce them to work more efficiently or to remain with the company. Examples include bonuses for meeting set production goals, retention bonuses, and commission payments based on a fixed formula.
    - ♦ By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards. An example would be an unannounced bonus or spontaneous reward for a specific act.
- When larger bonuses are paid, the amount is capped at 10 percent of the required salary amount.
- The nondiscretionary bonuses and incentive payments must be paid at least quarterly.
- If, at the end of a quarter, the salary plus 10% of the additional compensation does not equal $913 per workweek, the final rule permits "catch-up" payment to be made.
- The "catch-up" payment *must* be paid no later than the first pay period following the end of the quarter.
- The "catch-up" payment must satisfy the minimum salary for the preceding quarter, as spread over a 13-week period.
- Such a payment applies only to the preceding quarter and cannot be used to meet the salary requirements for the quarter in which it was paid.
- If a "catch-up" payment is not made, overtime is then owed for hours worked over 40 per workweek in the corresponding quarter.
- The "catch-up" provision does not apply when the individual is exempt as a highly compensated employee. For compensation paid in excess of the minimum $913 per week, the regulations remain unchanged that bonuses or other incentive payments can be used to establish the $134,004 per year required salary. In other words, additional compensation of up to $86,528 – in the form of bonuses, commissions, or incentive payments – can be used to satisfy the highly compensated employee test.

Basic Requirements for Claiming a White Collar Exemption under the Standard Duties Test

	EXECUTIVE	ADMINISTRATIVE	PROFESSIONAL
Salary Basis Test	• Employee must be paid on a salary basis	• Employee must be paid on a salary or fee basis	• Employee must be paid on a salary or fee basis
Standard Salary Level Test	• $913 per week ($47,476 per year for a full-year worker)	• $913 per week ($47,476 per year for a full-year worker) • Special salary level for certain academic administrative personnel	• $913 per week ($47,476 per year for a full-year worker) • Salary level test does **not** apply to doctors, lawyers, or teachers
Standard Duties Test	• The employee's "primary duty" must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full-time employees as well). • Additional requirements provided in 29 CFR 541 Subpart B	• The employee's "primary duty" must include the exercise of discretion and independent judgment with respect to matters of significance. • Additional requirements provided in 29 CFR 541 Subpart C	• The employee's "primary duty" must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. • Additional requirements provided in 29 CFR 541 Subpart D