Labor & Employment Law

Overtime Collection and Class Actions: The Need for Reform

*By Paul DeCamp**

In years past, when a recently-terminated employee walked into an attorney's office to discuss possible legal action against a former employer, the first issue the attorney would usually want to explore was what protected class or classes the client belonged to and what evidence the individual had to support an inference of unlawful discrimination, harassment, or retaliation. These days, the initial consultation is at least as likely to focus on how the former employer paid the client and whether there are other employees in the same job category. Of particular interest to the attorney will be whether the client worked, and received premium pay for, overtime.[1] Two of the potentially costliest claims that employers face in this area are that employees have been misdesignated as "exempt" from the overtime laws, receiving a salary rather than the required premium hourly compensation, and that employees designated as "non-exempt" and paid on an hourly basis have not been paid for all hours worked, including overtime hours.

According to one study, in 2001 the number of collective actions brought under the Fair Labor Standards Act of 1938 (the "FLSA"), as amended,[2] exceeded the number of class actions brought in federal court under the equal employment opportunity laws by a margin of 79 to 77.[3] In certain states, class and other multiple-plaintiff cases under state wage and hour laws have likewise flourished. The presiding judge in the Los Angeles complex case division, for example, has publicly opined that approximately 160 overtime class actions are currently pending in southern California, and practicing attorneys estimate the state-wide figure to be in excess of 300 class actions.

Why have lawsuits involving pay practices become so prevalent? Two recent developments account for much of the dramatic upswing in this kind of litigation. First, some courts have expressed a willingness to consider plaintiffs' job duties on a group-wide basis, rather than evaluating job duties individual-by-individual. Second, plaintiffs have increasingly pleaded their claims under state law in conjunction with, or instead of, the FLSA in order to take advantage of the class action device, which generally enables plaintiffs to assemble a much larger body of claimants than would ordinarily elect to opt into an FLSA collective action. Wage and hour class actions have generated numerous multi-million-dollar settlements and have made a lot of lawyers a great deal of money, and there does not appear to be an end in sight, unless the FLSA and its regulations are substantially revised and the states likewise amend their wage and hour laws, or employers dramatically reduce the number of employees they designate as exempt.

Part I of this article provides a brief overview of the FLSA's ambiguous overtime exemption provisions, changes in the American workplace since the passage of the FLSA that have rendered the exemption criteria increasingly difficult to apply, and the origins of the "misdesignation" issue. Part II addresses the current state of collective and class action litigation concerning overtime. Part III considers the future of overtime law and overtime litigation and offers suggestions for reform. This article does not weigh in on the long-running debate over whether wage and hour regulation is in the public interest, whether from the perspective of economics, workplace safety, or employee quality of life. Instead, the core premise is that statutes and regulations that spawn substantial amounts of litigation raising issues unrelated to the core concerns giving rise to those laws in the first place are against public policy and should, at a minimum, be amended to reduce the likelihood of litigation. Bright lines that enable employers and employees to determine readily their rights concerning overtime are the surest way to protect the interests of all parties.

I. BACKGROUND: THE LAW OF OVERTIME

A. The FLSA And State Wage And Hour Laws

In 1938, while the nation was in the grip of the Depression, Congress enacted the overtime provisions of the FLSA in order to alleviate the hardship of unemployment. The theory is straightforward: by making a particular employee's labor significantly more expensive after forty hours in a workweek, Congress would provide employers a strong financial incentive to shift work to other employees who can be paid non-premium wage rates.[4] Congress exempted several categories of employees from the scope of the FLSA's overtime requirements, including, inter alia, "any employee employed in a bona fide executive, administrative, or professional capacity."[5] Employers were not required to pay overtime to individuals who met the "salary basis" and "duties" tests for these exemptions.[6] In the late 1930s, these exemptions had a readily ascertainable meaning in the context of the then-prevalent industrial workplace. Executive, administrative, and professional employees were the highly-compensated "white collar" employees, who were not seen as needing the overtime protections of the FLSA, as opposed to the less highly compensated "blue collar" and clerical factory employees whom the FLSA was designed to protect. For example, in a typical factory executive employees were the managers; administrative employees were the purchasing agents, labor relations directors, and personnel directors; and the professionals were the scientists, engineers, and accountants. In short, "white collar" employees performed office work, aided by clerical support staff such as secretaries and filing clerks, whereas "blue collar" employees performed the manual labor.[7]

The states followed suit, enacting wage and hour laws that in many respects mirrored the substantive provisions of the FLSA.[8] California, which had enacted wage and hour legislation well before the passage of the FLSA, has been one of the few jurisdictions to impose particularly severe regulation in this

area. For the most part, with the exception of California, the substantive requirements under state law for overtime exemption are similar or identical to the federal standard.

B. Changes In The American Workplace

In the decades following World War II, the American workplace changed fundamentally. More people went to college, the economy shifted away from heavy manufacturing, and the retail and service sectors flourished. Technology played an increasingly important role in the workplace, and businesses automated many of the physical tasks performed by workers in years past. The modern factory bears little resemblance to what Congress had in mind in the 1930s, and the retail, service, and information technology sectors of the twenty-first century economy are substantially beyond the scope of the industrial economy that Congress sought to address through the FLSA.[9]

In the modern workplace, outside the context of manual laborers and employees in jobs involving little or no discretionary or intellectual component, it is often very difficult to apply notions of "white collar" and "blue collar."[10] Regulations that focus on whether employees customarily and regularly exercise "discretion" and "independent judgment"[11] or whether their jobs are "directly related to management policies or general business operations of [the] employer or [the] employer's customers"[12] do not yield determinate results when applied to the job duties of many of today's employees. Job titles have proliferated as the number of job functions to be performed, and thus the opportunity for increased specialization, has grown. Employees with some engineering education operate as engineers without necessarily obtaining formal certification. Managers and assistant managers of retail establishments may earn substantial compensation, oversee the operation of a multi-million-dollar business, and direct the work of numerous subordinate employees, but they may also spend part of their working time interacting with customers, making sales, or even flipping hamburgers on a grill.[13] Employees in the insurance and financial sectors, often with college or advanced degrees, may perform any number of specialized functions requiring a high degree of skill and responsibility. Employees of a television station may or may not be exempt.[14] The status of paralegals is likewise unclear.[15] In short, the vision of the American workplace that prompted the passage of the FLSA is largely outdated.[16] Because many millions of American employees are designated as exempt and judged by these aging and increasingly inapt and unworkable standards,[17] and because the cost of incorrect exemption decisions can easily reach thousands of dollars per employee, proper exemption designation is of great importance to employers and employees alike.

C. Origins Of The Misdesignation Problem

Depression-era overtime exemptions are still very much the law of the land. As jobs have moved farther and farther away from the relatively clear paradigms of the 1930s, employers have had to make increasingly difficult decisions regarding whether to classify employees as exempt from the overtime provisions.[18] In many instances, those decisions, while sound as a matter of common sense, may not clearly satisfy all of the requirements for exemption under the FLSA or state law.[19]

There is a strong tendency for employers to desire to classify as exempt their highly compensated employees who perform nonmanual work. This is especially so where an employee has a college education and a substantial amount of responsibility and where the quality of the employee's job performance can have a significant impact on the employer's bottom line. Exempt employees more often see their interests as in line with those of their employer, and they view their job more in terms of the service and value they provide to their employer's operations than in terms of the quantity of work produced or the time required to produce that work.[20]

And there is often an equally strong tendency for employees, at least those who perform nonmanual work, to desire to be classified as exempt.[21] In the factory setting of the 1930s, "exempt" and "non-exempt" were largely synonymous with "management" and "labor." Being paid a salary, rather than having to punch a time clock several times a day, was and is a sign of status. The president and top management personnel of the company are paid a salary, whereas the manual laborers submit time cards, so for an employee to be paid a salary is one indicium of being more like the bosses than the laborers.

The risks inherent in classifying any number of positions in today's economy increase dramatically when an employer has many employees in a given job category. As businesses national and international in scope have emerged, and as chain retail establishments have proliferated, employers increasingly find themselves having to make difficult classification decisions concerning potentially hundreds or even thousands of employees in a particular job category. In an environment of such legal uncertainty, litigation is inevitable.

II. OVERTIME LITIGATION

A. Early Attempts To Maintain Collective And Class Actions Seeking Overtime

As noted above,[22] the FLSA authorizes an opt-in collective action in which one employee may litigate, in a representative capacity, on behalf of himself or herself and any other "similarly situated" employees who affirmatively join the litigation. Until the early-to-mid 1990s, collective actions under the FLSA involving more than a handful of employees generally focused on the method of compensation—the "salary basis" aspect of the exemption standard—rather than whether the job duties of the employees are consistent with the requirements of the relevant exemption.[23] Courts recognized that the "similarly situated" standard requires "a common thread unifying the putative class"[24] and precludes a collective action where "each party would need to provide evidence"[25] and "individual questions of fact [would] predominate over common questions of fact."[26] The courts acknowledged the significant case management difficulties that would arise if a collective action were allowed to proceed despite variations in the plaintiffs' factual circumstances and the presentation of defenses unique to each individual plaintiff.[27]

In light of the detailed regulations that must be consulted in adjudicating an employee's exempt status under the

FLSA and the issues that those regulations require a fact-finder to consider, courts have held that "a highly fact-specific inquiry into the tasks and responsibilities of the subject employees" is necessary.[28] Unlike "salary basis" determinations, which in many instances can be made based on an employer's pay policies rather than an examination of each employee's particular circumstances, "duties test" inquiries are quintessentially individualized in nature. Not surprisingly, few, if any, courts before the mid-1990s permitted collective actions under the FLSA, or class actions under state wage and hour laws, to proceed where the issue in the case was whether the putative class of plaintiffs satisfied the "duties test" for one or more of the overtime exemptions. The main exceptions appear to involve instances where the defendant concedes or does not dispute that the plaintiffs' job duties are sufficiently alike to satisfy the "similarly situated" standard of the FLSA or the "commonality" standard for class action treatment of state-law wage and hour claims.[29]

In the early 1990s, plaintiffs first began to file significant numbers of putative class and collective actions raising duties test challenges. Fortunately for employers, this first generation of duties test cases was largely unsuccessful and often resulted in orders denying certification of a class or collective action. These cases tended to involve exceedingly ambitious attempts to challenge in a single case an employer's exemption decisions involving dozens or even hundreds of different job categories, generally covering thousands of employees. The plaintiffs argued for collective treatment based on such purportedly common legal issues as the applicable statute of limitations and the employer's alleged willfulness, but these cases usually foundered because in the end there was no realistic way to avoid the fact that at trial a court would be required to examine the particular work experiences of very large numbers of employees.[30]

B. Emergence Of Three Dangerous Types Of Collective And Class Claims

As the courts rebuffed plaintiffs' attempts to bring duties test cases challenging en masse an employer's exemption decisions as to widely disparate groups of employees, plaintiffs' litigation strategy became more sophisticated. Eventually recognizing that in the context of class certification less might be more, plaintiffs began to file complaints challenging an employer's designation decisions as to only one or two job classifications at a time. Rather than seeking to bring an action involving 500 different job categories, each with maybe two or three employees, plaintiffs began to sue on behalf of classes of hundreds or even thousands of employees in a single job category. This second generation of duties test class cases thus involved groups of employees whose job duties were more homogeneous than in the first round of these lawsuits. As discussed below, most of these cases have fallen into two categories: (1) challenges by managers and assistant managers of California retail and service establishments classified as exempt under the executive exemption and (2) challenges by various nominally administrative, professional, or sales employees to their designation based on the argument that their primary duty falls outside the relevant exemption. In addition, a type of class claim has arisen that is brought by employees already designated as non-exempt: the claim that they have not been compensated for all hours they worked.

1. Quantitative Challenges Under California's Executive Exemption

California's overtime laws differ from the FLSA in several respects, but perhaps the most significant difference is the quantitative, rather than qualitative, approach to the exemption analysis. Stated broadly, the FLSA's exemption inquiry for a manager would examine whether the "primary duty,"[31] or essentially the main purpose, of the employee's job is to manage. Under California law, however, the test is very different: whether the employee is "primarily engaged in the duties that meet the test of the exemption."[32] Exemption in California thus depends on whether an employee spends more than fifty percent of his or her working time performing tasks that satisfy the exemption criteria.[33]

California's "primarily engaged in" test enables claims to proceed that would not have a significant chance of success under the FLSA. Consider the example of a restaurant manager, who during the course of a workweek might prepare employee schedules, interview prospective hires, discipline employees, interact with vendors, prepare food, serve customers, and generally be responsible for overseeing and directing the operations of the business. During peak meal times, the manager might run the grill, turning away from that function only to address specific employee or customer concerns or problems. Under the FLSA, the focus of the analysis would be on whether the manager was truly in charge of supervising the restaurant and its employees. If so, then the manager would almost certainly be held to be an exempt executive employee. Under California law, however, the inquiry would be whether the manager spent more time performing exempt tasks, such as hiring, firing, and disciplining employees, directing the work of others, and devising ways to make the restaurant run more profitably, than performing such potentially non-exempt tasks as preparing food, running a cash register, or serving customers. The manager's claim that he or she spends more than half of the workweek performing non-exempt tasks often has at least a possibility of succeeding on the merits.

a. How The Arguments Play Out In Court

Since the mid-1990s, plaintiffs in California have been very successful in bringing putative class actions under the state's wage and hour laws challenging the designation of employees as executives in chain retail and service establishments. These cases have generally focused on managers and assistant managers, and targets have included the automotive parts and service business, the fast food industry, managers of individual departments in multi-department retail establishments, and more or less any other chain business that has a large number of sites with at least one exempt employee per site. Once a putative class action lawsuit is filed against one employer in a particular line of business, lawsuits against many other entities in that same industry tend to follow shortly thereafter.

Even though California law, like the FLSA, purports to require a highly fact-specific examination of employee duties

in an exemption case where employee duties are at issue,[34] California trial courts have shown a remarkable willingness over the past five to seven years to certify state-wide class actions involving employees of a company in one or two job categories.[35] Such cases have a certain amount of surface appeal, because many judges will have an initial gut reaction that says that if you have seen one Starbucks coffee shop, or one Taco Bell restaurant, or one U-Haul vehicle rental facility, you have seen them all, and so employee duties are probably fairly uniform throughout the chain. Playing into that initial judicial reaction, plaintiffs have supported their motions for class certification by proffering declarations from the named plaintiffs and from other putative class members hand-picked by plaintiffs' counsel attesting to the similarity of the job duties performed by members of the putative class. Plaintiffs focus on company policies that purportedly constrain the managers' discretion, and they argue that in reality the district managers or other comparable individuals who do not work in the stores handle all the key managerial decisions.

Another factor working in the plaintiffs' favor is the pre-conceived notion on the part of some judges that in most smaller retail or service establishments, there simply is not all that much "managing" that needs to be done. Plaintiffs and their attorneys understand that few judges have spent significant amounts of time working in retail or in the restaurant business, and they take advantage of the court's possible views about how much intellectual activity it takes to manage a small business. Plaintiffs try to paint a picture of chain businesses as involving a corporate nerve center that makes all decisions of any significance, as distinct from the stores, where employees simply carry out the tasks assigned to them from headquarters. Plaintiffs attempt to peddle the theme that the jobs in the store require relatively little training, and once the employees at a given location understand their jobs the store will function more or less on its own, with "management" needed only to deal with the occasional customer problem or employee discipline issue. The declarations plaintiffs offer in support of their motion for certification often describe substantial amounts of time spent performing potentially non-exempt tasks such as sales work or other interaction with customers. The typical plaintiff in such a case, as well as the typical supporting declarant at the class certification stage, is a former employee, often one who had a poor work record while at the company and who was fired for disciplinary reasons.

Employers have opposed motions for class certification on the grounds that common factual issues do not predominate and that there is no way to adjudicate the exempt status of a group of employees under a duties analysis without examining the particular circumstances of each individual employee. Employers have offered declarations from their own preferred members of the putative class, attesting to the extensive variations across the employer's various locations. These differences often reflect different management styles, variations in store size or volume, differences in the number of employees from site to site, and patterns of business that may be peculiar to the time of year, the region within the state, or the neighborhood where a particular store happens to be located. In contrast to the often performance-challenged declarants proffered in support of class certification, the witnesses that a company tends to put forth in opposition to certification tend, if anything, to represent the other end of the spectrum: successful and high-performing managers who may have an eye on a promotion to district manager or beyond.[36]

In the end, many California trial courts[37] have justified certifying misdesignation classes by citing three broad principles. First, courts observe that public policy favors class actions where possible. Second, courts note that the plaintiffs' burden of establishing the prerequisites for a class action is very low, essentially amounting to a bare prima facie showing that is satisfied by a handful of declarations stating that all putative class members do virtually the same work.[38] Third, courts contend that because the employer has not made individual determinations as to the exempt status of each member of the putative class, it is not fair for the employer to insist on individualized determinations for purposes of litigation.

b. The Results

Until very recently[39] there has been no appellate guidance whatsoever in California concerning whether overtime cases based on alleged misdesignation should be allowed to proceed as class actions. Once a class is certified, the stakes for the employer increase substantially. A verdict that an entire class of hundreds or even thousands of employees has been misdesignated and is entitled to receive overtime reaching back up to four years before the lawsuit was filed[40] can expose the employer to a potential damages award in the seven, eight, or even nine-figure range. Employers have repeatedly petitioned the California appellate courts for interlocutory relief, arguing that their cases have been certified as class actions contrary to law, but in almost every instance the petitions have been summarily denied. Moreover, because of California's quantitative standard for evaluating exempt status, the evidence proffered in support of certification almost certainly precludes summary judgment in the employer's favor. The employer then faces a choice of either going to trial in what would often be a bet-the-company context or else settling the litigation.

Not surprisingly, overtime class actions have tended overwhelmingly to settle, both before and after rulings on class certification, and for very large dollar amounts. Reported settlements since January 1, 2000 of California misdesignation class actions involving the executive exemption include the following:

- RadioShack Corp.: $29.9 million to 1,300 store managers[41];
- Rite Aid Corp.: $25 million to 3,200 managers, assistant managers, and managers-in-training[42];
- Bank of America Corp.: $22 million to 6,000 personal bankers[43];
- Starbucks Corp.: up to $18 million to at least 1,500 managers and assistant managers[44];
- Taco Bell Corp.: $13 million to 3,100 managers and assistant managers[45];
- U-Haul International Inc.: $7.5 million to 475 managers[46];
- Mervyn's California Inc.: $7.3 million to 1,600 managers[47]; and
- Money Store Inc.: $4 million to 600 assistant managers and loan officers.[48]

Unless there is a substantial change in either California law concerning exemptions, and the executive exemption in particular, or else the way that employers conduct their business in California, there is every reason to believe that employers will continue to pay very large settlements in misdesignation cases.

2. Qualitative Challenges Under Various Other Exemptions

In addition to the quantitative challenges to exemptions that arise under California law in which an employee, usually one designated as an exempt executive, argues that he or she spent less than the requisite amount of time performing exempt tasks, plaintiffs can contest their exempt status under both state and federal law on a qualitative basis. Rather than debating how employees allocate their time across specific job tasks, plaintiffs in such cases argue more fundamentally that the employer has erred in making the exemption determination because for one reason or another their primary duty does not meet the criteria for exemption.[49] Unlike the quantitative challenges that arise under California law, where employers and employees tend to disagree sharply concerning how the employees actually spend their working time, qualitative tests often involve substantial agreement concerning the fact of how the employees spend their working time. In a qualitative challenge, the focus of the dispute is usually on the legal consequences that follow from the essentially undisputed facts. There may, of course, be occasion to argue at the margins in such cases concerning how much time the employees allocate to various tasks, as that consideration is certainly relevant to the "primary duty" inquiry under the FLSA and the law of most states, but the specific quantity of time spent on exempt tasks tends to play a much less significant role than in California's quantitatively driven overtime litigation.

As is the case with challenges involving the executive exemption under California law, plaintiffs bringing "primary duty" challenges have refined their approach in recent years, focusing a complaint on one or two job categories, rather than challenging all of a company's exemption decisions in a single litigation. These claims can arise in any number of circumstances. For example, Pacific Bell recently settled for $35 million a class action brought on behalf of 1,500 outside plant engineers and draftsmen, most of whom did not have professional engineering degrees, who challenged their designation as professional or administrative employees.[50] In 1999, the City of Houston, Texas settled for $10.6 million two class actions brought on behalf of 2,600 fire department dispatchers, arson investigators, and firefighters who contended that their job duties did not constitute "fire protection activities" under the FLSA such that the City could schedule them for more than forty hours per week without necessarily paying overtime.[51]

A few types of "primary duty" challenges, however, seem to pose especially acute risks for employers.

a. Administrative Employees In The Insurance Industry

In a case that has received national attention, a class of more than 2,400 claims representatives[52] for Farmers Insurance Company sued their employer, alleging that they had been improperly designated as exempt administrative employees under California law. The liability portion of the case was resolved by motion, with the trial court ruling as a matter of law that the plaintiffs are not exempt administrative employees, a ruling that was upheld on appeal before trial.[53] The state court relied expressly on the FLSA regulations construing the administrative exemption as an aid in interpreting California law, so the court's decision may have some relevance beyond California.[54]

According to the appellate court's description of the facts, Farmers Insurance Exchange "performs a specialized function within the Farmers Insurance Group of Companies, having delegated activities normally associates with an insurance business to other related companies."[55] The company does not engage in sales activity ordinarily associated with an insurance business. Instead, the company uses independent contractor agents to sell insurance policies.[56] In addition, Farmers Insurance Exchange is managed by a related company, Farmers Group, Inc., and those management functions would "normally be included within the executive and administrative functions of a corporation."[57] Farmers Group., Inc., handles on behalf of Farmers Insurance Exchange such functions as "human resources (including compensation and benefits); payroll financial oversight; development of sales and marketing strategy and techniques; development and pricing of insurance products; financial and regulatory auditing; public relations; legal counselling; underwriting; data processing and other non-claims related matters."[58]

The entire purpose of Farmers Insurance Exchange is, in the court's view, to handle claims, and this function includes "perform[ing] a substantial amount of claims handling work for other related companies within the Farmers Insurance Group of Companies."[59] According to the court, "[t]he undisputed evidence establishes that claims adjusting is the sole mission of the 70 branch claims offices where the plaintiffs worked."[60] The court then concluded that the plaintiffs "are fully engaged in performing the day-to-day activities of that important component of the business."[61] As a result, in the court's opinion, the plaintiffs were non-exempt "production" workers, rather than exempt "administrative" employees.[62]

With the question of liability already resolved against Farmers, an Oakland jury in July 2001 returned a verdict for the plaintiffs of just over $90 million in back overtime.[63] Two months later the court awarded an additional $34.5 million in pre-judgment interest.[64] Farmers has appealed the judgment.[65]

How broadly the *Farmers* holding will be construed remains to be seen. Although the result in *Farmers* may itself be unsound, because, among other things, the appellate court alluded to conflicts in the evidence that arguably preclude summary judgment,[66] it is clear that the facts in that case were rather peculiar. As described by the appellate court, the employer functioned much as would a claims adjusting department within a larger insurance company. Thus, the court was able to characterize the "business" of Farmers Insurance Exchange as handling claims, rather than as selling insurance. It is therefore unclear whether claims representatives for a traditional insurance company would be deemed to be non-exempt production

workers under the *Farmers* analysis. The FLSA regulations themselves list "claim agents and adjusters" as the types of employees who fall within the administrative exemption.[67]

Nevertheless, six days after the *Farmers* jury returned its verdict, a group of plaintiffs filed a putative class action on behalf of 500 claims adjusters for the Automobile Club of Southern California.[68] Counsel for the plaintiffs in that case was quoted as saying that "[t]he case law in California is that if you're an insurance company, adjusting claims is production work."[69] Given that the enormous *Farmers* judgment has been widely reported, it seems likely that a number of plaintiffs' attorneys will be willing to take a chance that a court may elect to follow *Farmers* and to construe the holding broadly. Similar suits regarding claims representatives and other administrative personnel in the insurance industry seem likely, and not just in California.

b. Delivery Personnel As Outside Salespersons

Many businesses that employ route personnel to travel from customer to customer delivering products and servicing accounts designate those employees as commissioned outside salespersons exempt from the overtime laws.[70] A number of recent class and collective actions have challenged whether such employees are properly treated as exempt. This year, for example, the Appellate Division of the New Jersey Superior Court affirmed, in a 217-page ruling, a determination by the state labor commissioner that Pepsi Cola Co. misdesignated customer representatives and bulk customer representatives who were not "devoting significant amounts of time to selling products."[71] According to the court, the primary duty of the plaintiffs was "something other than sales work."[72] Although the administrative decision concerns only thirteen employees, the ruling could ultimately apply to approximately 400 employees.[73]

The Washington Court of Appeals issued a similar ruling in 2001, addressing a putative class action brought by a route driver for a business that contracts with customers to place vending machines in their cafeterias, lunchrooms, and snack areas.[74] The trial court entered summary judgment for the employer, but the appellate court reversed, holding that as a matter of law the employee is not an exempt commissioned salesperson.[75] The court concluded that the employee "is not involved principally in selling a product or service," but rather "is a delivery driver who stocks vending machines; his job does not involve selling a product or service."[76]

These are not the only cases to present this issue. BCI Coca-Cola Bottling Co. of Los Angeles, an independent bottler, settled a class action brought on behalf of 1,100 route sales representatives for a reported $20.2 million.[77] McKesson Water Products Co., which sells bottled water, settled a similar class action brought on behalf of 850 "route sales people" for $8 million.[78] Corporate Express Delivery Systems, Inc. settled for $9.75 million a class action brought on behalf of 4,300 messengers who were paid on a commission basis.[79] And a putative class action is currently pending in Los Angeles Superior Court on behalf of route salespersons for Dr. Pepper/Seven-Up Inc.[80]

These cases demonstrate that where route salespersons do not spend a significant portion of their working time interacting with customers and attempting to solicit sales and new business, there is a significant risk of litigation, including a judgment that the employees are not exempt.

3. Failure To Compensate Non-Exempt Employees For All Work

Yet another type of overtime claim has emerged as a powerful weapon in the arsenal of the plaintiffs' bar: that the employer has failed to pay its hourly employees for all time worked. This type of claim does not allege misdesignation, because the employer already treats the employee as non-exempt and, at least in principle, pays the employee premium wages for overtime work. Instead, this kind of case involves an allegation of either a practice on the part of an employer of requiring employees to work "off the clock" without reporting all of their working time, or else a policy of not compensating the employee for certain specific kinds of work, such as preparatory or wrap-up work at the start or end of a shift. Where an employee can muster sufficient evidence that the employer enforces such a policy or practice against a large number of employees, a class or collective action may result. Such cases do not necessarily include claims for overtime, because an employee who routinely works thirty hours a week might allege that she has been paid for only twenty or twenty-five. Nevertheless, overtime is often a significant aspect of claims for uncompensated work.

a. "Off The Clock" Work

In cases seeking compensation for working "off the clock," plaintiffs come to court pursuing certification of a class of many or all of the employer's hourly personnel, alleging that the supervisors instructed or otherwise coerced the employees into not reporting all hours worked. The plaintiffs assert that some aspect of the company's management structure exerts pressure on supervisors to reduce the number of working hours reported. For example, plaintiffs might contend that the company's supervisors have limited "labor budgets" with which to deliver the results expected by management, budgets that cannot be exceeded even if the work cannot be completed in the time allotted. Plaintiffs may assert more generally that the supervisors receive bonuses or performance evaluations that depend at least in part on their ability to minimize the cost of their subordinates' labor. Or plaintiffs might take a different tack, arguing that the supervisors simply expected them to do more work than could be completed in the allotted time, and that the employees feared reporting their overtime because they did not want to seem inefficient or to receive negative performance reviews. Under each of these scenarios, the basic gist of the allegation is that the plaintiffs felt pressure from their bosses not to record all time worked.

Employers often respond to such allegations by noting that the plaintiffs signed time cards attesting to their hours. The plaintiffs tend to reply with the argument that given the choice of signing a false time card or facing the ire of the company's supervisors, the choice to submit the false time card was reasonable under the circumstances. They also contend that they were not aware that they had a right to be paid for time that they did not record, so there was nothing questionable about their not reporting all their time. As a practical matter, of

course, once the plaintiffs can articulate a basis for distancing themselves from their time cards, which are often the only physical records of the hours they worked, then the damages at issue can increase substantially, often constrained by little more than the plaintiffs' imagination.

Although such off-the-clock cases should rarely be appropriate for treatment as a class or collective action, given the potential for fragmentation of the lawsuit into numerous mini-trials concerning credibility issues and the interactions between individual employees or small groups of employees and their particular supervisors, these cases can carry exposure that is quite high. Albertson's Inc., for example, settled a case involving off-the-clock issues affecting as many as 150,000 employees for $37 million.[81] Best Buy Inc. settled an off-the-clock case involving approximately 70,000 employees for $5.4 million.[82] Wal-Mart Stores Inc. is currently defending an off-the-clock case in Washington state court potentially involving tens of thousands of employees.[83] Given the substantial risk that such claims present, especially where so many employees are concerned, settlement is almost a given, particularly if a class is certified, regardless of the merits of the plaintiffs' claims.

b. Preliminary And Postliminary Work

Another type of claim that has received a great deal of attention recently concerns certain tasks at the beginning or end of a shift, referred to as preliminary and postliminary activities,[84] for which employers do not compensate their employees. Examples of this type of activity can include a pre-shift staff meeting or post-shift cleaning of equipment in preparation for the next shift. The Portal-to-Portal Act of 1947, as amended,[85] relieved employers of the obligation to compensate employees for incidental pre-shift and post-shift activities.[86] In *Steiner v. Mitchell*,[87] the Supreme Court interpreted the Portal-to-Portal Act to mean that "activities performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded."[88] In *Steiner*, the Court held that employees working in a battery factory and who are exposed to toxic chemicals during their shift are entitled to be compensated for time spent changing their clothes and showering.[89] If the preliminary or postliminary activities are deemed to be part of the job, as opposed to purely personal matters or matters of a brief duration that benefit primarily the employee, then compensation for those tasks may be necessary.[90]

Recent litigation in this area has focused on time that employees in various food processing businesses spend putting on and removing their working attire and safety equipment, so-called "donning" and "doffing."[91] Cases analyzing such activities have reached somewhat contrary conclusions. In *Reich v. IBP, Inc.*,[92] the Tenth Circuit concluded that time spent by meat processing employees donning and doffing sanitary outergarments was not integral and indispensable to the employer and thus not compensable.[93] In *Tum v. Barber Foods, Inc.*,[94] by contrast, a federal magistrate judge in Maine recommended that the court deny summary judgment to a poultry processing company whose sanitation employees were required by government regulation to wear certain clothing and equipment, expressly recognizing that "[s]everal courts have held otherwise in cases that appear close on their facts."[95]

As with other types of wage and hour class and collective claims where the law is uncertain, cases involving donning and doffing have produced large settlements. In 2000, Swift & Co. agreed to pay $3 million to a class of 2,300 workers at two meatpacking facilities to cover time spent donning, doffing, and cleaning safety equipment.[96] In May of this year, Perdue Farms Inc. settled for an estimated $10 million a donning and doffing case brought by the Department of Labor on behalf of up to 25,000 poultry processing workers.[97] Three months later, Perdue settled for another $10 million a private collective action brought on behalf of up to 60,000 poultry processing workers in ten states.[98] The same day the Department of Labor filed a consent decree in the Perdue litigation, it filed a lawsuit concerning donning and doffing against Tyson Foods Inc., another poultry processor.[99]

With payouts this substantial, it seems likely that other businesses whose employees spend a few minutes before and after each shift donning and doffing equipment, or performing cleaning or organizing functions, may find their practices being scrutinized by the government or by private plaintiffs. These concerns do not seem confined to the food processing industry.

III. THE FUTURE OF OVERTIME LAW AND OVERTIME LITIGATION

A. Possible Clarification Of California Law, For Better Or For Worse

Two recent appellate rulings in California have caused a great deal of excitement and concern among the employment bar and employers in California. First, in December 2001, the California Court of Appeal sitting in Los Angeles issued its opinion in *Indian Head Water Co. v. Los Angeles County Superior Court*,[100] an unpublished, and thus unprecedential and not citable, ruling concerning the propriety of class certification in a misdesignation case. The plaintiff moved to certify a class of route sales representatives for a bottled water company, and the trial court granted the motion. The employer petitioned for a writ of mandamus, arguing that the certification of the class was improper. The Court of Appeal denied the petition in most respects.[101] According to the court, "[t]o measure how employees spend their time on a class basis, courts can look at survey evidence taken from the class members, and/or courts can consider testimony from representative employees regarding their job duties and work hours."[102] Based on little more than the plaintiffs' assertions regarding the similar nature of their duties, the court concluded that "[t]his case . . . is well suited for class treatment since it involves a relatively narrow, well-defined issue, a pre-defined group of employees, a clearly identified job position, extremely similar job duties for all class members, and corporate-wide policies and practices controlling all class members' job duties and responsibilities."[103] Although several groups submitted requests to the court to publish its opinion, as it was apparently the first appellate ruling in California addressing the propriety of class certification in a wage and hour class action, the court denied those requests and maintained the unpublished status of the decision.

Just a few months after the *Indian Head* ruling, in April 2002 a different division of the same California appellate district that decided *Indian Head* issued its decision in *Sav-On Drug Stores, Inc. v. Superior Court*.[104] In *Sav-On*, the trial court certified a class of between 600 and 1,400 current and former operating managers and assistant managers at the employer's 300 stores, and the employer petitioned for a writ of mandamus. The plaintiffs contended that they were entitled to overtime, and the employer argued that the employees were exempt executives and that exemption could not be adjudicated on a class basis.[105] In opposition to the plaintiffs' motion for class certification, the defendants submitted 51 declarations from putative class members establishing "significant variations from store to store and manager to manager"[106] that were based on such factors as "the [general manager]'s management style, experience level, and status as a[] [market manager]; the number of [operating managers] and [assistant managers]; the experience level of the [assistant manager] or [operating manager]; and the store location, type, size, and sales volume."[107] The court "conclude[d] based on all the circumstances of this case that the trial court abused its discretion in certifying this class action,"[108] noting that the employer has established "that the stores and the circumstances under which the [assistant managers] and [general managers] operate are not identical but rather involve significant variations affecting their tasks and the amounts of time spent on those tasks."[109] Issuing the writ, the court held that "in *this* case, with so many stores and managers operating under different conditions, plaintiffs failed to sustain their burden to show that common issues predominate over individual issues."[110]

The *Sav-On* opinion was originally issued as an unpublished decision, once again depriving the bench and the bar of much-needed guidance in this area. After the court received numerous requests to publish the opinion, however, the court redesignated the opinion as a published opinion, thereby making it citable as precedent. The opinion appeared to sound the death knell for overtime class actions in California, at least with respect to managerial employees seeking to establish that they are not within the executive exemption.

On July 17, 2002, however, the California Supreme Court granted the plaintiffs' petition for review. The grant of review has the effect of superseding the Court of Appeal opinion and rendering that opinion of no further precedential weight. It is not clear whether the California Supreme Court took the case to resolve the disagreement among the courts of appeal, to reverse the holding in *Sav-On*, or for some other reason. What is certain is that virtually the entire employment bar in California is watching the *Sav-On* case very closely. Oral argument has not yet been scheduled, and it may be late 2003 or even 2004 before the case is decided.

B. The Need For Reform

The current situation is not good for anyone other than lawyers. Defending an overtime class action through the initial pleading and motion stages can cost hundreds of thousands of dollars, and that figure does not include the cost of taking a case to trial or paying a settlement. In addition to the significant financial costs, class actions tie up key corporate resources, because the defense attorneys need to conduct a thorough factual investigation that often requires substantial interaction with the heads of the human resources and sales departments, as well as top corporate officers. At the same time, class action plaintiffs find themselves subject to lengthy depositions as well as written and document discovery. The filing of an overtime class action also generates suspicion and distrust on the part of employees unfamiliar with the arcana of wage and hour law, who are left to wonder whether their employer has somehow treated them unlawfully. In addition, the pendency of an overtime class action is problematic from the standpoint of co-employee interactions, as it engenders divisions among current employees who opt to side with the employer in favor of exemption as against those who choose to side with the plaintiffs.

By and large, employers desire to comply fully with the law. Employees want to earn a fair wage for a fair day's work, and they do not want their health threatened by unsafe working conditions. Employers and employees alike welcome a certain degree of flexibility to structure compensation arrangements in ways that are mutually beneficial. Neither side wishes to find itself locked in high-stakes litigation over the meaning of overtime exemptions, or other wage and hour concepts such as preliminary and postliminary work, that are ambiguous and difficult to apply in specific cases. Indeed, it is inherent in the nature of class and collective litigation under state and federal wage and hour law that legal uncertainty leads to expensive litigation and to large settlements that, in the end, do not achieve real justice for anyone.

If the rules were clear, then employers could make informed choices ex ante regarding whether to pay overtime, and employees would be able to determine readily whether their compensation complied with the law. Part of the problem with allowing recovery of back overtime in the context of a misdesignation case is that the damages represent a pure windfall for the employees, who already willingly agreed to work at their former compensation level.[111] Assuming that the employee does not meet the criteria for exemption, the damages inquiry purports to put the employee in the position she would have occupied had she been properly designated in the first place. The fallacy, though, is the implicit assumption that the parties would have set the employee's hourly rate without taking into account the overtime hours that the employee would be required to work.[112]

For example, an employee who works sixty hours a week and earns a salary of $31,200 per year and is found to be misdesignated would be entitled, depending on how one calculates the back overtime, to either an additional $5,200 or $23,400 per year.[113] The total annual compensation for that employee would thus be adjusted upward from $31,200 to either $36,400 or $54,600, which reflect hourly compensation for sixty hours per week at a rate of either $10 or $15 per hour. But who can seriously contend that $10 or $15 per hour is the hourly rate that the parties would have agreed on if they were negotiating for an hourly rate at the outset of the employment? Common sense says that if the employer was willing to pay $31,200 for the job,

and the employee was willing to receive $31,200 for the job, and all parties knew approximately how many hours the job would involve, then the freely negotiated hourly rate would be $8.57, the figure that yields annual earnings of $31,200 at sixty hours per week for fifty-two weeks, including premium pay for overtime. For the compensation package to be converted from $31,200 per year to over $50,000 per year based on a technical violation of the wage and hour laws makes no sense.[114]

Most wage and hour litigation, therefore, has little or nothing to do with vindicating settled employee expectations. By and large, employees agree to a compensation scheme that seems reasonable and lawful, and they willingly provide services to their employer. Once their employment ends, or once they become upset with their employer and contact an attorney or a state or federal enforcement agency, the dispute is not about protecting worker rights except in the most legalistic and technical sense. Instead, the paradigm is standard zero-sum litigation: getting as much for the plaintiffs, at the expense of the employers, as possible.

Overtime laws can and should operate so as to facilitate the employer-employee relationship, not to undermine it. The primary rationale for the overtime provisions of the FLSA—spreading work in order to minimize unemployment—may be worth reexamination. Unemployment levels today, of course, are substantially lower than they were in 1938, so there seems to be much less need to use the overtime laws to distribute work. With regard to the issue of employees being overworked, the FLSA's exemptions indicate that Congress did not believe that all employees need protection from long hours. Federal and state minimum wage laws already provide substantial protection for employees at the low end of the income distribution, and the multitude of government social welfare programs that have come into existence since the enactment of the FLSA have created a measure of protection for employees that FLSA-mandated compensation structures cannot match.[115] In most instances, the FLSA affords more protection to a college-educated office worker earning $50,000 a year than to a manager of a fast food restaurant earning $25,000 a year, and it is time to bring the FLSA into line with current notions of public policy. If reform does not come, then the risk and expense of collective and class action litigation may compel employers to reclassify millions of employees as non-exempt, a change that is in the interest of neither the employees nor their employers.

C. Suggestions For Reform

Calls to reform the FLSA are certainly not new. As a matter of political reality, the FLSA is in no danger of being repealed any time soon, so the focus is properly on how to make the FLSA work for employers and for employees. Although there are numerous ways in which the FLSA and state wage and hour laws could be reformed so as to protect employees' rights while minimizing the present legal uncertainties that spawn litigation, three areas of reform seem to have a particularly strong likelihood of achieving these purposes: establishing a bright line compensation level such that employees above that level are exempt regardless of job duties or salary basis considerations, clarifying the appropriate formula for calculating back overtime in misdesignation cases, and setting clear burdens of proof for establishing that employees are "similarly situated" for purposes of maintaining a collective or class action.

1. A Clear Compensation-Based Standard For Exemption

Reform proposals have centered on bringing clarity to the exemption standards by establishing bright lines that responsible employers can readily observe. The most potentially beneficial proposals have emphasized establishing a straight compensation threshold for determining exemption: if an employee earns more than a certain amount of money, regardless of that employee's job duties, then that employee is not entitled to overtime.[116] Otherwise, the employee is non-exempt. Proposed thresholds have included five times the minimum wage[117] and six and one half times the minimum wage.[118] These proposals are headed in the right direction, although they still potentially leave the door open for litigation by linking the threshold wages to the number of hours worked.[119]

In order to provide clear guidelines that all parties concerned can understand, the most appropriate standard should not depend on the number of hours the employee worked, because fact issues could well arise concerning the workloads of employees whose compensation is at the low end of the exempt range. For example, if the exemption threshold were five times the minimum wage, an employee who earns a salary equal to five times the minimum wage based on a fifty-hour workweek might file suit alleging that he or she actually worked sixty hours per week, thereby falling below the exemption threshold. Instead, exemption should turn exclusively on the amount of an employee's total dollar compensation. An employee who works forty hours a week for fifty-two weeks will have a total of 2,080 hours for the year. Setting the threshold compensation level for exemption at a multiple of the minimum wage of $5.15,[120] applied to the 2,080 hours, establishes a straightforward method for determining whether an employee is entitled to overtime. At four times the minimum wage, for example, the required annual compensation would be $42,848.[121] If an employer pays an employee at or above the appropriate annual rate, perhaps judged on a monthly basis, then the employee should be exempt.[122] Such an arrangement protects employees by ensuring a substantial level of compensation, encourages employers to increase the compensation of employees who currently receive compensation somewhat below to the threshold, and eliminates one friction point between employers and employees. The ideal threshold will be sufficiently low to avoid depriving willing employees of the opportunity to be salaried, but sufficiently high to ensure that exempt employees who find themselves dissatisfied with their particular working situation will presumably have other employment options readily available.[123]

2. Clarifying The Proper Measure Of Damages In Misdesignation Cases

An important fuel that fires overtime litigation is the substantial uncertainty over what formula the court will use to determine damages for back overtime in a misdesignation case. Unlike a case involving a company that fails to pay hourly employees for all hours worked, in which the damages calcula-

tion is a straightforward arithmetic matter once the number of hours at issue has been determined, the courts have not adopted a consistent methodology for calculating back overtime where employees paid on a salary basis have been found to be non-exempt. As noted earlier,[124] there are two main competing schools of thought regarding how to calculate damages in such a case: one that treats salary as earned during all hours worked and another that treats salary as earned during only the first forty hours of work per week. Depending on whether the court adopts the methodology followed by such cases as *Blackmon*,[125] *Rushing*,[126] and *Zoltek*[127] on the one hand, or *Cowan*,[128] *Rainey*,[129] and *Skyline*[130] on the other, the result will vary by more than three-fold, because these methodologies differ in their assumption concerning whether the employer has already received, in effect, "straight" time for all hours worked, and thus whether the employee should receive half-time or time and one half for the overtime hours. In addition, because these methods differ in how they calculate the employee's hourly rate, as being based either on all hours worked in a week or only on the first forty hours, the differences between these two formulae become more pronounced as the number of hours at issue increases. Where the employee alleges 45 hours of work per week, the back overtime resulting from the *Cowan-Rainey-Skyline* line of cases is 3.375 times greater than the result obtained from the *Blackmon-Rushing-Zoltek* line. At 50 hours per week, the difference is 3.75 times; at 55 hours, 4.125 times; at 60 hours, 4.5 times; at 65 hours, 4.875 times; and at 70 hours per week, the difference between the two methodologies is a whopping 5.25 times.

Eliminating the ambiguity in the damages calculation could go a long way toward reducing the volume of overtime class and collective action litigation. Any form of back overtime damages for a misdesignated employee represents a form of windfall, but where the court might opt for the *Cowan-Rainey-Skyline* method for calculating damages, the extent of the windfall is magnified several times over. Such large potential jackpots encourage litigation, complicate negotiated resolutions of lawsuits, and extort excessive settlements from employers divorced from the merits of the plaintiffs' claims. Congress should clarify that the appropriate way to calculate back overtime in a misdesignation case is to follow the *Blackmon-Rushing-Zoltek* approach.

3. Specifying Burdens Of Proof For The "Similarly Situated" Standard

The third significant area in which the FLSA should be reformed is in the standard used to determine whether a group of potential plaintiffs are "similarly situated"[131] for purposes of maintaining a collective action. In many instances, the "similarly situated" standard has worked just fine, such as where an employer's admittedly uniform pay practice has been applied to all members of the putative plaintiff collective. In other instances, though, collective actions should not be available, such as where there is a significant chance that the case management problems inherent in making individualized inquiries may overtake the benefits of collective adjudication. Until recently, courts have properly applied the "similarly situated" standard, denying collective action status to cases in which the duties of a potentially diverse set of employees would be in issue. Now, however, in light of California's willingness to entertain class actions alleging the misdesignation of one or more entire job categories based on the duties of the employees, as well as the significant amount of recent off-the-clock mega-litigation involving tens of thousands of employees per case, there is a need to clarify the approach that courts are to take when determining whether to allow an FLSA case to proceed as a collective action.

Currently, a plaintiff must make a prima facie showing that the individuals within the proposed description of the putative class are "similarly situated," such that the court may adjudicate the claims of all individuals within the defined group, who elect to opt in to the lawsuit, on the basis of the representative testimony of one plaintiff or a handful of plaintiffs. The employer then has the opportunity to argue that the case is not appropriate for class treatment. At that point, the courts frequently certify the case as a collective action on a conditional basis, noting that they can make a final determination after the opt-on period has run as to whether the case should then proceed to trial on a collective basis or instead be decertified.[132] The problem with this approach, however, is that it leads too readily to certification, ignoring the substantial pressure that even a conditional certification ruling places on an employer to settle the case.

The better approach would be to set forth, within the FLSA itself, that once a plaintiff has made a prima facie showing that a collective action is appropriate, the burden shifts to the defendant to come forward with evidence sufficient to support a finding that the relevant facts concerning more than a de minimis number[133] of the individuals in the putative collective plaintiff group differ materially from the circumstances alleged by the putative representative plaintiff or plaintiffs concerning the main issue or issues in the case. This approach may at first seem to run counter to the shibboleth that in deciding whether to grant class certification, a court should not inquire into the merits of the case.[134] In reality, though, such an approach is the only practical way for a court to determine whether the case is appropriate as a collective action. If it cannot be said with certainty that a judgment of liability or non-liability will be correct as to every individual whose rights are adjudicated, then allowing the case to proceed as a collective action deprives the employer of due process insofar as it permits individuals to prevail who are not legally entitled to do so. This is not to say that where a plaintiff seeking certification comes forward with 100 declarations setting forth very similar duties, an employer should be able automatically to defeat certification by presenting a single declaration from one unusually well-qualified employee. But where the employer can present declarations showing that at least as to a non-trivial portion of the proposed collective plaintiff group, a determination of liability would necessarily involve an employee-specific presentation of proof concerning such issues as exemption, whether the employee worked off the clock, or whether the employee has been paid on a salary basis, certification is not appropriate.

This approach would not directly contradict the principle of avoiding consideration of the merits of the case at the

class certification stage, because the inquiry would not address the merits of the claims presented by the named plaintiffs, but rather would examine whether the employer can make a showing that individualized inquiry is necessary, generally by pointing to other potential plaintiffs whose testimony and experiences and circumstances will differ markedly from those of the proposed representative. If the employer can present substantial evidence to support the position that more than a de minimis number of potential plaintiffs will testify in a manner inconsistent with the views of the representative plaintiff or plaintiffs, or that there are facts unique to more than a de minimis number of potential plaintiffs that would preclude collective adjudication, then the court would be forced to conduct a plaintiff-by-plaintiff analysis to resolve the merits. There is no reason to assume, ex ante, that all employees in a given job category are necessarily either exempt or non-exempt, or that they have or have not been compensated for all time worked.[135] For a court to corral a disparate group of potential plaintiffs into a one-size-fits-all liability determination deprives employers of their substantive rights under the FLSA. Where an employer intends to present non-frivolous defenses that are specific to each potential plaintiff, or at least to more than a de minimis number of the potential plaintiffs, then case management concerns dictate that the litigation not proceed as a collective action.[136]

CONCLUSION

Overtime litigation on a class or collective basis has imposed an increasingly significant burden on employers throughout the country. Unless the antiquated standards established by the FLSA and state law are updated to reflect the realities of the modern workplace, as well as the dynamics of multi-party litigation, employers will continue to be targeted by opportunistic suits threatening multi-million-dollar liability, and often insolvency, based on nothing more than a technical violation of arcane wage and hour rules. Otherwise, employers will be forced to abandon exemptions en masse, a result that is not in the public interest.

As a post-script, it bears noting that changes to the FLSA alone do not necessarily accomplish much unless the states modify their wage and hour laws accordingly. California may well be a lost cause, at least in the near term, given the substantially anti-business mentality of the legislature. Nevertheless, most states have been willing in the past to follow the lead of the federal government by adopting rules that track the substantive exemption requirements of the FLSA, and it is conceivable that many would do so again if the FLSA were reformed along the lines addressed here. If Congress tackles FLSA reform and the states do not amend their laws accordingly, then the effectiveness of the federal legislative activity will be substantially undercut. The FLSA in its current form does not prevent states from imposing upon employers wage and hour burdens that exceed those set forth under federal law.[137] The possibility of continued overtime class action litigation under state law even after FLSA reform raises the question whether the FLSA should be given broad pre-emptive scope to ensure that state law does not frustrate a federal policy of providing bright lines and minimizing the risk of litigation. Even though such pre-emption might seem like a good idea in the short term,[138] in the long run expanding the power of the federal government in that manner at the expense of the states is probably not the most prudent approach.[139] Instead, addressing reform in the states with the same arguments that would be made to Congress with regard to the FLSA seems to offer the best hope for long-term positive results for both employers and employees.

* Paul DeCamp: Co-chair, Union Activity and Individual Employee Rights Subcommittee, Labor and Employment Practice Group, Federalist Society for Law and Public Policy Studies. Senior associate, Labor and Employment Department and Appellate and Constitutional Law Practice Group, Gibson, Dunn & Crutcher LLP, Washington, D.C. The author has devoted a substantial part of his practice over the past several years to defending employers in wage and hour matters, under both California and federal law, and many of the observations in this article concerning employee and employer preferences, behavior, and litigation strategies stem from that experience. The views expressed herein are those of the author alone and do not necessarily reflect the views of the Federalist Society or of Gibson, Dunn & Crutcher LLP, its attorneys, or its clients.

Footnotes

[1] Under federal law and the law of most states, covered employers must generally provide premium pay for work in excess of forty hours per week. Some states define overtime differently, requiring premium pay for work beyond a weekly number of hours other than forty, a certain number of hours in a day, or a certain number of days in a week.

[2] 29 U.S.C. §§ 201-219, 255, 260. The FLSA permits "any one or more employees" to sue "for and in behalf of himself or themselves and other employees similarly situated," although "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). Because this type of multiple-plaintiff suit authorized by the FLSA is limited to those individuals who affirmatively "opt in" to the case, it is commonly referred to as a "collective action," as distinct from a traditional "class action," which ordinarily covers every individual within the class description except those who affirmatively "opt out" of the case.

[3] Nancy Montweiler, *Discrimination: Wage-Hour Class Actions Surpassed EEO In Federal Court Last Year, Survey Shows*, Daily Lab. Rep. (BNA), Mar. 22, 2002, at C-1.

[4] *See, e.g.*, Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century*, 15 Lab. Law. 357, 360-61 (2000); Robert D. Lipman et al., *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 Hofstra Lab. L.J. 357, 359-60 (1994).

[5] 29 U.S.C. § 213(a)(1).

[6] *See generally* 29 C.F.R. Part 541 (Department of Labor regulations and interpretive guidelines implementing executive, administrative, and professional exemptions); Mark J. Ricciardi & Lisa G. Sherman, *Exempt or Not Exempt Under the Administrative Exemption of the FLSA . . . . That Is the Question*, 11 Lab. Law. 209, 212-16 (1995) (discussing requirements of executive, administrative, and professional exemptions).

[7] *See* Shawn D. Vance, *Trying to Give Private Sector Employees a Break: Congress's Efforts to Amend the Fair Labor Standards Act*, 19 Hofstra Lab. & Emp. L.J. 311, 314-16 (2002); Faillace, *supra* note 4, at 361-62. For a broader overview of some of the other issues that arise under the FLSA, see Joseph E. Tilson, *FLSA Cases: The New Wave of Employment Litigation*, 664 PLI/Litig. 789 (2001).

[8] *See* Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 Lab. Law. 321, 323 (1996).

[9] *See* Faillace, *supra* note 4, at 361-62.

[10] *See* Vance, *supra* note 7, at 315-16 & n.40; Yager & Boyd, *supra* note 8, at 331-36.

[11] 29 C.F.R. §§ 541.1(d) ("customarily and regularly exercises discretionary pow-

ers" in executive exemption "long test"), 541.2(b) ("customarily and regularly exercises discretion and independent judgment" in administrative exemption "long test"), 541.3(b) ("consistent exercise of discretion and judgment" in professional exemption "long test"). *See also* 29 C.F.R. §§ 541.214(a) ("exercise of discretion and independent judgment" in interpretive guideline specifying administrative exemption "short test"), 541.315(a) ("consistent exercise of discretion and judgment" in interpretive guideline specifying professional exemption "short test"). The so-called long tests set forth in the regulations specify several factors that must be met in order for an employee to be exempt. The so-called short tests contained in the interpretive guidelines provide that where an employee's earnings exceed a threshold higher than the compensation level established for the long test, the employer will be required to establish fewer of the factors included in the long test. The short tests reflect the presumption that increased compensation correlates with a greater likelihood of exempt status. *See, e.g.*, Ricciardi & Sherman, *supra* note 6, at 212-14. The current compensation levels for the short tests were established in 1975 and have not since been increased. As a practical matter, in light of state and federal minimum wage requirements, virtually all arguably exempt employees meet the compensation levels of the short tests.

[12] 29 C.F.R. §§ 541.2(a)(1) (administrative exemption), 541.205 (interpretive guidelines attempting to define distinction between exempt "administrative" work and non-exempt "production" or "sales" work).

[13] *Compare* Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982) (finding assistant managers of Burger King restaurants exempt, even though they spend part of their time taking customer orders and preparing food), *and* Thomas v. Jones Restaurants, Inc., 64 F. Supp. 2d 1205 (M.D. Ala. 1999) (finding restaurant manager exempt), *with* Cowan v. Treetop Enters., Inc., 163 F. Supp. 2d 930, (M.D. Tenn. 2001) (finding Waffle House unit managers non-exempt).

[14] *Compare* Dalheim v. KDFW-TV, 918 F.2d 1220,1228-32 (5th Cir. 1990) (finding nineteen general assignment reporters, producers, directors, and assignment editors are not exempt), *and* Nordquist v. McGraw-Hill Broad. Co., 38 Cal. Rptr. 2d 221 (Ct. App. 1995) (finding sports director/anchor not exempt), *with* Mandelaris v. McGraw-Hill Broad. Co., 1 W&H Cas. 2d (BNA) 64 (E.D. Cal. 1992) (finding sports director/anchor who was successor to plaintiff in *Nordquist* with same position and with same employer exempt).

[15] *See, e.g.*, Xavier Rodriguez, *Paralegal Overtime: Yes, No, or Maybe? An Update*, 63 Tex. B.J. 266, 267-68 (2000).

[16] *See generally* Faillace, *supra* note 4, at 367-86 (analyzing difficulties inherent in applying FLSA and its regulations to modern workplace).

[17] Tilson, *supra* note 7, at 797 (noting that according to a 1999 study by the federal government, between 20 and 27 percent of all full-time American workers are covered by the three "white collar" exemptions).

[18] Lipman et al., *supra* note 4, at 379.

[19] *See* Ricciardi & Sherman, *supra* note 6, at 209, 219, 223-24.

[20] Employee rights advocates would also argue a more cynical motivation on the part of employers: designating individuals as exempt so that the employers can demand more work from the employees at no marginal cost. Although it is questionable whether any employers actually think along those lines when deciding whether to designate an employee as exempt or non-exempt, there is plainly a benefit to the employer in knowing in advance how much the labor of a particular employee will cost, a determination that cannot necessarily be made with the same degree of precision where an employee is compensated on an hourly basis.

[21] Not surprisingly, in the context of overtime litigation, plaintiffs, who are generally former employees with no on-going stake in the defendant's business operations, vehemently assert that they were overworked and undercompensated. In hindsight, they may contend that they would have preferred to be designated non-exempt so that they would not have had to work so hard or so that they could have earned more money for their efforts. Litigation posturing aside, however, few, if any, current employees ever express a preference for hourly pay rather than a salary.

[22] *See supra* note 2.

[23] *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 460-63 (1997) (addressing when employee's wages are sufficiently subject to reduction for quantity or quality of work to undermine "salary basis" of compensation); Boykin v. Boeing Co., 128 F.3d 1279, 1281-82 (9th Cir. 1997) (holding that paying employees premium pay for certain overtime hours does not, by itself, undermine "salary basis"); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991) (exemption fails based on salary basis test); Abshire v. County of Kern, 908 F.2d 482, 490 (9th Cir. 1990) (same); Brock v. Claridge Hotel & Casino, 846 F.2d 180, 189 (3d Cir. 1988) (same).

[24] EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1445-46 (D.N.J. 1993) (denying collective action treatment to putative class of claimants under Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634, which by virtue of 29 U.S.C. § 626(b) incorporates the FLSA's enforcement provisions, including the "similarly situated" provision in 29 U.S.C. § 216(b)).

[25] St. Leger v. A.C. Nielsen Co., 123 F.R.D. 567, 569 (N.D. Ill. 1988) (denying collective action status in FLSA case).

[26] *Id.*

[27] *See* Lusardi v. Xerox Corp., 122 F.R.D. 463, 465-66 (D.N.J. 1988) (denying reconsideration of order decertifying ADEA collective action); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214-16 (5th Cir. 1995) (affirming denial of collective action status in ADEA case based on plaintiffs' disparate factual circumstances and individualized nature of defenses).

[28] D'Camera v. District of Columbia, 693 F. Supp. 1208, 1210 (D.D.C. 1988).

[29] *See, e.g.*, Murray v. Stuckey's, Inc., 939 F.2d 614 (8th Cir. 1991) (concerning managers at gas station / convenience stores); Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991) (concerning fire department captains); Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) (concerning various employees of television station).

[30] *See infra* Part II.B.1.

[31] 29 C.F.R. §§ 541.1(a) (executive exemption "long test"), 541.119(a) (executive exemption "short test").

[32] Cal. Lab. Code § 515(a).

[33] *See, e.g.*, Cal. Lab. Code § 515(b)(2)(e); Ramirez v. Yosemite Water Co., 978 P.2d 2, 10 (Cal. 1999) (construing outside salesperson exemption).

[34] *See, e.g.*, Ramirez v. Yosemite Water Co., 978 P.2d 2, 13 (1999) ("[T[he court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.").

[35] California law does not have a "salary basis" test precisely analogous to the salary basis requirement of the FLSA, although exempt executive, administrative, and professional employees must receive "a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." Cal. Lab. Code § 515(a).

[36] Plaintiffs generally deride such declarations by current employees as either coerced by the defendant or reflecting the declarants' incentive to further their own careers by providing testimony potentially favorable to the company.

[37] Opinions of California trial courts are not published and thus may not be cited as precedent. *See* Cal. R. Ct. 977(a). The author has reviewed many California trial court opinions certifying overtime class actions and has attended class certification hearings where these arguments have been made time and time again.

[38] These courts take comfort in the proposition that class certification decisions remain subject to reconsideration throughout the pendency of a case and can be revisited if, at some later date, it becomes clear that trial on a class basis is not appropriate.

[39] *See infra* Part III.A.

[40] Cal. Bus. & Prof. Code § 17208. *See* Cortez v. Purolator Air Filtration Prods. Co., 999 P.2d 706 (Cal. 2000) (allowing recovery for denial of overtime pursuant to general unfair business practices law, with four-year limitations period, rather than restricting recovery to three-year limitations period applicable to overtime statute).

[41] *RadioShack to Pay Employees $30 Million in Settlement of Overtime Exemption Claim*, Daily Lab. Rep. (BNA), July 18, 2002, at A-9.

[42] *Workers Awarded $90 Million In Class-Action Overtime Suit*, 11 Cal. Emp. L. Letter 1 (2001).

[43] *California News In Brief*, 11 No. 16 Cal. Emp. L. Letter 7 (2001).

[44] Tom Gilroy, *Starbucks Settles Two California Lawsuits Filed Over Alleged Wage And Hour Violations*, Daily Lab. Rep. (BNA), Apr. 24, 2002, at A-13.

[45] Alan J. Liddle, *Taco Bell Shells Out $13 Million in OT Suit*, Nation's Restaurant News, Mar. 19, 2001, at 1.

[46] Tom Gilroy, *U-Haul Agrees to Preliminary Settlement with California Managers in Overtime Suit*, Daily Lab. Rep. (BNA), May 1, 2001, at A-8. U-Haul appears to have been the very first of these large California overtime misdesignation cases to proceed all the way to trial on the merits. Before trial, the plaintiffs intentionally waived their overtime claims under the Labor Code and elected to proceed to trial solely on the basis of California's general unfair business practices statute, Section 17200 of the Business and Professions Code. By proceeding under only Section 17200, the plaintiffs waived a claim to attorney fees, which are recoverable under the Labor Code but not under Section 17200, but at the same time they enabled the matter to be heard by a judge and not a jury, as an action under Section 17200 is regarded as equitable in California. The plaintiffs' gambit paid off, as the judge issued a ruling approving of class treatment and finding U-Haul liable for misdesignation as to the entire class. The matter settled before a further trial could be held to determine damages.

[47] Karen Pilson, *California Court Approves $7.3 Million Settlement of Store Managers' Overtime Suit*, Daily Lab. Rep. (BNA), Mar. 22, 2002, at A-3.

[48] *Suit by Home Loan Company Workers Seeking Overtime Pay Settled for $4 Million*, Daily Lab. Rep. (BNA), Sept. 21, 2000, at A-10.

[49] Naturally, such claims can also arise under California's quantitative approach to exemptions, because if the main function that the employee performs falls outside the exemption, then the employee will in all likelihood not spend sufficient time

performing exempt duties to satisfy California's standards.

[50] Joyce Cutler, *Court Gives Preliminary OK to $35 Million Settlement Between Pacific Bell, Engineers*, Daily Lab. Rep. (BNA), Dec. 7, 2001, at A-6.

[51] Susanne Pagano, *Firefighters to Get $2.8 Million in Legal Fees to Close Case on Unpaid Overtime Wages*, Daily Lab. Rep. (BNA), July 21, 2000, at A-9; *see generally* 29 U.S.C. § 207(k) (specifying alternative maximum hours provisions for employees "in fire protection activities").

[52] The trial court certified three subclasses of claims representatives "assigned to handle property, automobile physical damage and liability claims." Bell v. Farmers Ins. Exch., 105 Cal. Rptr. 2d 59, 61 (Ct. App.), *review denied* (Cal.), *and cert. denied*, 122 S. Ct. 616 (2001). Two justices of the California Supreme Court dissented from the denial of review.

[53] *Id.* at 76.

[54] *Id.* at 69-72.

[55] *Id.* at 72.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 74.

[61] *Id.*

[62] *Id.* at 76.

[63] *Employer Held to Have Broken Law on Overtime*, NAT'L L.J., Feb. 4, 2002, at C9.

[64] *Id.* In addition, the plaintiffs' attorneys have reportedly moved for $11 million in attorneys' fees, over and above the previous award they received of 25% of the $90 million judgment. That request is pending before the trial court.

[65] *Id*.

[66] 105 Cal. Rptr. 2d at 72-74.

[67] 29 C.F.R. § 541.205(c)(5).

[68] Joyce E. Cutler, *As Many As 500 Claims Adjusters Seek Overtime Pay From Southern California AAA*, Daily Lab. Rep. (BNA), July 18, 2001, at A-5.

[69] *Id.*

[70] *See* 29 U.S.C. §§ 207(i) (exempting employees of retail or service establishments who earn at least one and one half times the minimum wage and for whom "more than half" of the "compensation for a representative period (not less than one month) represents commissions on goods or services"), 213(a)(1) (exempting outside salespersons); 29 C.F.R. §§ 541.5, 541.500-.508 (defining outside salesperson exemption).

[71] New Jersey Dep't of Labor v. Pepsi-Cola Co., No. A-918-00T5, 2002 WL 187400, at *77 (N.J. Super. Ct. App. Div. Jan. 31, 2002), *cert. denied*, 798 A.2d 1271 (N.J. 2002).

[72] *Id.* at *76.

[73] *See* Deborah Billings, *Pepsi Product Deliverers, Shelf Stockers Found Due Overtime Under New Jersey Law*, Daily Lab. Rep. (BNA), May 24, 2000, at A-7.

[74] Stahl v. Delicor of Puget Sound, Inc., 34 P.3d 259, 261 (Wash. Ct. App. 2001).

[75] *Id.* at 267.

[76] *Id.*

[77] *California Court Approves $20.2 Million Deal in Overtime Pay Class Action Against Bottler*, Daily Lab. Rep. (BNA), Nov. 6, 2001, at A-6.

[78] Tom Gilroy, *Court Approves $8 Million Settlement for Water Delivery Drivers in California*, Daily Lab. Rep. (BNA), July 13, 2001, at A-8. That settlement followed the California Supreme Court's ruling in Ramirez v. Yosemite Water Co., 978 P.2d 2, 13-14 (1999), which cast doubt on whether a route sales representative for a bottled water company was an exempt outside salesperson.

[79] *Delivery Company to Pay $9.75 Million to Settle Wage Claims by Messengers*, Daily Lab. Rep. (BNA), July 31, 2000, at A-6.

[80] *Seven-Up Route Salespersons File Class Suit Over Overtime Pay Against Company, Bottler*, Class Action Litig. Rep. (BNA), Dec. 14, 2001, at 829.

[81] *Settlement of "Off-the-Clock" Class Suit Against Albertson's Signed by Federal Judge*, Daily Lab. Rep. (BNA), Sept. 12, 2000, at A-1.

[82] *Best Buy Will Pay $5.4 Million to Settle Overtime Dispute, DOL Says*, Daily Lab. Rep. (BNA), July 5, 2001, at A-1.

[83] Nan Netherton, *Complaint Against Wal-Mart Alleges Violation of State Minimum Wage Law*, Daily Lab. Rep. (BNA), Sept. 14, 2001, at A-3.

[84] 29 U.S.C. § 254(a)(2).

[85] 29 U.S.C. §§ 216(b), 251-262.

[86] 29 U.S.C. § 254(a)(2).

[87] 350 U.S. 247 (1956).

[88] *Id.* at 256.

[89] *Id.* at 250.

[90] *See* Reich v. IBP, Inc., 38 F.3d 1123, 1125-26 (10th Cir. 1994) (defining work as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer") (quoting Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944)).

[91] The FLSA excludes from the definition of working time "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o).

[92] 38 F.3d 1123 (10th Cir. 1994).

[93] *Id.* at 1125. *See also* Anderson v. Pilgrim's Pride Corp., 147 F. Supp. 2d 556, (E.D. Tex. 2001) (holding, after bench trial, that the less than ten minutes per day spent by poultry processors donning and doffing sanitary and safety equipment was de minimis and not integral and indispensable to the employer's operations, and thus not compensable), *aff'd*, No. 01-40477 (5th Cir. June 26, 2002).

[94] 145 Lab. Cas. (CCH) ¶ 34,463 (D. Me. Jan. 23, 2002).

[95] *Id.*

[96] *Swift to Pay $3 Million to Settle Suit by Meatpacking Workers in Minnesota, Iowa*, Daily Lab. Rep. (BNA), Jan. 11, 2001, at A-3.

[97] Angela Swinson, *Perdue Settles Donning, Doffing Dispute; DOL Sues Tyson Foods on Similar Charges*, Daily Lab. Rep. (BNA), May 10, 2002, at A-5.

[98] Victoria Roberts, *Perdue Agrees to Settle Class Action Donning, Doffing Lawsuit for $10 Million*, Daily Lab. Rep. (BNA), Aug. 8, 2002, at AA-1.

[99] Swinson, *supra* note 97, at A-5.

[100] No. B146565, 2001 WL 1659525 (Cal. Ct. App. Dec. 28, 2001).

[101] *Id.* at *8-9. The court did grant the petition in part. The trial court attempted to deal with the declarations proffered by the several witnesses for the employer attesting to the fact that the route sales representatives spend most of their working time on exempt activities by simply excluding those individuals from the class. The Court of Appeal concluded that this attempt to carve up the class based on the relative merits of their claims was erroneous. *Id.* at *9-10. In fact, the trial court's ruling, if allowed to stand, would have worked substantially more mischief than the Court of Appeal acknowledged. In effect, the trial court's ruling would enable plaintiffs to proceed to trial based on a dramatically skewed picture of the class. Certifying a class in a duties test misdesignation case is bad enough, given the multitude of individualized inquiries that must be made, but certifying a class that ends up being only those individuals who meet the class description but have not submitted evidence favorable to the employer potentially deprives the employer of any kind of meaningful opportunity to present its defenses.

[102] *Id.* at *7.

[103] *Id.* at *9.

[104] No. B152628, 2002 WL 505114 (Cal. Ct. App. Apr. 4, 2002), *review granted and opinion superseded* (Cal. July 17, 2002) (No. S106718).

[105] *Id.* at *2-3.

[106] *Id.* at *5.

[107] *Id.*

[108] *Id.* at *7.

[109] *Id.*

[110] *Id.*

[111] Yager & Boyd, *supra* note 8, at 340.

[112] *Id.*

[113] One view of the damages calculation is that *overtime due = (weekly pay / weekly hours) x 0.5 x number of hours beyond 40*. *See, e.g.*, Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138-39 (5th Cir. 1988); Rushing v. Shelby County Gov't, 8 F. Supp. 2d 737, 743-45 (W.D. Tenn. 1997); Zoltek v. Safelite Glass Corp., 884 F. Supp. 283, 286-88 (N.D. Ill. 1995). The Department of Labor's FLSA "fluctuating workweek" regulation expressly contemplates this type of calculation. *See* 29 C.F.R. § 778.114. The theory behind this calculation is that the employee's salary is intended to compensate for all hours worked, so all that remains is the difference between straight-time and time-and-a-half premium pay for the overtime hours. The hourly rate is fixed by dividing total pay by total hours worked. Under this view, the employee earning $31,200 per year, or $600 per week, and working 60 hours per week would be entitled to back overtime as follows: *overtime due = ($600 / 60 hours) x 0.5 x 20 = $100 per week*. Over the course of a year, that back overtime would amount to $5,200. A different view of overtime, and the one that plaintiffs not surprisingly advocate, is that *overtime due = (weekly pay / 40 hours) x 1.5 x number of hours beyond 40*. *See, e.g.*, Cowan v. Treetop Enters., Inc., 163 F. Supp. 2d 930, 939-42 (M.D. Tenn. 2001) (using regular rate of total pay divided by all hours agreed upon for week); Rainey v. American Forest & Paper Ass'n, 26 F. Supp. 2d 82, 99-102 (D.D.C. 1998); Skyline Homes, Inc. v. Department of Indus. Relations, 211 Cal. Rptr. 792, 795 (Ct. App. 1985), *overruled on other grounds*, Tidewater Marine W., Inc. v. Bradshaw, 927 P.2d 296 (Cal. 1996). This method appears to be required under California law. *See* CAL. LAB. CODE § 515(d). The theory behind that kind of calculation is that the employee's salary is not intended to compensate for more than the first forty hours of work. The hourly rate, therefore, is established by dividing total earnings by up to forty hours. That rate is then multiplied by a full time-and-a-half for each hour beyond forty. Under that view, the employee earning $31,200 and working 60 hours per week would be entitled to back overtime as follows: *overtime due = ($600 / 40 hours) x 1.5 x 20 =$450 per week*. Over the

course of a year, that back overtime would amount to $23,400.

[114] Plaintiffs will contend that such a result is appropriate because the burden of compliance with the FLSA and state law is on the employer, and if the employer is not certain that the employee meets the exemption criteria then the employer should simply pay the employee on an hourly basis and avoid the risk of litigation. Such contentions ignore the significant benefits that exempt designations provide to employer and employee alike. *See supra* Part I.C. In short, if employers designated as exempt only those employees who without any doubt meet the exemption criteria, then employers and employees alike would be significantly worse off than with the current pattern of exemption determinations.

[115] To the extent that safety is a concern with respect to overtime, that concern is already being addressed at the state and federal level. Where long hours pose a genuine safety risk to employees in certain occupations, agencies such as the Department of Transportation and the Federal Aviation Administration are far better situated to enact appropriate regulations tailored to specific circumstances, as opposed to the FLSA's clumsy exemption scheme.

[116] Yager & Boyd, *supra* note 8, at 340-41.

[117] *See, e.g.*, Faillace, *supra* note 4, at 387.

[118] *See, e.g.*, Lipman et al., *supra* note 4, at 383.

[119] *See* Faillace, *supra* note 4, at 387-88 (proposing to exempt "all employees who earn income equivalent to five times the minimum wage on an hourly, weekly, semi-monthly, or other basis," as well as providing a duties-based exemption for administrative employees earning between two and five times the minimum wage); Lipman et al, *supra* note 4, at 384-88 (proposing to exempt "employees earning more than six and one-half times the minimum wage," as well as an exemption for employees earning between three and six and one half times the minimum wage, subject to a written agreement with various requirements).

[120] 29 U.S.C. § 206(a)(1).

[121] It is not the purpose of this article to press for the use of a particular multiple of the minimum wage so much as to suggest a framework for establishing a threshold that minimizes the risk of litigation. Plainly, arriving at a particular multiple would involve intense political debate. In many respects, simply having a clear number is more important than what the number actually is. Nevertheless, even representatives of organized labor would probably acknowledge that where employee compensation is substantial, eliminating overtime "would not offend the core purposes of the FLSA." Nicholas Clark, *Fair Labor Standards Act Reform—It's Not Broke, So Don't Fix It*, 11 LAB. LAW. 343, 346 (1996) (noting that exempting from FLSA salary test regulations employees earning more than $80,000 per year would not be inconsistent with policy of FLSA).

[122] Eliminating a strict salary basis test for exemption also seems appropriate as a means of avoiding litigation. So long as the employer pays the employee the required amount of money each month, it should make little difference whether the employee was "treated" as an hourly employee through docking of pay for partial day absences, a requirement of maintaining records of working time, mandatory adherence to a rigid work schedule, or any of the other types of considerations that can potentially defeat an exemption under the FLSA.

[123] This particular reform proposal addresses only misdesignation issues and does not purport to offer an answer to some of the other wage and hour issues that have haunted employers, such as off-the-clock time or payment for donning and doffing. It is not clear that the issue of off-the-clock work is in need of a legislative fix so much as increased attention by employers to corporate policies and the conduct of supervisors and managers, although courts should continue to give very careful consideration to whether such cases really are appropriate for class or collective treatment. The question of donning and doffing, and other preliminary and postliminary work, seems to be working its way through the courts and may yield clearer standards over the next few years.

[124] *See supra* note 113.

[125] Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138-39 (5th Cir. 1988).

[126] Rushing v. Shelby County Gov't, 8 F. Supp. 2d 737, 743-45 (W.D. Tenn. 1997).

[127] Zoltek v. Safelite Glass Corp., 884 F. Supp. 283, 286-88 (N.D. Ill. 1995).

[128] Cowan v. Treetop Enters., Inc., 163 F. Supp. 2d 930, 939-42 (M.D. Tenn. 2001).

[129] Rainey v. American Forest & Paper Ass'n, 26 F. Supp. 2d 82, 99-102 (D.D.C. 1998).

[130] Skyline Homes, Inc. v. Department of Indus. Relations, 211 Cal. Rptr. 792, 795 (Ct. App. 1985), *overrruled on other grounds*, Tidewater Marine W. Inc. v. Bradshaw, 927 P.2d 296 (Cal. 1996).

[131] 29 U.S.C. § 216(b).

[132] *See, e.g.*, Thiessen v. General Elec. Capital Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001) (ADEA case applying 29 U.S.C. § 216(b)), *cert. denied*, 122 S. Ct. 2614 (2002); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995) (same). *Cf.* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169-74 (1989) (approving early involvement of court in facilitating notice to potentially "similarly situated" plaintiffs under ADEA).

[133] A de minimis threshold of the lesser of five percent of the proposed group of plaintiffs or fifty individuals seems appropriate. As with the proposed bright-line compensation threshold for establishing exemption, however, *see supra* note 121, it is less important that the threshold be any particular number than that it be fixed and known to the parties and to the court before the certification issue arises.

[134] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[135] Of course, where the employer cannot come forward with evidence that even a de minimis number of individuals potentially within the group for which the plaintiff seeks certification are not entitled to prevail, then certification will most likely be appropriate. For example, if the employer has classified non-supervisory assembly-line workers as exempt on the theory that they are professional employees, and the employer cannot make even an arguable showing that the designation is correct as to a de minimis number of these employees, then collective adjudication of their claims would cause no real prejudice to the employer.

[136] Nor is it an answer to suggest that the parties can sort out their contentions during discovery. An employer is entitled under due process principles to a meaningful opportunity to investigate and to present all of its defenses. Yet much of the justification for having a collective or class action in the first place is undermined if the employer has to conduct discovery as to all or a substantial number of the potential plaintiffs to determine which defenses to press and which witnesses to present as to each individual. Where an employer makes the showing suggested here, all parties would be spared the enormous burden of conducting class-wide discovery concerning what, in all likelihood, would turn out to be a case inappropriate for class treatment.

[137] 29 U.S.C. § 218(a).

[138] This dilemma is particularly acute for employers in California, a state whose laws are almost uniformly at least as burdensome on businesses, if not more so, than federal law. The only real hope for a "pro-employer" fix with respect to California often seems to be broad federal pre-emption of state law, a result that, while tempting from the standpoint of obtaining immediate results, is also distinctly at odds with traditional notions of federalism.

[139] William J. Kilberg, *Rethinking Federalism: Is It Time for a "New Deal" for Employers?*, 28 EMPL. REL. L.J. No. 2, at 1-5 (Autumn 2002).