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Mary Ziegler, Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments in Support of DOL's Notice of Proposed Rulemaking Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act, RIN 1235-AA11

Dear Ms. Ziegler:

The National Employment Law Project (NELP) submits these comments on the Department of Labor's (DOL or the Department) Notice of Proposed Rulemaking regarding the executive, administrative, professional (EAP) and related exemptions from minimum wage and overtime coverage under the Fair Labor Standards Act (FLSA or the Act); RIN 1235-AA11 ("NPRM").

NELP is a non-profit research, policy, and advocacy organization that for more than 45 years has sought to ensure that all workers, especially those most vulnerable to workplace exploitation or abuse, receive the basic workplace protections guaranteed by our nation's labor and employment laws, including the FLSA. Our work entails direct interaction with low- and middle-wage earners who have been denied minimum wage and overtime pay they have earned, and with worker centers, labor unions, lawyers and other economic fairness advocates who promote and protect the rights and interests of workers. NELP's *National Wage & Hour Clearinghouse*, at www.just-pay.org, serves more than 900 members, including organizers, scholars, policymakers, lawyers, and others who through organizing, litigation, and policy advocacy in multiple forums across the nation work to cement basic wage protections, including the FLSA's 40-hour-workweek and overtime pay guarantees, for all workers who are or should be covered by the Act.

NELP and our partners and constituents have a direct and sustained interest in achieving comprehensive adherence to the FLSA’s national hours-of-work standard and narrow application of its exemptions, to ensure proper coverage of the large and fast-growing low-wage workforce.

As described below, the FLSA’s overtime pay requirement is intended to prevent excessive uncompensated work hours and to spread work more broadly. A Page 2 of 33s the courts have consistently held and Congress intended, fulfilling these goals demands extending FLSA coverage broadly to cover most employees, and applying the Act’s exemptions narrowly to exclude relatively few. In its NPRM on the EAP exemptions, the Department proposes to advance the FLSA’s goals consistent with these established rules of interpretation—simultaneously reducing confusion and erroneous application of the exemptions—through an updated bright line salary test that will more effectively differentiate between salaried employees who ought to be overtime-protected and those who may properly be classified as exempt. For this bright line test to serve as a meaningful proxy for coverage, it must represent a compensation level commensurate with a high degree of discretion and flexibility in a position requiring the performance of duties typically associated with exempt EAP status. The threshold must also be set considerably higher than the existing \$23,600 level, which is not even above the poverty threshold for a family of four. Set at an appropriate level, it will necessarily guarantee overtime—and minimum wage—protections to a much larger share and number of salaried employees than are currently protected.

A sound salary test for exemption, and the ensuing expansion of automatic coverage that entails, will mitigate decades of neglect in maintaining basic FLSA protections for most workers; correct the damage done when the Department conflated the “short duties test” and the “long duties salary threshold” to create a “standard duties test” with a low salary threshold in 2004; and help to begin reversing decades of wage declines that have harmed America’s middle class.

Though the Department addresses several matters in the NPRM, our comments focus principally on the proposed revision to the salary test. We proceed as follows:

- We show that the Department has authority to revise and index the salary threshold that determines EAP employees’ coverage under the FLSA;
- We describe the historical purposes of the FLSA overtime provisions, specifically, the Act’s intent to limit excessive work hours and to spread employment;
- We support the DOL’s goal of simplifying application of the EAP exemptions through a higher, well-reasoned salary threshold that will reduce employers’ need to apply the duties tests, resulting in greater predictability, fewer instances of misclassification, and less time-consuming and costly litigation;
- We endorse both the salary threshold proposed by the NPRM, while noting that even this proposal remains lower than levels suggested by some historical measures, and annual indexing of the threshold to avoid its erosion in the future;

- We encourage the DOL to adopt a bright line duties test as well, such as the California duties test requiring that at least 50 percent of an employee’s time be spent on exempt work to qualify for exemption;
- We show that the rules changes will likely increase hiring, spreading employment and fulfilling a primary goal of the overtime provisions in the FLSA, and
- We close with an illustrative sampling of the kinds of workers who will benefit from the rules change, culled from existing case settlements and filings over just the last few years. The EAP exemptions have been called “white-collar” as short-hand to describe an intended relatively small group of employees not subject to overtime protections; the cases collected demonstrate that many workers now swept into the exemptions by their employers do not belong there.

I. Congress Expressly Authorized the Department to Issue Regulations that Define and Delimit Exemptions from FLSA Coverage

Section 213(a)(1) of the FLSA exempts “bona fide executive, administrative or professional employees” from minimum wage and overtime coverage. The Congress did not define or delimit those terms, instead leaving it to Secretary to do so “from time to time by regulations.” *Id.* As the U.S. Supreme Court affirms in *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977), when a federal statute expressly instructs the agency to work out the details of those broad definitions, those regulations have the force of law. *See also, U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (agency has broad discretion in designing regulations under express regulatory authority); *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (noting DOL’s broad authority to define the scope of the EAP exemptions). (For a fuller discussion of the Department’s authority, *see also* <http://www.epi.org/publication/57-law-professors-submit-comment-to-dol-on-overtime-rule/>)

Nearly 16 months after the President directed the Department to review and revise the rules governing the EAP exemption, and after extensive outreach and deliberative information-gathering from all affected stakeholders along with its own research and analysis, DOL proposed in the NPRM to set the salary threshold for exemption at \$50,440 in 2016. This proposal is grounded in well-reasoned policy and economic determinations consistent with the purposes of the FLSA and fully authorized and supported by the express terms and spirit of the Act. Absent action that is arbitrary and capricious—which the NPRM manifestly is not—the Department’s updating of the EAP regulations is reasonable and appropriate, and its final rule will and should have the force of law.

II. The Department’s Regulations Defining the EAP Exemption Must Reinforce and Advance the Purposes of the FLSA’s Overtime Provisions.

Congress intended the FLSA's 40-hour workweek standard to serve a dual purpose. First, in mandating time-and-a-half pay for weekly hours exceeding 40, the Act shields workers from

substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a).¹ And second, requiring premium pay for overtime hours is designed to encourage employers to spread extra work to more, instead of piling extra hours onto fewer, employees. As Justice Reed wrote in *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941):

[T]he Act was [intended] to induce work-sharing and relieve unemployment by reducing hours.... The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. ... [A]lthough overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was part of the plan from the beginning. May 24, 1937, 81 Cong. Rec. 4983, 75th Cong. 1st Sess. Sen. Rep. No. 884 on S. 24754 (July 6, 1937), at 4.

At the same time it adopted a broad rule guaranteeing overtime pay to most workers, Congress also recognized that some white-collar employees enjoy executive decision-making authority, bargaining power, and discretion over time and work, along with higher pay, that justifies exempting them from overtime pay and minimum wage coverage. As the DOL notes, these employees had a guaranteed salary, more job security, and greater potential for promotion than did production workers, and these job characteristics negated the need for basic wage protections. NPRM at 38519; see also, Malcolm Cohen and Donald Grimes, *The "New Economy" and Its Impact on Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA)* (DOL, Jan. 2001), <http://www.dol.gov/asp/programs/flsa/report-neweconomy/main.htm>.

The exemption did not trump Congress's broader concerns about excessive work hours, however. Instead, as the Supreme Court has emphasized, the "breadth of coverage" of the FLSA's overtime work rules is "vital to [its] mission" of establishing a national work week standard.² To that end, all statutory exemptions to the Act must be narrowly construed, with the presumption being that all workers are covered.³

¹ See also *United States v. Darby*, 312 U.S. 100, 109 (1941); *Barrantine v. Arkansas Freight System*, 450 U.S. 728, 739 (1981).

² *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959)

³ *Id.*

Indeed, even decades before the FLSA was adopted, concerns about excessive work hours (among women) prompted the Supreme Court to uphold a state hours-of-work law. *Muller v. Oregon*, 208 U.S. 412 (1908) As future Supreme Court Justice Louis Brandeis argued in his “Brandeis brief” supporting the law limiting women’s work hours, protective hours-of-work statutes play an important role in maintaining public health, public safety and the general well-being of women and society as a whole. Relying on more than 90 national and international medical studies and committee reports, Brandeis showed that long hours of labor yield bad effects for health, safety, morals and the general welfare, while shorter hours produce economic benefits.

Effects of long work hours: Though anachronistic in its view of women, the concerns underlying Brandeis’s arguments for strict hours-of-work rules resonate still, with the negative effects of long work hours a continuing concern. Long work hours are related to stress and injuries at the workplace⁴ and a significant increase in risk of contracting specific chronic diseases, such as chronic heart disease, non-skin cancer, arthritis, and diabetes.⁵ As weekly work hours increase, so too does the risk for diagnosis of hypertension,⁶ and mortality rates rise by nearly 20 percent.⁷

Costs of work-related stress to American businesses due to absenteeism and employee turnover alone exceed \$300 billion annually.⁸ Another study this year found that the estimated annual health care expenditures related to workplace stress could be as high as \$190 billion per year, with long hours, shift work, and work-family conflict all factoring into the cost.⁹

In 2014, approximately 70 percent of women with children were either working or looking for work.¹⁰ On the days they did household activities, women spent an average of 2.6 hours on such

⁴ Galinsky, E., Bond, J. T., Kim, S. S., Backon, L., Brownfield, E., & Sakai, K. (2005), [Overwork in America: When the way we work becomes too much](#). New York: Families and Work Institute.

⁵ Association Between Long Work Hours and Chronic Disease Risks over a 32 Year Period, [Presentation](#) at American Public Health Association Meeting on November 18, 2014, on National Longitudinal Survey of Youth.

⁶ Yoo et al. [Effect of Long Working Hours on Self-reported Hypertension among Middle-aged and Older Wage Workers](#), *Annals of Occupational and Environmental Medicine* 2014, 26:25; Goh, J, Pfeffer, J, & Zenios, S. (2015) [Workplace stressors & health outcomes: health policy for the workplace](#). *Behavioral Science & Policy*, 1(1), pp 43-52.

⁷ Goh, J, Pfeffer, J, & Zenios, S. (2015) [Workplace stressors & health outcomes: health policy for the workplace](#). *Behavioral Science & Policy*, 1(1), pp 43-52.

⁸ European Agency for Safety and Health at Work, [Calculating the costs of work-related stress and psychosocial risks](#), 2014, citing 2001 estimated data compiled by Rosch.

⁹ Goh, J, Pfeffer, J, & Zenios, S. (2015) [The Relationship Between Workplace Stressors and Mortality and Health Costs in the United States](#). *Management Science*.

¹⁰ Bureau of Labor Statistics, [Employment Characteristics of Families – 2014](#). Released April 2015.

activities, while men spent 2.1 hours.¹¹ The combination of hours at work and at-home after-hours work leaves families with little non-work time, generating work-family conflict that increases the odds of self-reported poor physical health by about 90 percent.¹² But, by encouraging employers to build greater efficiencies into their organizations or share work more broadly among employees to avoid overtime pay premiums, the NPRM has the potential to alleviate work-family conflict-related stresses too. As Professor Lonnie Golden found, using data from the General Social Survey (GSS) to analyze whether salaried workers stand to lose flexibility by gaining overtime protections:

Because salaried workers in the affected pay brackets already work mandatory overtime at the same frequency as hourly workers and more days of overtime in general than hourly workers, raising the overtime threshold for them would not increase and in fact could decrease the work stress and work-family conflict associated with mandatory overtime.¹³

Similarly, former management consultant Francine Rodgers, who for years advised Fortune 500 and other large companies on programs to reduce work hours and otherwise accommodate work-life demands, opined in *The New York Times* that, “[i]t’s also very likely that [as result of the rule,]... [w]orking parents who qualify stand to benefit from fewer hours at work, without giving up income.”¹⁴

The Department’s regulations implementing the EAP exemption must advance the overarching goals of the FLSA, consistent with the Act’s longstanding interpretations and in harmony with economic and workplace realities. Instead of doing so, DOL’s chronic negligence in updating the EAP regulations and the troubling combined effects of the lax-duties test and low-salary threshold adopted in 2004 have subverted the purposes underlying both the FLSA overall and the EAP exemption, undermining overtime pay rights for millions of workers. These twin failings have sharply reduced both the share and absolute number of white-collar salaried employees automatically covered by overtime protections since 1975, from 12.6 million employees then (62 percent of the salaried workforce) to 3.5 million salaried employees today, only eight percent of salaried workers.¹⁵

¹¹ Bureau of Labor Statistics, [American Time Use Survey – 2014 Results](#), Released June 2015.

¹² Goh, J, Pfeffer, J, & Zenios, S. (2015) [Workplace stressors & health outcomes: health policy for the workplace](#). Behavioral Science & Policy, 1(1), pp 43-52.

¹³ Golden, Lonnie, [Flexibility and overtime among hourly and salaried workers](#), Economic Policy Institute (September 30, 2014).

¹⁴ New York Times Opinion Pages, [Who owns your overtime?](#) June 22, 2015.

¹⁵ Eisenbrey, Ross, [The Number of Salaried Workers Guaranteed Overtime Pay Has Plummeted Since 1979](#), and [What the New Proposed Overtime Rules Mean for Workers](#), Economic Policy Institute (June 1975).

Because of ongoing labor market slack, wages have not been rising despite steadily improving job growth and a declining unemployment rate—too many workers are involuntarily working part-time, and too many others remained sidelined altogether.¹⁶ At the same time, an astounding 25 percent of salaried employees report they regularly work 60-plus hours each week, and another 25 percent say they work between 50 and 59 hours weekly.¹⁷ In an economy characterized by too many workers with fewer hours than they want and need, while others are putting in excessive overtime hours for which they receive no pay at all, DOL must strike a sounder balance in defining and delimiting the EAP exemptions, to ensure it is once again advancing the purposes of the FLSA.

III. The bright-line salary test the NPRM proposes creates an effective, efficient and predictable means to define and delimit the EAP exemption.

The DOL’s aim in the NPRM is to minimize reliance on the fact-bound and easily manipulated duties tests to define and delimit which employees are subject to the EAP exemptions, and to instead establish a more realistic, objective and predictable salary threshold as the touchstone for coverage under the FLSA or the EAP exemptions. NPRM at 38517. Setting an objective salary threshold at an appropriate compensation level and avoiding over-reliance on subjective duties tests significantly facilitate proper application of the exemptions. As the DOL’s Weiss Report of 1949 found, lower salary thresholds lead to “increasing misclassification” of employees as exempt under the EAP definitions.¹⁸ A robust salary threshold, on the other hand, simplifies compliance, reducing the need to make subjective duties-based assessments on whether to exempt or not to exempt.

Because the current salary threshold for the EAP exemptions is so low and has not risen since 2004, despite the DOL’s intention to regularly update the levels,¹⁹ the scope of the exemptions grows continuously, with a rising number of workers subject to them each year as the salaried workforce grows. Moreover, the standard duties tests the Department adopted in 2004 are vague and overly broad, inviting exemption of more and more employees each year who should receive overtime pay. In other words, the current rules are set up to undermine the statute’s intended broad coverage with only a few narrow exemptions. The DOL’s proposal to rectify this situation and restore overtime rights to salaried employees through bright-line borders defining and delimiting the EAP exemptions is sorely needed.

¹⁶ Rothstein, Jesse, [The Great Recession and Its Aftermath: What Role Do Structural Forces Play](#), Washington Center for Equitable Growth (July 6, 2015)

¹⁷ Saad, Lydia, [The Forty-Hour Workweek is Actually Longer—by Seven Hours](#), Gallup (August 2014)

¹⁸ *Report and Recommendations on Proposed Revisions of Regulations*, Part 541, by Presiding Officer Harry Weiss, U.S. Department of Labor (June 30, 1949), 18.

¹⁹ The Bush administration’s DOL promised in 2004 that the DOL would “update the salary levels on a more regular basis.” 80 Fed. Reg. 38523 (July 6, 2015).

The NPRM has proposed a robust salary threshold that will be an effective proxy for capturing the kinds of work the duties tests are designed to measure, and to create a simple way to identify those properly covered by overtime protections. NPRM at 38517; 38523 (citing Stein, Weiss and Kantor reports); 38531 (noting confusion and litigation due to the duties test)²⁰ A worker's salary is a good indicator of whether she should be exempt from the overtime requirements of the FLSA as a white-collar employee, because higher-paid salaried EAP employees typically have greater discretion and independent judgment in their jobs, more economic power to bargain for better pay or working conditions, and at salaries above \$50,000 (roughly the same as the 40% percentile of salaried workers the NPRM proposes as the threshold), longer hours but greater flexibility with respect to their schedules.²¹

While it is conceivable that a rigid duties test with hard-and-fast elements required for exemption could provide the type of bright-line borders needed to harmonize the EAP exemptions with the overarching purposes of the FLSA, it is hard to imagine achieving the same degree of objectivity that a robust salary test provides. Of course, as we discuss below, including bright line criteria in a duties test—such as requiring that at least a certain share of an employee's work is in exempt duties—tightens application of the exemption and leads to less misclassification. But to maximize the likelihood that workers who should receive overtime pay are not improperly exempted and to minimize employers' potential exposure for improper classification, it is much more efficient to streamline decision-making using a realistic, objective and predictable salary test as a proxy for coverage. The Department's proposals are sound and completely within its statutory discretion.

III. DOL's salary threshold proposal is well within the range, and even the low range, for today's labor market, and its proposals for indexing are sound.

The NPRM proposes to set the salary threshold at the 40th percentile of weekly earnings for all full-time salaried employees. In 2016, that would mean a threshold of \$970 per week, or \$50,440 a year. Thereafter, the Department proposes to index the salary threshold to rise annually, and has invited comment on the measure to use for indexing. The Department's proposed salary threshold and annual indexing are entirely reasonable and consistent with the purposes of the FLSA.

As mentioned earlier, the current salary threshold for exemption, set in 2004, was then and still remains woefully low. At \$455 per week, or \$23,660 per year, the salary test is so low that it

²⁰ Employer representatives agree that the duties tests are difficult to administer and lead to litigation. See Congressional testimony of J. Randall McDonald, IBM, (July 2011), available at: http://edworkforce.house.gov/uploadedfiles/07.14.11_macdonald.pdf; testimony of former DOL Wage & Hour Administrator Paul DeCamp, lamenting the vague standards in the duties test and the difficulties faced by employers in classifying employees under those tests. (July 2014), available at: http://edworkforce.house.gov/uploadedfiles/decamp_testimony.pdf

²¹ Golden, op cit., page 2.

allows employers to exclude workers earning less than the poverty level for a family of four from overtime protection. And because exempt EAP employees get paid nothing at all for their hours worked over 40, the current salary threshold means that some workers classified as exempt who put in substantial overtime may get paid little more than the minimum wage today. An assistant retail or fast food manager who is paid \$25,000 annually and works an average of 60 hours per week would have an effective hourly rate of pay that is just above \$8.00.

DOL's proposed salary floor threshold is adequate but by no means excessive in today's economy or by historic standards. As DOL notes in the NPRM, previous DOL methodologies have set the salary thresholds at significantly higher levels – for example, the 1975 DOL threshold adjusted for inflation would be \$1,083 per week, or \$56,316 per year in 2013.²²

Taking into account the level and nature of duties legitimately associated with the EAP exemptions, it is entirely reasonable to conclude that the salary level at which the exemptions apply should be adequate to support a basic lifestyle for a typical middle class family. According to the Economic Policy Institute's updated Family Budget Calculator, income needed to support basic family needs for a two-parent, two-child family across America ranges from a low of \$49,111 to a high of \$106,493, with a median budget of \$63,741 required to maintain "an adequate but modest living standard."²³ The National Low Income Housing Coalition reports that hourly earnings needed to afford median rental costs for an adequate two-bedroom apartment across the United States are nearly \$20—or roughly \$40,000 for housing alone per year.²⁴ And across the country, average annual household expenditures for the year ending in the second quarter of 2014 ranged from a low of \$47,346 in the South to a high of \$57,630 in the Northeast (with a national average of \$51,933).²⁵

An overtime salary threshold that would protect overtime pay for salaried employees earning less than \$50,440 in 2016 is thus an entirely reasonable level, given costs associated with maintaining a basic, yet modest middle class lifestyle. Denying employees earning less than this amount the right to earn extra pay for extra hours—in essence, requiring them to work more for less—is a pay cut that erodes their ability to maintain an appropriate standard of living for themselves and their families.

While we believe the threshold selected by the Department is reasonable, we urge DOL to set a higher level, using either of two options:

²² NPRM at 38533.

²³ EPI - <http://www.epi.org/publication/what-families-need-to-get-by-epis-2015-family-budget-calculator/>

²⁴ [Out of Reach 2015: Low Wages and High Rents Lock Renters Out](#), National Low Income Housing Coalition (2015)

²⁵ Consumer Expenditure Survey, [Table 1800. Region of Residence: Annual expenditure means, shares, standard errors and coefficients of variations](#), 2014.

- A weighted average weekly threshold of \$1,122, derived from updating DOL’s 1975 benchmark, which achieved automatic overtime coverage for 65 percent of salaried workers.²⁶ In contrast, DOL’s proposed salary threshold automatically covers only 44 percent of salaried workers;
- An inflation-adjusted amount, pegged to the 1975 threshold, resulting in a weekly salary of \$970 in 2012 dollars.²⁷ DOL’s proposed salary threshold level is at \$970 per week in 2016 dollars.

A higher salary threshold would restore the effectiveness of the exemption’s boundary as a sound proxy for adequately separating out employees who are likely to be performing duties that comport with the exempt duties in the EAP exemptions.

IV. Indexing to automatically update the salary level threshold is a fair, predictable, and efficient way to ensure that the scope of the exemptions continues to keep pace with the FLSA’s intended reach.

The DOL proposes to index the salary thresholds to rise automatically each year, using either the Consumer Price Index (CPI) or pegging them to a percentile of wages. Either methodology would fulfill the DOL’s twin goals of providing predictability for employers and employees and eliminating the need for regular rulemaking to update the salary levels. NPRM at 38527. Indexing also furthers the FLSA’s overarching goals and is consistent with courts’ admonitions that the FLSA must be interpreted to extend coverage broadly and apply exemptions narrowly. DOL has the statutory authority to update the scope of the EAP exemptions, as discussed above. As indexing is simply a means to ensure the threshold will remain current rather than continuously erode, DOL is acting entirely reasonably and within its statutory authority to adopt indexing as a means to “define and delimit” the EAP exemptions.

The Department’s goals in proposing to index the salary threshold are appropriate and make good policy sense. History has shown that the current method of setting fixed levels results in outdated thresholds and ballooning numbers of workers improperly subject to employer classification as exempt. NPRM at 38537. Today’s poverty-level salary threshold is a potent example of this problem. And because the thresholds have been updated only eight times in 75 years, and only once since 1975, there is no reason to expect that the time-consuming and resource-intensive rulemaking processes will improve in the future.²⁸ While the DOL has used

²⁶ Heidi Shierholz, [It’s Time to Update Overtime Pay Rules](#), Economic Policy Institute, (July 2014)

²⁷ Jared Bernstein and Ross Eisenbrey, [New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules](#), Economic Policy Institute (March 13, 2014).

²⁸ Indeed, though even the Chamber of Commerce and former-Administrator of the Wage and Hour Division under President George W. Bush both agree that it is time to update the salary threshold, Paul DeCamp, also a former WHD Administrator under the same President Bush, believes that updating it eleven years later is “a little bit unseemly” because it is happening too

different methods over the decades as it has adjusted the EAP salary thresholds, regulatory adjustments to the thresholds have slowed in recent years, causing the lower level salary thresholds to become increasingly out of date, permitting more employers of low-wage workers to sweep them into the exemptions, as happens now.

Thus, not only does the Department have the authority to index the salary threshold to adjust annually, indexing is by far the most reasonable, efficient and predictable way to ensure that the standard for exemption remains true to the statute's intended purposes.

The DOL seeks comments on its two proposed methodologies, asking whether it should index to a fixed percentile of full-time salaried workers' wages or to the CPI-U, or inflation. NPRM at 38537. We believe that indexing the threshold to wages is a superior approach for four reasons: (1) the wage level is a less volatile method for incremental regular updates; inflation adjustments are more volatile because they are based on prices in our economy, while salaries tend to inch upward in a more consistent trajectory; (2) because the FLSA sets a minimum wage standard, it makes policy sense to reference the increase in the salary threshold to wages, not prices; (3) it is reasonable that the salary threshold would rise along with the rise in wages overall, because the exemptions are intended to cover only the higher-paid employees in the workforce, and finally, (4) the growth in wages is more predictable and thus a better policy choice for the EAP exemptions.

In sum, indexing the salary threshold to wages is a more effective way to ensure that tests for determining FLSA coverage are closely aligned with wage growth and wage patterns throughout the economy overall. We have experienced a long enough history of routine misalignment of EAP salary thresholds with the purposes of the Act and with prevailing economic and workplace circumstances. Now is the time to align this crucial wage standard, once and for all, with wages across the economy.

V. Updating the duties test to require that an exempt employee spend at least 50% of her time doing exempt work makes for a bright-line and workable rule and should be adopted.

soon after the last update. Workers should be quite clearly concerned that these regulations could languish for well over another decade without updating, but for the promise of indexing. Compare testimony of former Administrator Tammy McCutcheon House Education and Workforce Committee Subcommittee on Workforce Protections hearing on "Examining the Costs and Consequences of the Administration's Overtime Proposal," July 23, 2015, <https://www.youtube.com/watch?v=KXQfrGuuNII&feature=youtu.be>, at 42:20 ("There is no one at the U.S. Chamber of Commerce, who I am representing today, there is no one in business who claims that it is not time for a salary increase.") with "Inside the Battle to Overhaul Overtime – And What it Says About How Lobbying Has Changed," Wonkblog, The Washington Post, September 4, 2015, <http://www.washingtonpost.com/news/wonkblog/wp/2015/09/04/inside-the-battle-to-overhaul-overtime-and-what-it-tells-us-about-how-lobbying-works-now/>.

The salary threshold approach DOL has proposed is workable and consistent with the statutory goals, as noted above. But we believe the Department should also correct the error it made in 2004, when it abandoned the two-tier duties tests' structure and opted for a "standard duties" test with no bright-line criteria to ensure that employers do not improperly deny overtime rights to employees who earn above the threshold. DOL should update the duties test by adopting a bright-line measure for the share of an employee's overall work week that must be involved in exempt duties in order to render the employee exempt.

The DOL seeks comment on whether it should implement a revision to the duties test that would align the federal standard with the California 50% primary duties rule. NPRM at 38523. We believe the DOL should adopt such a standard to protect workers who will be above the new salary threshold.

Under the current EAP regulations, workers can and do spend very little of their time performing exempt tasks and yet still be counted as exempt, as the duties tests do not have minimum percentage-of-duties provisions. These rules enable employers to easily and successfully manipulate employee job titles to sweep more workers into the EAP exemptions. A central tenet of the FLSA is that employer-provided labels or job titles are not determinative of an employee's coverage under the Act. This runs through the FLSA jurisprudence and should be followed in determining overtime coverage as well, to ensure that employers may not simply evade requirements by naming employees exempt. *See, e.g.*, 29 C.F.R. § 541.201 (b) ("Titles can be had cheaply and are of no determinative value")

The California Labor Code and its implementing Wage Order require that at least 50 percent of a worker's duties be in the exempt category in order to be properly classified as exempt under the state EAP exemptions. Cal. Labor Code section 515; Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1)(e)); 2(K). Field-tested in California, this approach would provide a brighter-line test, giving employers and employees guidance as to how to interpret the scope of the exemptions, while providing overtime protections to those employees who should be covered by the FLSA.

A more restrictive "duties test" is consistent with the FLSA and the purposes of the EAP exemptions, would further expand the number of workers affected by the rule, and inhibit misclassification of workers with limited professional or managerial duties as exempt. *See, Heyen v. Safeway Inc.*, 216 Cal. App. 4th 795 (2013) (plaintiff did not spend more than ½ of her time each week on exempt duties).

VI. The rules change could increase hiring.

While it is impossible to predict exactly what employers will do in response to the rules changes, history shows that a number of adjustments will likely be made by employers, including an increase in hiring. Illustrative studies from the consulting firm and bank Goldman Sachs looking at historical employer behavior following the last rules change, and from the National Retail Federation (NRF) predict that:

- Some employers will raise salaries for employees near the new threshold in order to maintain those employees' exempt status.²⁹
- Some employers will continue to demand that workers newly reclassified as non-exempt perform overtime, and those workers will be compensated for that extra work.
- Other employers will reduce hours for workers working more than 40 hours in a week and shift work to under-40 hour employees and hire additional workers, too – the NRF (117,000 new jobs) and Goldman Sachs studies (120,00 jobs).³⁰
- And some employers could lower the wages of some salaried properly exempt workers to save on overall payroll costs, and continue to require them to work long hours.

While the last option is a possibility and some employers will likely implement it, at a time when the labor market is tightening, and even notoriously low-wage employers are voluntarily raising their starting and minimum wages because they need to compete to attract and retain a qualified workforce,³¹ we believe that reducing nominal wages of workers would result in exceedingly bad morale and higher-than-normal turnover. We also believe that many employers are well aware that this is a foolhardy business practice, and though many of their representatives in national organizations issue such doomsday prophecies, employers are simply too smart and too dependent on good personnel to implement such short-sighted and self-defeating strategies.

VII. Examples of workers who would be aided by the rules change.

Misclassification of workers as exempt from overtime under the EAP exemptions remains a significant problem. A just-released Rand study using relatively recent 2014 survey data to estimate the share of salaried workers misclassified as exempt from overtime finds that among hourly-paid employees who work over 40 hours in a week, 19.0 percent were paid less than the “time-and-a-half” standard for overtime.³² Among salaried workers, those purportedly earning

²⁹ See, e.g., NPRM at **XX**; Goldman Sachs letter to investors: <http://www.businessinsider.com/overtime-rules-will-affect-payrolls-more-than-pay-2015-7>.

³⁰ The National Retail Federation's report, *Rethinking Overtime* (https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf) estimates that 117,000 jobs will be created in the retail and restaurant sector alone. Goldman Sachs says 120,000 jobs will be created. See also Susann Rohwedder & Jeffrey B. Wenger, *The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage*, RAND Labor & Population (August 2015), at p. 37.

³¹ “Wal-Mart Raising Wages as Market Gets Tighter,” The Wall Street Journal, Feb. 19, 2015, <http://www.wsj.com/articles/wal-mart-plans-to-boost-pay-of-u-s-workers-1424353742>; “T.J. Maxx, Marshall's to Hike Minimum Wage for Workers,” CNN Money, Feb. 25, 2015, <http://money.cnn.com/2015/02/25/news/companies/tj-maxx-minimum-wage/index.html>; “McDonalds to Raise Pay at Outlets it Operates,” The New York Times, April 1, 2015.

³² Susann Rohwedder and Jeffrey B. Wenger, *The Fair Labor Standards Act Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage*, RAND Labor & Population (August 2015), available at

above a specified threshold and having professional-level duties that together exempt them from overtime compensation rules, 11.5 percent did not actually meet the exemption criteria and were thus misclassified. Some examples of this misclassification and of close cases that may or may not have been misclassification are illustrated in the case compendium appended to this letter.

VIII. Recent cases raising overtime misclassification claims under the EAP exemptions.

NELP has collected reported recently-filed or settled class and collective action cases alleging overtime misclassification abuses, primarily listing cases since the EAP rules changes were first announced. (See attached Appendix). The cases are intended to be an illustrative sampling of the kinds of jobs, employers and employees impacted by the difficulties in applying existing EAP tests. As is seen by the listing, the jobs and geographic locations are varied, but the following sectors are well-represented: retail, restaurants, hotels, banks, oil and gas inspection and repair, insurance company and call center service jobs.

Conclusion

The FLSA has stood the test of time as a bedrock protection for America's workers. Notwithstanding repeated incidences of wage theft, including rampant misclassification of employees as independent contractors, the promise of a fair day's pay for a fair day's work remains a touchstone of what Americans expect their jobs to deliver. Despite complaints from some in the business community that the Act itself is out of date and occasional attempts to roll back its guarantees, the FLSA remains the guidepost for minimum wage and overtime pay rights and protections across our economy.

Even with its resilience as a statutory hours-of-work standard, the FLSA's overarching purpose to extend pay protections broadly and exempt only a small share of the workforce from coverage has been eroded by the Department's failure to set and maintain an appropriate salary threshold governing overtime coverage or exemption as an EAP employee. In the NPRM, DOL proposes to change course, modernize the salary standard, and remedy years of neglect through automatic adjustments to a reasonable, effective and predictable bright-line salary threshold. In 2016, that threshold will be \$50,440—a compensation level fully consistent with the rationale underlying the EAP exemptions, and with the goal of assuring broad overtime-pay protections for most of America's workers. DOL also proposes to index this threshold to rise annually, an approach that will prevent the scandalous erosion of the standard's value in the face of DOL's failure to act, as well as ensure that employers will not face drastic upward revisions of the salary threshold in the future, as they have in the past. The predictability that indexing provides is a win-win for workers and employers alike.

http://www.rand.org/content/dam/rand/pubs/working_papers/WR1100/WR1114/RAND_WR1114.pdf.

Perhaps the surest sign of the correctness of DOL's proposed updates to the EAP exemptions is that many of the opposition arguments do not even pass the laugh test. For example, some business representatives have claimed that raising the salary threshold will result in workers being demoted and denied opportunities for advancement. Of course, nothing could be further from the truth. An employer that understands the value and potential of her employees can continue to create promotion opportunities, advancing employees to lower- and middle-management jobs with added duties and responsibilities—and surely will not demote valuable employees just because of a rules change governing their overtime classification. That same employer can bestow upon them whatever job titles are appropriate. The only difference is that once this regulation becomes operational, those same employees, who are learning new skills and advancing their careers, can't be forced to work for free in order to gain that added experience unless their earnings exceed the salary threshold, and their work is characterized by the independent judgment and discretion required for exemption. The new regulations and the FLSA do not require any demotions, any changes in title, or other form of diminution of an employee's status and stature within a workplace. As with the employer who decides to lower hourly rates to account for the regulation change, the employer who resorts to demotions will also surely find that its actions have overwhelmingly negative consequences.

Similarly, the new regulation will not require that salaried workers be paid above the threshold, nor will it foreclose promotion opportunities for workers in the future. Indeed, given the fact that the regulation will likely result in more part-time jobs becoming full-time jobs and more jobs being created for those currently out of the labor market, it will have just the opposite effect, providing opportunities not just for employment, but for eventual advancement, for many more workers.

We applaud the Department's approach in the NPRM, particularly its proposal to create a robust bright-line salary threshold as the principal gauge to define the EAP exemptions; the compensation level it proposes (though we also believe it should be higher); and its annual indexing. Millions of salaried employees now denied overtime protections will benefit from the reform and updating of this important rule. The Economic Policy Institute estimates that 13.5 million workers will benefit,³³ including 6.9 million women, 2.9 million Latinos, and 1.9 million African Americans.³⁴ Beyond these substantial numbers, however, reinvigorating the white collar

³³ Mischel, L. and Eisenbrey, R (August 2015), *Raising the Overtime Threshold Would Directly Benefit 13.5 Million Workers*, Economic Policy Institute, available at: <http://www.epi.org/publication/breakdownovertimebeneficiaries/>

³⁴ Other studies have slightly different estimates. The Institute for Women's Policy Research and MomsRising say an estimated 3.2 million women would be newly covered by increasing the overtime threshold, and that nearly half of currently exempt Black and Hispanic women workers and women workers aged 18 to 34 would gain coverage. The same study notes that 44 percent of exempt single mothers will become covered, possibly earning them an additional \$243 per week. Institute for Women's Policy Research & MomsRising, [How the new overtime rule will help](#)

test as a reasonable and sound standard for exemption will boost paychecks for some workers, reduce hours for others, and create work opportunities for many Americans who need jobs or more work hours, but are now unable to get them because it is too easy for employers to misclassify EAP employees as exempt.

[women and families](#), August 2015; Institute for Women's Policy Research, [Quick Figures](#), August 2015.



RECENT WHITE-COLLAR OVERTIME CASES (SEPTEMBER 2015)

The following listing is a sample of reported recently-filed or settled cases where workers allege they have been misclassified as exempt under the FLSA's executive, administrative or professional exemptions. The compendium shows a wide range of job sectors across the country where the scope of the exemptions are disputed.

D.C. CIRCUIT

- The D.C. Circuit upholds a jury verdict in favor of two medical record coders employed by Lifecare Management Partners. Though the coders each had some advanced education, and the employer claimed that they worked independently to develop various operating procedures, the jury found that their work did not rise to the level of overtime-exempt. **Radtke v. Lifecare Mgmt. Partners, 2015 WL 4528494 (July 28, 2105).**

FIRST CIRCUIT

- Department Managers and Assistant Managers at BJ's Wholesale Club stores in Massachusetts alleged that they were misclassified. Primary responsibilities included hourly duties such as loading and unloading materials, stocking shelves, and other non-exempt activities. The case settled for \$9.3 million. **Caissie v. BJ's Wholesale Club Inc., 08-cv-30220 (D. Mass. Nov. 18, 2008).**
- District Court issues an order of Conditional Class Certification in an action brought by Department Team Leaders and Department Managers at Price Chopper, a supermarket chain, who allege that they were misclassified as exempt employees. They worked at least 45 hours per week, and usually 50 hours. They had the same primary duties as workers who receive overtime wages and did not have any hiring or firing power over the other employees. **Davine v. The Golub Corporation et al., 3:14CV30136; 2015 WL 1387922 (D.Mass. March 25, 2015).**
- Conditional certification granted for a class of assistant managers of Dick's Sporting Goods Inc. alleging misclassification and unpaid overtime wages. Assistant managers worked more than 40 hours per week without being paid overtime or performing actual managerial duties. **Cheryl Lapan et al. v. Dick's Sporting Goods Inc., [1:13-cv-11390](#) (D. Mass. 6/10/2013).**

SECOND CIRCUIT

- A class of middle managers filed a class action lawsuit against their employer, BJs Wholesale Club, contending the company misclassified them and withheld overtime wages. BJs claimed the dispute should be addressed in arbitration, as all employees signed an arbitration agreement. BJs moved for a stay in litigation pending the outcome of arbitration, and the district court dismissed the case without prejudice. **Annabelle Powell et al. v. BJs Wholesale Club Inc., 3:14-cv-00081 (D. Conn. Jan. 23, 2014).**
- District Court approves a \$2 million settlement of wage-and-hour class action lawsuit alleging that FedEx misclassified service managers as exempt from overtime protection. In 2011, a line-haul service manager filed the suit alleging FedEx Ground Package System Inc. failed to pay him for time he worked beyond 40 hours a week, claiming he was exempt, despite performing tasks similar to nonexempt workers such as hourly clerks. **Michael Bozak and William Lawson v. FedEx Ground Package System Inc., 3:11-cv-00738, 2014 WL 3778211 (D. Conn. May 4, 2011).**
- About 3,000 managers and store leaders of Payless Shoes will receive a \$2.9 million to settle claims that the retail shoe company willfully misclassified its employees to avoid paying overtime. The former employees alleged the retailer regularly scheduled them to work 45 hours per week without receiving overtime. A federal judge in Connecticut approved a \$2.9 million agreement to settle the federal and state law wage and hour claims of about 3,000 Payless Shoesource Inc. store managers and store leaders. Payless faces similar lawsuits in New York and the District of Columbia. **Shallin v. Payless Shoesource, Inc., 3:14-cv-00335, (D. Conn., Mar. 3, 14).**
- Class action certified for assistant TD Bank Store Managers at branches in New York, New Jersey, Pennsylvania, and Connecticut who allege that they were misclassified under the executive exemption. They primarily performed non-managerial duties such as working as bank tellers, counting money in the vault, opening and closing the branch, and selling basic banking products. **Puglisi v. TD Bank, N.A., CV 13-00637 LDW GRB, 2014 WL 702185 (E.D.N.Y. Feb. 25, 2014).**
- Deli Manager at Village Farms Market in Massapequa brought suit against his former employer alleging that he was misclassified as exempt. His salary was \$1,000 per week, and he spent 90-95% of his time doing non-exempt work, including preparing food, interacting with customers, cleaning, stocking shelves, and other related activities. Defendant's Motion for Summary Judgment is denied. **DiDonna v. Village Farms IGA, LLC 2:12-cv-01487, 2014 WL 2939418 (E.D.N.Y. June 16, 2014).**
- Department Managers at Urban Outfitters allege they were misclassified as exempt executives. The named plaintiffs worked 47-60 hours per week. Their primary duties were taking out garbage, cleaning the store, stocking displays and shelves, folding clothes, unloading freight and unpacking boxes, operating the cash registers, processing returns and exchanges, running "go-backs" from the fitting room to the sales floor, recovering merchandise, inventory, filling customers' orders and checking for stock, and

providing customer service. **McEarchen v. Urban Outfitters, Inc.**, 13-CV-3569 FB, 2014 WL 2506251 (E.D.N.Y. June 3, 2014).

- Assistant Store Managers at TJ Maxx allege that they spent a significant amount of time ringing the register, unloading delivery trucks and cleaning the bathrooms. Other Assistant Store Managers performed primarily non-managerial duties, including unloading the trucks, ringing the registers, cleaning the store, running merchandise to the floor and stocking the store. **Ahmed v. T.J. Maxx Corp.**, 10-CV-3609 ADS ETB, 2013 WL 2649544 (E.D.N.Y. June 8, 2013).
- Plaintiffs in a collective action against Avis Budget Car LLC will move forward in their lawsuit alleging the rental car company misclassified shift managers to avoid paying overtime wages. A New York Magistrate Judge held the plaintiffs spent the majority of their time performing tasks of hourly employees such as cleaning cars, checking-in returned cars, and renting cars to customers. **Ruffin, Jr Et Al V. Avis Budget Car Rental, LLC ET. AL.**, 2:11-cv-01069, 2014 WL 294675 (E.D.N.Y., Jan. 27, 2104).
- On March 13, 2015, Cracker Barrel Old Country Store settled a proposed class action brought by more than 2,000 current and former associate managers who alleged the restaurant and souvenir shop misclassified their employment status, denying them overtime. Assistant manager Kenneth Proper contended he nearly always worked more than 50 hours per week and his duties included checking the level of food production, performing kitchen and wait staff duties, and driving in his own car to pick up products that the store had in short supply. **Proper v. Cracker Barrel Old Country Store, Inc.**, 3:14-CV-00413, 2014 WL 1608636 (N.D.N.Y. Apr. 11, 2014).
- New York Rite Aid managers claim they were misclassified as exempt executives. Almost all store managers worked between 50 and 70 hours per week. The amount of time they spent performing non-exempt tasks (including running the register, stocking shelves, unloading trucks, engaging in plan-o-grams, and general maintenance) varied from 50-95% of the day. **Indergit v. Rite Aid Corp.**, 293 F.R.D. 632, 635 (S.D.N.Y. 2013) recons. den., 08 CIV. 9361 JPO, 2014 WL 2741314 (S.D.N.Y. June 17, 2014).
- Assistant Branch Managers at Capital One branches in New York, New Jersey, and Maryland allege that they were misclassified as exempt. The Assistant Managers' daily duties included routine audits of teller drawers, the ATM, and the vault; generating and printing routine reports; acting as floaters for bank tellers and personal bankers; and performing customer service tasks. The case settled for \$3 million. **Mills v. Capital One, N.A.**, 1:14-cv-01937, 2014 WL 1094292 (S.D.N.Y. Mar. 19, 2014).
- Plaintiff Henig is an attorney who did document review for Quinn Emanuel for six weeks in 2012. Although the firm claims he fell under the professional exemption, he was paid an hourly wage. He regularly worked 57-60 hours per week. **Henig v. Quinn Emanuel Urquhart & Sullivan LLP et al.**, 1:13-cv-01432, 2013 WL 877090 (S.D.NY. Mar. 4, 2013).

- Putative class-action suit brought by Assistant Store Managers at Barnes & Noble. Mr. Trimmer’s duties included being a cashier and working in the café. Mr. Trimmer complained to the company that his duties were non-exempt and that he should be receiving overtime. The ASMs earned “little more than the non-exempt employees,” and did earn less when the non-exempt worker put in more than 45 hours per week. Barnes & Noble is claiming both the administrative and executive exemptions. **Trimmer v. Barnes & Noble, Inc., 13 CIV. 0579 JGK, 31 F.Supp.3d 618 (S.D.N.Y. 2014).**
- Housekeeping Managers for various Hilton Hotels alleged that they were misclassified as exempt executive employees. They earned around \$45,000 per year. The parties ultimately reached a settlement in which the five plaintiffs received a total of \$225,000, excluding attorneys’ fees and costs. **Martinez v. Hilton Hotels Corp., 930 F. Supp. 2d 508, 525 (S.D.N.Y. 2013).**
- Retail Account Executives at AT&T Mobility Services in NY and NJ are classified as administrative employees. Their primary job duty is developing and maintaining relationships with retail vendors who use AT&T’s wireless voice and advanced data communications services, including Staples, Radio Shack, Costco, and Best Buy, as well as smaller or more regional retail outlets. **Brooks et al., v. AT&T Mobility Services LLC, 1:13CV04303, 2013 WL 3091649 (S.D.N.Y. Jun. 30, 2013).**
- Financial Advisors/Financial Advisor Associates working at JP Morgan Chase in New York and New Jersey brought a class-action suit alleging that they were improperly classified as exempt employees and were therefore denied overtime. Their job description included making calls to individuals to tell them about Chase products for sale and to attempt to sign those individuals up as customers, meeting individuals at Chase branches to attempt to sign them up for Chase products, soliciting “walk-in” individuals in Chase branches and attempting to sign them up for Chase products, and interacting with Chase bankers in the branches in order to obtain customer referrals for purposes of selling Chase financial products. **Lloyd v. J.P. Morgan Chase & Co., 11 CIV. 9305 LTS, 2013 WL 4828588 (S.D.N.Y. Sept. 9, 2013).**
- Bookkeeper at a Holiday Inn in Fishkill, NY worked 50 hours per week, and sometimes worked an additional 1-4 hours from home. His duties involved preparing standard reports, performing data entry tasks, and managing the disbursement of petty cash at the direction of his supervisors. The Court found that he had been misclassified as an exempt administrative employee and was entitled to overtime pay. **Ebert v. Holiday Inn, 11 CIV. 4102 ER, 2014 WL 349640 (S.D.N.Y. Jan. 31, 2014).**
- Assistant Store Managers at Duane Reade alleged that they were misclassified as exempt employees. They spent the majority of their time doing non-exempt duties, including working the cash register, assisting customers, stocking shelves, arranging products in concert with the Plan–O–Gram sent by corporate, ensuring that the store was clean, packing out the store or trucks, handling money, and taking out the garbage. **Jacob v. Duane Reade, Inc., 293 F.R.D. 578 (S.D.N.Y. 2013).**

- Financial Solutions Advisors at Merrill Lynch locations in New York and California alleged that they were misclassified. Their primary duties were sales, customer service, meeting attendance, and clerical work, and involved little or no independent discretion and judgment. They were often required to stay several hours after their scheduled shifts ended to participate in meetings and “call nights.” They were also regularly required to work on Saturdays. The suit settled for \$6.9 million. **Zeltser et al. v. Merrill Lynch & Co., Inc. et al., 1:13-CV-01531 (S.D.N.Y. Mar. 7, 2013).**
- Panda Express agreed to pay \$2.98 million to a class of former general managers who sued the fast food giant for failing to pay overtime wages. Despite working more than 40 hours a week and spending much time performing non-managerial duties such as taking orders, cleaning, and taking out trash, managers were classified as exempt employees and not paid overtime. **Kudo v. Panda Restaurant Group Inc. et al., 7:09-cv-00712, (S.D.N.Y.)**.
- Employees of Chipotle Mexican Grill Inc. filed a collective action against the popular burrito restaurant chain, contending the chain uniformly classifies workers as overtime exempt, denying them overtime wages and other legally required benefits. Chipotle claims employees are part of management because they receive salaries and benefits, however the workers contend they spend most of their time on non-managerial tasks such as filing orders and operating cash registers. **Scott v. Chipotle Mexican Grill Inc., 1:12-cv-08333, (S.D.N.Y.)**
- In December, 2014, Wells Fargo & Co. agreed to pay more than 600 former loan officers, home mortgage consultants, and mortgage private mortgage bankers \$1.85 million to settle a lawsuit alleging the bank failed to pay minimum wage and were misclassified as overtime exempt. **Daly DeLeon v. Wells Fargo Bank NA, 1:12-cv-04494, (S.D.N.Y.)**.
- Charles Schwab agreed to pay former employees \$3.8 million to settle an overtime case. The plaintiffs sold financial products from call centers across the country, yet Charles Schwab labeled the workers associate financial consultants and encouraged them to work beyond scheduled shifts without compensation. Schwab settled the lawsuit days after it was filed. **Aboud et al. v. Charles Schwab & Co. Inc., 1:14-cv-02712, 2014 WL 5794655 (S.D.N.Y., Nov. 4, 2014).**
- Citigroup, Inc. paid \$4.7 million to settle a class action lawsuit alleging the company misclassified more than 800 home lending specialist employees as overtime exempt from overtime. Initially, the parties were compelled to arbitrate due to agreements the employees entered into stipulating all wage disputes would be arbitrated on a case-by-case basis. The parties agreed to a settlement before the arbitration commenced. **Raniere et al. v. Citigroup Inc. et al., 1:11:cv-02448, (S.D.N.Y.)**.
- Modell’s Sporting Goods Inc. paid up to \$800,000 to settle a class action lawsuit in which assistant store managers contend the sporting goods giant wrongly classified them as exempt from state and federal wage laws. Named plaintiff Francisco Ferreira claimed he spend 90% of the 50 to 55 hours he worked per week doing nonexempt tasks designed

for store associates, such as unloading trucks and cleaning the stockroom. Because he spent most of his time performing nonexempt tasks, Ferreira contended he is entitled to overtime. **Ferreira v. Modell's Sporting Goods Inc.**, 1:11-cv-02395, (S.D.N.Y.).

- As a writer at CGI Communications, plaintiffs' duties included communicating with customers, potential customers, and third party partners; formatting, proofreading, rewording, fact-checking and editing assigned scripts for CGI; obtaining background factual research about a customer or target customer; and plugging relevant facts into a script to conform to CGI's parameters for word-count and content. She alleged overtime misclassification. **Tornatore v. CGI Communicatons, Inc.**, 14-CV-6049 CJS, 2014 WL 1404924 (W.D.N.Y. APR. 10, 2014).

THIRD CIRCUIT

- Operations Managers at PetSmart stores alleged that they were intentionally misclassified as exempt, even though their primary job duties were stocking shelves, assisting customers, cashier duties, caring for pets, cleaning cages, unpacking merchandise, cleaning the store, and unloading delivery trucks. **McKee v. PetSmart, Inc.**, CV 12-1117-SLR, 2013 WL 6440224 (D. Del. Dec. 9, 2013).
- A fueler for a hydrologic fracking firm alleges Maxum Petroluem Operating Co., failed to pay him and other fuelers overtime, paying only \$300 per day despite sometimes working 10-15 hours a day. According to the lead plaintiff, Maxum regularly scheduled its fuelers two weeks on for every one week off and that, during on weeks, required 15-hour days without overtime. **Lewandowski v. Maxum Petroleum Operating Company et al.**, 1:15-cv-00408 (D. Del. May 21, 2015).
- Putative class action suit in which Assistant Store Managers at Kmart stores in New Jersey and Maryland allege that they were misclassified under the executive exemption. Their primary duties were working the cash registers, stocking shelves, cleaning the store, assisting customers, building displays, unpacking merchandise, and unloading trucks. Ms. Fischer, the lead plaintiff, claims to have worked 60-65 hours per week while another defendant worked 65-70 hours per week. The Court compelled arbitration for opt-in members. **Fischer v. Kmart Corp.**, CIV. 13-4116, 2014 WL 3817368 (D.N.J. Aug. 4, 2014).
- This is a putative collective action suit in which a paralegal alleged that Pasricha & Patel LLC misclassified him as overtime exempt. He worked an estimated 440 hours of unpaid overtime in 2011, 375 hours in 2012, 75 hours in 2013, and 60 hours as of the time of filing in 2014. **Barros v. Pasricha & Patel LLC**, 2:14-CV-04436 (D.N.J. Jul. 15, 2014).
- Class action in which Store Managers at Family Dollar stores alleged that they were misclassified as exempt. The case settled for \$1.15 million. **Hegab et al. v. Family Dollar Stores Inc.**, 2:11-cv-01206 (D.N.J Mar 3, 2011).

- Assistant Store Managers at Burlington Coat Factory, though classified as exempt, spent the majority of their time working on the sales floor, opening boxes, ticketing merchandise, stocking shelves, cashiering, unloading trucks, and cleaning the bathrooms. **Goodman v. Burlington Coat Factory, CIV.A. 11-4395 JHR, 2012 WL 5944000 (D.N.J. Nov. 20, 2012).**
- In August 2015, TD Bank agreed to pay \$9.9 million to teller service managers to settle a misclassification lawsuit. About 2,600 assistant store managers alleged they performed nonexempt managerial duties such as bank telling, money counting, and opening and closing branches. Despite performing routine duties that did not require independent judgment or discretion, the Bank classified the employees as exempt from overtime and did not compensate them for overtime hours or time worked during meal and rest breaks. **Kuri v. TD Bank NA et al, 1:15-cv-04058, (D.N.J.).**
- Former employees of Maryland and Pennsylvania locations of Aaron's Inc. are suing the rent-to-own retailer for failing to pay store managers overtime pay. Sales managers, account managers, or customer account managers accused Aaron's of failing to pay them overtime even though they performed substantially the same duties as other non-exempt workers. **Shannon Percy et al. v. Aaron's Inc., 2:15-cv-01767, (E.D. Pa).**
- Class-action suit in which Field Service Managers for Alliance Inspection Management, which inspects vehicles and audits automobile dealership inventories throughout the United States, alleged that they generally worked 50-60 hours per week, sometimes more, performing routine work associated with vehicle inspections and auditing inventories. **Jones v. Alliance Inspection Mgmt., LLC, CIV.A. 13-1662, 2014 WL 1653112 (W.D. Pa. Apr. 24, 2014).**
- About 30 employees of the hydrofracking firm Weatherford International PLC are suing the company for failing pay overtime for the often 100 hours per week they worked on tasks dictated by a client's representative. They claim that because they were managed by an outside party, they clearly lacked the degree of discretion and judgment required to be properly classified as exempt. **Imhoff et al. v. Weatherford International LLC et al., 2:15-cv-00679, (W.D. Pa.).**
- Fifth Third Bank paid \$3.25 million to over 500 employees who worked as bank tellers, customer service greeters and loan application processors, who claim that they were improperly classified as to avoid paying overtime. Fifth Third is paying each worker nearly \$6,000 to settle the lawsuit. **Amanda Stallard et al. v. Fifth Third Bank et al., 2:12-cv-01092, (W.D.Pa).**
- The Heartland Restaurant Group, owner of several Pittsburgh-area Dunkin Donuts franchises faces a federal class action by former assistant managers who claim they were improperly classified as overtime-exempt. The assistant managers received a flat salary, and worked between 50 to 65 hours. They contend that many of their duties overlapped with nonexempt employees, such as registering cash, preparing and serving food, and making donuts. The plaintiffs claim they were paid the same or less than hourly

employees who received overtime pay. **Helen Rambo v. Heartland Restaurant Group, d.b.a. Dunkin' Donuts, 2:14-cv-01257-MRH (W.D.Pa.)**.

- Health insurance company Highmark reached a settlement with Rummel, the lead plaintiff, a customer service supervisor at a health plan operations department. Her primary duty entailed ensuring customer service representatives adhered to company policy. Because she simply oversaw and enforced company policy, Rummel contended she exercised none of the discretion or independent judgement necessary for overtime exemption. **Rummel v. Highmark Inc., 3:13-cv-00087 (W.D.Pa.)**.

FOURTH CIRCUIT

- Administrative assistants and office managers at Belfor USA Group, a corporation providing disaster recovery and property restoration services to businesses in Virginia, regularly worked overtime but were not paid because they were misclassified as exempt even though they only performed routine administrative tasks. **Gregory v. Belfor USA Grp., Inc., 2:12CV11, 2012 WL 3062696 (E.D. Va. July 26, 2012)**.

FIFTH CIRCUIT

- The U.S. Court of Appeals for the Fifth Circuit held former marine superintendents for Oil Inspections (U.S.A.), an oil and gas transfer firm, do not fall within the white collar exemptions because they do not allow for the exercise of independent judgment and discretion. Therefore, they must be paid overtime. **Zannikos v. Oil Inspections (U.S.A.), Inc., No. 14-20253, 2015 U.S. App. BL 85650 (5th Cir. Mar. 27, 2015)**.
- A group of Loan Officers employed by Cornerstone Home Lending, Inc, recently filed suit claiming, among other things, that they are improperly classified as exempt employees because they don't regularly supervise the work of anyone, nor do they exercise discretion and independent judgment in any matters of significance. **Bingam v. Cornerstone Home Lending, Inc., (Federal District Court, Texas, August 17, 2015)**.
- Putative class-action suit in which Account Managers in the Housekeeping sector at Healthcare Services Group alleged that they were misclassified as exempt executive employees. The case covers Account Managers who spent 50-90% of their time performing manual labor, including cleaning floors, changing bed sheets, cleaning the dining room, removing trash, dusting, mopping, stripping and waxing floors, and doing laundry). Two of the three named plaintiffs were paid \$455 per week, while the other was paid \$11.48 per hour. **Kelly v. Healthcare Servs. Grp., Inc., 2:13-CV-00441-JRG, 2014 WL 3612681 (E.D. Tex. July 22, 2014)**.
- A jury found that Dallas law firm SettlePou misclassified a paralegal as an exempt employee. Her primary responsibilities were speaking with clients, composing documents, and organizing files. She was awarded \$338,025 in damages and fees. **Black v. SettlePou, P.C., 3:10-CV-1418-K, 2014 WL 3534991 (N.D. Tex. July 17, 2014)**.

- Drilling fluid specialists working for M-I Swaco, a Texas oil drilling company, allege that they were misclassified as exempt employees. The fluid specialists' job was to use standard tests and calculations to determine the additives necessary to maintain the consistency of the liquid used to extract oil ("drilling mud") that is formulated for the well. The formula and composition of the drilling mud is developed by a team of drilling engineers. Fluid specialists do not have input into the development of the drilling mud, nor do they have the authority to deviate from the mud plan without approval from drilling engineers. The company is claiming both the administrative and outside sales exemptions. **Dewan v. M-I, L.L.C.**, CIV.A. H-12-3638, 2014 WL 2981362 (S.D. Tex. June 27, 2014).

SIXTH CIRCUIT

- Former manufacturing supervisors brought action against Eaton Corporation, seeking to recover unpaid overtime compensation and other damages due to their alleged misclassification as exempt executive). The plaintiff alleged that he worked about 60 hours per week, and while he supervised hourly employees, he claimed that he lacked the authority to make hiring, firing, and disciplinary decisions. The District Court granted the employer's motion for summary judgment, but the Court of Appeals for the Sixth Circuit reversed and remanded the case to determine whether the company properly classified the supervisors. **Bacon v. Eaton Corp.**, No. 13-1816, 2014, WL 1717016 565 (6th Cir. May 1, 2014).
- Class action in which Area Managers at Burlington Coat Factory stores in Ohio and Kentucky allege that they were misclassified as exempt. Their primary duties were bringing merchandise to the floor, putting merchandise on the racks, and customer service. **Engel v. Burlington Coat Factory Direct Corp.**, 1:11CV759, 2013 WL 2417979 (S.D. Ohio June 3, 2013).
- Putative class action in which loan officers at Emery Federal Credit Union allege that they were misclassified as exempt even though their job duties consisted of collecting and organizing paperwork from clients and loan officers in order to process mortgage applications. **O'Neal v. Emery Fed. Credit Union**, 1:13-CV-22, 2013 WL 4013167 (S.D. Ohio Aug. 6, 2013).
- A federal court ruled that a parts manager for J.B. Hunt Transportation Inc. is entitled to overtime wages and liquidated damages because he failed to exercise independent judgment and discretion, two components required for the overtime exemption. **Stultz v. J.B. Hunt Transp., Inc.**, No. 2:13-cv-13705, 2014 BL-163379 (E.D. Mich., 6/12/14).
- Plaintiff was a First Level Manager in the Installation and Maintenance division at Michigan Bell, an AT&T subsidiary. She alleged that she was required to work at least 50-60 hours per week and was assigned "duty" weeks on a rotating basis, for which she was on-call 24 hours per day for the seven-day calendar week. During those duty weeks, she sometimes worked over 100 hours per week. Her duties included supervising technicians, performing clerical duties, and relaying company policies and directives to

the technicians under her supervision. However, she could not make employment-related decisions, set pay rates or work schedules, award promotions, discipline the technicians on her team, formulate management policies, or make any final decisions. She also did not have the authority to purchase routine office supplies without her supervisor's approval. She estimated that less than 5-10% of her time was spent on managerial tasks. The case ultimately settled for approximately \$430,000. **Arrington v. Michigan Bell Tel. Co., No. 10-10975, 2011 WL-3319691 (E.D. Mich. Aug. 1, 2011).**

SEVENTH CIRCUIT

- Former Loss Prevention Managers at Sears allege that they were misclassified as exempt. The case settled in July 2014 for \$5 million. **O'Toole v. Sears Holdings Management Corp., 1:11-cv-04611 (N.D. Ill. Jul. 8, 2011).**
- Account Executives for AccuQuote, a life insurance company, allege that they were improperly misclassified under the administrative exemption. Their job is to sell insurance policies to customers, which includes gathering information about consumers, reviewing insurance offerings from insurance carriers with whom AccuQuote maintains a relationship, and then helping the consumers apply for insurance policies. **Salmans v. Byron Udell & Associates, Inc., 12 C 3452, 2013 WL 707992 (N.D. Ill. Feb. 26, 2013).**
- A former Dick's Sporting Goods assistant manager filed a class action lawsuit against the retailer, contending it misclassified him as overtime exempt. He alleged that his responsibilities included mostly manual labor such as unpacking boxes and stocking shelves, and that he worked 60 to 70 hours per week, but did not receive overtime pay. **Bouchard v. Dick's Sporting Goods Inc., 1:15-cv-6300, (N.D. Ill. Jul. 20, 2015).**
- Several assistant managers at Jimmy John's franchises filed a lawsuit claiming misclassification as overtime exempt for the purposes of making them work long hours without minimum wage or overtime pay. Plaintiffs alleged that they spent more than 90% of their time making sandwiches, stocking shelves and cleaning the stores. The court held there were triable issues of fact that the defendants were not able to rebut on summary judgment. **Brunner v. Jimmy Johns Enterprises Inc., et al., 1:14-cv-05509, 2015 WL 1598106 (N.D. Ill. April 8, 2015).**
- About 350 call center employees will receive \$3.5 million from call center service provider APAC Customer Services Management and its parent Expert Global Solutions Inc. to settle allegations the provider misclassified them as exempt from federal and Illinois overtime statutes. **Thompson et al. v. NCO Group Inc. et al., 1:12-cv-03590 (N.D. Ill., Jun. 24, 2015).**
- Mr. Grass, classified as an exempt employee, was Facility Maintenance Manager at a multi-building residential campus for those with developmental and behavioral disabilities. He spent 65-70% of his time performing non-exempt maintenance work and the court held that, as a matter of law, his managerial duties were not his "primary duties," and therefore denied the defendant's motion for Summary Judgment. **Grass v.**

Damar Servs., Inc., 1:13-CV-00310-JMS, 2014 WL 2773027 (S.D. Ind. June 19, 2014).

- Ms. Mammos worked as a sales representative, and then as a podium presenter, at a Wyndham Resorts property in Wisconsin. She was responsible for giving tours of the timeshare units, making sales pitches, and later giving group presentations about the timeshares. **Mammos v. Wyndham Vacation Resorts, Inc., 13-CV-59-BBC, 2014 WL 1008017 (W.D. Wis. Mar. 14, 2014).**

EIGHTH CIRCUIT

- Three Lumber One Home Center employees were classified as exempt, but worked in shipping and receiving where they assembled shelves and received merchandise; completed data entry tasks; and helped out in the lumberyard by assisting customers, unloading trucks, and collecting trash. The Court of Appeals for the Eighth Circuit upheld a District Court ruling that two of the three employees were misclassified. **Madden v. Lumber One Home Ctr., Inc., 745 F.3d 899 (8th Cir. 2014).**
- Equipment Operators and Fluid Engineers working at ETS Oilfield Services allege that they were misclassified as exempt. The equipment operators travelled to well sites, operated various pieces of equipment such as trackhoes and mulchers, and performed other manual work labor related to servicing the oil and gas well sites. Fluid engineers controlled friction and pressure in coil tubing and helped keep the down drill holes clean of debris. They pumped chemicals in the water that then got pumped into the drilling hole. **Nixon v. ETS Oilfield Services L.P 4:13-cv-00726-JM, 2014 WL 2776322 (E.D.Ark. Jun. 16, 2014).**
- Field Engineers, working 75-120 hours per week for Frac Tech, a hydraulic fracturing company based in Texas, were denied overtime pay because the company claimed administrative, executive, and professional exemptions. They had varied duties including technical support, making recommendations to customers, and preparing job proposals. The court held that they did not meet the requirements for the exemptions. **Smith v. Frac Tech Servs., LLC, 4:09CV00679 JLH, 2011 WL 96868 (E.D. Ark. Jan. 11, 2011).**
- Brand advocates at ActionLink, whose job it was to visit retail stores and train retail sales associates on the benefits of LG products using PowerPoint presentations and other methods, were classified as overtime exempt. The District Court found that they were misclassified. **Beauford v. ActionLink, LLC, 4:12CV00139 JLH, 2013 WL 1247644 (E.D. Ark. Mar. 27, 2013).**
- A team Leader at ConAgra's Russellville, Arkansas plant, whose primary duty it was to observe and manage other workers doing their jobs on the line, was not paid overtime because she was classified as an executive. The court granted Garrison's motion for class certification. **Garrison v. ConAgra Foods Packaged Food, LLC, 4:12-CV-00737-SWW, 2013 WL 1247649 (E.D. Ark. Mar. 27, 2013).**

- In this class-action suit, Security Investigators for GEICO allege they were improperly classified as exempt administrative employees. Their job was to investigate claims filed with GEICO, write a report summarizing their findings, and then share their findings with the claims adjuster. The Court found in favor of the plaintiffs. **Calderon v. GEICO Gen. Ins. Co.**, 917 F. Supp. 2d 428 (D. Md. 2012). **appeal dismissed**, 13-2149, 2014 WL 2535408 (4th Cir. June 6, 2014).

NINTH CIRCUIT

- A class-action brought by store managers at AutoZone, plaintiffs in an Arizona store worked for a minimum of 50 hours per week, usually more than 55 hours per week, and for one extended period, more than 70 hours per week. Tasks included operating the register, entering orders/product info, stocking. Less than 10% of time was spent doing “managerial work.” The U.S. Court of Appeals for the Ninth Circuit held that there are genuine issues of material fact as to whether the AutoZone granted the managers enough authority to qualify as exempt. The parties settled the case. **Taylor v. AutoZone, Inc.**, 12-15378, 2014 WL 1877057 (9th Cir. May 12, 2014).
- Caremark LLC, a unit of CVS Health Corp. faces a class action lawsuit from employees at its corporate offices who claim Caremark misclassifies coding consultants, client benefits analysts, and benefits specialists, and makes those employees work more than 40 hours per week without overtime compensation. **Villarreal v. Caremark LLC**, [2:14-cv-00652](#), (D.Ariz. 2014).
- Plaintiff began as an hourly worker at Phoenix Oil, a local gas station and convenience store in Phoenix, AZ. After he was promoted to a salaried position, he continued performing the same duties he had while he was hourly, including running the cash register, restocking shelves, cleaning the store, and overseeing the hot food items. He also had an immediate supervisor in the store. He worked an eight-hour shift during the week, but alleged that he often had to stay two hours past the end of his shift and never received overtime because he was classified as an exempt manager. **Mariche v. Phoenix Oil, LLC**, CV-13-00550-PHX-NVW, 2014 WL 2467964 (D. Ariz. June 3, 2014).
- A line and prep cook for 9021Pho is suing the California-based French-Vietnamese restaurant franchise for misclassifying him an exempt employee and failing to pay him overtime. Jorge Alvarez, the plaintiff, claims that his primary duties included prepping ingredients, cutting vegetables, and cooking meals, often for more than 40 hour per week but did not receive overtime pay. **Alvarez v. 9021Pho Fashion Square LLC et al.** No.2:15-cv-03657 (C.D. Cal, May 15, 2015).
- Michael's Stores Inc. is sued by workers who claim they were illegally misclassified as managerial employees even though they contend that they engage primarily in nonexempt work for which overtime protections apply. **Rea v. Michaels Stores, Inc.**, SACV 13-455-GW AGRX, 2014 WL 1921754 (C.D. Cal. May 8, 2014).

- Bank of America to settle for \$5.8 million to workers of one of its subsidiaries spent 70-80 hours per week performing tasks such as assessing home values and proofreading home appraisal applications, did the standards for any overtime exemptions. Employees argued that the administrative exemption, which requires employees to exercise discretion, did not apply because they simply completed formulaic home assessment value forms. Similarly, they argued that the professional exemption requires "specialized intellectual instruction," while the LandSafe job required a high school diploma and training course. **Boyd v. Bank of America Corp. et al**, No. 8:13-cv-00561 (C.D.Cal.Apr. 11, 2013).
- A former manager of a Michael Kors shop filed a lawsuit against the retailer for misclassifying her as overtime exempt. Plaintiff claims she was a manager in name only, tasked with menial assignments such as assisting customers, cleaning fixtures, taking inventory, and generating day-end sales reports. **Thomas-Byass v. Michael Kors Stores (California) Inc. et al.**, No. 5:15-cv-00369 (C.D. Cal., Feb. 26, 2015).
- Insurance claims administrators for American Zurich Insurance Co. are appealing the 2013 judgment rejecting their claims they were misclassified as exempt from overtime regulations. The workers' responsibility involved clerical work such as processing insurance claims and did not require any special training or involve policymaking. **Bucklin v. Am. Zurich Ins. Co.**, No. 13-56085, 2013 WL 3147019 (C.D. Cal. June 20, 2013)
- Provident Savings Bank classifies mortgage underwriters as administrative employees. The underwriters who brought suit in this case generally worked more than 10 hours per day. **McKeen-Chaplin v. Provident Sav. Bank, FSB**, 2:12-CV-03035-GEB, 2013 WL 5883794 (E.D. Cal. Oct. 30, 2013).
- Employees of Abercrombie & Fitch Trading Co. filed a federal lawsuit contending the retailer failed to pay wages and keep employment records in compliance with the Fair Labor Standards Act. Samantha Jones, the class' lead plaintiff, worked for Abercrombie on the sales floor, in the back of the store, and eventually was promoted to store manager. Jones contends she was officially classified as nonexempt employee entitled to overtime, but failed to receive overtime compensation; a "uniform policy and practice" of Abercrombie, according to Jones. **Jones v. Abercrombie & Fitch Trading Company**, No. 3:14-cv-04631 (N.D. Cal, Oct. 15, 2014).
- Cogent Communications Inc. faces a class action accusing the internet service provider of unlawfully and purposefully withholding overtime payments, as well as misleading employees into thinking they were exempt from overtime pay. The class includes hundreds of current and former employees, and also accuses the ISP of exacting a policy of denying earned wages to employees who leave the company. **Ambrosia et al. v. Cogent Communications Inc.**, No. 3:14-cv-02182 (N.D. Cal. May 12, 2014).
- Approximately 500 exterminators allege that EcoLab Inc. failed to pay service specialists overtime pay. Ecolab settled the case for \$7.5 million. **Cancilla v. Ecolab Inc.**, No. C 12-03001 CRB, 2014 WL 5471034, at *1 (N.D. Cal. Oct. 24, 2014).

- Wells Fargo will pay account executives \$2 million to settle a class action about 500 former account executives brought accusing the bank of failing to pay for overtime, missed meal, and missed rest periods. **Morales et al. v. Wells Fargo Insurance Services USA, Inc.**, No. 3:13-cv-03867 (N.D. Cal. Apr. 21, 2013).
- Retail shop manager, whose duties included hiring and training staff, as well as product presentation, but had no input into the stores' budgets or schedules, and was directed as to how to clean and maintain the shop, claims he should have been paid overtime. Though he may have had the opportunity to perform exempt duties, the stores were so minimally staffed, according to the plaintiff, that it was impossible for him to perform those tasks. **Smith v. Equinox Holdings, Inc.**, No. 3:14-cv-00846 (N.D. Cal., Apr. 10, 2015).
- Mr. Chavez, a Store Manager who was classified as exempt from the overtime requirement at a Lumber Liquidators store in California, spent over 85 percent of his workday “checking in new material and moving it into the warehouse off of trucks ..., ‘pulling’ orders from the warehouse for customers, driving, checking material, [and] separating material and shipping material.” **Chavez v. Lumber Liquidators, Inc.**, CV-09-4812 SC, 2012 WL 1004850 (N.D. Cal. Mar. 26, 2012).
- Case Managers at On the Record, a litigation support firm, allege that they were misclassified as exempt employees for the media support work they did for law firm clients. When the attorneys were working on a trial, they worked up to 16-hour days, even though the billing records were sometimes filled out to reflect a 9 to 5 schedule. Plaintiffs’ motion for class certification is granted. **King v. On the Record, Inc.**, No. 12-CV-6271 JSC, 2014 WL 279843 (N.D. Cal. Jan. 24, 2014).
- Technical support workers at Hewlett Packard, whose primary duties were installing, maintaining, and/or supporting computer software and/or hardware for HP, were classified as exempt under the administrative exemption and the computer employee exemption. Plaintiffs’ motion for class certification was granted. **Benedict v. Hewlett-Packard Co.**, 13-CV-00119-LHK, 2014 WL 587135 (N.D. Cal. Feb. 13, 2014).
- Class action by Assistant Store Managers at Petco, who allege that Petco underfunded stores, forcing Assistant Store Managers to perform many of the menial tasks involved with running the store themselves because the store did not have sufficient funds to hire employees. **Erik Kellgren v. Petco Animal Supplies Inc. et al.**, 3:13-cv-00644 (S.D. Cal. Mar. 19, 2013).
- Trainers and First-Level Supervisors at Maximus’ call centers in Boise, ID and Brownsville, TX allege that they were misclassified as exempt employees. Trainers spent much of their time performing clerical duties. Trainers’ salaries ranged from \$38,000 per year to more than \$42,500 until January 2014, when they were re-classified as non-exempt and paid at an hourly rate of \$18.36 per hour. First-Level Supervisors monitor a team of approximately 14 call center agents who take calls from the public relating to the Affordable Care Act. Both Trainers and First-Level Supervisors have very little authority

to make employment-related decisions. They are at the bottom tier of the management structure and are tightly controlled by Maximus policy and by their managers. **Norton v. Maximus, Inc.**, 1:14-cv-00030, 2014 WL 2511678 (D. Idaho May 27, 2014).

10TH CIRCUIT

- More than 400 Family Dollar managers will receive a \$2.3 million award to settle a class action lawsuit which alleged the failed to pay store managers overtime. According to the plaintiffs, Family Dollar classified workers as salaried store managers with supervisory status and exempt from overtime. Despite the designation, however, the employees worked more than 40 hours per week, spending much time performing non-managerial tasks such as cleaning, stocking shelves, and operating the cash register. **Farley v. Family Dollar Stores Inc. et al.**, No. 1:12-cv-00325 (D. Colo., Oct. 30, 2014).
- Plaintiff Reyes was classified as an executive, but he spent the majority of his days at Snowcap Creamery working as a line cook. He frequently worked more than 40 hours per week and more than 12 hours per day. Reyes won a bench trial on December 20, 2013. **Reyes v. Snowcap Creamery, Inc.**, No. 11-CV-02755-WJM-KMT, 2013 WL 4229835 (D. Colo. Aug. 14, 2013).
- Putative class-action suit in which Ms. Crum, an Associate Financial Representative, alleges that she was improperly classified as an administrative employee. Her duties included typing correspondence; maintaining client files; filing paperwork; maintaining Mr. Way's schedule; scheduling appointments with clients; answering calls from clients and directing them to the appropriate personnel; and underwriting duties, which required processing up to 100 insurance applications per month. **Crum v. Way**, No. 12-CV-03313-MSK-BNB, 2014 WL 2974460 (D. Colo. July 2, 2014).
- Sports, promotions, and news producers in Kansas City allege that they were misclassified as exempt employees and denied overtime, even though they regularly worked over 40 hours per week. Court grants motion for class certification. **Greenstein v. Meredith Corp.**, 948 F. Supp. 2d 1266, (D. Kan. 2013).

11th CIRCUIT

- Class-action suit in which Store Managers at CitiTrends, a clothing store operating in 27 states, were classified as exempt from overtime even though they spent approximately 80% of their time performing the same non-exempt duties that their subordinates performed. **Billingsley v. Citi Trends, Inc.**, 4:12-CV-0627-KOB, 2013 WL 246115 (N.D. Ala. Jan. 23, 2013).
- Putative class action in which anti-money laundering investigators at Regions Bank in Alabama allege they were misclassified. Investigators worked 50-60 hours per week and did not have the authority to chase "leads" or "hunches" beyond the activity reported. They were also required by bank policy to stay within the scope of the investigation as

outlined in the case file. **Davis v. Regions Financial Corp. et al.**, No. 2:14-cv-00730 (N.D. Ala. Apr. 21, 2014).

- Thousands of former and current Dollar General store managers will receive \$8.3 million to settle claims the discount retailer provided inadequate overtime compensation. The settlement concludes a 2006 lawsuit alleging Dollar General classified employees as managers exempt from overtime, then required them to work sometimes 90 hours per week, while spending sometimes as few as 10 hours on exempt managerial duties. The settlement covers 2,722 individual plaintiffs who opted into the lawsuit. **Richter v. Dolgencorp Inc. et al.**, No. 7:06-cv-01537 (N.D. Ala., Nov. 24, 2014).
- Lowe's Home Centers Inc. paid a class of human resource managers \$3.5 million to settle a lawsuit alleging the home improvement giant misclassified them as exempt from overtime requirements. The class of about 900 Lowe's human resource managers contended the store named the employees managers but gave them no authority to supervise employees or make decisions independently. Further, the managers' primary duties included tasks such as greeting customers, sweeping floors, and cleaning toilets. **Lizeth Lytle et al. v. Lowe's Home Centers Inc. et al.**, No. 8:12-cv-01848 (M.D. Fla., Nov. 17, 2014).
- Shift Managers at Budget and Avis alleged that they were misclassified as exempt executive employees even though primary daily duties included regularly cleaning cars, renting out cars, moving cars, checking in returning customers, cleaning up work areas, refilling supplies, and otherwise filling short-staffed areas (such as service agent, rental agent, fast break agent, return agent, driver services, and key attendant). Shift Managers regularly worked at least 50 hours per week, and often work 70 or 80 per week. The named plaintiff spent over 80% of his time performing non-exempt duties. The case was settled in June 2014 for an undisclosed amount. **Espanol v. Avis Budget Car Rental, LLC**, 8:10-CV-944-T-30AEP, 2011 WL 4947787 (M.D. Fla. Oct. 18, 2011).
- A Florida judge certified two classes of Burger King employees to proceed with class actions alleging employee misclassification against the fast food giant. Former and current Burger King employers in 21 states may opt-in to the lawsuit alleging the fast food chain misrepresented employees to avoid overtime pay. The plaintiffs alleged they were forced to work more than 80 hours per week without receiving overtime compensation and classifying both trainees and coaches as exempt. **Torres Roman v. Burger King Corp.**, No. 1:15-cv-20455 (S.D. Fla., June 2, 2015).
- Putative class-action suit by Special Investigators at Humana, who allege that they were misclassified. **Garcia et al. v. Humana, Inc. and Humana Insurance Company of Florida**, 0:14-cv-61666-CMA (S.D. Fla. Jul. 22, 2014).
- Mr. Zenebe, an Assistant Store Manager at TJ Maxx, alleges that Assistant Managers are misclassified as exempt and not paid overtime for working in excess of 40 hours per week. **Zenebe v. The TJX Companies, Inc.**, No. 1:14-cv-22811, (S.D. Fla. Jul. 30, 2014).

- Dispatchers at an independent trucking company, Pratt (Corrugated Logistics), spent almost all of their time assigning loads and backhauls to drivers, but were classified as exempt employees under administrative and executive exemptions. The district court granted summary judgment for the dispatchers, finding that they were overtime eligible. Allemani v. Pratt (Corrugated Logistics) LLC, No. 1:12-CV-00100-RWS, 2014 WL 2574536 (N.D. Ga. June 6, 2014).